



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2022: 26

FIONA MILLER
(Police Sergeant / Informant)

Appellant

-v-

TAAHIR AUGUSTUS

Respondent

JUDGMENT

Prosecution Appeal against Order of Conditional Discharge

Date of Hearing: 5 January 2023

Date of Judgment: 24 April 2023

Ms. Cindy Clarke, the Director of Public Prosecutions, for the Appellant
Mr. John White, (Marshall Diel & Meyers Limited) for the Respondent

JUDGMENT delivered by Shade Subair Williams J

Introduction

1. This is the Crown's appeal against a sentence imposed on the Respondent in the Magistrates' Court by learned Magistrate, Ms. Maxanne Anderson (now the Senior Magistrate), on Information 20TR01503/20CR00126 pursuant to section 4 of the Criminal Appeal Act 1952. This appeal concerns Counts 3 and 4 of the said Information. Count 3 alleged that the Respondent unlawfully assaulted PC 2309 Philgence by coughing on him

and stating; “*I have coronavirus*” while PC Philgence was executing his legal duty by arresting the Respondent. A similar allegation arose on Count 4, save that it concerned another police officer, namely PC 2510 Noddings.

2. The Respondent pleaded not guilty to these offences and the matter proceeded to trial. It was not until after the Senior Magistrate ruled that there was a case to answer that the Respondent changed his pleas and pleaded guilty to Counts 2, 3 and 4. (Count 2 was a charge of failing to comply with a demand made by a police officer for a sample of breath for analysis, contrary to section 35C(7) of the Road Traffic Act 1947 (“RTA”). The Crown offered no evidence on Count 1 which was a charge for driving whilst impaired by alcohol or a drug, contrary to section 35AA of the RTA.
3. Having received those pleas and sentence reports, the Senior Magistrate imposed a conditional discharge in respect of Counts 3 and 4 pursuant to section 69 of the Criminal Code as read with section 70A(a)-(b). On Count 2, which is not the subject of this appeal, she fined the Respondent in the sum of \$1,500.00 and disqualified him from all vehicles for a period of 18 months.
4. By Notice of Appeal filed on 1 August 2022, the Crown appealed the Senior Magistrate’s decision to impose a conditional discharge the ground that the “*Learned Magistrate erred in law in [sic] when she found it to be not contrary to the public to discharge the defendant.*”
5. Having heard Counsel on their oral and written submissions I reserved judgment, which I now provide on the reasons set out below.

Summary of the Evidence at Trial

6. At approximately 6:00pm on 13 April 2020, Commander McLaren Smith of the Bermuda Regiment was manning a vehicle checkpoint on Pomander Road by Alberfeldy Nursery in performance of his special duties shortly after the break-out of the COVID-19 Pandemic.
7. Commander Smith’s evidence at trial was that he and his colleagues observed a bike heading into town from a westerly direction. The rider, the Respondent, was signalled to stop and did so. Commander Smith explained his role to the Respondent who was at a 4-5 foot distance from him. Commander Smith told the Court that the Respondent’s bike was falling over while he was still sat on the seat; so he, Commander Smith, approached to provide support. However, the bike fell over with the Respondent underneath it.

8. Commander Smith assisted with the bike and detained the Respondent who had fallen asleep up until the point of police arrival. On the evidence of PC 2309 Vivian Philgence, the Respondent's eyes were glazed and his speech was slurred. She asked him if he been consuming alcohol, to which he replied; "yes". The Respondent was subsequently arrested on suspicion of driving whilst impaired. Commander Smith said that he heard the Respondent state words to the effect that he was positive for the coronavirus and he observed him to be fake-coughing. PC Philgence placed a mask on the Respondent after he was handcuffed and he was placed in a police vehicle.
9. Commander Smith's evidence was that Mr. Augustus was somewhat resisting by squirming and making jokes. Commander Smith then opened the door to the police vehicle and assisted by sitting the Respondent upwards and securing him in the vehicle with the seatbelt. He said the Respondent continued to feign coughing with his head between the seats. This prompted the police officers to cause him to sit back.
10. The Respondent was seated behind the front passenger seat behind PC Philgence. PC 2510 Noddings was the driver. PC Philgence stated in her evidence that the Respondent used the back of the front seat head-rest to remove the mask she placed on him. When directed to keep the mask on his face, the Respondent was uncooperative; so he was again asked to comply.
11. During the drive to Hamilton Police Station the Respondent coughed on three distinct occasions and he leaned forward to put his face in the front cabin area of the police car. There were no protective screens in place to separate the backseats from the front seats. PC Philgence told the Court that the Respondent had again removed his mask and uttered; "*I have coronavirus.*" This caused PC Noddings to apply the car brakes and to stop the police vehicle to open the car doors.
12. Officer Noddings told the Court that he felt afraid that he had been contaminated given the closed environment in which he was with the Respondent. He explained that this occurred during the first wave of the pandemic and during the first lock-down before a vaccine had been produced and made available to the general public. He recalled that people during that period were dying from the virus.
13. Shortly thereafter the officers opened the windows and continued on their route to Hamilton Police Station. The Respondent was conveyed to the custody area and the officers were transported to Fairmount Southampton Princess Hotel to be quarantined. PC Noddings told the Court that at that time there were no available coronavirus tests on the island and so he was instructed to quarantine for a 14 day period. This came at a time when he and his wife had a new-born son of 8-9 weeks and minimal support.

14. In the end, the officers were quarantined for approximately 3-4 days pending the Respondent's negative test result. On that point it was noted that the Respondent voluntarily submitted to the testing process although he was not legally obliged to do so.

The Sentencing Hearing

15. By way of sentencing reports, the Court had the benefit of a report from the Bermuda Assessment and Referral Centre ("BARC Report") and a Social Inquiry Report ("SIR") written by Probation Officer, Mr. Norvell Furbert. Under the section of the SIR dealing with the Offender's attitude towards the offence, it is stated:

"Mr. Augustus indicated that he was maintaining his guilty pleas for the above listed offences when he was interviewed for his report. However, as it pertained to the Serious Assaults on Police, he added, "I feel I was wrongfully charged for the assault." In that regard, he maintained that he neither coughed on the ...complainants nor did he utter the words that are quoted in the Information..., namely, "I have corona virus." Mr. Augustus noted that he did not have any coronavirus, on April 13 2020. Mr. Augustus alleged that he was assaulted by one of the police officers who arrested him when the latter "knocked me off my feet and I had to go to hospital and get stitches to my head" because he, Mr. Augustus, "hit the ground face first." Mr. Augustus further indicated that he had no intention of reversing any guilty pleas. After expressing remorse for his actions, Mr. Augustus stated that he would not reoffend prior to and after the conclusion of these proceedings, as he had no desire to be in conflict with any of the laws that govern this jurisdiction."

16. The writers of the BARC Report also addressed the Court on the Respondent's attitude towards the offences in question [2]:

"Please note that during this assessment, Mr. Augustus discussed additional aspects of his case that he was not agreeable with. He stated that he was never offered the opportunity to take the Breathalyzer and also disputed the unlawful assault.

I never coughed on the officers and said I had corona virus. I had on a mask. I remember because when I was in the back of the police car they kept telling me to adjust it because it was falling off, but I couldn't because when they arrested me they cuffed my hands behind my back. When we got to Hamilton Police Station they laid me face down on the ground, one of the officers picked me up by my neck, dragged me inside, and put me in the holding cell. I never took the Breathalyzer because I was never asked. I never had the opportunity. The only exchange that I had with them (the

police officers) after that was when they took me to the hospital to get stitches in my head. I had a cut above my eye from the fall.

Mr. Augustus said that despite these particulars he intends to plead guilty to the refusal and will discuss the unlawful assault offenses with his lawyer. He shared that despite being not guilty this is how he would prefer to move forward because the offenses happened in 2020 and he does not wish to draw the process out any longer. "It's been 2 years. I just want to get this over and done with.""

17. It is reported in the SIR that the Respondent has a son (7 months old according to the BARC Report of 18 July 2022) whom he was actively parenting. The learned magistrate was also made aware of the Respondent's employment history and the fact that he was gainfully employed at the time of the sentencing proceedings. As to the question of risk of reoffending, it was reported in the SIR that the Respondent presented a 'very low' level of risk and had a 'very low' need for rehabilitative services. The absence of any dependencies or habitual use of illicit substances was supported by the BARC Report. Having consulted with his colleagues, Mr. Furbert opined that there was no apparent need for any community-based supervision by the Department of Court Services. Instead he recommended the imposition of a fine or a conditional discharge without community-based supervision.
18. Mr. John White, on behalf of Mr. Augustus, highlighted the Respondent's previous clean record, his young age (29 years of age at the stage of sentencing) and his 'glowing reports and character witness statements'. Counsel also asserted that Mr. Augustus had expressed remorse and that the offence was out of character for him. Additionally, Mr. White told the magistrate that Mr. Augustus had become a new father and spoke about the impact of parenthood on his life.
19. It is noted in the Record of Appeal that the Respondent, during the allocutus, told the Court, *inter alia*, that he realised that he had 'made a lot of mistakes in the past' and that he 'has to deal with his actions.'
20. Notably, the Prosecutor, Ms. Nicole Smith, supported the call by the Defence for a conditional discharge, notwithstanding her submission that Counts 3 and 4 would have otherwise attracted a custodial sentence.

The Statutory Provisions for a Conditional Discharge

21. Section 69 of the Criminal Code provides:

“Conditional and absolute discharge

69 (1) *Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, the court may, if it considers it to be in the best interests of the offender and not contrary to the public interest, instead of convicting the offender, by order direct that the offender be discharged absolutely or on conditions prescribed in a probation order made under section 70A or 70B.*

(2) *Where a court directs under subsection (1) that an offender be discharged of an offence, the offender shall be deemed not to have been convicted of the offence except that—*

(a) *the offender may appeal from the determination of guilt as if it were a conviction in respect of the offence;*

(b) *the Director of Public Prosecutions or the informant may appeal from the decision of the court not to convict the offender of the offence as if that decision were a judgment or verdict of acquittal of the offence or a dismissal of the information against the offender; and*

(c) *the offender may plead autrefois convict in respect of any subsequent charge relating to the offence.*

(3) *Where an offender who is bound by the conditions of a probation order made at a time when the offender was directed to be discharged under this section is convicted of an offence, the court that made the probation order may, in addition to or in lieu of exercising its authority under section 70CA, at any time when it may take action under that section—*

(a) *revoke the discharge;*

(b) *convict the offender of the offence to which the discharge relates; and*

(c) *impose any sentence that could have been imposed if the offender had been convicted at the time of discharge, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the offender is discharged.”*

22. The compulsory conditions under section 70A provide:

Compulsory conditions

70A *The court shall direct, as conditions of a probation order, that the offender—*

- (a) not commit another offence during the period of the order;*
- (b) appear before the court when required to do so by the court;*
- (c) notify the probation officer in writing in advance of any intended change of address and promptly notify the probation officer of any change of employment or occupation;*
- (d) report to a probation officer at the place and within the times stated in the order and thereafter when required by the probation officer and in the manner directed by the probation officer; and not*
- (e) leave Bermuda without the written permission of a probation officer.*

23. The optional conditions which may be imposed under a probation order or as a condition of a discharge are prescribed under section 70B. These conditions include provisions for the performance of up to 1000 hours of community service within no more than an 18 month timeframe, drug testing and requirements to refrain from specified locations and persons. The Court may also make an order for the abstaining from the consumption of intoxicating and/or controlled substances. Additionally, it is open to the Court to direct a Defendant to partake in rehabilitative programmes and curfew and electronic measures may also be employed.

Whether the Learned Magistrate Erred in Imposing a Conditional Discharge

24. The offences under Counts 3 and 4 of unlawful assault of a police officer while such officer is acting under the execution of his or her lawful duty are contrary to section 311(d) of the Criminal Code. The maximum penalty for that offence is 3 years imprisonment and/or a fine of \$3000.00.

25. The DPP, Ms. Cindy Clarke, submitted to this Court that the order for a conditional discharge for those two counts under section 311 was an error of law. Ms. Clarke also invited this Court to find that (i) a conditional discharge is a sentence for the purpose of section 2 of the Criminal Appeal Act 1952 and (ii) that such a sentence was manifestly inadequate under section 4A of the 1952 Act. Mr. White argued that the sentence was not manifestly inadequate and urged this Court not to interfere with the magistrate's disposal of those counts on the Information.

26. On the first point, I note that section 2 of the 1952 Act bestows an appellate jurisdiction on this Court in respect of "*convictions, sentences, orders and other decisions of courts of*

summary jurisdiction...". An informant has a right of appeal under section 4 where it involves a question of law alone. In accordance with section 4(1)(b) an appeal on a question of law may apply to "...*any decision in law which led the court of summary jurisdiction, after convicting the defendant in those proceedings, to impose a particular sentence or to deal with him in a particular way* [my emphasis]." Subsection (2)(a)-(c) provide examples of decisions to which section 4 applies.

27. On the case advanced by the DPP, the decision in law that wrongly led the magistrate to impose a conditional discharge refers to her non-application of the requisite statutory test for imposing a discharge under section 69.
28. When listing out the mitigating factors, the learned magistrate took account of the Respondent's previous clean record and expressly stated her consideration of the sentencing provisions under Part IV of the Criminal Code. Magistrate Anderson also noted her consideration of section 69 and 70. However, she did not state any findings as to: (i) whether it was in the best interest of the offender to order a conditional discharge and (ii) whether she was satisfied that it was not contrary to the public interest to make such an order. In my judgment, an omission to make these findings amounts to a clear error of law. (See *R v Almanzar and Reyes-Nunez* [2016] SC (Bda) 20 App [15], per Kawaley CJ).
29. This brings me to the prosecutor's second question as to whether the imposition of a conditional discharge would have been, in any circumstances, a manifestly inadequate sentence. It seems to me that I should instead approach the next steps by posing the following questions for my determination:
 - (i) Was it open to the magistrate to find that the imposition of a conditional discharge was in the best interest of the offender?
 - (ii) Was it open to the magistrate to find that the imposition of a conditional discharge is not contrary to public interest?
 - (iii) If the answer to any one or both of the above questions is no, then should this Court impose a sentence or should it remit the matter for sentence by the magistrate?
 - (iv) If the answer to both (i) and (ii) is yes, then should this Court interfere with the order for a conditional discharge?
30. There can be no real controversy that the answer to question (i) would be in the affirmative. The Respondent, then a relatively new father, had no previous convictions and was said to have acted out of character in committing these offences. It was clearly accepted by the

magistrate that he did not suffer any ongoing substance-abuse issues and was not in need of rehabilitative services. Under those circumstances, I find that it was indeed open to the magistrate to find that an order of conditional discharge was in his best interests.

31. Question (ii) does not allow for an equally straightforward analysis. When looking only at the acts comprising the assaults under Counts 3 and 4, it may be said that these offences were particularly serious and qualify as being on the higher end of the sentencing scale, given the early and fatal stage of the COVID-19 pandemic. The fact that by July 2022, when the sentence proceedings took place, the vaccine had been made widely available to the public and that the fatal effects of the pandemic had largely dissipated, does not negate the impact of the assault which occurred on 13 April 2020.
32. It is open to this Court, as it was to the Magistrates' Court, to take judicial notice of the fact that in April 2020, on account of the effects of the global spread of the coronavirus, several hundreds of deaths were being reported in multiple countries worldwide within a 24 hour cycle. Tens of thousands of people in neighbouring countries were falling gravely ill confronted by a real prospect of death. Country lock-downs and emergency curfews were in place and millions of people suffered unemployment. Simply put, the threat of the virus signified the threat of devastating and life-changing effects.
33. So, it is unimaginable that the Accused would have been sentenced to a conditional discharge had he been sentenced within the same month of April 2020 when the offences were committed. I am left with very little or no doubt that such a sentence would have been met with wide-spread public outrage making it unreasonable to conclude that a discharge would not have been contrary to public interest.
34. The reality, however, is that the trial and sentence proceedings did not proceed until July 2022 when the public's interest and fear of the coronavirus had significantly dwindled. Does this subtract from the seriousness of the offence committed? It does not. However, it is relevant to the question as to whether it would be contrary to public interest to impose a conditional discharge.
35. An order for an absolute or conditional discharge is a measure of disposal which is not arbitrarily off-limits to offences of any particular class of gravity. Whether a discharge under section 69 is appropriate, will call for an application of all the facts and circumstances of the case and the offender. Given all of these circumstances, I am compelled to find that it was indeed open to the learned magistrate to factor into her consideration the considerable time which had passed since the commission of the offence in addition to all of the other post-offence factors in deciding whether it was contrary to public interest to impose a conditional discharge. For those reasons, I cannot say that the learned magistrate

would have been wrong to find that it was not contrary to public interest to make such an order.

36. Having found that it was indeed open to the learned magistrate to have imposed a conditional discharge on the unique circumstances of this case, I see no lawful basis to interfere with the order made, even though I consider that it would have been more appropriate to attach a period of community service to the order made.

37. I would only add that I make these findings, notwithstanding my real distaste for the ugliness of Mr. Augustus' offensive conduct which could have proved far more dangerous than it actually was. On my assessment of the sentence proceedings, Mr. Augustus lacked any sense of sincere remorse for his actions and was incredibly fortunate not to have been sentenced closer in time to the assaults when it would have likely been contrary to public interest to impose a conditional discharge. Had he been sentenced during the midst of the pandemic, he would have likely faced a more serious penalty.

Conclusion

38. For all of these reasons, the Crown's appeal is accordingly dismissed.

Dated this 24th day of April 2023



THE HON. MRS JUSTICE SHADE SUE AIR WILLIAMS
PUISNE JUDGE