Easing pre-trial detention

Mr Justice Iain Morley QC

Eastern Caribbean Supreme Court

Antigua & Barbuda and Montserrat

Cajo, Belize, 2019

Control the list

- Essential, this cannot be overstated.
- With priority to cases in custody.
- Example.

Bail

- Civil action.
- Unclear test.
- No legal aid.
- Example.

Witnesses

- Monitoring.
- Movement.
- Motivation.
- Example – in particular SO cases.

Magistrates

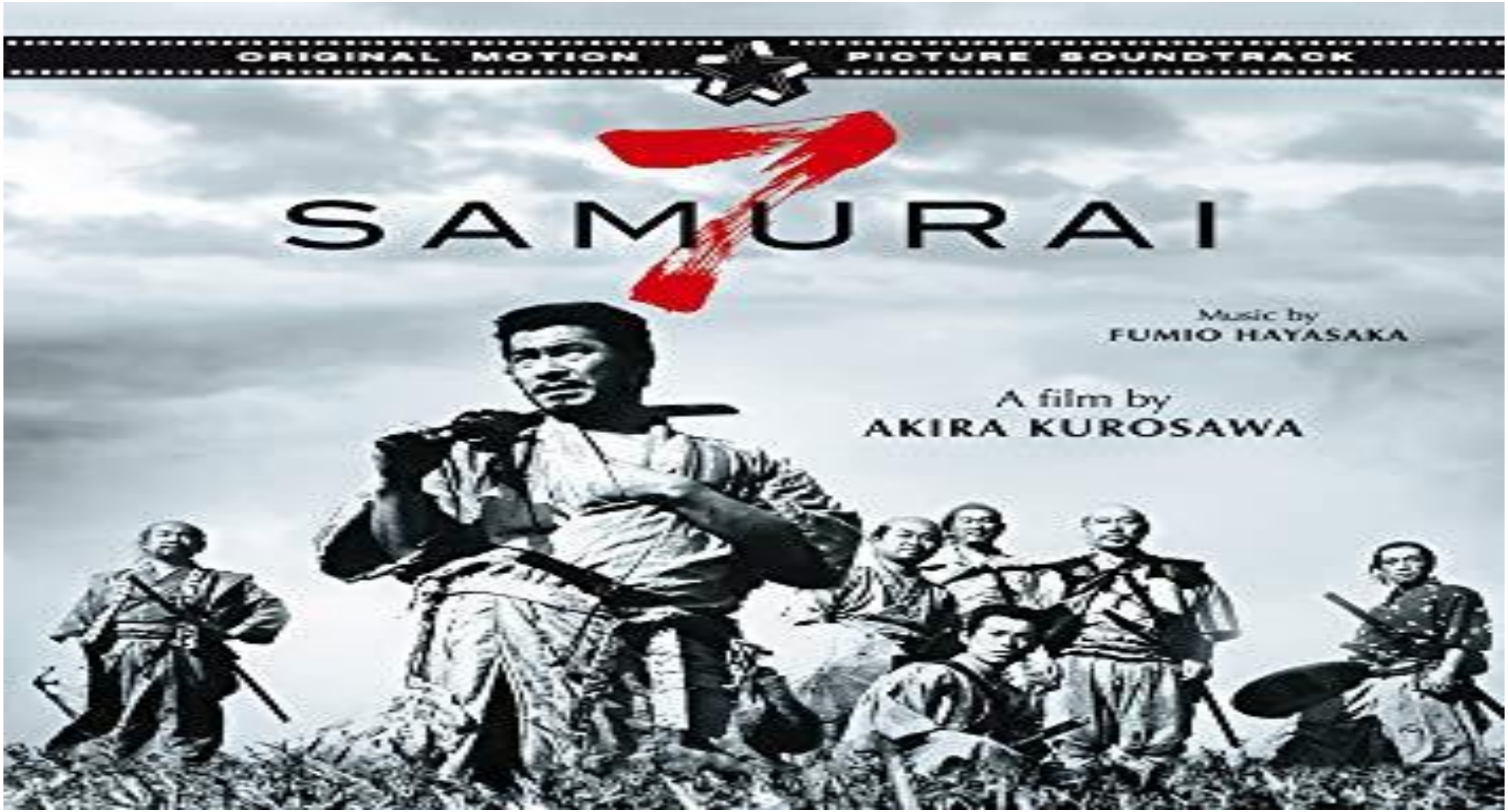
- Disconnect.
- Accountability.
- Example.

Jail

- Folk left behind.
- Conditions.
- Example.

The magnificent 7


DENZEL WASHINGTON
CHRIS PRATT
ETHAN HAWKE
THE MAGNIFICENT SEVEN
FROM THE DIRECTOR OF TRAINING DAY AND THE EQUALIZER


ORIGINAL MOTION PICTURE SOUNDTRACK
SAMURAI
Music by
FUMIO HAYASAKA
A film by
AKIRA KUROSAWA

To ease pre-trial detention: **the magnificent 7**

1. HCJs must control the list, and call on custody cases.
2. Custody cases should have trial priority.
3. Every jurisdiction should have a Bail Act.
4. Every court centre should have a dock-brief junior counsel.
5. Witnesses should be monitored.
6. Magistrates and HCJs should meet once per term.
7. Visit the jail.

Pre-Trial Detention

By
Justice Colin Williams
Supreme Court of Belize

6th Biennial Conference of the Caribbean Association of Judicial Officers
Biltmore Hotel, Belize City
Belize.

(Thursday, 31st October 2019)

Pretrial detention is the detaining of an accused person or suspect in a criminal matter before the trial has taken place. This detention may be as a consequence of (a) that persons' inability to meet the conditions of bail; or (b) the denial of bail.

Pretrial detention therefore carries the imprimatur of judicial action. Every person who is in detention is there either because of the conditions imposed by a judicial officer (which the applicant is unable to meet), or as a result of a decision that was made by a judicial officer to deny that person bail.

It is often said that "*bail is a right*." But as is the case with all rights, bail is subject to limitations. And it is a judicial officer who presides over the limitations of that right.

Since, therefore, it is a judicial officer who places a person in detention (or remand) pending that persons' trial, the solutions to any perceived challenges resulting from the number of persons in pretrial detention rests with the judiciary.

Is there, however, anything inherently wrong with pretrial detention?

All persons in detention have been accused of committing an offence. Some of them very serious offences. In the Commonwealth Caribbean our societies grew up accepting, for example, that anyone accused of murder will remain in custody until trial. Some may say until trial and conviction.

In some instances, the legislature has placed hurdles upon the granting of bail. There may be some specified offences for a Magistrate cannot grant bail or may do so only after a specified period. For example, in Belize, a Magistrate may not grant bail to anyone charged with a firearm offence before the expiration of three months. Then, there is the situation when an application for bail to the Supreme Court may not be filed expeditiously, or even when an application is filed, bail is heard only on a particular day of the week. In situations where a person is charged with an offence for which a Magistrate would ordinarily grant bail – but for the provision of law which limits the Magistrate to do so at the first instance – it is not often that counsel file any urgent application for the hearing of bail. Although the defendant in such cases may not spend exceedingly long in custody, persons can still end up being locked away when there is no need for it.

It is really for the Prosecution to make out a case for the detention of a person. The mindset of some persons however is that the defendant ought to prove or satisfy the court that bail should be granted. That, respectfully, is starting with the incorrect perspective.

But what if that persons for one reason or another is not convicted after being detained from the date of that persons' arrest? And this can in many instances be a very long time after: not days, weeks or even months. Not a year; but years after – three, four, five or even more.

But there is something that is often missed in these societies where the inherited rule is not to grant bail for very serious offences such as murder: that is trial within a reasonable time. This pretrial detention period however is constantly being enlarged. The challenge therefore is how to arrest that expansion and to bring about a reduction of time between the charging of a person for an offence and the trial of that person.

It is true that the number of matters to be tried and the number of persons awaiting trial are growing. And they are increasing at a far greater rate than any increase in the number of judicial officers or the availability of courts for matters to be tried.

Is the answer therefore simply to leave persons in custody to await their day in court? What can be done to ensure that a defendant's day in court is sooner rather than later? The issue of pretrial detention and delay reduction strategies are therefore intimately related.

It was noted earlier that one of the concerns with lengthy pretrial detention is the fact that there are times when a person is acquitted after being on remand for an extended period of time. But it is not just the person who was in custody who may be aggrieved by this delay. What about the complainant? They are forced to wait inordinately long to have some access to the justice system. During this waiting period, some victims are forced to put their lives on hold, waiting for justice to be done. And with the passage of time, after several years, on occasions the availability and quality of the evidence perishes, or even sometimes, regrettably, the complainant's interest wanes.

The delay in the hearing of matters may therefore sometimes favour a person in custody. The time spent on remand then becomes the '*opportunity cost*' of offending. If the case falls down for one or another reason and the defendant is acquitted, even though the defendant would have spent time on pretrial detention, they emerge without a conviction and their antecedent record intact.

But is that good for the justice system and the rule of law. After all, the intention is for the guilty to be punished and the innocent to walk free. The criminal justice system ought therefore to be engineered in a fashion that would function effectively and engender confidence of the citizens in the rule of law.

I would like to look at some rough data from the two jurisdictions that I am most familiar with: Belize and Saint Vincent and the Grenadines. Bear in mind that the population of Belize is roughly three times that of Saint Vincent and the Grenadines.

The most recent figures that I got of the respective prison populations show that there are 1,150 inmates in Belize and 471 in Saint Vincent and the Grenadines. The remand population in Belize

as 453, or 39% and in Saint Vincent and the Grenadines 82 or 17.4%. (I have been told that the highest the remand figure has ever reached in Saint Vincent and the Grenadines is 150).

What can be done therefore to reduce the delay in the holding of trials as well as to reduce pretrial detention? There is no magical cure; but within the available legislative framework, it would be left up to judicial officers to creatively use the tools at their disposal.

Doing away with the old style preliminary inquiry has long been touted as an important tool for delay reduction. But will the introduction of paper committals simply transfer 'the bottleneck' in having cases disposed and not impact on pretrial detention? Saint Vincent and the Grenadines still does the long form PI's, but at a dedicated court – the Serious Offences Court. In Belize, persons are more likely than not, after being charged with an indictable offence, to be committed to stand trial without consideration of the evidence. The first time that evidence is assessed it at the Supreme Court. The Defendant is Saint Vincent and the Grenadines however not only gets his/her day in court earlier, but has an opportunity for the case to be thrown out at the committal stage.

The abolition of PI's on its own may not do much to solve the challenges of the overcrowded system.

Belize has taken the important and bold step to have mandatory judge alone trials for certain types of matters. This eliminates the opportunity for theatrics and drama that can accompany a trial by judge and jury. A judge only trial reduces the consideration to gamble on the chance that two or three of the jurors may be left in doubt.

An additional benefit of the judge only dispensation in being able to address delay reduction and pretrial detention, is that a judge at case management can and ought to be more activist in focusing the parties minds on the issues and realistic outcomes. Criminal case management is an indispensable tool in the timely disposal of cases.

A judge through the case management process ought to be able to identify the weak cases and see if those can be '*weeded out*' as early as possible. Setting and adhering to timelines, making wise case management orders, ensuring that the prosecution has access to its witnesses are just some of the necessary considerations.

The judge has to be alert to ensure that neither party is seeing to use the good office of the court to further the agenda or particular interest of either of the parties. The court ought not to allow the prosecution to rely on pretrial detention as some kind of alternative to conviction-based incarceration; on the other hand, the court ought not to accommodate adjournments to enable counsel to collect fees.

The simple practice of requiring the filing of Case Management Orders go some way in facilitating the trial process. Not only do counsel have documentary evidence as to who is to do what by when, but it serves as a continuous record for other counsel who may end up with the file to know what has already been done and the stage the matter is at. Of course, building the electronic database of each matter has other benefits. It is important for Belize which has the CCJ as its final Court of Appeal and would limit post trial delay the entire record would be readily available.

The use of agreed evidence is a technique that can be used to reduce overall length of a trial. This need not be completed at the Case Management Conference but should be utilized even on the trial day. Understandably, the defendant may feel that one or another witness may not be found or be willing to testify. However, when that witness does in fact turn up at the door of the court, then there may be a willingness to accept the testimony from that witness being formally tendered. Overall, however, where a witness is not needed for cross examination and where the witness is giving just formal evidence, the parties should be encouraged to agree to have the evidence from the witness formally read into the record.

The sharp and more focused the issue in dispute is made, the easier it is for the parties to understand which witness will be contentious and need to be cross examined. Case Management enables the parties to focus better on their cases and to prune the fluff.

A recent measure implemented by Chief Justice Kenneth Benjamin provides an opportunity for persons on remand to access bail at the Supreme Court. The strengths of the bail practice in the Eastern Caribbean countries of Saint Lucia and Saint Vincent and the Grenadines have been combined into a single one leaf document and in a distinctive and authentic Belizean document which permits persons on remand to access a bail hearing. This was introduced in August this year. Prior to this, all applications were filed by lawyers and those unable to pay the fees were forced to remain in custody.

One of the perennial problems which impacts the criminal justice system is the impecuniosity of many of the defendants. Upon observation, the persons who populate detention facilities by and large are from the most challenging backgrounds, lower levels of education, financially challenged and lacking in family ties. In many jurisdictions, only those charged with murder are likely to have counsel assigned to them. But the counsel is for the purpose of the trial, not to press for bail. It may become necessary for the judicial officer to keep a close look on the efforts of the assigned counsel, who may well be tempted to put greater effort into representing the interests of fee paying clients. This assigning of counsel in "*capital cases*" does not however address the needs of a significant number of detained persons who are not charged with murder-related offences, since the State would ordinarily not pay a stipend towards their defence. These persons nevertheless could benefit from representation. This significant group of detainees includes persons suffering from mental illness or sub-normality.

Ideally, a properly resourced and legal aid programme can do much for the improvement of the criminal justice system. Until then, however, judges will have to see how best they can prevail upon counsel at the Bar to assist.

The legislature in Saint Vincent and the Grenadines provided the investigators with a valuable tool which has resulted in the elimination of *voire dires* to challenge the voluntariness of confessions. The shortening of trial time means that more time is available to do other matters. The introduction of legislation for the mandatory video recording of custodial interviews with suspects in serious offences has eliminated the challenge to the voluntariness of confessions and admissions, even though the legislation also introduced the concept of negative inferences to be drawn when a suspect does not disclose to the police at the time of the interview anything which that suspect

knows about the offence for which they are being interviewed. With the time consuming exercise being eliminated, it means that incrementally, more judicial time is available to address other matters, including persons who are in detention.

To summarise:

- ✓ Pretrial detention and delay reduction strategies are interconnected;
- ✓ Judicial officers have a direct responsibility to control the length of pretrial detentions and to eliminate delays;
- ✓ Pretrial detention and delays can undermine the efficacy of the criminal justice system;
- ✓ Case management of the cases is a most valuable tool in the clearing of backlogs;
- ✓ Judicial officers must be willing to make incisive orders to drive the process forward;
- ✓ Legislative reforms can enhance the delivery of justice; in the meantime wise administrative changes would help.

Title of Session: Pre- Trial Detrition

Session Chairperson: The Honourable Mr Justice Jacob Wit, JCCJ

Session Panelists:

The Hon Justice Iain Morley - Eastern Caribbean Supreme Court, Antigua and Barbuda and Monserrat

The Hon Mr Justice Colin Williams - Supreme Court of Belize

Objectives of Session:

At the end of this session, participants will be able to:

a. Identify some key issues which surround pre-trial detention, and

b. Formulate solutions to effectively deal with these issues.

Key points from presentations:

Justice Iain Morley QC

1. In order to ease pre-trial detention, there are a few things which judicial officers could do:
   - Control the list: This is essential and cannot be overstated. It is imperative that judicial officers assign priority to cases which are in custody.
   - Bail can also be used as a tool to ease pre-trial detention. This is especially so for matters or in jurisdictions where there is no legal aid. The test for the granting of bail is unclear.
   - Due to the importance of witnesses, they can also have an impact on the influence of pre-trial detention, they must be monitored, shown that there is movement within their case in order to keep them motivated. The significance of this point can be seen for example in sexual offences cases.

2. Judicial Officers have the responsibility to control the length of the trial

3. Case management can be a resourceful tool

4. Legislation reform can be enforced to aid in this process as well

The Hon Mr. Justice Colin Williams

1. To ease pre-trial detention: The Magnificent 7

    a. High Court Judges must control the list and call on custody cases. Judges need to take control of the accused list. Otherwise, the DPP will determine which cases go first and which cases get thrown out. The challenge with this is that the DPP might not consider these cases to be as important as the judge.

    b. Custody cases should have trial priority.

    c. Every jurisdiction should have a Bail Act.

    d. Every court centre should have a dock-brief Junior Counsel.

    e. Witnesses should be monitored.

    f. Magistrates and High Court Judges should meet once per term.

    g. Visit the jail.

2.

    Bail

- Civil action
- Unclear test
- No legal

Witnesses

- Monitoring
- Movement
- Motivation

Magistrates

- Disconnect
- Accountability

Jail

- Folk Left behind

- Condition

Questions and Responses for both panelists

More so responses (their names were not stated)

Bail

Bail is served if the accused meets certain criteria.

The bail is denied due to the serious of offense

Most people can't afford it

Guyanese Question

The Judges have three months to make an order for a case it be presented

Jail delivery

Response

There is no jail delivery in Monserrat, Antigua

Evidence maybe reconsidered

No time limit before case gets listed again

Justice Shanks

In the UK custody time limit is 6 months

When making a ruling, the time spent on remand is taken into consideration in deciding the accused has to spend in jail.