In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2019: 36

SAFIYAH TALBOT

Appellant

-v-

FIONA MILLER
(POLICE SERGEANT)

Respondent

JUDGMENT

Appeal against conviction in the Magistrates' Court- Failure or Refusal to comply with a demand for a sample of breath for analysis- Section 35C(7) of the Road Traffic Act 1947 - Making a false or misleading statement in giving information which was lawfully demanded - Section 122(2) of the Motor Car Act 1951 - Late Applications for Adjournments- Non-Compliance with Case Management Directions

Date of Hearing:	09 September 2020
Date of Judgment:	17 September 2020

Appellant	Mr. Bruce Swan, Bruce Swan & Associates
Respondent	Mr. Javone Rogers for the Director of Public Prosecutions

JUDGMENT delivered by S. Subair Williams J

Introduction

1. The Appellant was tried in the Magistrates' Court on Information 18TR05443 and convicted by Magistrate Craig Attridge on 4 October 2019 for (i) having failed or refused to provide a sample of her breath for analysis, contrary to section 35C(7) the Road Traffic Act 1947 and (ii) having made a false statement to the police, contrary to section 122(2) of the Motor Car Act 1951.

2. Prior to the start of the trial in the Magistrates' Court, the Appellant commenced proceedings in the Supreme Court for judicial review of the decision to charge the Appellant under section 35C(7) the Road Traffic Act 1947 ("RTA") (See ***S. Talbot v The Queen*** [2019] SC (Bda) 9 Civ (7 February 2019). The application was heard on 17 January 2019 and dismissed by the Chief Justice in a reasoned judgment delivered on 7 February 2019.

The Evidence

Evidence underlying the conviction for refusal to provide a breath sample

3. At the trial the Crown called three police officers to give evidence, namely Detective Sergeant Windol Thorpe, Police Constable Kyle Outerbridge and Sergeant Paul Watson. The Appellant gave evidence in her own defence.

4. It was uncontroversial on the evidence that at approximately 6:50am on 14 April 2018, Detective Sergeant Windol Thorpe was travelling westward on Wellington Road in St. George's Parish where he came upon the Appellant's motor car overturned on its rear side. There was extensive damage to the windshield at the general frontal portion of the car. Three individuals were seen to be pushing the vehicle back onto its wheels.

5. Sgt. Thorpe's evidence was that he observed blood on the Appellant's bottom lip and a strong smell of alcohol on her breath. Additionally, he noticed the presence of an opened wine bottle and an unopened WKD blue [vodka] bottle in the Appellant's car.

6. Despite having advised the Appellant to be seated for a check-over, the Appellant left the scene on foot. Sgt Thorpe stated that in answer to his insistence for her to remain at the scene, the Appellant asked him if he knew her cousin [Inspector] Mark Clarke. This caused Sgt Thorpe to telephone Inspector Clarke. However, the Appellant continued to walk away in an eastwardly direction.

7. Thereafter, the Appellant was intercepted by Sgt Thorpe as she was running towards her residence in the vicinity of Cut Road and Redcoat Road. When Sgt Thorpe approached the Appellant and asked her where she had come from the Appellant shared that she had visited her sister's house in Warwick Parish. Sgt Thorpe then asked the Appellant if she had been drinking any alcoholic beverages to which she replied in the affirmative stating that she had had 'a few'. When pressed further, she said 'quite a few'. This evidence was corroborated by the accompanying officer, PC Outerbridge.

8. It was Sgt Thorpe's evidence that he formed a belief that the Appellant had been driving impaired based on the occurrence of the accident, her irrational behaviour and the smell of intoxicants on her person. Accordingly, he instructed PC Outerbridge to arrest the

Appellant on suspicion of impaired driving. PC Outerbridge complied and stated in his evidence that he too noticed a strong smell of an intoxicant on the Appellant's breath and observed that her eyes appeared to be dazed. When he demanded a sample of the Appellant's breath for analysis, her immediate reply was 'Yes', however, shortly thereafter she said; "I will not take that test." These verbals were corroborated by Sgt Thorpe.

9. The Appellant was subsequently conveyed to South Side Police Station and then to Hamilton Police Station where she was processed by Sergeant Paul Watson who was the final witness for the Crown. At approximately 8:27am Sgt Watson asked the Appellant if she was still refusing to provide a sample of her breath for analysis. He stated that he advised the Appellant that failure to provide a breath sample constituted an offence and he informed her that the penalties for the offence were the same as those for driving whilst impaired. Sgt Watson told the Court that the Appellant indicated her understanding but still refused to take the breath test. He then completed the processing forms and noted her demeanour and his observation of the smell of intoxicants.

10. Sgt Watson stated in his evidence that at approximately 8:49am the Appellant conveyed that she wished to speak to a lawyer and other persons. He stated that she simply indicated that she wished to speak to a lawyer in answer to his question to her in compliance with the Prisoner's Rights form. He said that PC Charles allowed her to make several calls and that she was permitted to stay in the reception area of the station in lieu of being placed in a holding cell. Sgt Watson said that at 9:29am he received a telephone call from the Appellant's lawyer, Mr. Paul Wilson. Sgt Thorpe stated that Mr. Wilson demanded that the Appellant be permitted to provide a specimen of her breath in accordance with his advice to her. This was followed by a subsequent phone call from Mr. Wilson at 9:45am during which Sgt Watson informed Mr. Wilson that he was not going to allow the Appellant to take the test as she had previously refused.

11. The Defence case at trial was that the Appellant initially informed Sgt Watson that she was willing to take the breath test but that she wanted to speak to Mr. Wilson first. This was put to Sgt Watson during cross-examination but he disagreed that the Appellant had ever expressed a willingness to take the test prior to speaking to her attorney. He stated that when he asked the Appellant about taking the test, he was simply seeking clarification on whether she was still refusing to take the test, having initially refused on Red Coat Lane.

Evidence underlying the conviction for providing false information

12. On Sgt Thorpe's evidence, the Appellant told him at the scene of the accident that she was the driver of the car but she identified herself by her sister's name, 'Sakinah Talbot' of Cut Road. When he later interacted with the Appellant in the area of her residence, he instructed PC Outerbridge to arrest her. This was at approximately 7:12am. PC Outerbridge stated during his evidence that he arrested the Appellant but it was not until

a later period that she was correctly identified to him as 'Safiyah' Talbot. When questioned by Magistrate Attridge, PC Outerbridge clarified his belief that he was advised of the Appellant's correct identity prior to his departure from the scene of the accident.

13. Under cross-examination Sgt Thorpe stated that he had previously dealt with the Appellant and was aware that she had a sister named Sakinah. He maintained under cross-examination that the Appellant gave her name as 'Sakinah' and not 'Safiyah'.

14. The Defence, however, challenged this evidence. Mr. Swan, who also represented the Appellant at trial, put it to Sgt Thorpe that the Appellant identified herself by her true name. The Appellant also denied during her evidence under cross-examination that she presented herself to the police as 'Sakinah'. According the magistrate's note of the evidence, the Appellant was silent on this issue during her evidence in chief.

The Grounds of Appeal

Ground 1:

The Learned Magistrate erred in fact and law when he stated that the Appellant's request to speak with her Lawyer amounted to a refusal to provide a sample of breath for analysis.

15. This ground of complaint was argued by Mr. Paul Wilson in the judicial review proceedings which were determined prior to the start of the trial in the Magistrates' Court. The disputed issues before the Court were listed as follows in Hargun CJ's judgment [para 7]:

(a) whether exercising her constitutional right to consult an attorney upon arrival at Hamilton Police Station can be interpreted as a refusal to comply with the demand;

(b) whether police have the authority to refuse to administer the taking of a sample where the indication of a willingness to comply comes within reasonably timely manner;

(c) whether the rationale of previously decided cases is contrary to the constitutional right to obtain legal advice;

(d) whether the Applicant's constitutional right to consult an attorney upon arrival at Hamilton Police Station is outweighed by the police need to recover evidence;

(e) whether a sample of breath amounts to evidence for which defendants should be safeguarded against; and

(f) *whether the constitution should be read as the Supreme Law*.

16. Hargun CJ bifurcated these points in the following way [para 8]:

"*All these issues identified by the Applicant resolve themselves into two main questions: (1) does the refusal to comply with the demand for a breath sample because a person wishes to consult with a lawyer amount to a "reasonable excuse" within the meaning of section 35C (7) of the RTA, and (2) if it is not a "reasonable excuse" does the situation created thereby constitute a breach of section 5 of the Bermuda Constitution?*"

17. In resolving these questions, Hargun CJ was referred to the binding decision of the Court of Appeal in <u>*Sybil Young v McClean*</u> Criminal Appeal No 14 of 1993 [pages 55-56]:

"*The evidence which she* [the Appellant, Ms. Sybil Young] *gave was not accepted by the magistrate, in so far as it conflicted with the evidence of the prosecution witnesses. He found as a fact, 'that P.C. Iris demanded breath samples and that the defendant refused to give them* (').

Even if he had accepted her evidence that she refused because she wanted to consult her lawyers, this would not, in our opinion, have constituted a reasonable excuse for refusing to comply with a lawful demand made under section 35A R.T.A.

The powers which a police officer may exercise under that section depend upon the officer having reasonable and proper suspicion of an offence against section 35A or 35B R.T.A., subject only to a reasonable excuse for failure to comply.

There may well be circumstances which would amount to a reasonable excuse. A wish to see a lawyer is not one of them. Nor is there any obligation upon a police officer, exercising the powers conferred upon him by law, to inform a defendant that the latter has a right to obtain legal advice…"

18. The reasoning in the Court of Appeal's more recent decision in <u>*Tracey Pitt v The Queen*</u> [2014] Bda LR 49 was also followed. In *Pitt*, the Appellant was convicted by a jury for offences arising out of her road traffic collision. On Count 6 of the Indictment she was convicted for failing or refusing to provide a specimen of her breath contrary to section 35C(7) of the RTA. In that case the Appellant caused serious injury to twin brothers who had been dragged under her car for some 13-26 meters from the point of impact.

19. Zacca P, Evans JA and Baker JA were unanimously agreed in dismissing ground 5 of the appeal which had been pursued on the grounds that the Appellant had a reasonable excuse for failing or refusing to provide a breath specimen. In dismissing this ground of appeal, the Court of Appeal also confirmed its approval of the decision in *Young v McClean* [paras 20-25]:

"*20. Section 35(C)(7) of the Road Traffic Act 1947 provides that any person who, without reasonable excuse, fails or refuses to comply with a demand made to him by a police officer under the section commits and offence.*

21. At the scene the appellant agreed to provide a sample of breath and at the police station she admitted to having consumed two glasses of red wine prior to driving. She said she asked Sgt Samaroo for a lawyer when he said he was going to breath test her. He said he wanted to finish his paperwork. He then did allow her to call a lawyer, albeit another officer, PC Mills, was reluctant to allow her to as it would delay the breathalyzer process. In the event, she was allowed to call Ms Pearman but there was no reply. She was then taken to the Alco-Analyzer room and she again asked if she could contact a lawyer but was told not until after the breath test. Her evidence was that she wanted to speak to a lawyer but wanted to take the breath test. She disputed saying "I am not providing any samples." The judge correctly directed the jury as to the effect of section 35(C)(7). He pointed out that where there is an accident and death or grievous bodily harm results, a police officer can demand a breath test from the accused without delay or as soon as practical and that the implication of this was that the police officer need not wait for a defendant actually to get hold of a lawyer or for a lawyer to give advice or come to the police station or come to the police station before the sample could be taken. Furthermore, a concession to allow a defendant to tray and contact a lawyer could be ended if it was creating a too great a delay and a mistaken belief of entitlement to contact a lawyer could not amount to a reasonable excuse.

22. In our judgment this direction is plainly correct. Were the position otherwise the breath test procedure could be rendered completely nugatory. The fact that the appellant was allowed to try and contact Ms Pearman was a concession that need not have been given if the appellant had succeeded in contacting a lawyer. If she had refused to provide a sample without reasonable excuse she committed an offence and no reasonable excuse had been suggested other than not being allowed to speak to a lawyer.

23. We were referred to authority in support of the judge's direction to the jury namely Young v McClean Criminal Appeal 14 of 1993 in which Roberts P said: "There may well be circumstances that would amount to a reasonable excuse. A Wish to see a lawyer is not one of them."

24. Ms Christopher made a valiant effort to persuade us that there is a right to legal advice under the Bermudian Constitution and/or the Criminal Code and referred us to the Canadian case of R v Prosper [1994] 3 SCR 236 but we remained unpersuaded that there is anything in the laws applicable to Bermuda that trumps a police officer's right to demand a breath test in the circumstances of this case.

25. Accordingly the appeal against conviction on count 6 was dismissed."

20. Relying on the legal principles clearly affirmed by the Court of Appeal in the cases of both *Young v McClean* and *Pitt v The Queen*, Hargun CJ refused the Appellant's application for judicial review.

21. Notwithstanding, the Appellant's defence at trial was that any delay occasioned by the Appellant's efforts to obtain legal advice amounted to a reasonable excuse to comply with the demand for the breath samples. The Defence case advance at trial was also that the extent of delay in actuality was not unreasonable, having regard to a memorandum of guidelines and policies of the Bermuda Police Service in investigating cases of this nature. In particular, Mr. Swan pointed to the following section of what I shall refer to as the "BPS Policy Memorandum":

"*11. REQUEST TO CONTACT LEGAL COUNSEL*

11.1 There is a legal difference between a delay in providing a sample and a refusal to provide a sample.

11.2 If a suspect wishes to contact a lawyer, this will be granted by the qualified technician or station sergeant to allow the suspect to seek legal advice. Any delay caused by the suspect seeking legal advice should be reasonable and should not extend beyond 30 minutes. Once the suspect has consulted legal counsel, or after a delay of 30 minutes (whichever occurs first) a further demand for a sample will be made. Any subsequent delay in agreeing to provide a sample will be interpreted as a refusal.

11.3 A refusal to provide a sample occurs if the suspect insists that they will not give samples unless their lawyer is present, or they wish to wait for their lawyer, before providing samples. Lawyers and friends of the suspect will not be allowed in the examination room during testing."
[Page 30 of the Record]

22. The argument advanced by the Appellant's Counsel before this Court was that it was reasonable for the Appellant agree to take the breath test on the condition that she be permitted to first obtain legal advice. However, in the written judgment of Magistrate Attridge, the trial Court found that the Appellant was not a witness of truth and her evidence '*in respect of the events of the night in question*' was rejected [para 49]. In specifying the rejected portions of the Appellant's evidence, he stated [para 51]:

"*51. In particular I reject the Defendant's evidence that she indicated to the police, apparently on numerous occasions according to her, that she wanted to talk to a lawyer, or specifically Mr. Wilson, before taking the alco-analyser test. I am satisfied, and accept the evidence of the police offices, that she never once communicated that to the police. I am also satisfied that Ms. [Talbot] refused a demand for samples of breath both at Redcoat Lane and again following her arrival at Hamilton Police Station. In particular, PS Watson, who is an experienced officer, was clearly in the Court's view*

familiar with the law and procedure relating to cases of this nature, and to the extent that he was in any doubt, the Court is satisfied that he sought properly to refresh himself at the time of his dealings with the defendant and consulted with his inspector, and there can be no criticism of his conduct in this case."

23. Having cited and rehearsed passages from both *Young v McClean* and *Pitt v The Queen*, the magistrate found [para 55]:

"*55. Thus, even if I were to accept, which I do not, that the Defendant indicated to the police, that she wanted to talk to a lawyer before taking the alco-analyser test this would not afford her a reasonable excuse for refusing, as she did, to provide samples of breath. In all the circumstances I am satisfied beyond reasonable doubt, so that I feel sure, that the Defendant, Safiyah Talkbot did on 14th April 2018, without reasonable excuse, refuse to comply with a demand made by a police officer for a sample of breath contrary to section 35C(7) of the 1947 Act and I find her guilty of the second charge in the information*."

24. As a matter of general and established principle, this Court, in the exercise of its appellate jurisdiction, will be reluctant to go behind a magistrate's findings of facts drawn from an assessment of witnesses' oral evidence given at trial. This is because the magistrate, who would have had the sole advantage of observing the demeanour of those witnesses, is best positioned to evaluate the truthfulness of the evidence. It is with that logic that I would proceed with trepidation before interfering with findings of facts which were formed by the trial magistrate. In this case, I have not been invited to review or to otherwise set aside any of the factual conclusions drawn by Magistrate Attridge as it relates to the charge and conviction under section 35C(7). In any event, there is no appearance of a rational basis which would support an impediment by this Court on Magistrate Attridge's findings about the truthfulness of the witnesses before him.

25. This Court will, therefore, proceed on the evidential basis that the Appellant never expressed a willingness to comply with the demands made for a breath sample prior to speaking to her attorney. I also accept that the evidence clearly demonstrated that a demand for a breath sample from the Appellant was made at Red Coat Lane at approximately 7:12am. While the Appellant initially agreed to take the test, she withdrew that willingness and stated her refusal to the officers before having left the Red Coat Lane area.

26. I was initially intrigued by Mr. Swan's submission that it would be wrong to regard a police officer's demand for a breath sample as lawful if such a demand was made at a place where a qualified technician was unable to administer the test using the procedures required by the law. In support of this point, Mr. Swan alluded to the wording in section 35C (1) of the RTA which empowers a police officer to demand such samples of breath "*as in the opinion of a qualified technician are necessary to enable a proper analysis to be made*…".

27. However, section 35C(1) must be read as a whole in order to give effect to its full meaning. The section clearly contemplates that a demand may be made for the immediate provision of a breath sample or for provision of such a sample as soon as practicable thereafter. Section 35C(1) provides:

"35C (1)…where a police officer on reasonable and probable grounds believes that a person is committing, or at any time within the preceding twelve hours has committed an offence under section 35, 35AA or 35A, he may arrest him without a warrant, and by demand made to that person forthwith or as soon as practicable thereafter, require him to provide then or as soon thereafter as is practicable such samples of his breath as in the opinion of a qualified technician are necessary to enable a proper analysis to be made in order to determine the proportion, if any, of alcohol in his blood, and to accompany the police officer for the purpose of enabling such samples to be taken.

28. The Court of Appeal in *Young v McClean* settled this very point [page 54]:

"*It is argued that paragraph (a)* [a demand for a sample of breath forthwith under section 35 of the RTA as it then was] *is ambiguous in that it is not possible to give effect to such a demand, in the absence of roadside testing devices and that only paragraph (b)* [a demand for a sample of breath as soon as practicable thereafter under section 35 of the RTA as it then was] *is practicable until they are available.*

No doubt it is correct that the absence of roadside testing equipment means that there will usually be an interval between the finding in a public place of a person suspected of driving under the influence of alcohol and the test by breathalyzer of the level of alcphol in his blood. This is recognized by the section, which provides that, after the demand, a defendant may be required to accompany the police officer to a police station for samples to be taken.
There will be occasions on which the demand for a sample of breath is not made until the suspect is at a place where the testing equipment is present. There is thus a choice, not an ambiguity. If the equipment is available at the roadside, paragraph (a) will be followed. If it is not, paragraph (b) will be adopted.

There is no requirement for any particular form of words to be used by a police officer making the demand, so long as he makes it clear to the suspect that a sample of his breath is required."

29. I am bound by this construction of section 35C(1) which I consider to be literal and irresistible having regard to the wording of the provision. To accept Mr. Swan's submission to the contrary would be to arrive at the erroneous conclusion that a lawful demand for a breath sample cannot be made outside of the facility where it is to be executed.

30. The question as to the lawfulness of the demand made at Red Coat Lane, which I have now resolved against the Appellant, was relevant to Mr. Swan's arguments on the

calculation of the timeline between the first demand made and the Appellant's subsequent agreement to comply, having obtained legal advice. However, on the facts of this case, the delay period significantly exceeded the timeframe contemplated under the BPS Policy Memorandum which Mr. Swan sought to apply with the force of law. This Court, however, is not guided by the internal procedures or policies of the Bermuda Police Service, as helpful as they may be in carrying out the internal purposes for which they were created.

31. Following the binding reasoning in *Young v McClean* and *Pitt v The Queen*, as did Magistrate Attridge and Hargun CJ in the related proceedings, I find that the delay caused by the Appellant's request to speak with her lawyer did not constitute a reasonable excuse for her failure or refusal to comply with the demands made of her at Red Coat Lane and at Hamilton Police Station for samples of her breath for analysis.

32. Failure or refusal to comply with a lawful demand for a breath sample under section 35C(1) of the RTA is an offence contrary to section 35C(7). The subsequent pursuance or obtaining of legal advice does not diminish the unlawfulness of the initial failure or refusal to comply with the demand. This is the same logic which would apply to the commission of any other road traffic offence. So, for example, where a person commits the offence of leaving a vehicle in a dangerous position [contrary to section 14 of the RTA], a request for access to a legal advisor before being made to change the position of the vehicle cannot undue the criminality of the act of placing it in a dangerous position in the first instance.

33. For these reasons, I would dismiss this ground of appeal.

Ground 2:

The Learned Magistrate erred in fact when he allowed PS Watson to incorrectly apply his discretion to allow the Appellant a second opportunity to provide a sample of breath.

34. I would dismiss this ground of appeal applying the same reasoning relied on in respect of Ground 1.

Ground 3:

The Learned Magistrate failed to correctly identify any evidence that police Inspector Mark Clarke had confirmed the identity of the Appellant and her used [sic] of her late sister's name as stated by DS Thorpe.

35. The intended meaning of this complaint is buried in the ambiguous wording of this ground of appeal. During the hearing before me, Mr. Swan explained that the Appellant

means to challenge Sgt Thorpe under this ground of appeal for having failed to confirm her identity through his conversation with Inspector Clarke. When pressed further for clarification of the Appellant's grievance under this ground, Mr. Swan revealed that the Appellant's position was that the evidence did not support a conviction on count 3 where it was alleged that she knowingly made a materially false or misleading statement to Sgt Thorpe contrary to section 122(2) of the Motor Car Act 1951.

36. Section 122(2) provides:

"122 (2) Any person who, in giving any information lawfully demanded or required under this Act or under any regulations made thereunder (otherwise than in connection with the matters set out in subsection (2)) makes any statement which to his knowledge is
in any material respect false or misleading commits an offence against this Act:

Punishment on summary conviction : imprisonment for 3 months or a fine of $840 or both such imprisonment and fine; or, where the information is given by way of a sworn declaration imprisonment for 6 months or a fine of $1,680 or both such imprisonment and fine.

37. As outlined earlier herein, I see no reason to interfere with the magistrate's assessment of the truthfulness of the police witnesses and his preference of their evidence over the evidence of the Appellant. This ground of appeal raises the simple question as to whether the magistrate erred in favouring the evidence given by Sgt Thorpe on what the Appellant said about her name. Did the magistrate err in rejecting the Appellant's denial of falsely identifying herself as 'Sakinah'?

38. Magistrate Attridge would have observed the demeanour of Sgt Thorpe as he gave his evidence on the stand and it was open to the Court as the trier of fact to draw reasonable conclusions from the evidence heard. It is clear that the magistrate believed Sgt Thorpe's evidence which was consistent during both his evidence in chief and the Defence's cross-examination of him.

39. It was also open to the magistrate to remain steadfast in his assessment of Sgt Thorpe's evidence of the name provided which was hardly challenged by the Appellant's evidence in chief. So, I would not criticize Magistrate Attridge for his rejection of the Appellant's evidence under cross-examination that she identified herself correctly.

40. In my judgment, the evidence is soundly supported the conviction and so this ground of appeal also fails.

Refusal of Appellant's Application to Adjourn

41. At the commencement of the hearing before me, Mr. Swan sought for this matter to be adjourned due to his lack of preparedness. Mr. Rogers objected to the adjournment application on the basis that the appeal lacked merit and was worthy of swift disposal.

42. In refusing the application to adjourn I would draw attention to the principles outlined in *Practice Direction Circular No. 7 of 2007 Ref. A/50*. At paragraph 8 of the Practice Direction, an extract from the 1999 White Book [para 32/6/25] is reproduced as a reminder on the Court's general approach to belated adjournment applications. This approach is no less applicable to criminal appeals:

    "*Late applications for adjournment- Late applications to vacate appointments before Judges or [the Registrar] because of lack of preparation will not be granted easily or without close scrutiny. The effect of the late vacating of a fixed date or appointment is that other cases waiting to be heard are necessarily and proportionately delayed because of the waste of the time set aside*…"

43. Counsel are encouraged to review the outline of the Court's general approach to adjournment applications in criminal matters as provided in my earlier ruling in *R v Harry Lightbourne* [2017] SC (Bda) 63 Crim (17 July 2017).

Non-Compliance with Case Management Directions

44. Mr. Swan failed to comply with my direction given on 5 March 2020 for a skeleton argument to be filed with the Court and served on Crown Counsel of the DPP's Office.

45. In previous cases this Court has warned against un-foreshadowed and unexplained failures to comply with case management directions issued by the Court. In *D S v the Queen* [2018] SC (Bda) 13 App (19 February 2018) [paras 43-44] I previously stated the importance of case management directions for the hearing of criminal appeals.

46. In *Paul Martin v The Government of the United States of America* [2020] SC (Bda) 13 App (27 February 2020) I referred the Court of Appeal's Ruling in *Dill; Wolffe; Franklyn Smith; Tucker v The Queen* [2019] CA (Bda) 14 Crim where Clarke P outlined the expectations of the Court for the future conduct of Counsel in response to directions made by the Court. I expressly stated that these points were equally applicable to the conduct expected of Counsel appearing in the Supreme Court for appeals from the Magistrates' Court:

    "*At paragraphs 47-51 Clarke P not only identifies some of the various delinquencies of Counsel which plague the general efficiency of the upper and lower Courts but goes on to explain the conduct expected. I wish to make it widely known that the points stated*

in the below passages equally apply to appeals from the Magistrates' Court to the Supreme Court:

"*The Future*

47. The history of the events in the four cases display some disturbing features. These include (a) either an apparent preparedness simply to ignore the mandatory intent of the Court's orders, or a failure so to plan matters as to be able to comply with them, or both; (b) a failure of communication with either the Court or the Crown as to any difficulties in producing submissions until a very late stage; (c) a failure timeously to address the question of what transcripts other than those specified by Order 3 Rule 10 may be needed for the appeal so as to ensure that they are transcribed in time; and (d) a failure of adequate communication between counsel when more than one counsel had been involved.

48. For the future a number of things are required.

49. First, Counsel must appreciate the obvious, namely that the Court's orders are there to be obeyed. If difficulties are foreseen, they should be raised with the Court before the order is made; and, if they arise later, the Court and the Crown should be appropriately informed.

50. We are conscious of the burden that rests on Counsel in the preparation of submissions. But it is not an acceptable excuse for noncompliance for the Court to be told that Counsel has a myriad of things to do and has been working day and night (unsuccessfully) to comply with the order. If the work cannot be done in accordance with the order of the court it should not be taken on.

51. Second, it is important for appeals to be planned for. When a notice of appeal is filed counsel will need to consider what transcripts other than those automatically provided pursuant to Order 3 Rule 10 are likely to be needed and make a timeous application for them. Asking for them a fortnight before the hearing is not acceptable. He or she will also need to arrange space in his or her timetable to accommodate the drafting of submissions.

…"

47. It is hoped that Counsel will have a more careful regard for all case management directions issued by this Court. The practice of non-compliance accompanied only by a verbal statement of belated apology must be brought to an immediate end to be replaced with the approach directed by the Court of Appeal in *Dill; Wolffe; Franklyn Smith; Tucker v The Queen.*

Conclusion

48. The appeal is dismissed on all grounds.

Dated this 17th day of September 2020

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE