

CRIMINAL PRACTICE

AND



PROCEDURE



PRESENTED BY: JUSTICE GILLIAN LUCKY



THE CASE MANAGEMENT CONFERENCE

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See **Criminal Procedure Rules** of
Trinidad and Tobago, 2016

THE CASE MANAGEMENT CONFERENCE



1. Overriding objective – **Criminal Procedure Rules**, Section 3.1

The overriding objective of these Rules is that **criminal cases be dealt with justly**.

R v Jisl [2004] EWCA Crim 696 (at [114])

Lord Justice Judge

The starting point is simple. Justice must be done. The defendant is entitled a fair trial: and, which is sometimes overlooked, **the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant**. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate.

THE CASE MANAGEMENT CONFERENCE



2. Timeliness (filing) (adjournments)

3. Disclosure – (no longer about ‘cut and thrust’ at all costs or about ‘keeping information ‘close to chest’)

THE CASE MANAGEMENT CONFERENCE



4. Defence statements – (**Sexius v Attorney General of St Lucia** 2017 UKPC 26; **Garth O’Brien** CV 2018-00854)

See Criminal Procedure Rules 2016, Practice Direction dated December 15th 2017 – **Direction in relation to the nature of the accused’s defence**

Within 56 days of the prosecution disclosing evidence and other material under Rule 14.1(a) and (b) respectively, and complying with its obligations under Rule 14.1(c), and the defence shall pursuant to the overriding objective of the Rules and active case management disclose the following –

1. A written document, signed and dated by the accused and his attorney setting out
 - (a) The nature of the accused’s defence, including any particular defences on which he intends to rely;
 - (b) Indicating the matters of fact on which he takes issue with the prosecution;
 - (c) Setting out, in the case of each such mater, the reason he takes issue with the prosecution;
 - (d) Setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence.
2. This document is referred to as a Defence Statement

5. Sanctions

Criminal Procedure Rules 2016, Practice Direction dated December 15th 2017

5 (1) The court or any other party may make such comment(s) as appear(s) appropriate, and the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offences in the following circumstances –

- a. Where the defence advanced at trial is different in nature to that set out in the defence statement (for example a change from alibi to self defence)
- b. Where the factual basis of the defence advanced at trial is significantly different to that set out in the defence statement. Whether a defence is significantly different is a matter of fact and degree.
- c. Where a 'positive defence' is advanced at trial and no defence statement was served at all. A 'positive defence' is any defence that is more than asserting that on the basis of the prosecution's unchallenged evidence the accused has not been proven guilty.
- d. Where a compliant defence statement is disclosed but beyond the 56 day limit, and if the late service may be relevant to the credibility of the defence or adversely affects the prosecution's ability to investigate the defence disclosed.

(2) A person shall not be convicted solely on the basis of an inference referred to in section 5 (1) above.

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- Sanctions
- **R v Rochford** [2010] EWCA Crim 1928 – the COA found that adverse finding and comments were appropriate sanctions for failing to give further and better particulars in the defence statement.



BAIL

BAIL



- Consider:-

The **Constitution of Trinidad and Tobago**, Section 5 (2) (f) (iii)

(2) Parliament may not—

(f) deprive a person charged with a criminal offence of the right—

(iii) to ***reasonable bail without just cause***

BAIL

- Factors which may prevent the Court from granting bail – See The **Bail Act of Trinidad and Tobago**, Chapter 4:60, Section 6 (2): -



(2) Where the offence or one of the offences of which the defendant is accused in the proceedings is punishable with imprisonment, it shall be within the discretion of the court to deny bail to the defendant in the following circumstances:

(a) where Court is satisfied that there are substantial grounds for believing that the defendant, if released on bail would –

- (i) fail to surrender to custody;
- (ii) commit an offence while on bail; or
- (iii) interfere with witness or otherwise obstruct the course of justice, whether in relation to himself or any other person;

(b) where the Court is satisfied that the defendant should be kept in custody for his own protection or, where he is a child or young person child, for his own welfare;

(c) where he is in custody in pursuance of the sentence of a Court or any authority acting under Defence Act;

(d) where the Court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this section for want of time since the institution of the proceedings against him;

(e) where, having been released on bail in or in connection with the proceedings for the offence, he is arrested in pursuance of section 13;

(f) where he is charged with an offence alleged to have been committed while he was released on bail; or

(g) where his case is adjourned for inquiries or a report and it appears to the Court that it would be impracticable to complete the inquiries or make the report without keeping him in custody

BAIL



- Factors to be considered by the Court in the granting of bail – See The **Bail Act of Trinidad and Tobago**, Chapter 4:60, Section 6 (3): -

(3) In the exercise of its discretion under subsection (2)(a) the Court may consider the following:

- a. the nature and seriousness of the offence or default and the probable method of dealing with the defendant for it;
- b. the character, antecedents, associations and social ties of the defendant;
- c. the defendant's record with respect to the fulfilment of this obligations under previous grants of bail in criminal proceedings;
- d. except in the case of a defendant whose case is adjourned for inquiries or a report; the strength of the evidence of his having committed the offence or having failed to surrender to custody; and
- e. any other factor which appears to be relevant.

BAIL



- Bail conditions include:- See Section 12 of Bail Act

12. (1) A person granted bail in criminal proceedings shall surrender to custody.

(2) A Court may require any person applying for bail to provide, as a condition for bail before his release, a surety to secure his surrender to custody.

(3) A Court may further require any person applying for bail to –

(a) surrender his passport to the Court

(b) inform the Court if he intends to leave the State;

(c) report at specific times to any police station, And comply with any requirements as appear to the Court to be necessary to ensure that –

(i) he surrenders to custody;

(ii) he does not commit an offence while on bail;

(iii) he does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person; and

(iv) he makes himself available for the purpose of enabling inquiries or a report or any medical examination, to be made to assist the Court in dealing with him for the offence.

(4) Where it appears that the applicant for bail is unlikely to remain in Trinidad and Tobago until the time appointed for him to surrender to custody, he may be required, before being released on bail, to give security for his surrender to custody and the security may be given by him or on his behalf

BAIL



- Accused persons may also be required to participate in the Bail Monitoring Programme as a condition of bail.
- The Judicial Officer has a range of conditions that can be imposed, such as, requiring the Accused to attend anger management and drug rehabilitation courses.

BAIL



Examine -

- Risk factors
- Property v Cash
- Meaning of 'Bail granted in the sum of _____ with a surety to be approved by the Registrar of the Supreme Court'

RENEWAL OF BAIL APPLICATION



- See Re Donaldson's Application for Bail [2002] NIQB 68, para 4 –

“[4] In what circumstances may an applicant, who has been refused bail, make a further application for bail to the High Court? The leading decision on this point... is the decision of Hutton LCJ on 25 January 1993 In the Matter of an Application by Michael Hugh Beck and Others.....Hutton LCJ dealt with this question at page 3 of his judgment as follows:

*'I consider that there is a clear rule of law established by a number of authorities that, where there has been no material **change in circumstances**, a judge cannot disregard an earlier refusal of bail but is bound by it and should not embark on a fresh hearing into the merits. It is therefore clear that the practice followed by the judges in this jurisdiction is not a matter of policy, but is grounded on a firm and valid principle of law which should be followed...'*

- R v Nottingham Justices, ex parte Davies [1980] 2 All ER 775

BAIL





PRE TRIAL APPLICATIONS/ISSUES

Pre Trial Applications/Issues



- Admissibility of Evidence
- Logistical issues
- Determination of Judge alone/jury trial
- Disclosure
- Length of Trial estimation



MAXIMUM SENTENCING INDICATION

MSI



- See The Maximum Sentencing Indication Practice Direction of Trinidad & Tobago dated August 25th, 2015.

MSI



- DOCUMENTS TO BE FILED –
 - ✓ A summary of Agreed Facts
 - ✓ Submissions on an appropriate sentence by both sides
 - ✓ Information as to any previous convictions
 - ✓ Victim impact statement

THE STEPS OF THE MSI



THE SENTENCING METHODOLOGY



The four stage process as set out in **Aguillera Aguillera & Others v The State Crim. App. Nos.5-8 of 2015** can be simplified as the following:

Calculation of the Starting Point

Upward or Downward
Adjustment of the Starting Point

[Where appropriate] Discount
for a Guilty Plea

Credit for the period of time
spent in pre-trial custody.

THE MSI SENTENCING METHODOLOGY

Indication of the Starting Point

(Based on agreed facts, submissions, victim impact statements and/or previous convictions)

Discount for Guilty Plea

MSI Given

Plea in Mitigation

(Starting point may decrease or stay the same based on factors not considered earlier eg. Bio Social Report)

Credit for Time Spent in Pre Trial Custody

MSI



DISCUSS –

- Right to withdraw or set aside the MSI (eg. After reading PO report)
- Issues to be advanced – (Compensation, Probation officer's report, Bio-social report, victim impact statement.)



JUDGE ALONE TRIALS

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- See **Miscellaneous Provisions (Trial by Judge Alone) Act, 2018**
- Trial case management
- Treatment of voir dire
- Focus on issues
- Much less drama



TRIAL BEFORE JURY

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- Proper preparation – (time wasting frustrates the jury and the Court)
- Caution about prejudicial remarks/conduct/statements
- Social media



LEGAL SUBMISSIONS

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- Written submissions
- Caselaw
- Timelines



CLOSING ADDRESSES

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- No reference to law or citing of cases (general reference to burden and standard of proof allowed)
- No speculation (strictly evidence and inferences which may be drawn from it)
- No Personal views
- Prosecution counsel not entitled to abandon or attack the credit of his own witness (unless he has been given leave to treat him as hostile)

CLOSING ADDRESSES



- A prosecutor should not press for a conviction – **Allie Mohammed v The State** (1996) 51 WIR 320
- Defence counsel should not refer to the likely consequences of a conviction in terms of punishment since sentencing is no concern of the jury



ENSOR HEARING

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- In **R v Ensor** [1989] 2 All ER 586 the accused was charged with two counts of rape. One of the grounds of appeal was that the trial Judge should have directed the jury with regard to the second count on the need for corroboration of both the act of intercourse and the lack of consent. Lord CJ Lane made the following observation -

ENSOR HEARING



- *“There is one observation that we wish to add. Counsel for the Crown told us that, as far as he could recall, the judge did not invite, nor did counsel volunteer, any submissions in connection with corroboration. This was a case which was by no means straightforward in that respect, and we feel that the judge would have been assisted by submissions from counsel, in the course of which there would have been explored, separately in relation to each count, both aspects of the matter, namely (i) what were the ingredients of the offences in respect of which the jury should be told to look for corroboration and (ii) what evidence was there capable of amounting to corroboration. In almost all cases where a direction on corroboration is required, it is desirable that the judge should, at the conclusion of the evidence, hear submissions from counsel (they will often be very brief) on these two important matters. If this practice is followed, the sort of problems exemplified by the present appeal will usually be avoided.”*

ENSOR HEARING



- At the close of the evidence the Court usually conducts an “Ensor” hearing to discuss with counsel the issues in the case and the directions he/she should give to the jury.
- Areas discussed include:
 - Bad character
 - Good character
 - Lucas direction
 - Corroboration
 - Defence/s



MITIGATION

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- Restorative Justice
- Impact of lack of speedy trial
- Remorse
- Guilty plea

MITIGATION



- Benjamin principles - **Benjamin v R (1964) 7 W.I.R 459**

The following are the principal objectives of sentencing:

- (1) the **retributive** or denunciatory, which is the same as the punitive
- (2) the **deterrent vis-a-vis potential offenders**
- (3) the **deterrent vis-a-vis the particular offender then being sentenced**
- (4) **the preventative**, which aims at preventing the particular offender from again offending by incarcerating him for a long period
- (5) **the rehabilitative**, which contemplates the rehabilitation of the particular offender so that he might resume his place as a law-abiding member of society



QUESTIONS?