



In The Supreme Court of Bermuda

APPELLATE JURISDICTION 2021: 15

JAMEL SIMONS

Appellant

-v-

FIONA MILLER
(POLICE SERGEANT)

Respondent

REASONS FOR ORDER OF REMAND FOLLOWING THE DISMISSAL OF APPEAL AGAINST CONVICTION AND PENDING SENTENCE IN THE MAGISTRATES' COURT

*Upon Dismissal of Appeal against conviction in the Magistrates' Court
Sexual Assault on a Person under the Age of 16 years –
Section 329E of the Criminal Code*

Date of Request for Reasons: 21 February 2022¹

Date of Judgment: 02 March 2022

Appellant Mr. Paul Wilson (Westwater Hill & Co.)

Respondent Ms. Karen King for the Director of Public Prosecutions

REASONS delivered by Shade Subair Williams J

¹ Date of written request cites date 21 February 2021 in apparent error. The written request for reasons was filed in the Supreme Court on 21 February 2022 and first placed before me on 1 March 2022.

Introduction

1. By a written judgment dated 18 January 2022 I dismissed the Appellant’s appeal against conviction entered by Magistrate Mr. Khamisi Tokunbo on Information 19CR00392 to a charge of sexual assault, contrary to section 323 of the Criminal Code. The underlying facts on which the conviction was based and upheld are set out in full in my January 2022 judgment. In short, in April 2002 Mr. Simons, then 19 years of age, used physical force against the Complainant in order to have sexual intercourse with her at the age of 15 years.
2. Counsel informally² appeared before this Court on 18 January 2022 at the hearing during which judgment was delivered. I dismissed the appeal and remitted this matter to the Magistrates’ Court for sentencing. Further, I remanded the Appellant into custody for a report to be prepared under section 329E of the Criminal Code. Mr. Wilson was informed that if an application for bail was to be made, it would have to be heard pursuant to a bail application by summons and at a time when Mr. Wilson’s right of audience was confirmed. That said, I shared that the merits of a bail application at this stage were far from glaringly obvious.
3. No formal bail application has since which been made and these Reasons are not intended to bar the Appellant from bringing any such application. However, the Appellant now seeks written reasons for my order of remand. Accordingly, I provide me reasons below.

Reasons for Remand

4. In exercise of this Court’s inherent jurisdictional powers and statutory powers under both the Bail Act 2005 and section 329E of the Criminal Code this Court remanded the Appellant into custody pending sentence and the preparation of a sentencing report.
5. Paragraph 9 of the Bail Act provides:

² The employment of the term “informally” is used to signify that the Court was informed by the Registrar that Mr. Wilson’s Practicing Certificate had not been renewed and that he could not be properly heard before the Court on 18 January 2022.

Where his case is adjourned for inquiries or a report, the defendant need not be granted bail if it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody.

6. Bail post-conviction and post-dismissal of an appeal against conviction is discretionary. Unlike an accused awaiting trial, the Appellant may no longer assert an absolute presumption of innocence having been convicted of a serious violent offence and having failed to successfully prosecute his appeal. Further the probability of a custodial sentence is high, thereby increasing the likelihood of his absconding Court.
7. In my earlier ruling in *R v Chae Foggo* [2017] Bda LR 88 I outlined the relevant provisions of the Bail Act 2005 as follows [25-32]:

“The Law on Bail

25. *While neither Counsel referred to the relevant provisions of the Bail Act 2005 in the course of their submissions, it is uncontroversial that section 6 of the Act outlines the general right to bail.*
26. *Section 6(1) reads: “A person to whom this section applies shall be granted bail except as provided in Schedule 1.”*
27. *Section 6(4) reads: “This section also applies to a person who has been convicted of an offence and whose case is adjourned by the court for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence.”*
28. *Section 6(6) reads: “In Schedule 1 “the defendant” means a person to whom this section applies and any reference to a defendant whose case is adjourned for inquiries or a report is a reference to a person to whom this section applies by virtue of subsection (4).*
29. *Part I of Schedule 1 at item 1. Reads: “Where the offence or one of the offences of which the defendant is accused or convicted in the proceedings is punishable with imprisonment, the following provisions of this Part of this schedule apply.”*
30. *Under the Part I ‘Exceptions to the right to bail’ at item 6 it reads: “The defendant need not be granted bail if he is in custody in pursuance of the sentence of a court.”*
31. *While Counsel did not address me on the construction of item 6, I accept that it is drafted in a way which, on a literal interpretation at least, it suggests that it applies to*

Defendants who are already in custody seeking bail as opposed to a Defendant already on bail looking to extend his bail right through to sentence.

32. *However, the Courts have a long history of interpreting these provisions to generally exclude Defendants convicted on offences punishable by imprisonment from a general right to bail. In my view, a Defendant becomes even further removed from the prospect of bail where an immediate custodial sentence is likely.”*

8. This is a crime which involves a victim who has long suffered the effects of the Appellant’s sexual attack on her. Sexual assaults involving physical force and vaginal penetration are in the class of offence whereby an immediate custodial sentence is most often a practical certainty. Section 329E(2)(a) implicitly recognises a heightened risk of reoffending in sex offenders to whom the provision applies because it requires those convicted persons to submit to a special assessment on whether there is a risk of reoffending. The assessment to be performed under section 329E(2)(a) is in relation to the extent of the sexual offender’s ability or failure to control deviant sexual impulses. This is expressly relevant to the central question which arises on account of offences of this nature: Will the sex offender commit further sexual offences by reason of a failure in the future to control such impulses? The answer to such a question cannot be automatically made absolute by reference to a clean antecedent history on the part of the offender. After all, it is well-known that cases of this kind are often left unreported.
9. Mr. Simons, whose guilt of a sexual offence constituting a serious personal injury offence was affirmed by both the Magistrates’ Court and Supreme Court, was remanded by this Court in pursuance of a report under 329E the Criminal Code and sentence to follow.

10. Section 329E provides:

Remand of offender for assessment

329E (1) Where an offender is convicted of a serious personal injury offence, the court shall, before sentence is imposed on the offender, remand the offender for a period not exceeding 60 days to the custody of the Commissioner of Prisons.

(2) The Commissioner of Prisons shall cause an assessment to be conducted by a qualified professional to determine if the offender constitutes a threat to the life, safety or physical or mental well-being of any other person on the basis of evidence establishing—

(a) in the case of a sex offender, that—

*(i) the offender, by his conduct in any sexual matter, including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses; and
(ii) there is a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control such impulses; or*

(b) in any other case, that—

*(i) the offender has demonstrated a pattern of repetitive behaviour, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons or inflicting severe psychological damage on other persons, through failure in the future to restrain his behaviour; or
(ii) the offender has demonstrated behaviour of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.*

(3) The person charged with the conduct of an assessment under subsection (2) shall report his findings and recommendations for sentence to the court.

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11. In *Justin Parsons v The Attorney General and Minister of Legal Affairs* [2018] Bda LR 82 this Court construed the ‘shall’ in section 329E(1): ‘Where an offender is convicted of a serious personal injury offence, the court **shall**, before sentence is imposed on the offender, remand the offender...’ to ‘**may**...remand the offender’. In that case I determined that this adjustment was more consistent with section 54 of the Criminal Code which states that the fundamental principle of sentencing is that it must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

12. I thus exercised my judicial discretion in remanding Mr. Simons into custody pursuant to the provisions under section 329E. Further, it seemed inevitable to me that Mr. Simons would be made the subject of a report under section 329E of the Criminal Code. If the report were to be first commissioned upon his remittal to the Magistrates’ Court, his period of remand and the fixture of his sentence hearing would be avoidably prolonged. So, in exercise of this Court’s case management powers, the section 329E report was ordered at the earlier opportunity.

Conclusion

[2022] SC (Bda) 13 App (2 March 2022)

13. These are my reasons for having remanded the Appellant following the dismissal of his appeal and pending sentence in the Magistrates' Court.

Dated this 2nd day of March 2022

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE