In The Supreme Court of Bermuda

Appellate Jurisdiction
2009 No. 34

BETWEEN:

MICHAEL COLES DIEL

Appellant

-and-

LEE-ROMA SWAN

Respondent

Date of Hearing: Thursday 12th November 2009
Date of Judgment: 20th November 2009

Mr. Marshall for the appellant; and
Ms. L. Burgess for the Respondent.

JUDGMENT

1. Mr. Diel appeals against a sentence of probation imposed by the learned Senior Magistrate following his pleas of guilty to three offences charged in Information 09CR12261. The offences were –

> **Count 2** – refusing to give a breath test contrary to section 35C (7) of the Road Traffic Act 1947, the maximum penalty for a first offence being 12 months imprisonment or a fine of $1,000 or both, plus a minimum of one year's disqualification and a maximum of five years.
> **Count 3** – using offensive words contrary to section 11 (a) of the Summary Offences Act 1926, the maximum penalty being 6 months imprisonment or a fine of $2,880 or both
> **Count 5** – violently resisting arrest contrary to section 2 (f) of the Summary Offences Act 1926, the maximum penalty being 6 months imprisonment or a fine of $2,880 or both.

His pleas of not guilty to the remaining counts were accepted by the prosecution.

2. The charges arose out of an incident in the early hours of Wednesday 26th August 2009, when the appellant was found in an apparently drunk and incapable state next to his motorcycle at the Ice Queen in Paget. When arrested for being in charge of the motorcycle whilst impaired he used various obscenities and acted in an aggressive and violent manner towards the police, necessitating handcuffing, which he resisted giving rise to "a minor struggle". He was then placed in a police vehicle, at which time he made offensive remarks of a racial nature to the arresting officer[1]. At the police station he refused to provide a sample of breath for analysis.

3. Having heard mitigation, the learned Senior Magistrate ordered Social Inquiry, Drug Assessment (BARC) and Psychiatric reports. These were prepared very promptly, and sentencing proceeded on 14th September 2009, the day before the appellant had been due to go overseas to England to attend 'Oxford Brookes University'. Having considered the reports, the Senior Magistrate then made a 2 year Probation Order. On Count 2 he also fined the appellant $1,000, disqualified him from all vehicles for 12 months and awarded 10 demerit points. No appeal is made against those penalties, the appeal being directed to the Probation Order.

4. The Probation Order contained the mandatory conditions required by section 70A of the Criminal Code, which include a condition that the probationer "not leave Bermuda without the written permission of the probation officer." It also contained various "optional" conditions, purportedly pursuant to section 70B of the Code. Apart from various standard conditions, requiring abstention from illicit drugs, attendance at therapy and the avoidance of bad company, it also contained the following:

> "8. Probation Services may at the appropriate time make application to the Court for the Defendant to continue with his education abroad."

[1] The words charged were "You Nigger, get me out of these fucking things, Nigger." "I'm gonna fuck you up Nigger, you don't know who your (sic) messing with." "My dad's a lawyer".

5. It is the appellant's case, ably advanced by Mr. Marshall, that the imposition of a Probation Order was manifestly excessive for the offences concerned, and he relied upon a series of newspaper reports to demonstrate that the Magistrates habitually dealt with offensive word cases with a fine. Without detracting from the generality of that, it was also his case that the restriction on the appellant continuing his education abroad was inordinate and inappropriate.

6. The various reports ordered by the Senior Magistrate demonstrated a history of substance abuse (including alcohol) and mental health problems, which appeared interrelated. In addition the appellant had a record of expulsion from various schools, and had got into serious mental health problems when he went to Manchester University in England in September 2008, leading to his withdrawal in early 2009. However, the subject offences are his first involvement with the law, and he has a clean record. Against that background the social inquiry report ('the SIR') had recommended that the appellant "is both suitable for and would benefit from a sentence of community supervision, under which he would receive additional rehabilitative and supervisory services and thereby more effectively address his areas of risk".

7. The SIR concluded with the following paragraph:

> "The Department of Court Services also recommends that Mr. Diel defer his overseas attendance at university for one year, to allow him time to fully stabilize his mental health and substance abuse issues."

There is much in the reports to support that recommendation. In particular the appellant's problems at a series of schools, and his serious substance abuse problems when he first attended university in Manchester. It is not unreasonable, therefore, to recommend that he first sort himself out before trying again, and there must be a real risk that he will not get any benefit from university until he has done so.

8. Against that background I do not think that the Probation Order imposed by the learned Senior Magistrate was wrong or manifestly excessive. It was a course which was plainly open to him, and supported by the SIR. He was entitled to take the view that a fine, however large, would

not address the underlying causes of the appellant's offending behaviour, and that until that was done he remained a risk both to himself and the community.

9. However, the provision in paragraph 8 of the optional conditions[2] was, in my view, legally beyond the powers of any court to impose. The permissible optional conditions are set out comprehensively in section 70B of the Criminal Code, and they do not include anything along the lines of this one. The only possible candidate for a sufficient enabling provision is section 70B(i), which permits an additional condition that the offender –

> "comply with such other reasonable conditions as the court may direct for facilitating the successful reintegration of the offender into the community."

But this part of the Order is not, in fact, a condition imposed upon the appellant, but a direction to the Probation Officer which in fact limits the discretion given to that officer by the mandatory conditions. The mandatory conditions impose upon the probation officer the task of deciding whether a probationer should be permitted to leave the jurisdiction[3], and in my judgment there is nothing in the rest of the statutory provisions which allows the court to limit that.

10. I think, therefore, that the Court should not have attempted to reserve to itself the decision as to whether the probationer could leave the jurisdiction to pursue further education, but should have left that matter to the discretion of his Probation Officer. I therefore strike out condition 8 of the optional conditions. That leaves the decision as to whether he should be able to take up his place at university in January 2010 with the probation service. In considering that question they should understand that there is nothing in the fact of the probation order itself which is necessarily inconsistent with the appellant attending further education abroad. Apart from that it is for them to balance the risks and benefits in the light of any safeguards that it is practicable to put in place. They will, of course, want to take into account the views of his parents and of his mental health practitioner. However, at the end of the day the primary consideration must always

[2] "8. Probation Services may at the appropriate time make application to the Court for the Defendant to continue with his education abroad."

[3] "70A the court shall direct, as conditions of a probation order, that the offender –
(e) not leave Bermuda without the written permission of a probation officer."

be to do what, in the professional opinion of the probation service, is in the true best interests of this young man.

11. Apart from that I see nothing wrong in principle with the Probation Order that was made in this case. The SIR contained a clear recommendation that the appellant would benefit from a sentence of community supervision, and given his history it is hard to argue with that. The words he used to the police officer were nasty in the extreme and in my view their racial content was an aggravating circumstance which the Senior Magistrate was entitled to take into account. Perhaps more importantly, driving a bike whilst in the state that this appellant was obviously in poses a real danger not just to himself but also to others, and the learned Senior Magistrate was entitled to take steps to remediate his behaviour in this respect beyond a mere fine and disqualification[4].

12. Subject, therefore, only to my striking out condition 8 of the optional conditions, I dismiss this appeal and confirm the sentence of the learned Senior Magistrate.

Dated this 20th day November 2009

Richard Ground.
Chief Justice

[4] Lest there be any argument about it, I have checked the Senior Magistrates' manuscript notes and he clearly imposed probation on all the counts, including Count 2.