In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2025: No. 40

BETWEEN:

DAMIR ARMSTRONG

Appellant

-and-

THE KING

Respondent

Before: **The Hon. Mr. Justice Juan P. Wolffe, Puisne Judge**

Appearances: Mr. Bruce Swan for the Appellant
Mr. Seth Lavine for the Respondent

Dates of Hearing: 17th & 18th March 2026[1]
Date of Judgment: 10th August 2026
Date of Reasons: 12th November 2026

JUDGMENT

Appeal against Sentence – Possession of a Controlled Drug - .13grams of Delta 9 Tetrahydrocannabinol – Whether a Conditional Discharge is appropriate

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[1] The date on which this decision was to be delivered was subject to the parties sending to the Court precedents from the Magistrates' Court in respect sentences meted out for offences involving small amounts of the controlled drug Delta 9 Tetrahydrocannabinol. That information was placed on the Court file on the 15th May 2026 but due to the unavailability of the Court and the Appellant it is only now that this decision can be handed down.

WOLFFE J:

1. On the 30th October 2025 the Appellant pleaded guilty to (i) Impaired Driving contrary to section 35AA of the Road Traffic Act 1947 (Count 1 on Information No. 24TR03562)(the "Information"), and (ii) Possession of a Controlled Drug, namely Delta 9 Tetrahydrocannabinol ("Delta 9 THC"), contrary to section 6(2) of the Misuse of Drugs Act 1972 (the "MDA")(Count 3).

2. This appeal is only in relation to the sentence which the Appellant received for the possession of .13 grams of Delta 9 THC. In this regard and on the same day the Appellant pleaded guilty, the Worshipful Tyrone Chin sentenced the Appellant to a fine of $130 and gave him 13 days to pay it. By this sentence, the Learned Magistrate effectively entered a conviction against the Appellant.

3. The Appellant launched an appeal of the Learned Magistrate's sentence on the primary ground that it was *"manifestly excessive and unreasonable in light of all the circumstances"*. The Appellant sets out further grounds of appeal in his Notice of Appeal dated 7th November 2025, but they are essentially derivatives of the Appellant's primary ground that the sentence was manifestly excessive. Therefore, for efficiency, I will deal with the grounds collectively under the one banner of "manifestly excessive".

4. On the 10th August 2026 I allowed the Appellant's appeal and in doing so I stated that having heard Counsel I do not find that the Learned Magistrate could be faulted for the sentence which he gave to the Appellant as the basic sentence was squarely within the range of sentences that could have been imposed for the offence charged. However, taking into consideration: (a) the delay in charging the Appellant with the offence (a factor which was not put before the Learned Magistrate); (b) the best interests of the Appellant; and (c) that it would not be contrary to the public interest, I decided to substitute the Learned Magistrate's sentence with one of a Conditional Discharge for a period of 12 months and further that the Appellant be the subject of a Probation Order with the condition that he participate in and

complete an alcohol and/or drug counseling programme as deemed appropriate by the Department of Court Services ("DCS").

5. Set out in the following paragraphs are my reasons for doing so.

Summary of the Evidence

6. The Learned Magistrate heard that on the 20th September 2023 at about 2.30am police officers observed a black motorcycle travelling at a high rate of speed. This motorcycle was stopped and when the police officers approached the rider, who was the Appellant, they noticed that his eyes were red and glazed, there was a strong scent of intoxicating liquor coming from his breath, and that he was unsteady on his feet. When asked if he had anything to drink the Appellant said that he had four (4) beers. Consequently, the Appellant was arrested for impaired driving offences and conveyed to the police station so that alco-analyzer tests could be carried out. The Appellant failed the breath tests (i.e. the quantity of alcohol in his breath exceeded the prescribed limit set out in the Road Traffic Act 1947).

7. Once the alco-analyzer tests were done police conducted a search of the Appellant before placing him in a cell. Upon searching his front pocket police found a clear plastic twist containing plant-like material and in his back pocket another clear plastic twist containing white powder was also found. The police then arrested the Appellant for drug offences and when cautioned the Appellant replied, *"You can arrest me but its THC"*.

8. On the 14th February 2024 the Government Analyst analyzed the "off-white rock substance" which was found in the Appellant's back pocket to be .13 grams of the controlled drug Delta 9 Tetrahydrocannabinol ("Delta 9 THC").

9. I should note that the typed version of the Learned Magistrate's Notes on page 9 of the Appeal Record states on two (2) occasions that the quantity of the Delta 9 THC was "13" grams but this is obviously a typographical error because in his actual handwritten note the Learned Magistrate correctly states that the quantity of the Delta 9 THC was ".13" grams.

The Sentencing Hearing

10. The Appeal Record indicates that on the 20th October 2025 the Appellant appeared in the Magistrates' Court to answer to the impaired driving and drug charges and thereupon pleaded guilty to the stated offence of simple possession of the Delta 9 THC (he also pleaded guilty to the impaired driving offence). It does not appear that the Appellant was charged with any offence in relation to the plant material which was found in his front pocket when the police searched him at the police station on the 20th September 2023.

11. While there is no indication in the Appeal record, I presume that the Learned Magistrate heard the Summary of the Evidence. The Learned Magistrate would have certainly heard submissions from Prosecutor Mr. Adley Duncan as his notes appear to reflect this, but it is unclear from the Appeal Record as to whether Ms. Aqueelah Simmons (who is referenced as being the Appellant's then attorney but she may have been in Court in her capacity as Legal Aid Duty Counsel) put forth any submissions to the Learned Magistrate on behalf of the Appellant. In any event, it was brought to the Learned Magistrate's attention that while the Appellant was before the Court for the first time for drug offences, on the 28th June 2007 he received a conditional discharge for threatening words and behaviour and unlawful damage offences, and, that on the 22nd December 2010 he received a conditional discharge for an assault offence. So, prior to the convictions for the current offences before me the Appellant would not have committed any criminal offences for a period of approximately 13 years.

12. In mitigation, the Appellant read aloud a written statement which unfortunately did not make its way onto the Appeal Record (there is an email from the Appellant's attorney Mr. Bruce Swan dated the 18th March 2026 which sets out a statement from the Appellant but it is unclear as to whether this was the same statement which was read to the Learned Magistrate).

13. Presumably taking all of this into consideration, which would have included the fact that this was the Appellant's first conviction for a drug related offence and that the amount of the

Delta 9 THC was small (.13 grams), the Learned Magistrate sentenced the Appellant to the $130 fine.

Decision

14. Section 27 of the MDA provides that where a person commits an offence under section 6(2) of the MDA (i.e. possession of a controlled drug *simpliciter*) then punishment on summary conviction is a maximum of 12 months imprisonment or a maximum fine of $1,000, or both.

15. Section 69 of the Criminal Code provides that the Court may, if it considers to be in the best interests of the offender and not contrary to public interest, instead of convicting the offender, direct that the offender be discharged absolutely or on conditions prescribed in a probation order. The effect of an absolute or conditional discharge is that a conviction is not entered against an offender's name.

16. To support his submissions that the Learned Magistrate's sentence of a fine should be substituted for one of a Conditional Discharge (and hence no conviction being entered against the Appellant's name), Mr. Swan submitted orally and in writing that:

    (i) The Appellant was a first-time offender for drug offences and therefore should be considered as having a good character.

    (ii) The Appellant was *"due a discount for his early guilty plea"*, and the fact that he accepted guilt as far back as the date of his arrest in September 2023 should be taken into consideration.

    (iii) Due to the small quantity of the Delta 9 THC which was in the Appellant's possession he should not have received a criminal record.

    (iv) The Prosecution had suggested a sentence of Conditional Discharge for the Appellant at the sentencing hearing.

(v) The Learned Magistrate did not give reasons *"why he did not agree with the suggested Conditional Discharge"*.

(vi) Parliament and Government *"sought to indicate a [sic.] alternative view on use of cannabis in the general community, this suggest [sic.] a believe [sic.] the previous penalties would not be reasonable any further"*.

(vii) That with a conviction the Appellant's work, travel, and other opportunities will be limited, particularly as a Sargeant in the Bermuda Regiment which requires him to travel to the United States and Canada.

(viii) The Learned Magistrate did not take into consideration the personal circumstances of the Appellant nor the principles and purposes of sentencing set out in sections 53 to 55 of the Criminal Code 1907 (the "Criminal Code").

(ix) The Learned Magistrate did not consider other sentencing options.

17. On behalf of the Respondents, Mr. Seth Levine submitted that:

(i) "Cannabis" and "Tetrahydrocannabinol" (i.e. Delta 9 THC) are listed as two separate and distinct controlled drugs under Schedule 2 of the MDA, and therefore, since only cannabis is referenced in the Misuse of Drugs (Decriminalization of Cannabis) Amendment Act 2017 (the "MDDCA"), which decriminalizes possession of less than 7 grams of cannabis, the provision does not apply to Delta 9 THC. *Ergo*, Mr. Levine submits, the Appellant cannot rely on the amendment to support his position that a conditional discharge should have been granted as the Legislature did not contemplate such.

(ii) The Appellant has already received two conditional discharges and therefore should not enjoy the imposition of a third.

(iii) At the time of being sentenced for the drug offence the Appellant was convicted of a serious road traffic offence for which he received a substantial fine.

(iv) Whilst the amount of Delta 9 THC was small, Delta 9 THC remains an illegal substance.

18. Mr. Levine concluded his written submissions by saying that the *"Crown is neutral as to what the appropriate sentence is in this case and what, if any, equivalence ought to be drawn between possession of small amounts of cannabis and small amounts of Delta-9-tetrahydrocannabinol"*.

19. Not to diminish the gravamen of Mr. Swan's submissions, but I will deal with one of Mr. Levine's points first. I agree with Mr. Levine that I should not treat Delta 9 THC in the same way that cannabis is dealt with under the MDDCA. In their infinite wisdom Parliament thought it necessary to draw a distinction between cannabis and Delta 9 THC for the purposes of decriminalization. Hence, Parliament's decision not to include Delta 9 THC in the MDDCA. While the reason for such distinction is unknown, I would not be surprised if Parliament's thoughts were rooted in the knowledge that Delta 9 THC may be more potent and therefore more addictive than cannabis, and possibly that it has more psychoactive properties than cannabis. This is not to say that the Court should not take into consideration the relatively small quantity of the .13 grams of Delta 9 THC in sentencing the Appellant as it goes without saying that the lower the amount of a drug the more likely that any eventual sentence will be concomitantly lower (including a sentence which may involve a conditional discharge). But the type of drug is also a factor to be considered even in circumstances where the quantity of that drug may be small. This is probably why there are different classifications of controlled substances under the MDA and why they attract different sentencing tariffs. For example, an offender possessing 20 grams of cannabis will likely receive a lesser sentence than an offender who possesses 5 grams of cocaine (which is a far more potent drug than cannabis). So, it cannot be reasonably sustained that because a quantity of drug is small that an offender should receive a conditional discharge. The type

of drug matters. Therefore, in the case at bar, even though the quantity of the Delta 9 THC is relatively small at .13 grams, because of its potency it should not be a foregone conclusion that the Appellant, even though he may be deemed to be a first-time offender, will automatically receive a sentence at the lower end of the sentencing spectrum. It most certainly should not be expected that he should not receive a conviction.

20. I accordingly decline the invitation by Mr. Swan to use the decriminalization of less than 7 grams of cannabis under the MDDCA as a basis upon which I should accede to his ground that the Learned Magistrate's sentence was manifestly excessive. To do so would not be consistent with the Legislature's intentions and furthermore I am not satisfied that treating cannabis and Delta 9 THC equally for the purposes of sentencing is a reflection of the public's view.

21. Turning more fulsomely to Mr. Swan's submissions, I should say from the outset that at no time whatsoever should a sentencer be beholden to a sentencing position taken in concert by the Prosecution and the Defence or even one adopted solely by a Prosecutor who may proffer a sentence which may be at or below the lower end of what would otherwise be an appropriate sentence. Whilst a sentencer is obliged to take into consideration any sentencing submissions put forth by Counsel, short of a *Goodyear* indication being given by the sentencer as to the likely sentence that may be imposed, the sentence eventually meted out should be untethered to any agreements reached by Counsel or to any mutual positions which they may take. The sentencer must still apply proper sentencing principles and reach their own decision as to what sentence is warranted. So, other than the fact that Mr. Duncan may[2] have suggested that a sentence of a conditional discharge would be appropriate, the fact that the Learned Magistrate did not accede to Mr. Duncan's submission is not a sustainable ground to disturb the Learned Magistrate's sentence.

22. Moreover, while the Learned Magistrate did not specifically articulate in detail that he considered that the Appellant was of good character (i.e. a first-time offender) and that the

[2] I say "may" because the Appeal Record only indicates that Mr. Duncan submitted that a fine between $100 and $300 would be appropriate.

Appellant should be given a discount in sentence for an early guilty plea, by virtue of the $130 fine which was at the very low end of the range of fines that could have been given (the maximum being $1,000) it is obvious that the Learned Magistrate took the Appellant's good character and early guilty plea into consideration when sentencing him.

23. I should say that even though the Appellant had previous conditional discharges in 2007 and 2010 they should not deprive him of his good character status (partly due to the elapse of time) and nor should they be a bar to him receiving a conditional discharge for the drug offence which is the subject of this Appeal. It appears that the Learned Magistrate took the same view in light of the sentence which he did give.

24. Further, by virtue of the fact that the Learned Magistrate inquired of the Appellant as to whether he had an alcohol issue, and that the Learned Magistrate discussed with the Appellant the possibility of him entering into the Driving Under the Influence Court ("DUI Court")(which is governed by section 68 of the Criminal Code), it is obvious to me that the Learned Magistrate, while not expressly stating such in his written notes, firmly had in his mind sections 53 to 55 of the Criminal Code (the "Purposes and Principles of Sentencing").

25. It was for the reasons set out above that I concluded that on its face the Learned Magistrate's basic sentence was not manifestly excessive. However, neither Counsel for the Prosecution nor for the Defence put before the Learned Magistrate a factor which should have been taken into consideration when sentencing the Appellant. A factor which most likely would have assisted the Learned Magistrate in deciding whether to sentence the Appellant to a conditional discharge. I am referring to the delay by the prosecutorial and police authorities in bringing the Appellant to Court to answer to the offences. To put this into context, it would be useful to turn to the chronology of how this matter progressed, or did not progress, from the date of the Appellant's arrest to the date of his first appearance in Magistrates' Court.

26. As noted earlier, the Appellant was arrested for the offences on the 20th September 2023. Five months later on the 14th February 2024 the Government Analyst analyzed the substance

to be Delta 9 THC. On an unknown date thereafter the Appellant was charged with the offence of simple possession of the Delta 9 THC (the Appeal Record does not indicate the date on which the Appellant was charged by the police). It then appears that the Information was laid in the Magistrates' Court on or about the 17th September 2024 which was almost one year after the date on which the Appellant was arrested. It is concerning to me that over a year had elapsed from the date of the Appellant's arrest before the police and/or the Department of Public Prosecutions decided to bring charges against the Appellant, especially since on the day of his arrest he admitted to knowing that the substance found in his back pocket was "THC".

27. However, the delay did not stop there. To compound matters, it appears from the Appeal Record that it was not until six (6) months later on the 5th March 2025 that the matter was actually brought into the Magistrates' Court for the first time. There does not appear to be any reasons why the Appellant could not have been summoned to appear in Magistrates' Court closer to the 17th September 2024 when the Information was laid. In any event, the Appellant did not appear on the 5th March 2025 and a warrant was issued for his arrest due to his non-appearance (while it is unclear as to whether the Appellant had actual notice of the requirement for him to appear in Court on the 5th March 2025 I will presume that the Learned Magistrate was satisfied that he was). It was not until the 20th October 2025 though that the Appellant appeared in the Magistrates' Court for the first time to answer to the offences charged.

28. By my calculation, a period of 2 years and 1 month elapsed between the date of the Appellant's arrest (20th September 2023) and the date of his first appearance in Magistrates' Court (20th October 2025). Neither this protracted background nor the Appeal Record assists me in answering the following pertinent questions:

    (a) Why did it take so long for the police to charge the Appellant for the drug offence, especially when one considers that this would not have been a particularly complex matter?

The Appellant basically admitted to having knowledge of the drug when he was searched upon arrest);

(b) Why did it take 5 months after the Appellant's arrest for the substance to be analyzed by the Government Analyst?;

(c) Why did it take so long for the Information to be laid after the drug was analyzed on the 14th February 2024?

By this time, there would have presumably been *prima facie* evidence to charge him the Appellant;

(d) Why was it that the Appellant was not required to attend Magistrates' Court for some six (6) months after the Information was laid?;

(e) What was the reason for the Appellant's non-appearance on the 5th March 2025? Was he properly served with a summons to appear in Court?; and,

(f) Why did it take a further seven (7) months for the Appellant to appear in Magistrates' Court?

29. There was nothing before me to suggest that any of the delay in bringing the Appellant to Court was his fault. In the absence of credible answers to the above questions by the police or the DPP's office, I am irresistibly drawn to conclude that the delay in bringing the Appellant to the Magistrates' Court was inexplicably prolonged. A delay in time over which the Appellant would have likely been waiting nervously to learn of his fate.

30. To be clear, I do not find that because of the delay that the Appellant's constitutional right to a trial within a reasonable time under section 6(1) of the Bermuda Constitution was infringed, but I do find that the delay in bringing him to the Magistrates' Court should have

been put to the Learned Magistrate as a significant factor to be considered when sentencing the Appellant.

31. Delay being a circumstance which should be considered in any sentencing decision enjoys foundational support from the Bermuda Court of Appeal authority of *Larry Benjamin v. R [2025] CA (Bda) 19 Crim* which was delivered on the 22nd July 2025 i.e. 3 months before the Appellant was sentenced on the 20th October 2025. In *Benjamin*, a five-year delay from the date of the offence to the date the appellant was arraigned in the Supreme Court led the Court of Appeal to substitute a sentence of 9 months' immediate imprisonment to one of a suspended sentence of imprisonment (pursuant to section 70K of the Criminal Code). It should be noted that the Court of first instance in *Benjamin* actually took into consideration the 5-year delay and accordingly reduced the appellant's sentence by 25% (from 12 months to 9 months imprisonment) but did not accept that the sentence should be suspended. It is obvious that on the appeal the Court of Appeal was of the view that more consideration should have been given for the 5-year delay and it then went ahead and suspended the term of imprisonment (keeping the basic sentence intact).

32. While the delay in *Benjamin* was more than twice the delay in the case-at-bar, the principle laid out therein is that a basic sentence could be materially discounted when demonstrable delay in bringing an offender to Court is inputted into the sentencing equation. Applying the reasoning in *Benjamin* to the case-at-bar, I find that the 2 years plus delay, which was not due to any fault on the part of the Appellant, was such that it brought the sentencing option of a conditional discharge into clear focus. An option which the Learned Magistrate may have likely taken into consideration had he known about the delay.

33. I should be pellucid. But for this element of delay, I would not have disturbed the Learned Magistrate's sentence of $130 fine because absent the delay the sentence was well within the range of the sentences which he could have imposed. It is therefore from this limited perspective, and because I find that it is in the best interests of the Appellant and not contrary to the public interest, that I allow the Appellant's appeal and substitute the Learned Magistrate's sentence of $130 fine with one of a Conditional Discharge for 12 months.

Attached to the Conditional Discharge shall be a Probation Order with the condition that he participates in and completes an alcohol and/or drug counselling programme as deemed appropriate by DCS. Effectively, by virtue of the Conditional Discharge a conviction shall not be entered against the Appellant's name.

34. Having allowed the Appellant's appeal there is no need for me to go on further and address any other points which were raised by Mr. Swan in his oral or written submissions. However, I do find it necessary to comment on Mr. Swan highlighting that the Learned Magistrate did not provide written reasons for the sentence which he gave. I accept Mr. Swan's argument that the Learned Magistrate did not set out in full the reasons by which he imposed the sentence. By not setting out the reasons why he did not prefer a conditional discharge over the fine the Learned Magistrate probably fell into error, but not by much. This conclusion is supported by the Bermuda Court of Appeal authority of *Shae Butterfield v. R [2023] CA (Bda) 25 Crim* in which Kawaley JA set out, *inter alia*, the following principles:

(i) Section 83(5) of the Criminal Justice and Procedure Act 2015 (the "CJPA") provides that 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 decision.

(ii) Every magisterial judgment in a criminal case must be recorded in writing and set out the legal and/or factual points to be decided and the reasons for the relevant decision(s)[paragraph 14 of *Butterfield*].

(iii) The underlying purposes of section 83(5) of the CJPA, which is consistent with common law fair hearing rights, is that *"a person against whom a judicial decision has been made should be able to identify and understand the reasons for the adverse decision"* [paragraph 14 of *Butterfield*].

(iv) As per the Commonwealth Judges and Magistrates Association edition of 'A Guide for the Magistrate in the Commonwealth: Fundamental Principals and Recommended Practices', 4th edition (2001), paragraph 9.1:

> *".....The giving of reasons promotes transparency and accountability through the provision of 'accessible reasoning [which is] necessary in the interests of victims, the parties, appeal courts and the public'. Reasons for decision serve the dual function of allowing "the parties to see the basis for the judge's decision" and "to see the extent to which their arguments have been understood and accepted".*"

35. The reasoning in *Butterfield* is eminently sound and it, along with section 83 of the CJPA, should most definitely be followed by Magistrates and Judges alike. However, it is also important to inject practicality into the issue. It has to be taken into consideration that the exigencies of the Magistrates' Court (a Court of summary jurisdiction), particularly the overwhelming pressures of disposing of a high volume of matters in short periods of time and in one Court sitting (such as Plea Court, Traffic Court or Directions and Disclosure Court), makes it extremely difficult and near impossible for Magistrates to find the time to render decisions which are more than just *ex tempore*. The unavoidable result is that decisions, although they may be in writing, may not be in complete compliance with *Benjamin* in that decisions may not set out fully the legal or factual points for determination or the decisions made on such points, or the full reasons for the decision. This is primarily because Magistrates often do not have the luxury of rising from the Bench in order to fully write out their decisions or to reserve their decisions for a later time or to another day. Especially, in instances where a defendant's liberty is at stake.

36. As an example, consider Plea Court where it appears that the Appellant's matter was handled by the Learned Magistrate. Plea Court is held every day in the Magistrates' Court, and it is where any number up to 30 or more matters may need to be disposed of. Depending on the day it could go on for 1 to 3 hours with the presiding Magistrate being called upon to decide on a cornucopia of urgent and consequential issues such as bail, sentencing, disclosure, directions, setting hearing dates, enforcement of orders, warrants, incarceration, etc. In virtually all instances, neither Counsel nor the unrepresented alleged offenders advance full

submissions (and they are certainly not written). In short, Plea Court can be a pressure cooker. If Magistrates are required to take the time to fully write out the reasons by which they reached their decisions in each individual matter that comes before them (particularly in instances were Counsel or the unrepresented party do not provide written submissions as to the legal and/or factual issues) then the already stretched Magistrates' Court docket would become unmanageable and the Magistrates' Court would be besieged by system busting backlogs. Ultimately, this would not be consistent with the proper administration of justice.

37. To be clear, I am in no way whatsoever providing an excuse for Magistrates not providing written reasons for their decisions, and most certainly I do not seek to dilute *Benjamin* or section 83 of the CJPA. But I do hope to provide an explanation for the unique vicissitudes and challenges confronting Magistrates as they endeavour to get through their heavy docket in a short period of allotted time. In every case Magistrates should definitely provide written reasons for their decisions, but the extent to which they do so should depend on the nature and context of the decision that is being made. Some decisions may require less written recitation of the legal and/or factual points which are up for determination than other types of decisions which may require a more comprehensive written reason. In the case-at-bar and given the Plea Court environment in which the Learned Magistrate rendered his written decision, other than not setting out in writing the reasons why he thought that a conditional discharge was not warranted, I do not see any major issues with what the Learned Magistrate did in fact write.

Conclusion

38. In consideration of the above paragraphs, I reiterate my decision to allow the Appellant's appeal on the ground that the Learned Magistrate's sentence of $130 fine for the offence charged was manifestly excessive. Accordingly, I substitute the said fine for one of:

- **A Conditional Discharge for 12 months coupled with a Probation Order with the condition that he participates in and completes an alcohol and/or drug counselling programme as deemed appropriate by DCS.**

Dated the 12th day of November, 2026



The Hon. Mr. Justice Juan P. Wolffe
Judge of the Supreme Court of Bermuda