IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS APPELLATE JURISDICTION
BEFORE THE HON. JUSTICE SHADE SUBAIR WILLIAMS
CASE NUMBER 2023: No. 6

IN THE MATTER OF THE KING AND TAAHIR AUGUSTUS

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
and

JUSTICE OF APPEAL IAN KAWALEY

B E T W E E N:

THE KING

Appellant

And

TAAHIR AUGUSTUS

Respondent

Appearances: Mr Alan Richards, Department of Public Prosecutions, for the Appellant

Mr Jonathan White, Marshall Diel & Myers Limited, for the Respondent

Date of hearing: 12 March 2024

Judgment delivered: 22 March 2024

Index

Crown appeal against conditional discharges imposed by Magistrates' Court - statutory requirements - appellate jurisdiction of Supreme Court and Court of Appeal - Criminal Code, section 69 - Criminal Appeal Act 1952, sections 4, 19 - Court of Appeal Act 1964, sections 17 (2) and 23

FINAL JUDGMENT

CLARKE P

1. The question in this appeal is whether the Learned Magistrate, Ms Maxanne Anderson (now the Senior Magistrate), was in error in imposing only a conditional discharge for two years in respect of two of the four Counts against the Respondent; and whether the learned judge, Justice Subair Williams, was in error in dismissing the appeal of the Crown from the decision of the Magistrate.

2. In her judgment the learned judge helpfully summarised the evidence at the trial of the accused, which summary I gratefully adopt:

> "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 headrest 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."

3. The Respondent first appeared at Magistrates' Court Plea Court on the **16th April 2020**, to answer to Information 20CR00126 and 20TR01503.

4. On the same date the Respondent entered "Not Guilty" pleas in relation to all four counts on the information, being:

(1) Driving whilst his ability to do so was impaired, contrary to section 35AA of the Road Traffic Act 1947 ("RTA");

(2) Failing to provide a sample of breath for analysis, contrary to section 35C (7) RTA;

(3) & (4) Two counts of Serious Assault, contrary to section 311(d) of the Criminal Code.

5. The trial commenced on **7th April 2021**, and continued on **8th April 2021**, but a joint application to adjourn to the **6th May 2021** was made by both Counsel, in order for discussions to continue between Counsel. Thereafter, a series of dates were set but, for various reasons, the trial was unable to continue until **2nd February 2022**, when the Crown closed its case.

6. The Respondent made an unsuccessful application that there was No Case to Answer, and the Learned Magistrate handed down her Ruling on **30th March 2022**. On **1st June 2022**, the Learned Magistrate put the charges to the Respondent, who maintained his "Not Guilty" plea to Count 1 (and the Crown offered no evidence), but changed his pleas to "Guilty" in relation to Counts 2 to 4. Reports were ordered and, on the **20th July 2022**, the Respondent was sentenced to a fine of $1,500 and 18 months' disqualification from driving all vehicles on Count 2; and conditionally discharged for two years in relation to Counts 3 and 4. The conditions imposed were those provided for by sections 70 A (a) and (b) of the Criminal Code i.e. not to commit another offence and to appear before a court when required to do so,

7. By Notice dated **1st August 2022**, the Appellant appealed to the Supreme Court, against the failure by the Worshipful Magistrate to convict on Counts 3 and 4. The ground of appeal to the Supreme Court was that the Learned Magistrate erred in law when she found it not to be contrary to the public interest to discharge the defendant[1]. The ground of appeal to this Court was that the Learned Judge erred in law when she declined to interfere with the discharge, and therefore not convict the Respondent.

8. According to her notes the Learned Magistrate said the following in her Sentencing Remarks:

> *"The Court after hearing submissions from Ms Smith and Mr White and the defendant*
>
> *Taking into consideration the contents of the BARC and SIR*
>
> *Also taking into consideration sections 53- 55 and 69-70C of the Criminal Code*
>
> *The Court is satisfied to sentence the defendant as follows:"*

The Magistrate then recorded the dismissal of count 1, the sentence on Count 2 and the conditional discharges on Counts 2 to 4.

[1] In the Crown's submissions in the Supreme Court there is a reference to section 4A of the Criminal Appeal Act 1952 (manifest inadequacy). This does not seem to us applicable. Since, following the conditional discharges, there was deemed to be no conviction on Counts 3 and 4 there would not appear to be any sentence to which section 4A could apply.

9. In the Bermuda Assessment and Referral Centre Report and the Social Inquiry Report the Respondent was recorded as having said that he was maintaining his guilty pleas although he said he never coughed on the complainants nor uttered the words quoted in the Information, and that he was never offered the opportunity to take the breathalyser. However he pleaded guilty and the Learned Magistrate heard the evidence which is summarised above.

10. In her judgment the Learned Judge recorded the following:

> "*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.*"

11. Section 69 of the Criminal Code provides as follows:

> ***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.*

12. As is apparent the Magistrate could only impose a conditional discharge if satisfied that to do so was in the best interests of the offender and was not contrary to the public interest. Although the Magistrate said that she had taken into consideration sections 69-70C she did not, in my judgment (and contrary to the ground of appeal to the Supreme Court), in fact make any findings under section 69, or give any reasons therefor.

Rights of Appeal

13. As I have said, Section 69(2)(b) of the Criminal Code provides that the DPP

> "*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 or a dismissal of the information…"*

14. Section 4(1) of the Criminal Appeal Act 1952 gives the prosecution a right of appeal from the Magistrates Court to the Supreme Court "*upon a ground which involves a question of law alone- (a) where the information was dismissed, then against any decision in law which led the court of summary jurisdiction to dismiss the information".*

15. The first question that then arises is whether the Crown's current appeal is upon a ground which involves a question of law alone. The Learned Judge held that the decision in law which wrongly led the Magistrate to impose a conditional discharge was her non-application of the requisite statutory tests for imposing a discharge under section 69; and that her omission to make the necessary findings amounted to a clear error of law. In this respect she relied on the observations of Kawaley CJ, as he then was, in *R v Almanzar and Reyes-Nunes* [2016] SC (Bda) 20 App [15]. One of the

circumstances in which Kawaley CJ said that it was "*possible to imagine potential legal errors under section 69 (1) which raise at least potentially "pure" questions of law*", was:

> *"(3) a discharge is ordered under section 69 (1) without any finding that either of the two principal statutory requirements are met."*

16. I would respectfully agree and would elevate what CJ Kawaley thought it was possible to imagine to the realm of accuracy. A dismissal of the information (or the equivalent conditional discharge) without the two findings that are necessary to justify such a conclusion is, in effect, a decision that such a result can lawfully be made without such findings, which is erroneous as a matter of law.

17. If that be so, it is then necessary to consider how the Supreme Court is to proceed. As to that Section 19 of the Criminal Appeal Act 1952 governs how the Supreme Court should determine an appeal brought under section 4. Sub-section (1) provides that it *"shall allow the appeal if it appears to the Supreme Court that the dismissal of the information should be set aside on the ground of a wrong decision in law; and in any other case shall dismiss the appeal."* Further, sub-section (2) provides that *"the Supreme Court, on allowing an appeal as aforesaid, may set aside the dismissal of the information and may remit the matter to the court of summary jurisdiction with a direction to that court to convict the respondent or otherwise to proceed in accordance with the law".*

18. What the Learned Judge in fact did in this case was to consider whether it was open to the Magistrate to find that the imposition of a conditional discharge was in the best interests of the offender and not contrary to the public interest. If the answer to one or both of those questions was no, then the judge thought that it would be necessary to consider whether the Court should impose a sentence or remit the matter for sentence to the Magistrate. If the answer to both was yes, then the Court would need to consider whether it should interfere with the order for a conditional discharge.

19. She then concluded that there could be no controversy over the proposition that the imposition of a conditional discharge was in the best interests of the offender.

20. But as to the second question she said this:

> "*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 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 lockdowns 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."

21. The approach of the judge was, in my view, erroneous. Section 19 of the 1952 Act provides that the appeal shall be allowed if it appears to the Supreme Court that the dismissal of the information should be set aside on the ground of a wrong decision in law. In the present case there was such a wrong decision, and the appeal should have been allowed. It was then for the Supreme Court to decide whether to remit the matter

to the court of summary jurisdiction with a direction to convict or otherwise to proceed in accordance with the law.

22. Nothing in section 19 (1) or (2) contemplates that the judge should determine whether the Learned Magistrate could have decided that there should be conditional discharges, a decision that could only properly have been made after the Magistrate had addressed both questions in section 69 (1) and answered them in the affirmative. It was, in my judgment, an error of law on the part of the judge to hold that her task was to consider whether it was open to the Magistrate to decide on conditional discharges and, if it was not, to consider imposing a sentence herself; or, if she considered that the answer to the two questions was in the affirmative, to consider interfering with the conditional discharges.

23. What the judge did need to do was to consider whether to remit the matter to the Magistrate either with a direction to convict or to proceed in accordance with the law i.e., by addressing the two key questions. Her failure to do so was another error of law. These errors the Crown is entitled to appeal under section 17 (2) (b) of the Court of Appeal Act 1964.

24. Even if the relevant question was whether it was open to the Magistrate to conclude that it was not contrary to the public interest not to convict the Respondent, I cannot accept that it was. At the time when the offence was committed (which is the relevant time) the assaults which the Respondent committed were serious. He was telling the police officers that he had Covid and taking steps which, if he had it, meant that there was a severe risk that he would infect them. At that stage, when vaccines were not generally available, such activity was both wicked and frightening. As the judge recognised, a conditional discharge in April 2020 would have been unimaginable and would have been met with widespread public outrage. And as the judge also recognised, subsequent events do not subtract from the seriousness of the offence committed.

25. In those circumstances it would be entirely inapposite and contrary to principle that the Respondent should receive, in effect, no penalty at all when, if he pleaded guilty at the earliest possible opportunity he would have been much more severely dealt with. He would, of course, have been able to pray in aid the fact that, as it turned out at the time, he did not actually have Covid and did not infect the officers with it.

26. As the judge herself said:

> "*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.*"

27. It is also relevant to note that the reason why the Respondent was not sentenced until July 2022 was that he contested the case and only changed his pleas when the Magistrate determined that he had a case to answer. He deserved little to no credit for these late pleas.

28. I would, therefore, allow the appeal.

29. Mr Richards for the Crown contended that we should substitute a conviction for the discharge on Counts 3 and 4, although he recognised that, as the Respondent was not responsible for the substantial time which had passed since he was initially sentenced, we might conclude that no further penalty needed to be imposed.

30. I am not minded to take this course. Recording a conviction but without any consideration of sentence would be open to us under section 23 (2) (a) of the Court of Appeal Act 1964; but would be a somewhat anomalous result. If a conviction is to be recorded it would ordinarily be done by remitting the matter to the Magistrates Court for that purpose and for that Court to impose a penalty.

31. I do not propose to do that. Whilst the lapse of time has not reduced the seriousness of the offence it seems to me inappropriate to remit the matter to the Magistrates Court, or to record a conviction but not to order any remission. The offence was committed nearly 4 years ago; the prosecution agreed that there should be conditional discharges, which the SIR had invited the Court to consider; both the Magistrate and the Learned Judge did so as well; a substantial time has passed since the Respondent was initially sentenced; and this appeal has primarily been brought to clarify points of principle. In those circumstances I do not think that recording a conviction is appropriate.

32. Accordingly, I would allow the appeal, but make no further order.

BELL JA

33. I agree

KAWALEY JA

34. I also agree. The present appeal has some unusual features to it which have helped to shed light on three important points of principle which merit brief, further elaboration:

> (a) the importance of assessing the appropriate way for the sentencing judicial officer to deal with an offence or offences primarily by reference to the circumstances when the offence occurred;

(b) the importance of giving reasons for sentencing decisions, even where the Crown and the Defence are agreed as to what the disposition ought to be; and

(c) the importance of the distinction between an appellate court's jurisdiction to decide the merits of the appeal and how to dispose of the appeal. The former limb is governed by hard-edged legal principle; the latter limb affords greater leeway for discretionary factors to come into play.

35. As for the first point, the President has rightly pointed out (at paragraph 24 above) that the relevant time for evaluating the gravity of an offence is when it was committed. The contrary position appeared to be supported by certain remarks set out in the Supreme Court's decision. As Mr Richards submitted in his '*Case for the Appellant*':

> "*21. Should we find ourselves in a comparable emergency in the future, this decision risks sending entirely the wrong message to those who commit offences connected with the emergency and find themselves before the courts. It will encourage them to withhold their pleas until the emergency has abated, in the expectation of a more favourable disposal.*"

36. This important point of principle raised on behalf of the Director of Public Prosecutions has been vindicated in this appeal, even though it has formally been disposed of on the narrower basis that the Magistrates' Court sentencing decision did not expressly record a decision on the two statutory requirements for imposing a conditional discharge instead of recording a conviction.

37. As for the second point, the appeal was in substance allowed because of a failure to give adequate reasons for the sentencing decision which was made. Mr White, appearing for the Respondent, sensibly did not dispute that an error of law had been made. It is entirely understandable why the Learned Magistrate (as she then was) dealt with section 69 of the Criminal Code in such an abbreviated way. Judicial officers at all court levels routinely make consensual decisions without articulating explicit reasons for a disposition which is supported by all concerned. It is only in exceptional circumstances that either party will appeal. However, Magistrates (perhaps because of the high volume of cases they deal with and the resultant enhanced risk of procedural errors) are subject to an express statutory duty to record reasons for their decisions. Section 84 of the Criminal Procedure and Jurisdiction Act 2015 provides:

> "(5) *The record of proceedings must include the magistrates' court's final judgment in writing, which will include—*
>
> *(a) the point or points for determination;*
>
> *(b) the decision made on such points; and*

(c) the reasons for the decisions."

38. This judicial requirement was not satisfied in relation to the requirements of section 69 by recording that the section had been taken "*into consideration*", even though Prosecuting counsel and Defence counsel were agreed that the conditional discharges ordered were legally appropriate.

39. As to the third point, the Supreme Court decision elided the two limbs of the appellate jurisdiction conferred on that Court by section 19 of the Criminal Appeal Act 1952. Section 69 (2) (b) of the Criminal Code (see paragraphs 11-13 above) confers a right of appeal against a decision to discharge and not convict (made under section 69 (1)) "*as if that decision were a judgment or verdict of acquittal of the offence or a dismissal of the information against the offender*" The dispositive powers conferred on the Supreme Court are, for present purposes, those set out in the following subsections of section 19 of the 1952 Act:

Appeals under section 4 on point of law

> *19. (1)The Supreme Court, in determining an appeal under section 4 by an appellant (being an informant) against any decision in law which led a court of summary jurisdiction to dismiss an information, shall allow the appeal if it appears to the Supreme Court that the dismissal of the information should be set aside on the ground of a wrong decision in law; and in any other case shall dismiss the appeal.*
>
> *(2) The Supreme Court, on allowing an appeal as aforesaid, may set aside the dismissal of the information and may remit the matter to a court of summary jurisdiction with a direction to that court to convict the respondent or otherwise to proceed in accordance with law; and the court of summary jurisdiction shall govern itself accordingly.*"

40. Subsection (1) obliges the Supreme Court to decide whether an error of law has been made which justifies setting aside the dismissal or acquittal and allowing the appeal. If no such "*wrong decision of law*" has been made, the appeal must be dismissed. Subsection (2) confers a discretion on the Supreme Court, where it allows an appeal, to remit the matter to the Magistrates' Court with a direction to either convict or to otherwise deal with the case according to law. The Supreme Court may, by necessary implication, allow an appeal and elect not to remit the matter to the Magistrates' Court. But the Supreme Court has no jurisdiction to enter a conviction itself. Nor does the Court of Appeal, in a case such as the present one. As the President has observed (at paragraph 21, above), where no valid determination was made in the Magistrates' Court as to whether or not a conditional discharge was appropriate under section 69 (1) of the Criminal Code, the Supreme Court does not have jurisdiction to decide this question for itself.

41. This Court's jurisdiction on a further appeal against an acquittal in the Magistrates' Court is similar to that of the Supreme Court, but materially broader:

Determination of appeals under section 17(2)

> *23. (1) Upon the hearing of an appeal brought by the Director of Public Prosecutions or an informant, as the case may be, under section 17(2), the Court of Appeal shall allow the appeal if it appears that the discharge or acquittal of the accused or the dismissal of the information should be set aside on the ground of a wrong decision of law; and in any other case shall dismiss the appeal.*
>
> *(2) Where the Court of Appeal allows an appeal under subsection (1), then — in a case which was tried before a court of summary jurisdiction, the Court of Appeal may set aside the dismissal of the information and remit the matter to the court of summary jurisdiction with a direction to that court to convict the respondent or otherwise to proceed according to law, and the court of summary jurisdiction shall govern itself accordingly, or make such other order as it may consider just.*" [Emphasis added]

42. The last ten words of section 23 (2) of the 1964 Act explain why it was common ground at the hearing of this appeal that this Court had the power to allow the appeal and direct the recording of a conviction, without remitting the matter to the Magistrates' Court. They also explain why it was within the remit of this Court to allow the appeal without remitting the matter to the Magistrates' Court for reconsideration of whether the conditional discharges imposed nearly two years ago are or are not appropriate. In addition to the reasons set out by the President above for allowing the appeal and making no other Order, Mr White advanced one additional consideration in oral argument. The conditional discharges were imposed for two years on 20 July 2022. Accordingly, the Respondent has almost satisfied the requirements of the conditional discharges, but is still at risk of being convicted for the offences in question if he fails (over the next four months) to comply with the following condition set out in section 70A of the Criminal Code:

> "*(a) not commit another offence during the period of the order …*"

43. For these additional reasons, I agree that the appeal should be allowed but no further Order should be made by this Court.

.