In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CRIMINAL APPEAL 2012: NO. 50

GLEN BRANGMAN

Appellant

-v-

LYNDON D. RAYNOR
(Police Sergeant)

Respondent

JUDGMENT
(In Court)

Date of Hearing: March 8, 2013
Date of Judgment: April 4, 2013

Ms. Shade Subair, Mussenden Subair, for the Appellant
Ms. Nicole Smith, Office of the Director of Public Prosecutions, for the Respondent

Background

1. The Appellant was charged on January 29, 2010 in the Magistrates' Court with ten counts of sexual assault. The four offences found to have been proved were accepted as being committed between January and June 2009.

2. The Complainant (C) was 19 years old at the beginning of the period covered by the charges and went 20 in May 2009. The Appellant was 56 in January and went 57 years old in February 2009. It is also not in dispute that the Appellant was at all material times General Manager of the Bermuda Housing Corporation which provided C, who had been convicted of offences of dishonesty and was on probation, with both employment and accommodation. The Appellant accepted that C regarded him as a father figure.

3. The trial took place over several months before the Worshipful Khamisi Tokunbo. Following a no case submission at the end of the Prosecution's case, counts 4 and 5 were dismissed with the concurrence of the Crown on the grounds that there was no case to answer. At the end of the trial, at which the Appellant, a then 59 year-old man of previous good character, gave evidence, counts 2, 6, 7 and 9 were dismissed.

4. The Appellant appealed against his conviction, which was recorded by the Learned Magistrate in a 35 page long Judgment dated February 6, 2012, on counts 1, 3, 8 and 10. The offences all involved the Appellant groping C's genitals through his clothing, with C by his own account only overtly manifesting his objections after the touching had started. Only in the case of count 10 was the Appellant found to have used any physical force in connection with the assault in question.

5. Sentencing was postponed to await the outcome of the appeal against conviction. I dismissed the appeal on October 29, 2012 in unequivocal terms, essentially on the grounds that the case turned on issues of credibility and that no cause had been shown for an appellate court to interfere with the factual findings made by the trial judge. On November 13, 2012 he filed a Notice of Appeal against this conviction to the Court of Appeal.

6. The sentencing hearing took place on November 15, 2012. The Appellant was sentenced to three years imprisonment concurrently on counts 1, 3 and 8 and 3 ½ years concurrent on Count 10. He was remanded in custody. The same day he appealed against those sentences on the grounds that they were harsh and excessive. He failed to obtain bail pending appeal in the Magistrates' Court. He renewed his application to this Court, obtaining bail pending the determination of his appeal against conviction to the Court of Appeal from Greaves J. This bail application was based on provisions of the Court of Appeal Act 1964 and Criminal Appeal Act 1952 which the Appellant contended created an automatic stay of sentence pending appeal.

7. It became clear in the course of argument that some guidance was required as to the appropriate Magistrates' Court sentencing tariff for offences such as those of which the Appellant was convicted not just from this Court but, ideally, from the Court of Appeal as well. There appears on superficial analysis to be a great disparity in sentencing in the Magistrates' Court although it is impossible to make well informed judgments about disparity without access to all the relevant facts. Nevertheless, even a brief reference the bare facts of a case may in some cases be sufficient to demonstrate disparity.

The sentencing hearing in the Magistrates' Court

8. The Prosecution case before the Learned Magistrate at the sentencing hearing can be summarised as follows. Based on the Victim Impact Statement, emotional and psychological damage had been caused to the victim which was likely to be long-lasting. This type of offence was prevalent and was aggravated by the breach of trust and authority involved in offences where the Appellant took advantage of a vulnerable person. It was submitted, based on the case of *Garnett* (not relied upon before me) that an immediate custodial sentence of at least 5 years was required.

9. The Appellant's case as to the appropriate sentence can be summarised as follows. The reliance on the *Garnett* case was wrong and the request for a 4 year sentence was "shocking". Physical force was minimal and only present at all in relation to Count 10. There were exceptional circumstances which justified suspending any custodial term (this argument was not pursued on appeal). Based on more serious local cases (*Boorman*, *Evans*), any term of imprisonment ought not to exceed six months to one year.

10. The Learned Magistrates' sentencing remarks were as follows:

> "*I have fully considered the submissions of both Counsel in this matter on the question of sentencing. This is a very serious matter as is all offences of sexual assault.*
>
> *The Defendant has been convicted of 4 offences of sexual assault committed over a period of months – the first occurring in February 2009 and the last in June of that year.*
>
> *I accept, as Counsel for the Defendant has said, that the offences were primarily non-violent or not involving use of force in connection with the first three offences.*
>
> *Nonetheless they involved the violation of another's sexual integrity and privacy during which clothing was penetrated and the victim's genitals masturbated.*
>
> *The 4th offence went further and involved use of physical force and power being exercised over the victim.*
>
> *In determining the appropriate sentence I take into account:-*
>
> *1.The inevitable emotional damage that such offense can do to the victims and in particular this victim, as outlined in Victim Impart Statement.*

2.The prevalence of such offences in the community and the need to pass a deterrent sentence.

3.The fact that the Defendant was in a position of authority to Victim and, an acknowledged father figure to victim, a position of trust. In my view, the Defendant took advantage of those positions as well as the victim's personal vulnerable circumstances.

4.The fact the offences were committed over a period of months and, in my view, were calculated.

5.Defendant is a person of previous unblemished character with years of outstanding service to the Community.

6.The Contents of the Social Inquiry Report and Counsel's submissions.

Having regard to all of that I am satisfied that the only appropriate, sentence for these offences are immediate terms of imprisonment. This means a community based sentence as advocated for by Counsel is totally unsuitable in the circumstance.

On the facts of these offences it is my view that these offences attract terms of imprisonment of between 3 – 3.1/2years. I am not in agreement with Counsel that it would be appropriate, or that there are any exceptional circumstances, as listed by Counsel on behalf of the Defendant, that would warrant suspending the sentence wholly or in part.

Accordingly the Defendant is sentenced as follows:-

Counts 1, 3 and 8 – 3 yrs. Imprisonment

Count 10 - 3.1/2yrs. Time spent in custody taken into account."

11. While these remarks fully, clearly and accurately recited the applicable sentencing principles and the factors which were taken into account, they shed no real light on how the tariff ultimately arrived at had been reached. In particular, no explicit reasons are given for imposing either a comparable or higher penalty than that imposed in the cases relied upon by the Appellant's counsel where the sexual acts complained were more serious than those involved in the present case.

The submissions on appeal

12. Ms. Subair made the compelling submission that when the sentences imposed for the offences of which the Appellant was convicted (involving a young adult complainant) were compared with the sentences imposed for seemingly more serious offences involving child victims, the sentences imposed on the Appellant were starkly disproportionate and on this ground alone harsh and excessive. In *Pantry* (Magistrates' Court, September 17, 2012), the 64 year old offender pleaded guilty to a

series of five sexual assaults over a period of 12 years involving touching a girl who (when the offences commenced) was only 8 years old. A sentence of 3 years imprisonment was imposed and this was the sentence requested by the Crown.

13. Ms Smith fairly responded that the *Pantry* case relied upon by the Appellant's counsel was only described in a newspaper report. However, it was surely open to Crown Counsel to peruse the file in the *Pantry* case and offer some rational explanation as to why the sentence imposed in *Pantry* for a series of sexual assaults over a period of years starting when the female victim was only 8 years old was appropriate in all the circumstances of that case. No such explanation was proffered. If a one-third discount for a plea of guilty is added back onto the *Pantry* sentence for comparative purposes, the sentence imposed was one of 4 years. That is only six months more than the sentence the Appellant received in the present case which did not have the additional and very weighty gravity factors of (a) a child victim, and (b) offences spanning several years.

14. It is possible that the sentence requested by the Crown in *Pantry* was the price extracted for a guilty plea in a case which may well have been extremely difficult to prove (it appears that the offences were reported many years after the assaults first began) and for sparing the victim from a highly traumatic trial. This is merely speculation and must be viewed in the context of the legal reality that the ultimate sentencing function rests with the courts who cannot be automatically bound by any plea bargain made between the prosecution and an accused in which the sentencing judge is not involved.

15. The case of *Boorman and Evans* (August 24, 2012), another case involving a female child victim (between the ages 14 and 16), also on its face appeared to involve circumstances of greater gravity than those of the present case having regard to both (a) the nature of the acts perpetrated on the victim (forceful oral and vaginal penetration), and (b) the victim's age. However, the offenders were themselves in their low twenties. Nevertheless, Boorman received 12 months imprisonment (plus 18 months' probation) and Evans (who had a previous similar conviction for unlawful carnal knowledge) was sentenced to serve 2 years following a guilty pleas. Assuming a discount of one-third for a guilty plea, the sentences imposed in this case were 16 months and 32 months respectively. Evans' sentence (ignoring the discount for a plea of guilty) was almost a year shorter than the Appellant's.

16. The Respondent's counsel was again unable to satisfactorily explain the appropriateness of the difference between the penalties imposed by the Learned Senior Magistrate in another case during the same broad time-frame as the Appellant's case was before the Magistrates' Court. She did not, it is noteworthy, rely before this Court upon the case of *Garnett* which was used before the Magistrates' Court as the basis for seeking a term of four years imprisonment. Although Ms Smith did rightly point to the youth of the offenders in *Boorman and Evans*, a significant

mitigating factor absent in the present case, she was bound to concede that sexual offences against minors are inherently more serious than similar offences committed against adults.

17. In the course of argument I raised with the Appellant's counsel whether she contended that the Appellant's seemingly more harsh treatment could reflect a bias against same-sex male offenders. I also raised with the Respondent's counsel whether she considered that the commission of a homosexual assault on a heterosexual victim could constitute an additional aggravating circumstance. Each counsel enthusiastically embraced these propositions which potentially supported their respective cases. Each counsel appeared to me to be more tentative in embracing the Sentencing Council Guidelines (England and Wales) as a rational basis for determining the appropriate sentence in a sexual assault case.

18. In the absence of any sentencing guideline cases for sexual assaults of a similar nature, the Court was left in something of a quandary in terms of assessing the appropriate level of sentence and avoiding the ultimate sentencing vice of appearing to conjure an appropriate sentence out of thin air based on the subjective views of the sentencing judge as opposed to determining the tariff based on objective grounds.

Legal findings: general sentencing principles

19. The Learned Magistrate accurately stated the general sentencing principles now codified in sections 53 to 55 of the Criminal Code. The fundamental principle set out in section 54 is the following: "*A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.*" It is this governing principle which gives rise to the need to objectively analyse the circumstances of each case and to impose sentences which are not simply "internally" proportionate but also "externally" proportionate to the circumstances of other similar cases.

20. In assessing the gravity of the offence and the sort of sentence that will be required, the sentencing court must bear in mind the fundamental purpose of sentencing, which is articulated in section 53 as follows:

> "*...to promote respect for the law and to maintain a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives—*
>
> *(a) to protect the community;*

(b) to reinforce community-held values by denouncing unlawful conduct;

(c) to deter the offender and other persons from committing offences;

(d) to separate offenders from society, where necessary;

(e) to assist in rehabilitating offenders;

(f) to provide reparation for harm done to victims;

(g) to promote a sense of responsibility in offenders by acknowledgement of the harm done to victims and to the community."

21. Section 55(1) not only provides the important rule that imprisonment should only be imposed as a last resort. Section 55(2) also provides a statutory prescription of the factors which a sentencing court must take into account, which include:

(a) "*the nature and seriousness of the offence, including any physical or emotional harm done to a victim*" (section 55(2) (a));

(b) the prevalence of the offence (section 55(2) (e));

(c) "*the presence of any aggravating circumstances relating to the offence or the offender, including—... (ii) evidence that the offender, in committing an offence, abused a position of trust or authority in relation to the victim...*" (section 55 (2) (f));

(d) "*the presence of any mitigating circumstances relating to the offence or the offender*" (section 55(2) (g)-of seven examples of mitigating factors, only one applies to the Appellant in the present case).

Legal findings: sentencing approach in sexual assault cases

22. The Court of Appeal for Bermuda does not appear to have considered in any reported judgement the appropriate sentencing approach for sexual offences involving young adult victims by older offenders in a position of trust. In *White-v-R* [2005] Bda LR 50, a total sentence of 18 years imprisonment was considered appropriate for an offender convicted following a Supreme Court trial of 10 counts including offences of sexual exploitation and attempted buggery and three separate victims. This was another male on male case and the trial judge's total sentence of 20 years (the maximum for some offences) was reduced marginally on appeal. Evans JA noted "*in considering the English cases we have to bear in mind the different structure of sexual offences, and sentences therefor, which exist in this jurisdiction*" (at page 2). However he went on to note common sentencing principles between England and Wales and Bermuda:

> "*It is clear that in both jurisdictions the Court is bound to take account of the likelihood of reoffending and of the need to safeguard the public from offences of this kind; and the judge was correct to do so. Moreover he was entitled to pass deterrent sentences in the circumstances of this case.*"

23. In my judgment the England and Wales Sentencing Council Guidelines can be utilised in Bermuda as long as one pays due regard to any material difference of structure of offences and maximum sentences which may apply to any offence. As I observed in *Crockwell-v- Fiona Miller (Police Sergeant)* [2012] SC (Bda) :

> "*81. In my judgment the Sentencing Council of England and Wales Guidelines on the sexual offences Act 2003 can serve as a useful general guide to Bermudian judges in relation to the range of sentences which are appropriate where the relevant offences are substantially the same under local and English or British law. This is because the modern sentencing principles recently codified in our own Criminal Code are heavily influenced by English sentencing law and practice. Our criminal law culture has long been heavily influenced by the system of law in force in England and Wales, with increased commonality in terms of overarching fundamental rights and freedoms principles since the incorporation into United Kingdom domestic law the European Convention on Human Rights upon which Chapter 1 of our Constitution is substantially based. The Sentencing Council is comprised primarily of judges with representation from civil society, established under the Coroners and Justice Act 2009 (UK) and has the following objects according to the council's website*[1]*:*
>
> - *promote a clear, fair and consistent approach to sentencing;*
> - *produce analysis and research on sentencing; and*
> - *work to improve public confidence in sentencing.*

24. The English offence of "sexual assault" is broadly similar in terms of the broad range of conduct it covers as its counterpart under Bermudian law. However, the Sexual Offences Act 2003 (UK) distinguishes between assaults by penetration (section 2,

[1] www.sentencingcouncil.org.uk.

maximum penalty, life imprisonment) and assaults only involving touching (section 3, maximum penalty 10 years imprisonment). Under section 323 of the Criminal Code, a 'simple' sexual assault is punishable with 20 years imprisonment on indictment or 5 years summarily. It seems clear that an offence under section 323 includes sexual assaults involving penetration as well as touching. This may be inferred from the definition of sexual assault (section 233(6), applying the standard definition of "assault") and from the fact that a "serious assault" and "aggravated sexual assault" are defined without reference to the act of penetration (sections 325, 326). The aggravating factors in sections 325-326 are all concerned with the degree of violence involved. Applying the general sentencing principles and common sense, it seems obvious that a sexual assault involving penetration will ordinarily in and of itself be more serious than a mere touching and that certain forms of touching will be more serious than others.

25. To this extent, therefore, the Sentencing Council Guidelines on Sexual Offences most general statements as to the approach to sexual assaults and assessing their gravity provides a useful guide to Bermudian sentencing courts. In paragraph 84 of my Judgment in *Crockwell*, I cited the following passage from those Guidelines:

> "***The harm caused by sexual offences***
>
> *1.10 All sexual offences where the activity is non-consensual, coercive or exploitative result in harm. Harm is also inherent where victims ostensibly consent but where their capacity to give informed consent is affected by their youth or mental disorder.*
>
> *1.11 The effects of sexual offending may be physical and/or psychological. The physical effects – injury, pregnancy or sexually transmitted infections – may be very serious. The psychological effects may be equally or even more serious, but much less obvious (even unascertainable) at the time of sentencing. They may include any or all of the following (although this list is not intended to be comprehensive and items are not listed in any form of priority):*
>
> - *Violation of the victim's sexual autonomy*
> - *Fear*
> - *Humiliation*
> - *Degradation*
> - *Shame*
> - *Embarrassment*
> - *Inability to trust*
> - *Inability to form personal or intimate relationships in adulthood*
> - *Self harm or suicide…*
>
> *…2.16 All the non-consensual offences involve a high level of culpability on the part of the offender, since that person will have acted either deliberately without the victim's consent or without giving due consideration to whether the victim was able to or did, in fact, consent...*"

26. However, the following provisions of the Guidelines are particularly apposite to the offences under present consideration:

> "*2B.2 The offence of 'sexual assault' covers all forms of sexual touching and will largely be used in relation to the lesser forms of assault that would have previously fallen at the lower end of the penalty scale.*
> *2B.3 The exact nature of the sexual activity should be the key factor in assessing the seriousness of a sexual assault and should be used as the starting point from which to begin the process of assessing the overall seriousness of the offending behaviour.*
>
> *2B.4 The presence of aggravating factors can make an offence significantly more serious than the nature of the activity alone might suggest.*"

27. The Guidelines also state that the following factors should be taken into account in relation to sexual assaults generally, factors which in my judgment will generally be relevant under Bermudian law:

> "*1. The sentences for public protection must be considered in all cases of sexual assault. They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm.*
>
> *2. The offence of 'sexual assault' covers all forms of sexual touching and therefore covers a wide range of offending behaviour. Some offences may justify a lesser sentence where the actions were more offensive than threatening and comprised a single act rather than more persistent behaviour.*
>
> *3. The nature of the sexual activity will be the primary factor in assessing the seriousness of an offence and should be used as the starting point from which to begin the process of assessing the overall seriousness of the offending behaviour.*
>
> *4.The presence of aggravating factors can make an offence significantly more serious than the nature of the activity alone might suggest.*
>
> *5.For the purpose of the guideline, types of sexual touching are broadly grouped in terms of seriousness. An offence may involve activities from more than one group. In all cases, the fact that the offender has ejaculated or has caused the victim to ejaculate will increase the seriousness of the offence.*
>
> *6.An offender's culpability may be reduced if the offender and victim engaged in consensual sexual activity on the same occasion and immediately before the offence took place. Factors relevant to culpability*

in such circumstances include the type of consensual activity that occurred, similarity to what then occurs, and timing. However, the seriousness of the non-consensual act may overwhelm any other consideration…"

27. The English Guidelines on sentencing ranges for sexual assaults not involving penetration would seem to be apposite to similar cases being prosecuted summarily in Bermuda because although the Magistrates' Court maximum sentence is half that of the English maximum of 10 years, the overall maximum sentence under Bermuda law is 20 years. What I omitted to take into account in my obiter dicta in Crockwell (at paragraph 87, suggesting a reduction of the starting tariff in the Guidelines to take into account the reduced summary sentencing jurisdiction) is the Magistrates' Court's duty to commit a case for sentencing in the Supreme court if it considers its sentencing powers are insufficient: section 25 Summary Jurisdiction Act 1930. This suggests to me, and it is to be hoped that the Court of Appeal will clarify this position more authoritatively, that the Magistrates' Court when sentencing an offender for an offence which could have been tried on indictment is always entitled to take the Supreme Court's sentencing power into account. I do not ignore the fact that in England and Wales separate Guidelines exist for sexual offences dealt with in the Magistrates' Court; but there the maximum penalty which can be imposed summarily appears to be only 10% of our summary sentencing jurisdiction, which means the English summary jurisdiction applies ordinarily to only very minor offences indeed.

28. For the type of sexual activity involved in the present case with an adult Complainant, the England and Wales Sentencing Guidelines suggest a starting point of 12 months' custody and a sentencing range of 26 weeks to 2 years assuming a maximum sentence of 10 years imprisonment. Before the Supreme Court that tariff would arguably have to be doubled. But in my judgment that range is appropriate for the Magistrates' Court bearing in mind that the Magistrate may always commit for sentence in the Supreme Court under section 25 of the Supreme Court and is therefore bound to have regard to the overall maximum penalty for the relevant sexual assault offence, which is twice the English Crown Court equivalent.

Legal findings: appropriateness of the global penalty imposed upon the Appellant

29. In the present case a sentence 3 ½ years imprisonment appears to be disproportionate to other sentences imposed for more serious offences by the Magistrates' Court during the same time period. Crown Counsel offered no or no convincing explanation for this disparity. Is the sentence also high compared to the persuasive English Sentencing Guidelines? Because this is an appeal by the offender against sentence, this Court is required to exercise its own independent sentencing discretion and is not required to find any error of principle on the part of the sentencing judge.

30. The Victim Impact Statement suggests the Complainant suffered emotional trauma from which he has yet to fully recover. The Appellant is wholly responsible for the offences and his defence does not give rise to any basis for concluding that his responsibility as a mature man was n any way diminished at the time of the offences. The only mitigating factor advanced was the Appellant's previous good character.

The Social Inquiry Report suggests that the Appellant represents a low risk of re-offending based on his undergoing a standard test seemingly administered by a social worker as opposed to a comprehensive independent psychological or psychiatric assessment. In all the circumstances of the present case, this finding is of marginal significance.

31. There were three important aggravating factors. Firstly, and most importantly, the Appellant was in a position of trust emanating from his managerial role in a Government agency charged with assisting vulnerable persons such as the Complainant. This was a very significant aggravating factor. Secondly and closely connected with this, the Complainant was a vulnerable person with previous convictions for dishonesty and therefore doubly impeded in his ability to complain: firstly, he needed the services the Appellant's agency was providing and secondly he was prone to being disbelieved. Thirdly the offences were repeated on three occasions after the initial assault. Having regard to the suggested English sentencing range of 26 weeks to 2 years imprisonment based on the nature of the assaults alone, I find that a penalty beyond that range was justified by the aggravating factors present in the Appellant's case. The question is whether a sentence so far above that range was justified in the Appellant's case.

32. On balance I consider that a sentence of 3 years imprisonment was an appropriate sentence in all the circumstances of the present case. I find that the disparity of the Appellant's sentence when compared with sentences recently imposed in the other obviously more serious cases to which Ms Subair referred is sufficiently great to justify some downward adjustment to the Appellant's sentence. There is in these circumstances no need for this Court to embark upon the almost impossible task of considering whether any subconscious discrimination against the Appellant may have occurred based on the fact that he perpetrated same-sex assaults.

33. The Appellant cannot expect much credit for his previous good character in the absence of any other mitigating factors explaining why he committed these offences. The trial judge in effect has found that he lied to protect himself and falsely accused the Complainant of fabricating his complaints. His manipulation of the appeal system to ensure that he remains at liberty while pursuing a dubious appeal against conviction has been lawful; but these tactics have done nothing to mitigate the self-evident adverse impact of these proceedings on the Complainant. In these circumstances the trifling level of sentence contended for by the Appellant's counsel is to my mind wholly unrealistic in all the circumstances of the present case. I find no basis for interfering with the Learned Magistrates' finding that a deterrent sentence was called for. Because sexual assaults of this nature are often committed by otherwise law-abiding citizens likely to find incarceration particularly unpalatable, firm sentences in this area of the criminal law more than perhaps any other have a realistic prospect of deterring others from committing such crimes.

34. I positively reject Ms Smith's submission that the fact that the relevant assaults were perpetrated by a male offender against a heterosexual male was an additional aggravating factor. The criminal conduct which is prohibited is interfering with another person's sexual autonomy over their own body without their consent. Where a sexual assault is proved, the law presumes that the victim found the unwanted physical interference with their body to be unpalatable and the gender of the offender

and/or the sexual orientation of the victim are to my mind wholly irrelevant considerations. There may be exceptional cases where, for instance, a victim is specifically targeted because of their sexual orientation where this may constitute an aggravating circumstance as contemplated by section 55(2)(f)(i).

35. It was submitted by the Prosecution below that that these offences were prevalent and the Learned Magistrate accepted this submission (which does not appear to have ben challenged). In any event it is a notorious fact that such offences are under-reported and the breach of trust which these offences involved reflecting adversely on the integrity of an important public agency requires a sentence which suitably denounces the serious breaches of the criminal law which occurred. Bermudian courts dealing with sexual offences which do not involve great physical violence must also avoid a perhaps historical and cultural propensity to trivialize emotional harm and to undervalue the significance of the sexual autonomy of non-privileged members of the community. As I observed in the *Crockwell* case:

> "*88...In our early legal history, the law gave scant recognition not just to slaves, but to women and children as well. The notion that conduct which caused minor physical harm but significant emotional and/or psychological harm to legal "non-persons" such as children (and other second class citizens) could be punishable as a crime was for many years as inconceivable as the idea that a man could walk on the moon. The law sanctified rather than condemned coercive relationships in which the powerful were permitted, more or less, to treat human beings under their control as their personal property.*"

36. However, another legacy of our legal history is an expectation on the part of some that the criminal courts will use the sentencing process to 'terrorise' the disobedient into compliance. Such an approach to criminal sentencing (which is in any event of dubious efficacy) is no longer permissible under modern Bermudian criminal law. The fundamental requirements of proportional sentencing demand that any sentences imposed are justified on objective grounds following the guiding principles laid down by Parliament as interpreted by the courts in this jurisdiction and other jurisdictions which adhere to similar guiding principles. This Court must adopt a proportionate view of the gravity of the crimes the Appellant has committed which is grounded in legal logic rather than populist passions.

37. For these reasons the Appellant's appeal against sentence is allowed and the sentence of 3 ½ years imprisonment imposed on Count 10 is quashed and substituted with a term of 3 years imprisonment concurrent with the similar terms imposed for the other counts upon which the Appellant was convicted.

Legal findings: bail pending appeal

38. Counsel explained that Greaves J had granted bail pending appeal to the Court of Appeal pursuant to the provisions of the Criminal appeal Act 1952 as read with the Court of Appeal Act 1964 when I sought to remand the Appellant in custody at the end of the hearing of the present appeal against sentence.

39. In the present matter, an application was made for bail pending the determination of the appeal against sentence in this Court by Summons dated November 22, 2012 which was heard by Greaves J on November 28, 2012. Although the application only formally applied to bail pending the determination of the present appeal, Greaves J pragmatically took into account the fact that the Appellant had also appealed as of right against the dismissal of his appeal against conviction by me on October 29, 2012. He also entertained a "piggy-back" informal application for bail pending appeal to the Court of Appeal from this Court as well.

Criminal Appeal Act 1952

40. Sections 11 and 12 of the Criminal Appeal Act 1952 provide (so far as is material) as follows:

> "***Effect of giving notice of appeal on sentence or order***
>
> *11 (1) Where notice of appeal has been duly given by an appellant under this Act all further proceedings shall, subject to this section, be stayed; and accordingly, after notice of appeal has been given, no sentence shall be imposed or order made pending the determination, or, as the case may be, the abandonment of the appeal.*
>
> *(2) Where a court of summary jurisdiction, before notice of appeal has been given,—*
>
> *(a) has imposed a sentence; or*
>
> *(b) has made a compensation order or an order for the payment of costs; or*
>
> *(c) has made any order mentioned in paragraph (a) of section 1(2) (including any order mentioned in sub-paragraphs (ii), (v), (vi), (vii) or (viii) of that paragraph) ; or*
>
> *(d) has made a recommendation mentioned in section 1(2)(b), then, upon notice of appeal being duly given—*
>
> *(i) where a sentence of imprisonment has been imposed the appellant, unless released from custody under section 12, shall be detained in a prison pending the determination or abandonment of his appeal; and in any such case section 70J(3) of the Criminal Code and section 8(2) of the Prisons Act 1979 , shall have effect accordingly…*
>
> *12 (1) Where an appellant, being an offender who has been sentenced by a court of summary jurisdiction to a term of imprisonment or to undergo corrective training, has duly given notice of appeal against the sentence or against the conviction in respect of which that sentence was imposed, a court*

of summary jurisdiction may, if it thinks fit, upon the application of the appellant, release him from detention in custody on such terms and conditions as it thinks fit pending the abandonment or determination of the appeal..." [emphasis added]

41. The effect of these provisions appear to be that, as occurred in the present case, if a notice of appeal against conviction is filed before sentencing takes place, the sentencing hearing is automatically stayed and if the offender is on bail he cannot be remanded in custody until the determination of the appeal against conviction. It is only where a sentence of imprisonment has been imposed before a notice of appeal is filed that the Magistrates' Court and/or this Court is empowered to exercise a discretion to grant bail pending appeal to the Magistrates' Court under section 12(1) of the 1952 Act.

42. The result seems extremely anomalous as it potentially allows a convicted person who has been on bail to postpone, at his own election (i.e. by simply filing a notice of appeal before sentencing takes place), the implementation of any sentence by filing an unmeritorious appeal against conviction. To my mind that is precisely what occurred in the present case. Parliament may wish to consider amending section 11(1) of the Criminal Appeal Act 1952 which in the modern era of word-processing can easily be exploited by ably represented criminal defendants to undermine the wider interests of ensuring that justice is seen to be done.

43. Nevertheless, it was open to Greaves J under the 1952 Act to grant bail pending the determination in this Court of the Appellant's appeal against sentence. When the present appeal was filed, after all, the Appellant proposed to argue that an immediate custodial sentence was not required. In addition, Greaves J was invited to have regard to the still pending appeal to the Court of Appeal against his conviction.

The Court of Appeal Act 1964

44. Greaves J was referred to the November 17, 2012 Notice of Appeal against Conviction filed with the Court of Appeal and to the following provisions of the 1964 Act:

"**Effect of giving notice of appeal**
20 (1) Where notice of appeal or of application for leave to appeal has been given in accordance with section 18(1), then—

(a) in the case of a conviction involving sentence of death, the appellant shall be detained in prison pending the abandonment or determination of the appeal;

(b) in the case of a conviction or order involving detention or a sentence of preventive detention, imprisonment or corrective training, the Supreme Court or a Judge thereof may, upon the application of the appellant, release him from custody on such terms

and conditions as the Court or Judge thinks fit pending the abandonment or determination of the appeal;

(c) in the case of a conviction of an offence under the Road Traffic Act 1947, or under the Motor Car Insurance (Third Party Risks) Act 1943 , where an order has been made suspending a driver's licence, or cancelling a driver's licence, or declaring the person convicted to be disqualified for obtaining another licence, or for driving an auxiliary bicycle, then any such order shall have effect pending the abandonment or determination of the appeal;

(d) in the case of a conviction involving any other sentence or order, the sentence or order shall not be put into effect pending the abandonment or determination of the appeal." [emphasis added]

45. The Affidavit in support of the bail pending appeal against sentence Summons under the 1952 Act recited the provisions of section 20(1)(d) of the Court of Appeal Act 1964 contending that the Appellant's sentence was automatically stayed. It is unclear from the available record whether Greaves J acceded to this argument. In any event, it was open to him to exercise his discretion to grant bail pending the determination of the Appellant's appeal against conviction to the Court of Appeal under section 20(1)(b) of the 1964, which in my judgment clearly applied to the Appellant's case as he was sentenced to a term of imprisonment.

Summary: bail pending appeal

46. Had the Appellant filed a formal freestanding application for bail pending his appeal against my dismissal of his appeal against his conviction in the Magistrates' Court, the application would likely have been listed before me. He has in my judgment been somewhat fortunate to obtain bail pending what I consider to be an unmeritorious appeal to the Court of Appeal, having earlier deployed the mandatory stay provisions of the 1952 Act to delay his sentencing by filing a notice of appeal after conviction and before sentence.

47. In these circumstances it is not properly open to me revisit the question of bail having dismissed the Appellant's appeal against sentence. The Appellant's counsel has foreshadowed a possible appeal against this decision to be jointly listed with the pending appeal against conviction before the Court of Appeal. It is to be hoped that the Court of Appeal will see fit to add its own observations on the terms and effect of the provisions of the Criminal Appeal Act 1952 and Court of Appeal Act 1964 which have been referred to above.

Conclusion

48. The appeal against sentence is allowed to the extent that the total time to be served, taking any time served on remand into account, is 3 years imprisonment rather than 3 ½ years.

Dated this 5th day of April, 2013 _____

IAN R.C. KAWALEY CJ