Neutral Citation Number: [2020] CA (Bda) Crim 9

Case No: Crim/2020/1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON. MR ACTING JUSTICE WOLFFE
CASE NUMBER 2019: No. 19

Sessions House
Hamilton, Bermuda HM 12

Date: 19/06/2020

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

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Between:

THE QUEEN

Appellant

- and -

KYLE WHEATLEY

Respondent

Mr. Alan Richards (Office of the Director for Public Prosecutions) for the Appellant

Mr. Richard Horseman (Wakefield Quin Ltd.) for the Respondent

Hearing dates: 9 June 2020

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APPROVED JUDGMENT

CLARKE P

INTRODUCTION

1. On 10th December 2019 the Respondent. Kyle Wheatley ("Mr Wheatley") was sentenced by The Hon Acting Justice Juan P. Wolffe to 2 ½ years' imprisonment for conspiring, contrary to section 128 of the Criminal Code Act 1907 ("the Criminal Code") to "*prevent the course of justice by agreeing to facilitate the unauthorised destruction or suppression of tickets issued to motorists alleged to have committed traffic offences".* The Crown contends that that sentence was manifestly inadequate and should be increased. On 9 June 2010 we dismissed the Crown's appeal. These are our reasons for doing so.

2. Mr Wheatley was at the time of the offence employed as a Police Constable with the Bermuda Police Service (the "BPS") and was attached to the Court Liaison Unit (the "CLU"). In that capacity he had the means of access to traffic tickets issued by police officers. The copy portion of the ticket is forwarded to the CLU. The information from the ticket is entered into the Judicial Enforcement Management System and the ticket remains in a secure drawer at the CLU until the Court date. The ticketholder appears in Court and is dealt with, after which the ticket is filed. Someone who, like Mr Wheatley, has access to the system, can pull tickets from it, i.e. withdraw the ticket from the administrative and Court process. The result of doing that is that the ticket is never put before the Court and the person to whom it is issued escapes prosecution for the traffic offence set out in the ticket.

3. For a period of about 2 years between early 2016 and January 2018 Mr Wheatley pulled tickets in return for cash. Two other people acted as "brokers" for him by identifying people who had received traffic tickets and obtaining cash for him, from which they received a commission, in order for their traffic tickets to be pulled. It appears that in total at least 61 traffic tickets never resulted in Court proceedings as a result of Mr Wheatley's activities. The prosecutor estimated that he received about $10,700 in return for pulling these tickets and that the actual loss to the Government was in the region of $ 29,675, being the sum that would have been received if the relevant members of the public had appeared in Court and been convicted and fined. Not all the tickets were pulled for cash but the exact number that were is unknown.

THE SENTENCE

4. The penalty for conspiring to prevent the course of justice contrary to section 128 of the Criminal Code is, for conviction on indictment, an unlimited fine or imprisonment for up to10 years or both.

5. The judge in a careful and reasoned judgment set out why he decided that the appropriate sentence was one of 2.5 years imprisonment. In essence he said – correctly – that offences of this nature strike at the heart of our justice system and compromise the integrity upon which it operates. The BPS and the Court must be able to rely upon police officers to carry out their duties in a manner which is consistent with the proper administration of justice. A clear and unequivocal message had to be sent to Mr Wheatley and other would-be offenders that they will be treated harshly when sentenced for this sort of offence.

6. The judge referred to a number of English authorities, which Mr Horseman, who appeared for Mr Wheatley below and who appears for him now, had helpfully produced. I do not propose to refer to all of them. They are set out at paragraph 13 of the judge's judgment.

7. The judge also referred to the guidelines for offences under the UK's Bribery Act 2010, for which the maximum sentence is 10 years. These guidelines are provided by the Sentencing Council for England and Wales, and the judge considered that they could be applied generally in Bermuda to equally serious corruption type offences committed by public officers. We revert to that question below.

THE SENTENCING GUIDELINES

8. The Sentencing Council's guidelines ("the Guidelines") require the Court to determine the degree of culpability of the offender and the harm which he has caused, and provide starting points and ranges for sentences according to the degree of harm and the degree of culpability in any given case. The level of culpability is to be determined by weighing up all the factors of the case to determine the offender's role and the extent to which the offending was planned and the sophistication with which it was carried out. The Guidelines indicate that a "*High*" degree of culpability (Category A) can be demonstrated by one or more of, inter alia, (i) "*A leading role where offending is part of a group activity*"; (ii) "*Abuse of position of significant power or trust or responsibility*"; (iii) "*Sophisticated nature of the offence/significant planning"; (iv)" Offending conducted over a sustained period of time*"; (v) "*Motivated by expectation of substantial financial, commercial or political gain"*.

9. *"Harm*" is assessed in relation to any impact caused by the offending, and the actual or intended gain to the offender. It is divided into three Categories. In relation to Category 1 harm can be demonstrated that falls within this category if there is "*Serious undermining of the proper function of local or national government, business or public services*" or "*Substantial actual or intended financial gain to offender or another or loss caused to others*". Harm can be demonstrated that falls within Category 2 if there is "*Significant undermining of the proper function of local or national government business or public services*" or "*Significant actual or intended financial gain to offender or another or loss caused to others*". Having determined the degree of culpability and the degree of harm the court is to use the starting points set out in the table provided in the Guidelines and determine the appropriate starting point for sentence for the case in question, before any discount for plea, in the category range specified. It does so by considering potential aggravating and mitigating factors, which will or may increase or diminish the starting point chosen. In the latter category fall (1) no previous convictions; and (2) good character.

10. The judge said that the authorities to which he had been referred and the Guidelines mirrored the sentencing principles set out in section 55 of Bermuda's Criminal Code, particularly those under section 55 (2) to which he referred.

WHAT THE JUDGE CONSIDERED BEFORE SENTENCING THE RESPONDENT

11. In reaching his decision the judge took into account Mr Wheatley's erstwhile good character (including the absence of any criminal record) and his genuine expressions of regret and remorse.

It was accepted that whilst his plea of guilty occurred some five months after he was initially arraigned it had always been his intention to enter a guilty plea and there had been discussion with the prosecution about this. The judge accepted (and the Crown accepts) that he was entitled to the normal discount for plea. The judge accepted as a mitigating feature, but (he said) a small one, that for 14 years he had carried out his police duties without incident and presumably had gained the respect of other police officers and members of the public.

12. The judge took the view that the aggravating circumstances more than sufficiently countered the mitigating circumstances. So far as aggravating circumstances were concerned, in paragraph 23 of his decision he put the degree of Mr Wheatley's culpability as high and his degree of harm done to others as serious. This was for a number of reasons. First, he had played a leading role in an offence which was part of a group activity, on account of the involvement of brokers. Second, he had abused his position of trust, power, authority or responsibility. He had used his knowledge of the inner workings of the CLU and exploited any weaknesses in the CLU's system.

13. The judge thought that the offence was not particularly sophisticated or complex. But the use and deployment of brokers required a considerable degree of communication and coordination between them and multiple "customers".

14. Third, the offending conduct was over a sustained period of time namely from early 2016 to January 2018. (We would note that in the indictment the conspiracy alleged was between 1 July 2017 and 8 May 2018). Although Mr Wheatley started to pull tickets as a favour he eventually received payment and, in any event, 1-2 years was a significant period of time and 61 tickets a considerable sum, although the time period and the number of occasions was not as long as some of the misconduct exhibited in some of the cases to which he had been referred. As to financial gain the judge recorded that Mr Horseman accepted that the amount received may have been in the region of $ 7,500, which, compared with the sums involved in a number of the authorities cited to him, was not substantial. But the loss of the money which the Government would have received in fines was "*particularly egregious*".

15. As to harm, there was, the judge said (at paragraph [23]) a serious undermining of the proper functioning of the BPS and the justice system. The type of offence committed by Mr Wheatley had a significant impact on the integrity of the BPS and the Court. What he had done might result in difficulties for the BPS and the Courts in enforcing the law. The only saving grace was that it did not appear that any police intelligence, investigations or operations were compromised or affected by his conduct.

16. The learned judge was, in paragraph [23] of his judgment, plainly addressing himself to the Guidelines. In terms of the Guidelines he clearly regarded Mr Wheatley's culpability as High. In what category he placed the harm is somewhat less clear. On one view it was in Category 1 as being serious, since that is what he says at the beginning of paragraph [23], and the heading "*Serious undermining of the proper functioning of the BPS and the justice system"* appears in bold later in that paragraph, in which he sets out the features of the offence to which he has regard. On the other hand, it could be said to have been in Category 2 as being "*significant*" since that is how the impact of Mr Wheatley's offences is described in the sentence which immediately follows the heading.

17. Under the Guidelines, if the culpability was high and the harm was in Category 1 the starting point was 7 years and the range 5-8 years. If the culpability was high and the harm was in Category 2 the starting point was 5 years and the range 3-6 years. These are the sentences before any discount for any guilty plea. The sentence of 2.5 years would, on the assumption that a 1/3rd discount was given for a plea, amount to a sentence before discount of 3 years and 9 months.

THE SUBMISSIONS TO THIS COURT

18. The Crown submits that this was a case of high culpability and either Category 1 or Category 2 harm so that the sentence which one would expect to see after a trial should be between 5 and 7 years. In the present case, it submits, the sentence ought not to have been less than 3.5 years and should have been somewhere between 3.5 years and 5 years. This would represent a sentence before discount for plea of between just over 5 years and 7.5 years.

19. Mr Horseman for Mr Wheatley submits that the sentence cannot be categorised as manifestly inadequate for a number of reasons. The Appellant had an unblemished record in the BPS. He was extremely remorseful for committing these offences. He apologised to his police colleagues who were in Court to support him. On the date of sentencing he submitted his resignation to the Police Commissioner and his career as a police officer was over. A consequence was the loss of much of his pension. The measure of his financial gain from the offence was limited. The defendant conceded that the Court could consider $ 7,500 as the measure of the financial benefit. No one suggested that a *Newton* hearing was necessary to determine the exact amount.

20. As to the Guidelines, they are not binding in Bermuda which has its own statutory code, to which the judge referred. This requires, inter alia, that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. A sentence of between 5 and 7 years, before plea, does not, he submits, reflect the case law.

THE AUTHORITIES

21. In ***AG's Reference (No 30 of 2010) R v Bohannan*** [2010] EWCA Crim 2261 the English Court of Appeal increased a sentence to 6 years when the facts were far more serious than the present one. A police officer had assisted a drug dealer for 5-6 years by supplying sensitive and confidential information to him. This allowed him to escape detection and run his drug supply business. The officer provided him with information held on police computers, which allowed him to locate drug runners who had failed to pay, or members of their families, in order that the dealer could track down the defaulters. This placed individuals at risk of serious harm. The searches carried out by the officer were also used to identify whether individuals were informers to the police; to discover what the police knew about the dealer's associates in the drugs business; to find out who the police were searching for, and which areas they would be concentrating on, or whether a particular individual was a target of a police operation; and to alert the dealer's runners to pending search warrants. The officer conducted over 471 searches and received payment in the form of cocaine for his wife, and some cash. The officer thus allowed the extensive and lucrative network of a major player in the drugs trade to flourish. The officer denied any culpability and said that he was conducting searches in order to target the dealer. His trial lasted 6 weeks. The judge had

sentenced him to 3 years imprisonment. It is that sort of case, Mr Horseman submits, for which a sentence of 5-7 years is appropriate. The Court in that case said that the very least sentence that could properly be imposed was 6 years.

22. In ***R v Keyte*** [1998] 2 Cr App. R. (S) 165 the Court of Appeal upheld a sentence, following a seven day trial, of 2 years for misconduct in a public office by a police officer. The misconduct consisted of obtaining information from the police national computer on 192 occasions over a period of 12 months and supplying it to private investigators.

23. In ***R v Kassim*** [2005] EWCA 2020 a police officer was sentenced to 2.5 years imprisonment on 3 counts of misconduct in a public office for selling information, derived from police computers, to Saudi diplomats regarding Saudi citizens, and in particular Saudi dissidents, from which the officer made some £ 14,000. There was no evidence that anyone had in fact been harmed. The English Court of Appeal refused to interfere with a sentence of 2.5 years on a plea of guilty, which it described as "*severe*."

24. In ***R v O'Leary*** [2007] 2 Cr App R. (S) 317 a sentence of 3.5 years' imprisonment was upheld for an offence of misconduct in a public office where the offender was a serving police officer, who passed sensitive information to an intermediary, who passed the information on to criminals. No police operations were in fact prejudiced by his activity nor was the course of justice in fact perverted. The Court of Appeal held that a starting point of four years after a trial was not too high. The sentencing judge had said, in his sentencing remarks, that the fact that the officer was of good character did not amount to significant mitigation because police officers were inevitably of good character – a statement upon which the Crown places some reliance.

25. In ***R v Mungur*** [2018] 2 Cr App R (S) 33 over a period of six years a police officer sold to lawyers personal information about road traffic victims some 21,802 times and made for himself £ 363,000. The Court of Appeal reduced his sentence from 5 years (following a guilty plea) to 4 years, on the basis that the proper starting point should have been 6 years,

26. Lastly there is a Bermuda case of ***Jameekah Wilson*** [2012] Bda LR 13. This case appears to have been known about at the time of the hearing before the judge; but the report was not found until afterwards. Wilson was a civilian data entry clerk. She had withdrawn 79 parking tickets, 9 of which related to a vehicle registered to her sister. In respect of some of the tickets she received cash. She was fined in the Magistrates Court but, on appeal by the prosecution, Ground CJ increased the sentence to a total sentence of 12 months. He said that he would have increased it to 18 months had it not been for the time period between the original sentence and the hearing of the Crown's appeal.

27. The Crown points out that the defendant in that case was not a sworn police officer and so did not have the duties and responsibilities which Mr Wheatley had. It also observes that the sentence appears to have been reached without any reference to case law. The Chief Justice appears, the Crown suggests, to have focused on correcting the imposition of the financial penalties imposed in the Magistrates Court, and the importance of emphasizing as a matter of principle that only a custodial sentence would suffice, without going into any detail or analysis as to why the particular term of imprisonment was chosen. It was also decided some time ago. The Crown originally

submitted to us that the offence related to parking tickets rather than tickets for traffic offences, where the fines are generally higher and attract penalty points or disqualification. But it is apparent from the reference to the evidence at paragraph [4] of the decision that at least some of the tickets pulled related to road traffic offences. The sentence was, the Crown submits, well below what was appropriate in the present case.

DISCUSSION

28. The Guidelines are not part of Bermuda law and we do not think that the Bermuda Courts should feel constrained to adopt the approach and the step by step process laid down in them. The Guidelines are the product of much work and consultation by the Sentencing Council; but such work has not been carried out from a Bermudian perspective, and it is not self-evident that identical considerations would apply, and identical conclusions would result, if Bermuda were, itself, to appoint a Sentencing Council to construct guidelines for use in Bermuda. The Criminal Code lays down in some detail the matters to which the Courts must have regard when sentencing an offender. But it contains nothing like the specificity or the process of the Guidelines, and we do not think it appropriate to treat them as, in effect, mandatory or close thereto.

29. In saying this we do not mean that the Guidelines are without utility or assistance. They will, self-evidently, reveal the approach that an English Court is likely to take; and they contain indications of the factors which will, or may, increase or reduce the culpability of the offender, or the harm or loss that he has caused, which may well be relevant and applicable in the case of Bermudian offenders. In determining whether, in all the circumstances, any proposed sentence is appropriate the judge may wish to take into account whether, or to what extent, it would tally with the level of sentence indicated by the Guidelines and he may find it of assistance to do so. But, at the end of the day, the judge in Bermuda must reach his or her decision as to the correct level of sentence by reference to what he or she regards as appropriate having regard to the considerations which the Bermudian Legislature has laid down, even if the result differs from what the Guidelines might suggest.

30. The judge took into account, as he was plainly entitled to do, the English cases, all but one of which were cases where the decision was reached when the Guidelines were not in force: they came into force on 1 October 2014. As so often happens, none of the cases is directly in point; some features of them are shared with the present case and some are not.

31. But if one takes the cases in which 6 years was taken as the appropriate starting point before plea - ***Bohannan, Kassim*** and ***Mungur*** - their facts appear to us to be very much more serious in terms of the length of time of offending, the number of times that the offender had access to confidential information on police computers, and the financial benefit that he received. In addition, accessing confidential information on police computers and misusing it for the purposes for which it was used in those cases, appears to us to be of a different order of seriousness to pulling tickets for a traffic offence, because of the implications for national security, public safety and the protection of confidential information either of the police or members of the public.

32. Looking at the matter in the round, it does not seem to us that the sentence of 2.5 years, which reflects a sentence before discount for plea of nearly 4 years (in fact 45 months) is markedly

lenient. It is six months longer than the sentence of 2 years in ***Keyte***, which followed a seven-day trial. It is the same as the sentence in ***Kassim*** (where the offender received £ 14,000 in the early 2000s) which the Court of Appeal classified as" *severe*". And it is a year and a half longer than the sentence actually imposed (and a year longer than that which the Chief Justice said would otherwise have been appropriate) in ***Wilso*n** where, the entry clerk, although not a police officer, was performing a similar function, and only pleaded in the course of the trial.

33. We take account of the core submission of the Crown that Mr Wheatley was in a position of particular trust, in charge of the management of traffic cases; that what he did was a corrupt interference with the justice system; and that that circumstance distinguishes his case from all the others that have been cited. We do not for a moment underestimate the public importance of having trustworthy officers operating the system. At the same time the offence involved no misuse of police intelligence or information; nor did it involve use of confidential information to the detriment of others – activities which would seem to us to be of considerably graver consequence.

34. It is not clear to us whether the judge intended to apply the figures in the Guidelines and, if so, how he did so, since he did not identify an initial starting point (7 or 5 years) or the point in the category range that he took as the appropriate starting point before any discount for plea. It may be that he looked to the Guidelines for consideration of the relevant factors only, and determined, on a broad basis, that 2.5 years was the right sentence (noticeably it fell between the 1.5 years argued for by Mr Horseman and the 3.5 years + argued for by the Crown).

35. It would, however have been possible to reach a starting point of circa 4 years in terms of the Guidelines either by (a) treating the harm as in Category 2 and taking 1 year below the starting point of 5 as the sentence before discount; or (b) taking the harm as between Category 1 and Category 2 (i.e. between significant and serious) and adopting 4 years before discount, being the midpoint between the lowest figures of the category range for Categories 1 and 2 (i.e. between 3 and 5).

36. As to course (a), whether the undermining of the police and Court service was "*serious*" or "*significant*" and whether the financial gain or loss was "*substantia*l" or "*significan*t" depends on exactly what interpretation one gives to the relevant adjectives. In one sense any pulling of tickets is serious and the receipt of over (say) $5,000 (or depriving the Crown of that amount) is substantial. But, having regard to the range of activities which may undermine the public interest, and the amounts that corrupt officers may gain, it seems to us that category 1 could appropriately be reserved for offences which inflict more harm or produce more gain than occurred in this case.

37. As to course (b), taking the midpoint between the lowest figures in the two category ranges might be thought generous, particularly given the fact that at [22] the judge thought that Mr Wheatley's 14 years of service without incident was only a small mitigating feature. But he may not, when saying that, necessarily have been downplaying the good character and absence of criminal record which he had previously said he had taken into consideration. Further, in determining which starting point to adopt in any given category range the absence of previous convictions, previous good character, and remorse are, under the Guidelines, all relevant considerations. We would, also, not accept that the previous good character of a man who has been a police officer for 14 years (and whose good character in any event goes back beyond 14 years) is to be entirely disregarded

under the Guidelines because all (or at least most) police officers are of good character. Contrary to views expressed in ***O'Leary*** [8], it is plainly something to which section 55 (2) (g) (i) of the Criminal Code requires the judge to have regard. The Crown points out that Mr Wheatley's remorse took some time in expression since he did not resign until the day of the hearing. We take that point, but the judge regarded his expressions of regret and remorse as genuine. We also bear in mind that Mr Wheatley has lost not only his job but his pension (save for what may have accrued to him).

CONCLUSION

38. As we have said, we do not regard the outcome of this appeal as dependent on whether and, if so, exactly how the judge fitted (or could have fitted) his sentence into the Guidelines, which are, in any event, as Mr Richards put it, guidelines and not tram lines. Looking at the matter in the round, we take the view that it was open to the judge to take a starting point (before discount for plea) of the order of 4 years. Whilst the sentence imposed can, by reference to the Guidelines be said to be either on the low side or below that specified if the culpability and harm were both at the highest level, we do not regard it as manifestly inadequate.

39. In those circumstances we dismissed the appeal.