

2021

The Chief Justice's Report to the Opening of the Courts

13 January 2021

Welcome

Gathering invited to remain standing while Pastor Winston Rose leads us in prayers.

The usual salutations.

Thanks first of all to Pastor Rose for his uplifting and inspiring prayer.

Welcome to H.E the Governor, Hon Premier, Minister Rivers, Minister McTaggart and Ms Barbara Connolly, other distinguished guests, members of the profession, officers of the Court, all, ladies and gentlemen.

In welcoming you all to the opening of the courts for 2021, I must also note that along with our gathering here in person, there are others who are following the proceedings by way of live-streaming through the judicial website. I welcome them all as well, notably among them being Justices Williams, Kawaley, Segal, Parker and St John Stevens who are either working while in quarantine by Zoom or joining from their homes in the UK. I am told that Mrs Diana Quin and former Acting Judge Malcolm

Swift and his wife are also online and extend greetings to them as well.

The reduced size of our invited gathering, while these proceedings are open to the public, reflect the still pervading need for social distancing.

Live-streaming as a means of access to court proceedings, was introduced during the Covid-19 Shelter-in-Place regime last year and has now become a standard feature of court proceedings. It is a very welcome aspect of the technological advancements about which I will have more to say later on.

Invitation for the motion for the opening

Invitations to the Hon Attorney General, the DPP, President of CILPA and Mr Mckie QC to move and in turn, to support the motion for the opening of the Court.

Responses in turn to the movers.

To: The Attorney General.

Thank you for your words of encouragement. You accomplished a very impressive program of legislation last year. On behalf of the Administration congratulations to you and your staff for all the great work done last year, with special note of the timely responses to the COVID-19 situation and the demands for novel regulations.

You will permit me to single out the Legal Services Act because of the importance you also mentioned and to note the new

responsibilities which it will impose upon the offices of the Chief Justice and Attorney General in particular for the Regulation of the Profession. I look forward to a meeting to discuss the way forward – the remit will be quite a challenge.

And thank you for remembering Mr Norman Hill QC. Our condolence go out to his family and friends.

To the DPP: Your insightful comments on our responses to the Covid-19 situation and the other difficulties experienced last year are much appreciated. I remember all too well the teething problems experienced in setting up the Dropbox account for your office. Our thanks to you and your staff for making that work. As I mentioned earlier, there will be a renewed emphasis on the use of technology in our report this year. Our congratulations to Ms Candia-James-Malcolm on her well-deserved appointment as Deputy Director.

To Mr Collins: You and the rest of the Council of CILPA are justifiably proud of the work done for bringing the Legal Services Act to fruition. I look forward to your continued input (despite your sense of relief expressed at this being your final appearance in your capacity as President). Your input especially for the educational programs to be delivered through the Truman Bodden Law School should be welcomed.

To Mr McKie: Especially Mr Alberga QC. Thank you for your usual comprehensive review on law report and the editorial work for the CILRs. Your tribute to Mr Alberga's work as a consultant editor is very appreciated and welcomed. Special mention of Mr

Alberga's contributions will also be made in the Formal Report to be published this year.

I accede to the motion for the Opening of the Court for 2021 and now turn to offer some remarks of my own.

Transitions

Justice Robin McMillan

As the Attorney has said, Justice McMillan has had a long and illustrious career at both the public and private bars which career he has, at least for now, culminated as a distinguished Grand Court judge. Loved and respected by all, Justice McMillan will be sorely missed. He has especially earned the respect and admiration of his colleagues on the FSD, a sentiment which is neatly encapsulated in an extract from one of Justice Kawaley's judgments in the ***Torchlight*** case which that judge has invited me to read:

"47. An open justice advocating placard writer might, perhaps, have put all of the above far more pithily: "McMillan J rules O.K.!"

On behalf of your colleagues and the entire staff of the Administration, I thank you judge for your invaluable service and wish you a very long and enjoyable retirement

Chief Magistrate Nova Hall

As the Attorney also mentioned, Chief Magistrate Nova Hall has given her notice of retirement. I can assure everyone that this was not at all happily received. But she was not to be deterred

and so she sits with us this morning at my invitation as we remember and thank her for her many years of invaluable service given to the courts and to the Islands in her various capacities as Dep Clerk of Courts, Clerk of Courts, Magistrate, Chief Magistrate and Acting Judge of the Grand Court. She will be greatly missed by all her colleagues of the judiciary and the administrative staff alike. While she sits with us this morning, it is of course, only fitting that we should hear from her colleagues of the Summary Courts as well. And so, they ask that I read the following suitably brief but poignant tribute prepared by Magistrate Foldats on their behalf:

“One of the fundamental principles of a healthy democracy is judicial independence. We're all familiar with that principle and we expect and encourage our judges to adhere to that basic tenet. As a result, those of us on the bench share a number of personality traits – independence, firmness, the ability to work alone, etc.

What does that mean for a Chief Magistrate?
What did that mean for our Chief Magistrate?

On many days, I'm sure it was like herding cats – each of us with our own independent expectations, independent ways of doing things – each of us exercising our "judicial independence". Fortunately, our Chief

Magistrate mastered the art of cat-herding and she did so in the face of constant courtroom shortages, unexpected urgent hearings, and the like.

As a result, through her diligence, eye for detail and – most of all – her uncanny ability to foresee and plan for all contingencies, our summary court has continued to evolve and become the envy of our region delivering fair and timely justice. Thank you, Chief Magistrate.”

Those sentiments which so fittingly recognize the Chief Magistrate’s gifts as judge and leader, I wholeheartedly endorse on behalf also of the judges of the Grand Court. Thank you Chief Magistrate.

Justice Dame Linda Dobbs

Justice Linda Dobbs also retires this month from our Panel of Acting Judges, having attained the constitutional age of retirement. We have been fortunate and privileged to have her as a colleague. Beyond the trial of many indictments which she has taken with her own inimitable business-like approach, Justice Dobbs has given unstintingly of her time and experience, especially to assist with the modernization of the criminal case management rules and with the continuing education and

training of the judiciary as well as the public and private criminal bar lawyers.

While we certainly hope that she will find time to enjoy her retirement, we also hope that she will be able to find time in her busy calendar to continue to participate in our continuing education program and other justice improvement initiatives.

With those brief but heartfelt remarks, I note now that there will be another occasion when we can more fittingly mark their retirement and thank Justice McMillan and Chief Magistrate Hall for their service.

Appointment of new Chief Magistrate

While it is with a heavy heart that we bid farewell to Chief Magistrate Hall, it is with acclaim that we welcome the news of the appointment of Magistrate Foldats as her successor. We bid him a warm welcome in his new capacity and I take this opportunity to say that I very much look forward to working with him, especially for the formal establishment of the Mental Health and Domestic Violence Courts which, although well tried and proven, are still in their pilot stages.

The business of the Courts

I now turn to the usual report on the business of the courts but, given all that has already been said, you will be pleased to hear that we have decided this year to break with the tradition of giving a full oral report by me on this occasion.

Instead, recognizing that while a written and oral report has been delivered each year on the business of the courts, those have not been formal published reports but informal reports in the nature of speeches, which become subsequently available only on the judicial website. In fact, the first and only formal published report, was in the year 2000.

The beginning of the third decade of the millennium seemed a suitable milestone for the investment of the time, energy and some modest expense, for the publication of a full formal report and this is what we are doing this year.

The publication will include of course, among several others, a report which looks back over the developments and achievements within the Administration since the turn of the millennium and even further back, with an overview of the early history of the judiciary and the courts.

The real objective is to provide as much useful information to the public about the administration of justice as we might¹. Indeed, as is noted in the report²:

“In a democracy, any educated citizen should have an understanding of the role of the judiciary, the manner in which the courts function and the history of the relationship between the courts and the other organs of government. This is particularly important because (except insofar as the

¹ Indeed, a full formal report was promised at the opening last year but like many other objectives, postponed due to the Covid-19 pandemic.

² Quoting from a foreword given by former Chief Justice Gibbs of the High Court of Australia.

Constitution places the judiciary in a special position) the independence and authority of the judiciary, upon which the maintenance of a just and free society so largely depends, in the end has no more secure protection than the (moral and intellectual) strength of the judges themselves and the support and confidence of the public”.

So, it is with those brief introductory remarks that I turn to the few remaining items of my speech for today, leaving the fuller account of events to be reported in the formal report which I hope everyone will take the time to read and consider.

I proceed next with the topic: **court information technology**

At the opening last year, I announced that we were soon to be launching the pilot for the e-filing platform. Little could we have then foreseen, that while that was to be postponed due to Covid-19, a different kind of e-filing and case management would have to be immediately improvised and adopted by recourse to emails, Dropbox and video-conferencing.

This improvisation took place virtually over-night implemented by our very willing and capable registry staff and IT technicians, led by the senior management, with procedures set out and explained in a large series of practice directions. All in all, at very short notice a new technological environment was created in which the judges and magistrates could continue to administer justice and members of the public could continue to interact with the courts for everything – from the filing of cases to the making into and receipt of payments from the courts. In the

result, once again proving that necessity is indeed the mother of invention, and allowing us to continue to provide essential court services despite the lockdowns mandated by the Shelter-in-Place Regulations.

I am sure you will allow me to take this opportunity therefore publicly to thank the staff and my colleagues of the judiciary for their dedication and exceptional efforts.

However, as everyone will understand, improvisation has its limits and those which come with using emails for court filings have very quickly been realized, with a massive backlog of attachments which must be downloaded from the emails and then redirected into the respective case files within the JEMS database.

These along with others, are the processes which are made automatic by a proper e-filing system and the pilot project for such a system -that which I announced at last year's opening was soon to commence but was postponed due to COVID-19- is now actually underway as of this morning. Practice directions have been issued and the pilot will run for one month, following which the system will be opened up to all of the profession and as soon as possible thereafter, to the public at large. However, recognizing that some members of the public will not have access to their own computers, the intention is also to set up kiosks in the public areas of the court buildings through which such persons may make their filings, with the assistance if needed, of registry staff.

Ultimately, the objective is to allow the management of cases to be done electronically from beginning to end and in the process, changing the courts into a paperless environment.

Not only will this be good for the natural environment, it will also save a great deal of effort, time and money and help to ensure that our courts and the Cayman jurisdiction remain an efficient, effective and competitive forum for dispute resolution.

QCs

It has been four years since QCs have been appointed and recommendations are now being made to the Governor for additional appointments.

Case disposal

In keeping with my promise for an abbreviated report now, I turn next and finally to the all-important topic of case disposal.

I will, for reasons which will become obvious, concentrate now on the criminal side.

In one respect in the Grand Court, there is a bit of good news with 99 indictments disposed of last year (6 of those still pending sentence), and again, despite the COVID-19 shutdown. Combining the 108 indictments carried forward from 2019 with the 79 new indictments filed last year, this has resulted in a reduced number of 88, carried over into this year, 2021.

88 indictments, each a serious case, is nonetheless a daunting number of pending cases and the challenge they present when

taken with the new cases which are constantly being filed, is still, I regret to report not being properly confronted.

Of the 88 pending cases, 22 of them involve defendants who have been in prison while awaiting trial. In one case, the worst example, the defendant has been in custody since 2017, although she is awaiting a retrial. Of the others, 4 have been in custody pending trial since 2019 and all of the remaining 17 have been in custody since 2020, 3 since early January 2020. What this means is that already at the start of this year, there are many persons in prison awaiting trial, several of them for longer than the 6 month period, which is the longest time allowed by the international standards for the provision of a timely trial.

And so, despite our best efforts during the COVID-19 shutdown, including being the first court in the region to resume jury trials at beginning of July, I must renew my call yet again this year for more court rooms.

Even while we await the approval of the project for the building of a new court house, the project for the installation of two court rooms in the building acquired from Scotiabank in 2018 must be at the top of Government's priorities this year and I urge the Governor, the Premier and their colleagues of Cabinet to ensure that this happens.

Again, I confirm that the problem is not lack of judicial capacity. Nor, is it the lack of defence counsel, because arrangements can surely be made to enlist more lawyers, even if only on a

temporary basis. The problem is the lack of court rooms in which to try these serious and often very sensitive and involved cases.

Just this past Monday, I was told that although the outfitting of the building for the two courtrooms will involve only internal works, this project cannot begin until summer this year. I am sure you will all agree that this is unacceptable, faced as we are with the prospect of denying persons their constitutional right to a timely trial.

In the Summary Courts, on the criminal side, the situation continues to be just as unsatisfactory and for the same reasons, the lack of courts.

While the Magistrates and their support staff worked as assiduously as ever throughout the year, disposing of 1393 criminal charges, 1689 charges are currently pending trial.

This kind of backlog cannot be overcome without additional courtrooms. As I remind each year, the Magistrates find themselves in the unenviable and often embarrassing situation of having to vie against the Grand Court and when it is in session, against the Court of Appeal as well, for courtrooms, with the inevitable result that the Summary Criminal cases are relegated in a manner that is equality antithetical to any notion of timely justice.

That I am afraid, is the only appropriate note on which to end the report this year on criminal case disposal.

The situation on the civil side, especially with the FSD, is rather more encouraging with, as you have heard, the very large number of judgments rendered last year, again despite the shutdown.

Also, in the Family Divisions, there is good news with the mediation program having been put on a formal footing and managed by the Mediation Coordinator. 68 divorce cases were successfully mediated.

As usual, the Chief Magistrate's report generally on the business of the Summary Courts will be published along with my report, as part of the formal publication to come.

In closing, I thank the Commissioner and his men and women on parade for their usual resplendent turn out and symbolic expression of support for the rule of law and the administration of justice

I thank you all for being here and wish for you all and your families, all the very best for 2021.

I invite you to stay behind for the usual refreshments before returning to the business of the day.

Hon Anthony Smellie

Chief Justice

13 January 2021.