The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 8 of 2011

Between:

THE QUEEN

Appellant

-v-

JASON DAMIAN BROWN

Respondent

Before: Zacca, E. President
Evans, Anthony, JA
Baker, Scott, JA

Appearances: Ms C Clarke for the Appellant
Ms E Christopher for the Respondent

Date of Hearing: **Wednesday, 7 March 2012**
Date of Judgment: **Thursday, 22 March 2012**

JUDGMENT

EVANS, JA

1. The Crown did not pursue its appeal against sentence; accordingly, the appeal is dismissed.
2. Miss Clarke, however, did draw to the Court`s attention the procedure adopted in the present case by the learned Supreme Court Judge who was hearing an appeal against the sentence imposed by the learned Acting Magistrate after the

hearing before him, and we were asked to provide guidance on the correct approach. Miss Clarke submitted that the Judge was wrong to treat the appeal as a rehearing of the sentence proceedings when, as she submitted, an appeal to the Supreme Court should be regarded as a review of the Magistrate`s decision on sentence.

3. We have heard helpful submissions on this procedural issue from Miss Clarke and from Miss Christopher for the Respondent, and we are grateful to them both. We therefore take this opportunity to set out what appears to us to be the procedure required by statute when a sentence appeal from a Magistrate is heard by the Supreme Court.

4. The procedure is set out in section 18(3) of the Criminal Appeals Act 1952 which reads –

> *"(3) Subject as hereinafter provided, the Supreme court, in determining an appeal under section 3 by an appellant against his sentence, if it appears to the Court that a different sentence should have been imposed, or that the appellant should have been dealt with in some other way,--*
>
> *(a) may quash the sentence imposed by the court of summary jurisdiction and may impose such other sentence allowed by law (whether more or less severe) in substitution for the original sentence as the Court thinks just; or*
>
> *(b) may quash the sentence imposed by the court of summary jurisdiction and may deal with the appellant in such a way as may be allowed by law in respect of the conviction of the offence in question;*
>
> *And in any other case shall dismiss the appeal:*
>
> *Provided that no sentence imposed by a court of summary jurisdiction shall be increased upon appeal by reason of or in consideration of any evidence which was not given during the criminal proceedings before the court of summary jurisdiction."*

5. The meaning in our judgment is clear. The Supreme Court Judge is required to consider, first, what sentence the Magistrate imposed; secondly, whether in his or her view a different sentence should have been imposed, taking account of the evidence that was before the Magistrate and any fresh evidence introduced

on the hearing of the Appeal; and thirdly, whether in all the circumstances of the case, the sentence passed by the Magistrate should be quashed and a different sentence imposed.

6. This may mean, for example, that the Supreme Court Judge would decide not to quash the original sentence in a case where, in his or her independent view, the sentence might have been marginally different from the one the Magistrate imposed.

7. We have been referred to a judgment of the Chief Justice when he was a Puisne Judge in *Andrew Robinson v. Commissioner of Police, [1995]* S.C. Appellate Jurisdiction No. 22 and we are content to adopt the principles he stated there in connection with appeals against conviction. The Court`s reluctance to differ from the Magistrate`s assessment of demeanour, and from his or her findings of fact made after hearing oral evidence from witnesses, applies equally in a sentence appeal.

8. In our judgment, the Judge adopted the wrong approach when she considered the matter of sentence entirely afresh and without regard to the sentence imposed by the Magistrate.

Signed

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Evans, JA

Signed

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Zacca, P

Signed

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Baker, JA