



In The Supreme Court of Bermuda

APPELLATE JURISDICTION 2020: 26 and 2021 :27

FIONA MILLER
(POLICE SERGEANT)

Appellant

-v-

TROY WOODS

Respondent

JUDGMENT

*Appeal against sentence in the Magistrates' Court
Whether sentence was manifestly inadequate
Obtaining Property by Deception Section 345(1) of the Criminal Code*

Date of Hearing: 01 November 2021

Date of Judgment: 23 March 2022

Appellant Ms. Shaunté Simons-Fox for the Director of Public Prosecutions

Respondent In person

JUDGMENT delivered by Shade Subair Williams J

Introduction

1. Regrettably, the delay of this judgment is attributable to an unfortunate administrative error resulting in the misplacement of this file.

2. Appeal No. 26 of 2020 is an appeal by the Crown against the sentence imposed in the Magistrates' Court. The sentence was passed after the Respondent, Mr. Woods, was tried and convicted on a single count of obtaining property by deception, contrary to section 345(1) of the Criminal Code (Information 17CR00548). Appeal No. 27 of 2021 was an appeal by the Crown against Magistrate Khamisi Tokunbo's decision to allow Mr. Woods' order or probation to remain in place. However, during the course of the appeal hearing, the Crown confirmed that it would abandon Appeal No. 27 of 2021. I, therefore, dismiss that appeal.
3. Below is an outline of my decision and reasons in respect of Appeal No. 26 of 2020.

Procedural Background

4. On 6 October 2020 the learned magistrate sentenced the Appellant to 6 months imprisonment, suspended for a 12 month period in addition to a restitution order in the sum of \$500.00.
5. By Notice of Appeal filed on 14 October 2020 the DPP, pursuant to section 4A of the Criminal Appeal Act 1952, appealed against the sentence imposed on the grounds that the impugned sentence was manifestly inadequate.
6. On 1 November 2021 the appeals were heard before me. Although the Respondent appeared in person, the Crown expressed its position that the appeal is purposely driven by the Crown's endeavour for the points of law raised to be settled by this Court. As such no measures would be taken by the Crown for the Respondent to submit to prison custody to serve any harsher sentence approved by this Court on appeal.

The Sentence Hearing and Factual Background

7. At the sentence hearing Magistrate Tokunbo was made aware that the Respondent, now 49 years of age (DOB 23 June 1971), had numerous previous convictions recorded against his name since 1985. This antecedent history included dishonesty type offences. Most recently, in 2018 the Respondent was convicted on multiple counts of obtaining property by deception and other like offences for which he received a 3 year probation sentence (18CR00446).
8. The Complainant in this case, a then 46 year old man afflicted with a learning disability, was living in the same apartment building as the Respondent. Although the two men were not personal friends, they were known to one another since 2008.
9. On the facts underlying the conviction, the Respondent dishonestly informed the Complainant that he was in possession of an audio recording which depicted the Complainant alleging to five other persons that the Respondent was the "motorcycle

bandit” responsible for the recent thefts of various motorcycles. Falsely threatening litigious action on the strength of this non-existent recording, he caused the Complainant to pay him \$500.00. The Crown’s case was also that the Respondent, since 2011, had been physically intimidating the Complainant who feared being beaten up. At a subsequent point, the Complainant reported the matter to the police.

Analysis and Decision

10. At the core of the complaint made by the Crown, the sentence imposed was not proportionate to the seriousness of the offence. Highlighting the particularly aggravating features of the case, the Crown pointed out that the Respondent preyed on a vulnerable person and in doing so, he forcibly caused the Complainant to tow him on the back of the Complainant’s motorcycle to the ATM machine in order to withdraw the cash obtained, notwithstanding his awareness of the Complainant’s personal fear of towing a pillion passenger. More so, the this offence was committed only four weeks after the Respondent was sentenced to the maximum 3 year period of probation in respect of a previous offence which also involved his targeting of another vulnerable complainant. This, the Crown contends, was all overlooked by the learned magistrate in passing a custodial term of 6 months and then suspending that sentence for 12 months.
11. In sentencing the Respondent, the Record of Appeal reflects that Magistrate Tokunbo made the following bare remarks:

“Mr. Woods has a history of dishonesty and he committed this offence while on probation. However, I understand from his Probation Officer that the Defendant has been compliant throughout the operation of the Order. For that reason I am going to allow his probation to continue undisturbed. For this current offence, I will sentence Defendant to 6 months imprisonment, suspended for 12 months with an order for restitution of \$500 via the Court...”
12. The maximum penalty for an offence of obtaining property by deception is a fine of \$10,000.00 and/or up to 5 years imprisonment. The Crown submits that the appropriate range of sentence was one of 12 to 15 months imprisonment. In support of this range, this Court’s attention was drawn to *Russell v R* [2016] Bda LR 26 where the Court of Appeal in reviewing a sentence passed in the Supreme Court considered it relevant that the offender at the time of the offence was also serving a sentence of probation.
13. Before settling on the appropriate range of sentence, I had regard to a previous decision of this jurisdiction of Court in *Maxwell Roberts v Lyndon Raynor* [2008] Bda LR 19. In that case the appellant, Mr. Roberts, was convicted after a contested trial in the Magistrates’ Court for attempting to obtain \$20,000,000.00 from a re-insurance company. The deception involved in the commission of the offence was characterised by Ground CJ on appeal as both ‘transparent’ and ‘inept’. Having lost his appeal against

conviction, Mr. Roberts was sentenced by the magistrate to 5 years imprisonment. On Mr. Robert's appeal against sentence, Ground CJ recognised that the magistrate intended for Mr. Roberts to receive the maximum sentence of imprisonment but allowed the appeal only on the basis that the maximum sentence which could be passed pursuant section 78 of the Criminal Code was one half of the maximum available to the sentencing magistrate for the completed offence. A sentence of 2½ year imprisonment was thus substituted as the maximum sentence available.

14. *R v Maxwell Roberts* was deemed by Ground CJ as an example of the most serious end of the spectrum for an offence of obtaining property by deception. In that case, the sum of money involved, although not obtained, was extraordinary. Also, Mr. Roberts had a long history of dishonesty offences and had been released from prison almost immediately before committing the inchoate offence.
15. Arguably, an offender who targets a vulnerable person by fusing intimidation into the deception commits an equally serious, if not more serious, offence than an offender who targets a resourceful and protected corporate entity in a hopeless attempt to secure an inordinate sum of money. However, supposing that Mr. Roberts had been successful in obtaining \$20,000,000.00 from the reinsurance company, this would have undoubtedly had long lasting and far-reaching effects on many victims, directly and indirectly affected. So, I make no criticism of the Ground CJ's view that *R v Maxwell Roberts* qualified for the maximum sentence available.
16. In the present case Mr. Woods preyed on a vulnerable victim using an approach clearly intended to intimidate the victim. Having done so, he secured the sum of \$500.00 from him, a sum which was likely to be of real value to the Complainant. I agree with the prosecution that a sentence of 6 months imprisonment was inadequately low. In my judgment, the appropriate range of sentence is, as was put by the Crown, 12-18 months imprisonment. Mr. Woods did not have the benefit of mitigation such as a guilty plea although he expressed his remorse to the Court and was made to pay restitution to the Complainant. It is, of course, relevant that he appeared before the Court as a habitual offender who was serving a maximum probation sentence at the time he committed the offence. Given all of these factors, I deem it proper to substitute his 6 month prison sentence for a term of 15 months.
17. Citing the Court of Appeal's decision in *The Queen v Garth Bell* [2016] Bda LR 104, the Crown correctly submitted that the test for suspending a term of imprisonment pursuant to section 70K of the Criminal Code is one which requires 'good reason' to do so. The 'good reason' test was followed by this Court in my earlier decisions in *Natasha York v Fiona Miller* [2020] Bda LR 60 and *Mandaya Thomas v Fiona Miller* [2020] Bda LR 1.
18. Regrettably, Magistrate Tokunbo did not offer any reasons for having suspended the prison sentence imposed. Indeed I can see no good reason for a suspension of sentence in this case. The fact of the Appellant's favourable probation review, putting aside the

commission of this offence, does not, on the facts before this Court, constitute a ‘good reason’ for a suspended sentence. For that reason, I accept the position put forth by the Crown that the sentence of imprisonment should have been an immediate term.

Conclusion

19. For all of the reasons stated herein, I allow the appeal.
20. The 6 month term of imprisonment which was suspended for a term of 12 months is substituted for a sentence of 15 months imprisonment. The restitution order in the sum of \$500.0 shall remain in place.
21. Had Mr. Woods been sentenced to 15 months imprisonment when he was sentenced in the Magistrates’ Court on 6 October 2020, he would have by now completed his service of that prison term. Given the delay in the prosecution of this appeal, which no doubt was most largely caused by the outbreak of the COVID-19 pandemic and the delay in the production of this judgment, which was attributable to an administrative error of the Registry, I consider that it would be unfair to direct Mr. Woods to now submit himself to prison custody. I, therefore, direct that the Appellant shall not be made to serve the substituted sentence of imprisonment.

Dated this 23rd day of March 2022

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE