In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2021: 32

LAMONT MARSHALL

Appellant

-v-

FIONA MILLER
(POLICE SERGEANT)

Respondent

JUDGMENT

Appeal against Sentence in the Magistrates' Court- Road Traffic Offences- Driving Whilst Impaired – Driving Whilst Disqualified – Repeat Offender – R v Goodyear Legal Principles

Date of Hearing:	13 April 2022
Date of Judgment:	12 May 2022
Appellant	Ms. Victoria Greening (Resolution Chambers)
Respondent	Ms. Maria Sofianos for the DPP

JUDGMENT delivered by Shade Subair Williams J

Introduction

1. This is Mr. Lamont Marshall's appeal against a sentence which was passed on him by the Senior Magistrate, Mr. Juan Wolffe, (as he then was) in respect of offences of driving

whilst disqualified, contrary to section 123(1)(a) of the Motorcar Act 1951 (Count 1) and driving whilst impaired, contrary to section 35AA of the Road Traffic Act 1947 (Count 2) on Information 21TR00914.

2. Having pleaded guilty on 8 April 2021 to Counts 1 and 2 before Magistrate Maxanne Anderson, the matter was deferred with the consent of Mr. Marshall who was voluntarily placed into a treatment Court programme ("the DUI Court") in lieu of being sentenced. On 31 August 2021, however, it was reported to the Senior Magistrate that Mr. Marshall had been non-compliant with the terms of the DUI Court insofar as he had been consuming alcoholic beverages while at the Ocean View Golf Course. When tasked to address this breach, Mr. Marshall communicated to the Senior Magistrate that he wanted to be released from the treatment Court. This led to a controversial exchange between the Appellant and the Senior Magistrate, who at that time was presiding over the DUI Court. The Appellant's Counsel, Ms. Greening, characterised some of the remarks made by the Senior Magistrate during that exchange as 'non-judicious' and she complained that the Senior Magistrate wrongly led the Appellant to believing that he would be liable to a $5000.00 fine as a maximum penalty if he opted to be sentenced in lieu of completing the treatment programme.

3. Instead, on 13 September 2021 the Senior Magistrate, now sitting in the ordinary traffic and criminal jurisdiction of the Magistrates' Court, sentenced the Appellant to six months imprisonment on both counts (to run concurrently) and on both counts disqualified the Appellant from driving all vehicles for 5 years. Additionally, the Senior Magistrate imposed a $5,000 fine on Count 2 to be paid within 3 months of the Defendant's release from custody.

4. Against that background, the Appellant complained that his sentence was unfair, wrong in principle and manifestly excessive.

5. Having heard Counsel for both sides on their oral and written submissions, I reserved judgment which I now provide with my reasons.

The Grounds of Appeal

6. At the outset of the hearing, Ms. Greening informed this Court that she would be relying on Grounds 1 and 3 of the Notice of Appeal filed on 15 September 2022. However, during the course of her oral submissions she argued Grounds 1, 2 and 3, which provided:

    1. The sentence was manifestly excessive

2. *The sentence was contrary to law;*

3. *The Learned Judge failed in his duty when he misled the self-represented Defendant in respect of his sentence.*

The Verbal Exchange between the Senior Magistrate and the Appellant in the DUI Court on 31 August 2021

7. According to an agreed transcript produced by Counsel, the following exchange took place between the Senior Magistrate and the Appellant in DUI Court on 31 August 2021:

Senior Magistrate Juan Wolffe	*So we got to talk because you're not helping yourself and let me just say this here, the people who tell me are not saying about you in global terms. They're basically saying in terms of, excuse my language, "That guy's an ass." So it's not even like Marshall's smart man, that guy is bright. He's in DUI Court and he's schooling those people, he's the man. Nah, it's not in those terms. It's in terms of, "That guy's an ass. He's already got multiple offences and he's still doing shit." Excuse my language but those are the words. I'm trying to get to the bottom of it…*
Lamont Marshall	*I apologize for my actions. I would concur with most of what you said. I definitely I knew in terms of passing my urine test and things like that and my biggest thing mostly was even though I was drinking, I wasn't driving and that was the biggest issue for me. I didn't really that the programme was the best for me after being in it but I guess I never really spoke to it or bought those issues up. I just, like you said, went through the motions.*
Senior Magistrate Juan Wolffe	*So we can make a decision today, because we can issue all of that today and have you rid yourself of us and say Merry Christmas. You'll be off the road probably for five years. This your third offence. What you want to do?*
Lamont Marshall	*Yeah I think I'll do that.*
Senior Magistrate Juan Wolffe	*Okay…three convictions*
The Crown… [Pupil Barrister]	*Yes Your Worship, to confirm what you just said the defendant does have previous offences. There was an offence that he was sentenced for in 2018 and then there was one in 2019,2020, my*

	apologies, and that resulted in the grievous bodily harm to the complainant involved so this would be his second offence Your Worship
Senior Magistrate Juan Wolffe	*You sure his second offence, I think it may be his third?*
The Crown… [Pupil Barrister]	*The first one was 2018, over two years ago*
Senior Magistrate Juan Wolffe	*For the committed offenders within those two years*
The Crown… [Pupil Barrister]	*I'm guided Your Worship*
Senior Magistrate Juan Wolffe	*What was before that though?*
The Crown… [Pupil Barrister]	*So, according to his history you've got the 2018 which was the impaired and refusal, you've got the 2020 which again was the GBH by DUI and then for 2021 he has the impaired driving and refusal*
Senior Magistrate Juan Wolffe	*So 2018, 2020*
The Crown… [Pupil Barrister]	*…and then this one. Yes, Your Worship*
Senior Magistrate Juan Wolffe	*Miss Mills you want to…*
Ms. Mills - DCFS	*…I don't have any more to add, Mr. Burgess is Mr. Marshall's primary caseworker [inaudible…]*
Lamont Marshall	*I don't want waste your time anymore.*
Senior Magistrate Juan Wolffe	*You're not wasting my time, you're ain't wasting my time at all. It's your decision not mine. Seems to me that you're taking the easy way out, you just want to drink. That's the problem there and you would rather be off the road for five years, with a $5000 fine. That's alright. You still want to think about it?*

Lamont Marshall	*…no I won't do it now. I mean not with that severity…I'll stay in the programme then.*
Senior Magistrate Juan Wolffe	*It's up to, what was expected to say [inaudible] Mr. Burgess…*
Ms. Mills - DCFS	*[inaudible] another concern is that he was he was discharged from Turning Point…[inaudible] it's quite evident that he would benefit from treatment*
Senior Magistrate Juan Wolffe	*Benefits a lot of people…so this is what we need to do, if you want to maintain your position next week, [inaudible] what you need to do what you need to find out…[inaudible] If you remain in the programme [inaudible]…you understand?*
Lamont Marshall	*Yes sir*
Senior Magistrate Juan Wolffe	*We are going to mention this case then on the 7th of September 2021 at 3:30pm in respect of whether the defendant wishes to remain in programme and or sanction. Thank you.*

The Appellant's Decision to proceed to Sentence and the Sentence Hearing

8. On 7 September 202 the Appellant returned to DUI Court. On this occasion he appeared before Magistrate Tyrone Chin. Mr. Marshall informed Mr. Chin that he no longer wished to participate in the treatment Court programme. The Appellant was therefore removed from the programme and bailed to reappear before the Senior Magistrate on 13 September 2021.

9. On 13 September 2021 the Appellant was sentenced. The Record of Appeal reflects that the Senior Magistrate made the following remarks to the Appellant before handing down the sentence imposed:

"*I have heard all that has been said by the Prosecution and the Defendant. The only mitigating feature of this case is that the Defendant plead guilty. The Defendant's history of committing like offences is simply horrendous. Since 2009 he has committed 5 offences of DUI and the most recent offence occurred whilst he was disqualified from driving vehicles for DUI. The Defendant has also served time in prison for like offences, and he was given the opportunity to address his DUI behaviour by being referred to DUI Court. Not only did the Defendant continue to drink whilst in DUI Court, but he chose not to participate in the program. No doubt because he wants to continue to drink.*

Over the past years, the Defendant has placed members of the community in jeopardy and has caused injury to members of the public. There is no indication whatsoever that he will not continue to do so. In the circumstances, having taken into consideration section 53 to 55 of the Criminal Code a term of imprisonment is warranted in this case. Further, I see no good reason why such term of imprisonment should be suspended. I therefore sentence the Defendant as follows…"

The Relevant Legislation

10. Section 123(1) of the Motor Car Act applies to the offence of driving whilst disqualified. It states as follows:

Offences of driving motor car while disqualified for obtaining drivers' licence

123 (1) Notwithstanding anything in the foregoing provisions of this Act any person who—

(a) while he is disqualified under any Act for obtaining a driver's licence, or as the case may be, a driver's licence valid for the driving of any particular class of motor car; or

(b) while his driver's licence is suspended under any Act, or, as the case may be, is suspended to the extent of its validity for the driving of any particular class of motor car,

drives a motor car or, where the disqualification or suspension is in respect of a motor car of a particular class, then a motor car of that class, commits an offence against this Act.

11. The offence of driving whilst impaired is created under section 35AA of the Road Traffic Act 1947 (RTA) which provides:

Driving when under the influence of alcohol or drugs

35AA Any person who drives, or attempts to drive, or has care and control of a vehicle on a road or other public place, whether it is in motion or not, when his ability to drive is impaired by alcohol or a drug, commits an offence.

12. The sentencing provisions for these offences are contained in the Traffic Offences (Penalties) Act 1976 ("the 1976 Act"). Section 2 outlines the structure of the sentence provisions under the 1976 Act:

2 (1) Schedule 1 shall have effect with respect to the prosecution and punishment of traffic offences.

(2) In relation to any traffic offence-

(a) head 3 of the Schedule indicates the general nature of the offence;

(b) head 4 of the Schedule shows whether the offence is punishable on summary conviction or on indictment or either in one way or the other;

(c) head 5 of the Schedule shows the maximum punishment by way of fine or imprisonment which may be imposed on a person convicted of the offence in the way specified in relation thereto in head 4, any reference in head 5 to a period of months or years being construed as a reference to a term of imprisonment of that duration;

(d) head 6 of the Schedule shows the type and length of disqualification in relation to which offences the court is required or empowered to order the person convicted to be disqualified from holding or obtaining a driver's licence, any reference in head 6 to obligatory disqualification importing such a requirement and any reference therein to discretionary disqualification importing such a power;

(e) head 7 of the Schedule shows the demerit points to be recorded under section 4A in respect of a person convicted of the offence.

(3) Where in head 5 of Schedule 1 different penalties are specified for second, third or subsequent offences against the same section committed within two years of the date of conviction of a first offence, only offences committed-

(a) within the two years immediately preceding the coming into operation of this Act; or
(b) after the coming into operation of this Act,

shall be taken into account for the purpose of determining whether the offence in question is to be treated as a first, second, third or subsequent offence, as the case may be, and any offence committed at an interval of more than 2 years after the date of conviction of a previous offence shall for such purposes be treated as a first offence:

Provided that nothing in this subsection shall be construed to derogate from any rule of law under which evidence of previous convictions may be given to a court.

[Section 2 amended by 1993:30 effective 29 June 1993; subsection (2)(e) inserted by 2005:44 s.3 effective 1 November 2007]."

13. Ms Greening emphasised in her submissions that subsection (3) envisages that the timeframe for calculating "*second, third or subsequent offences against the same section*" within two years runs from "*the date of conviction of a first offence*" contrary to that same section.

14. In *Laurin Davis v Fiona Miller (Police Sergeant)* [2020] Bda LR 59 [para 16] I observed that the statutory term "reckonable offence" is employed as a reference to a relevant previous conviction only for the purpose of determining a disqualification period. Section 2(3) of the 1976 Act governs the rule on previous convictions for the purpose of imposing a fine or a period of imprisonment. Section 3 provides:

3 (1) In this section "reckonable offence" means an offence against a provision of law specified in heads 1 and 2 of Schedule 2 of a description specified in head 3 of Schedule 2.

(2) Where-

(a) a person is charged with a reckonable offence; and

(b) he has within the two years preceding the date of commission of such offence been convicted of a previous reckonable offence, such previous conviction shall, for the purpose only of determining the period of disqualification…be deemed to be a previous conviction…

Provided that in each group of Schedule 2 the offences therein specified shall be reckonable inter se, the offences specified in group 1 shall be reckonable with the offences specified in group 2 but not conversely.

15. The offence of driving whilst disqualified is a reckonable offence as it appears under group 1 of Schedule 2. However, the offence of driving whilst impaired, contrary to section 35AA of the RTA is not listed under Schedule 2 as a reckonable offence.

16. The descriptive terms 'obligatory' and 'discretionary' for the purposes of imposing a disqualification period are explained under section 4 of the 1976 Act:

Disqualification; obligatory and discretionary

4 (1) Where a person is convicted of a traffic offence in relation which there appears in head 6 of Schedule 1-

> *(a) the word "obligatory", the court shall order him to be disqualified for such period as is specified in that head as the period of obligatory disqualification in relation to that offence unless the court for special reasons thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified;*
>
> *(b) the word "discretionary", the court may order him to be disqualified for such period as the court thinks fit, not exceeding the period specified in that head as the period of discretionary disqualification in relation to that offence;*
>
> *(c) both the word "obligatory" and the word "discretionary", the court shall, subject to paragraph (a), order him to be disqualified for the period of obligatory disqualification and may, subject to paragraph (b), order him to be disqualified for a further period, the aggregate of such periods not exceeding the period of discretionary disqualification.*

(2) Where a person is convicted of a traffic offence, other than an impaired driving traffic offence and the court orders him to be disqualified, the court may order him to be disqualified for driving the class of motor vehicle in respect of the use of which the offence is committed or may order him to be disqualified until he has, since the date of the order, passed the test of competence to drive prescribed under the Motor Car Act 1951.

(2A) Where a person is convicted of an impaired driving traffic offence and the court orders him to be disqualified, the court shall order him to be disqualified for driving all motor vehicles, including auxiliary bicycles and may, in addition to any other order under this section, order him to be disqualified until he has, since the date of the order, passed the test of competence to drive prescribed under the Motor Car Act 1951.

(3) A disqualification ordered by the court under this section may be in addition to, or in lieu of, any other punishment imposed by the court in respect of the offence.

17. Under Schedule 1 of the 1976 Act (Prosecution and Punishment of Offences), the Head 5 (fine or imprisonment) and Head 6 (disqualification) sentence provisions applicable to **driving whilst impaired**, contrary to section 35AA of the RTA are as follows:

    Fine or Imprisonment
    Head 5: if first offence - $1,500 or 12 months, or both
    if second offence - $2,500 or 18 months, or both
    if third or subsequent offence - $5,000 or 2 years, or both

    Disqualification
    Head 6: if first offence - obligatory - 18 months
    if second offence - obligatory - 3 years
    if third or subsequent offence - obligatory - 5 years

18. The Head 5 and Head 6 sentence provisions applicable to **driving whilst disqualified**, contrary to section 123(1)(a) of the Motorcar Act 1951 are as follows:

    Fine or Imprisonment
    Head 5: if first offence - $1,000 or 3 months
    if second offence committed within 2 years of the date of conviction of first offence $1,000 or 6 months
    if second offence in any other case $1,000 or 3 months
    if third or subsequent offence committed within 2 years of the date of conviction of first offence $1,000 or 12 months
    if third offence in any other case $1,000 or 3 months

    Disqualification
    Head 6: if first offence - discretionary – 3 years
    if second offence committed within 2 years of the date of conviction of first offence; discretionary 5 years
    if second offence in any other case; discretionary – 3 years
    if third or subsequent offence committed within 2 years of the date of conviction of first offence; discretionary 5 years
    if third offence in any other case; discretionary 3 years

Analysis and Decision
Grounds 1 and 2 (Manifestly Excessive and Contrary to Law)

19. The Crown relied on the Appellant's record of previous traffic offences in defending this appeal. Ms. Sofianos highlighted that on 4 June 2009 a conviction was entered against the Appellant in respect of the offence of driving while in excess alcohol. On 20 August 2009 the Appellant was convicted for driving whilst disqualified and on 14 August 2015 he was convicted for driving whilst impaired. His final previous conviction occurred on 12 June 2020 in respect of the offence of refusing to provide a breath sample to a police officer for analysis.

Findings on Count #1 Driving whilst Disqualified

Finding on Maximum Term of Imprisonment

20. Starting with the Count 1 (driving whilst disqualified), the Senior Magistrate sentenced the Appellant to 6 months imprisonment and disqualified him for 5 years. For the purpose of the sentence of imprisonment under Head 5, the sentence must be consistent with the approach provided for by section 2(3) of the 1976 Act because the offence was committed during the operational period of the 1976 Act and different penalties are specified for the second, third and subsequent offences against the same section for offences committed within 2 years of the date of conviction. Section 2(3) further provides that "… *any offence committed at an interval of more than 2 years after the date of conviction of a previous offence shall for such purposes be treated as a first offence.*"

21. The relevant date of conviction in this case is 8 April 2021. This was not the Appellant's first offence. On 20 August 2009 the Appellant was convicted for driving whilst disqualified. That is not within a 2 year period of the first offence, so it falls to the maximum penalty classification of a "*second offence in any other case $1,000 or 3 months"*. Thus the highest sentence of imprisonment which could have been lawfully imposed by the Senior Magistrate was 3 months imprisonment.

Finding on Maximum Term of Disqualification

22. A term of disqualification can only be imposed under Head 6 and in accordance with section 3 on "reckonable offences". Section 3 defines reckonable offences as offences which are listed under Schedule 2 of the 1976 Act.

23. I have noted that the Appellant has previous convictions for driving while in excess alcohol, driving whilst disqualified, driving whilst impaired and refusing to provide a breath sample to a police officer for analysis. Save one exception, namely driving whilst impaired, these offence all appear under Schedule 2 and are therefore clearly reckonable offences.

24. The absence of the offence of driving under the influence/whilst impaired under section 35AA from Schedule 2 is an obvious drafting error in the legislation. This is readily apparent from the erroneous reference to "section 35(1)" in the below statement of offence under Schedule 2:

"*Head 1: Road Traffic Act 1947 Head 2:* ***section 35(1)*** [my emphasis] *Head 3: Driving or attempting to drive a motor car or auxiliary bicycle while under the influence of alcohol or drug*[s]"

25. Section 35 of the RTA was repealed by the Road Traffic Amendment Act 2012 ("the 2012 Amendment Act"). Under the 2012 Amendment Act section 35 was replaced by the offence of "causing death, or grievous bodily harm, when driving under the influence of alcohol or drugs". Further, the RTA was amended by the 2012 Amendment Act to insert section 35AA (Driving when under the influence of alcohol or drugs) after section 35.

26. By assigning a section "35(1)" to the description of "*driving or attempting to drive a motor car or auxiliary bicycle while under the influence of alcohol or drug*" the draftsman inadvertently obscured Parliament's intention for section 35AA (driving or attempting to drive, or having care or control of a vehicle…when the offender's ability to drive is impaired by alcohol or drugs) to be included under Schedule 2.

27. This gives rise to the need for the Court to arrive at corrected version by applying a constrained construction of this part of Schedule 2. (See Introduction to Part VII on Bennion on Statutory Interpretation and (Sixth Edition)). Comment on Code S 157:

"*Using the term 'literal meaning' as comprehensively defined in Code s 156, this section of the Code can be summed up by saying that a strained meaning of an enactment is any meaning other than its literal meaning…*

> *'When the purpose of an enactment is clear, it is often legitimate because it is necessary, to put a strained interpretation upon some words which have been inadvertently used…* [citing *Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd* [1938] Ch 174, per MacKinnon LJ at 201]'"

28. In my judgment, it is plainly the case the Parliament intended section 35AA to be included under Schedule 2 as a reckonable offence. This drafting error is made even more visible by the fact that other similar road traffic offences involving impairment of alcohol or a drug are listed under Schedule 2. For that reason, I am bound to construe: "*Head 1: Road Traffic Act 1947 Head 2: section 35(1) Head 3: Driving or attempting to drive a motor car or*

auxiliary bicycle while under the influence of alcohol or drug[s]" as meaning section 35AA in order to arrive at the "corrected version" of Parliament's true intention.

29. So, now taking into consideration the Appellant's previous convictions for driving while in excess alcohol, driving whilst disqualified, driving whilst impaired and refusing to provide a breath sample to a police officer for analysis, I find that he was liable to be penalised under Head 6 "*if third offence in any other case; discretionary 3 years*".

30. So, the longest period of disqualification which could have been lawfully imposed by the Senior Magistrate was for 3 years.

Analysis on Count #2 Driving whilst Impaired

Finding on Maximum Term of Imprisonment and Maximum Fine

31. The Senior Magistrate sentenced the Appellant to 6 months imprisonment and sentenced him to $5,000 in respect of Count 2. As outlined under my reasoning in respect of Count 1, section 2(3) of the 1976 Act applies where different penalties are specified for the second, third and subsequent offences against the *same section* for offences committed within 2 years of the date of conviction. So, notwithstanding the Appellant's previous convictions for similar offences such as refusal to provide a breath sample or his driving in excess of 80 milligrammes of alcohol in 100 millilitres of blood, section 2(3) requires the Court to only look at previous offences against the same section when imposing a penalty of imprisonment or a fine. This differs from how the system of reckonable offences operate.

32. Ms. Sofianos pointed out the harmful effect of allowing section 2(3) to be construed on its plain and literal wording. In doing so, she referred to the well-known and longstanding practice of the prosecution to accept an offender's guilty plea to any one of the following offences which may jointly appear on an Information:

    (i) driving whilst impaired (s. 35AA)
    (ii) driving in excess of 80 milligrammes of alcohol in 100 millilitres of blood (s. 35A) and
    (iii) failure or refusal to provide a breath sample for analysis (s.35C(7)).

33. As this Court is aware, the Crown ordinarily will charge an accused person with two of the above offences (typically (i)+(ii) or (i)+(iii)). In such a case, where the accused person pleads guilty to one of the two offences charged, the Crown would offer no evidence on the other count, without any real analysis as to which Count was elected for guilty plea by the offender.

34. This policy or practice by the Crown, however, cannot be the impetus for the Court's approach to interpreting the statute. There must be a strong basis on which this Court can reasonably conclude that Parliament intended for these three offences to be treated, for the purpose of section 2(3), as belonging to the "same section". That said, it was perhaps open to the Crown to argue that all of the maximum penalties for these three offences are identical between each other, in respect of fines, imprisonment, disqualification and demerit points. However, this parity of penalty maximums is not unique between these three offences as there are other similar offences which carry the same penalties e.g. s. 35B(1): driving a motor car …under the influence of a dangerous drug and s. 35BE(2): failing to comply with a demand for a preliminary test. (There are further like examples which qualify in addition to not-so-similar offences such as dangerous driving contrary to section 36.) So, in my judgment, the fact that the maximum penalties are the same would not justify a straining of the interpretation of section 2(3).

35. In the end, I have found no sufficient ground for giving section 2(3) anything other than its plain and literal meaning. So, in accordance with section 2(3) and noting that (i) the Appellant was previously convicted under section 35AA on 14 August 2015 and (ii) his present conviction under section 35AA occurred on 8 April 2021, I find that the Court was obliged to treat the Appellant as a first offender under Head 5 when imposing a term of imprisonment and a fine.

36. Thus the maximum fine which could have lawfully been imposed under Count 2 for driving whilst impaired was $1,500 and the maximum term of imprisonment was 12 months.

Analysis and Decision

Ground 3 (Misleading Indication on Sentence)

37. Ms. Greening submitted that the Senior Magistrate addressed the Appellant inappropriately and argued that his misleading indication on the Appellant's sentence liability coupled with his imposition of a sentence which was inconsistent with that indication amounted to an unfairness and an abuse of process. She contended that the sentence should be either quashed or varied to match the sentence indication given.

38. Ms. Greening further argued that the legal principles settled by the English Court of Appeal in *R v Goodyear [2005]* 3 ALL ER applied to the Senior Magistrate's remarks and that he was barred from imposing a sentence which was more severe than the indication he had given.

39. Ms. Sofianos, however, discouraged this Court from attaching any real significance to the verbal statements of the Senior Magistrate made in a treatment Court. She explained that the formality which is part and parcel of ordinary Court proceedings is not always featured in treatment Courts. On that basis, she defended the Senior Magistrate's manner of parlance and disagreed with Ms. Greening's complaint that he spoke inappropriately. Ms. Sofianos also sought to distinguish this case from the kinds of issues to which *R v Goodyear* governed.

40. In *R v Goodyear* the judge had a meeting in chambers with the prosecutor together with Counsel for the appellant, Mr. Goodyear, and Counsel for two other co-defendants. There, Mr. Goodyear's lawyer, having addressed various background matters, had the following exchange with the judge [pages 122-123]:

> Mr. Goodyear's Counsel: *Mr. Goodyear is very eager not to have a trial, and is very eager to avoid, if it were possible, the possibility of a custodial sentence, and on my behalf I wonder whether your Honour would be in a position to given any indication?*
>
> Judge: *Well, certainly not at this stage, because I haven't considered the question of sentence at this point and in any event I don't think I would be in a position to given an indication. I am sorry for that.*

41. The judge then had an exchange with Counsel for one of the co-accused, Mr. Daniels:

> Mr. Daniel's Counsel: *I will make submissions … that the custody threshold would not be passed, and I simply wondered whether your Honour is in a position to assist in that regard, both I anticipate on behalf of myself and my learned friend …* [counsel for another co-accused, Green].
>
> Judge: *… as things stand and on the prosecution case at it is put, it seems to me that I cannot assist, although I can obviously say that your client's good character would stand him in good stead, and a guilty plea would stand him in good stead. But it does seem to me at the moment the issue as to the value of the benefits is significant.*

42. At some point thereafter, the Crown Counsel clarified a factual element of its case in relation to the issue of whether the defendants had secured additional work for themselves in exchange for the benefits corruptly provided to one of the co-defendants, Mr. Stones.

Upon the prosecutor stating how he would have put this point in an opening speech to the jury, the judge told Counsel for Mr. Goodyear; "*Yes, in those circumstances I can revise what I said earlier. I do take the view, by contradistinction to the case of Mr Stones, who was a public servant and may be in a rather different position, but I do take the view that this is not a custody case*."

43. Counsel then returned to the Court and Mr. Goodyear and his co-defendants were re-arraigned and sentence reports were ordered. The sentence report for Mr. Goodyear concluded that neither a custodial sentence nor a community rehabilitation order would be appropriate and a financial penalty was recommended. However, the judge at this point voiced that he was considering a suspended sentence for Mr. Goodyear and the others. Counsel for the appellant, Mr. Goodyear, submitted that it would be wrong in principle for a suspended sentence to be imposed. However, the Appellant was sentenced to six months' imprisonment suspended for two years in addition to a fine. In the judge's sentencing remarks he is reported to have said [para 28]:

"*… that this is a case in which a prison sentence is justified. I indicated on an earlier occasion that I did not think that this was a custody case. I hoped that that was not misunderstood. I certainly did not intend to indicate that this was a case where the custody threshold had not been crossed. I was intending to indicate, for the benefit of the defendants, that they need not worry about having to serve an immediate prison sentence. I take the view that this is a case in which there are, however, exceptional circumstances, where the prison sentence which I have to pass can be suspended*."

44. The sentence was therefore appealed on the basis, *inter alia*, that the judge did not abide by his indication to Counsel and therefore passed sentence which was wrong in principle. In reconsidering the position in ***R v Turner*** which once upon a time imposed a stricter rule against a judge giving an early indication on sentence, Lord Woolf CJ, delivering the judgment of the English Court of Appeal, outlined the statutory developments which since which and to some extent relaxed the ***R v Turner*** rule. Woolf CJ then went on to provide a detailed narrative on the responsibilities of the judge, the Defence and the Crown in cases where a sentence indication is being contemplated.

45. Distinguishing between a sentence indication given in answer to a defendant who has deliberately chosen to seek it from the judge on the one hand and an unsolicited indication from the judge on the other, Woolf CJ warned about the dangers of improper pressure on an accused to plead guilty, particularly in respect of the latter, stating [paras 55-56], [63-64] and [68]:

"*[55] The judge should not give an advance indication of sentence unless one has been sought by the defendant.*

[56] He remains entitled, if he sees fit, to exercise the power recognised in R v Turner to indicate, that the sentence, or type of sentence, on the defendant would be the same, whether the case proceeded as a plea of guilty or went to trial, with a resulting conviction. Nowadays, given the guidance published by the Sentencing Guidelines Council on the credit to be given for a guilty plea, this would be unusual. He is also entitled in an appropriate case to remind the defence advocate that the defendant is entitled to seek an advance indication of sentence.

…

…

[63] Subject to the judge's power to give an appropriate reminder to the advocate for the defendant (see [56], above) the process of seeking a sentence indication should normally be started by the defendant.

[64] Whether or not the judge has given an appropriate reminder, the defendant's advocate should not seek an indication without written authority, signed by his client, that he, the client wishes to seek an indication.

…

[68] In the unusual event that the defendant is unrepresented, he would be entitled to seek a sentence indication of his own initiative. There would be difficulties in either the judge or prosecuting counsel taking any initiative, and informing an unrepresented defendant of this right. That might too readily be interpreted as or subsequently argued to have been improper pressure. "

46. Turning to the responsibility of a prosecutor where a sentence indication has been proposed, the English Court of Appeal in *R v Goodyear* said that a prosecutor should ensure that a judge is first aware of the fullness of the relevant sentencing factors such as the facts, the impact on any victim and the previous convictions of the defendant. In the judgment of the Court, Lord Woolf stated [70(c)]:

"*If the process has been properly followed, it should not normally be necessary for counsel for the prosecution, before the judge gives any indication, to do more than, first, draw the judge's attention to any minimum or mandatory statutory sentencing requirements, and where he would be expected to offer the judge assistance with relevant guideline cases, or the views of the Sentencing Guidelines Council, to invite the judge to allow him to do so, and second, where it applies, to remind the judge that the position of the Attorney General to refer any eventual sentencing decision as unduly lenient is not affected.*"

47. Of particular relevance to this case, the Court of Appeal spoke about the binding impact of a sentence indication given by a judge and held that the judge should have sentenced Mr. Goodyear in accordance with his earlier indication [61] and [79]:

"[61] Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case. In principle, the judge who has given an indication should, where possible, deal with the case immediately, and if that is not possible, any subsequent hearings should be listed before him. This cannot always apply. We recognise that a new judge has his own sentencing responsibilities, but judicial comity as well as the expectation aroused in a defendant that he will not receive a sentence in excess of whatever the first judge indicated, requires that a later sentencing judge should not exceed the earlier indication. If, after a reasonable opportunity to consider his position in the light of the indication, the defendant does not plead guilty, the indication will cease to have effect. In straightforward cases, once an indication has been sought and given, we do not anticipate an adjournment for the plea to be taken on another day…"

…

THE DECISION IN THIS CASE

[79] In our judgment the judge should have abided by the sentencing indication he gave on 19 April. This was one of those rare cases in which a non-custodial sentence for an offence of corruption may have been appropriate… … …"

48. In the present case, a guilty plea and conviction had already been entered against the Appellant prior to the day on which the Senior Magistrate made his remarks and early indication on sentence. However, it is undeniable that the Appellant's decision whether or not to quit the DUI Court was largely influenced by the Senior Magistrates' suggestion that he would be facing a five year disqualification period and a $5000 fine. In my judgment, it was reasonable and even inevitable that the Appellant would rely on the Senior Magistrate's sentence indication as an accurate description of the maximum penalty he would likely face if he were to leave the treatment Court programme. More so, it is clear that he did rely on that indication in confirming his decision that he would face a full sentence over remaining in DUI Court. For that reason, it was indeed unfair and wrong in principle for the Appellant to be sentenced more severely than the earlier indication given directly to him from the Bench.

49. The circumstances of this case, as I see it, are sufficiently caught by the *R v Goodyear* rule insofar as the Senior Magistrate should have considered himself bound by his earlier statements. I therefore find that the Appellant ought not to have been sentenced more severely than the indication gratuitously given by the Senior Magistrate. While I accept that the treatment Courts may operate less formally than the ordinary sessions of Court, I

must emphasise that magistrates sitting in the treatment Courts continue to exercise a judicial function and are no less bound by their judicial obligations nor removed of their judicial standing.

Conclusion

50. The appeal is allowed.

51. The sentence of 6 months imprisonment is hereby quashed.

52. The period of disqualification shall be reduced from a 5 year term to one of 3 years.

53. The fine $5,000 is hereby quashed and substituted for a fine of $1,500.

Dated this 12th day of May 2022

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE