IN THE SUPREME COURT OF BERMUDA
APPELLATE JURISDICTION
CRIMINAL APPEAL
2013: No. 34

FIONA MILLER **Appellant**

-v-

CRAIG CLARKE **Respondent**

EX TEMPORE JUDGMENT

(in Court)

Date of hearing: January 30, 2014

Ms. Nicole Smith, DPP office for the Appellant
Mr. Javon Rogers for the Respondent

Introductory

1. In this matter the Informant appeals to this Court against a decision of the Learned Senior Magistrate on August 22, 2012 whereby the Respondent was conditionally discharged for twelve months having pleaded guilty to the first count of an Information which charged him as follows:

> "*1. Between a date unknown and the 5th day of May 2012, in Pembroke Parish, wilfully caused or permitted the unnecessary suffering of an animal. Contrary to Section 8(1)(a) of the Care and Protection of Animals Act 1975.*"

2. The main thrust of the appeal had two elements to it. The first element was a complaint that when one looked at previous similar offences that have been dealt with in the Magistrates' Court, the discharge imposed was inconsistent with those sentences; because the normal tariff was for an offender, even on a guilty plea, to be

fined or given probation. In any event, in some four previous Magistrates' Court cases for similar offences which were placed before the Court, convictions were entered in each case. The second limb of the appeal was that the Learned Senior Magistrate erred in law in failing to go through the appropriate legal analysis required by section 69 of the Criminal Code before deciding to impose a conditional discharge.

Incomplete record

3. The pursuit of the appeal on its merits was hampered by two somewhat irritating deficiencies with the record. The most significant deficiency was the absence of any reasons for the decision. In the absence of written reasons, it was impossible to assess whether or not the reasoning process which the cases relied upon by Ms. Smith suggest should be carried out was in fact carried out. It is often difficult to know whether in every case a judge has only articulated orally what is summarised in his or her notes.

4. As I have indicated in previous appeals, where the written record is silent, it is incumbent on the judge who signs the record to advise this Court in the comments at the end of the record whether or not there is in fact some electronic record of oral reasons which were not reduced to writing and which could be used to supplement the record. That did not occur in this case[1].

5. The second deficiency was the absence from the record of a Summary of Facts. This made it impossible for this Court to know on what factual basis the sentencing took place. The record did include a Question and Answer Interview Record with the Respondent. It also included a Witness Statement from a vet whose evidence was relied upon to some extent by the Prosecution below. Ms. Smith (who did not appear below)[2] advised the Court that she had a Summary of Facts in her file but understandably she could not confirm whether or not that Summary of Facts was in fact read out and handed in to the Court and did form the basis of the sentencing.

6. This left the Court in the position of having to consider whether or not to adjourn this hearing which is taking place some 18 months after the sentence was imposed in the Magistrates' Court in circumstances where the Respondent is represented by counsel and would in all likelihood have to incur costs over and above the level of fine that might well have been imposed in the Magistrates' Court in the way that the Appellant contends for.

Disposition of Appeal

7. In these circumstances I took the view that justice requires that the decision imposed below should not be disturbed and that it would be unfair to extend the life of this appeal any further by seeking to clarify what the content of the record is. It is, I should note, ultimately the responsibility of an Appellant to ensure that before an appeal comes on for substantive hearing the record is in fact complete. In this case the

[1] Because the Summary Jurisdiction Act 1930 imposes a positive duty to record in writing reasons for decisions made by the Magistrates' Court, it was not possible to assume that reasons were articulated but not recorded in writing.

[2] The Respondent's counsel did not appear before the Magistrates' Court; the Respondent apparently appeared in person.

deficiencies were not the fault of the Appellant but is unfortunate that, as regards the missing Summary of Facts, that they were not noticed before today.

The correct approach to discharging without convicting under section 69 of the Criminal Code

8. Be that as it may, Ms. Smith did put before the Court a very well researched argument which demonstrates the correct approach to dealing with binding over i.e. discharging without entering a conviction. She relied upon a variety of Canadian cases and also put before the Court a decision of Ground CJ in *Dubell—Richards* [2009] Bda LR 63. Mr. Rogers for the Respondent agreed with the broad principle that wherever any significant decision is made by a judge reasons should be given for it. In *Dubell*, the Appellant was imprisoned for importing firearms and, on appeal, this Court substituted a discharge. In considering the approach at page 2 of the Judgment, Ground CJ set out at paragraph 6 the provisions of section 69(1) of the Criminal Code which provide as follows:

> "***Conditional and absolute discharge***
> *69 (1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, the court may, if it considers it to be in the best interests of the offender and not contrary to the public interest, instead of convicting the offender, by order direct that the offender be discharged absolutely or on conditions prescribed in a probation order made under section 70A or 70B.*"

9. Ground CJ then went on:

> "*7. That provision apparently derives from a Canadian model, and has been the subject of judicial consideration and interpretation in that country. In R v Fallofield [1973] BCJ No. 559, the British Columbia Court of Appeal said –*
>
> > *'(2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.*
> >
> > *(3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.*
> >
> > *(4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.*
> >
> > *(5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.*

> *(6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions."*"

10. He then cited another passage from the decision in *R-v- Moreau* (1992) 76 C.C.C. (3d) 181 at pages 185-186 (Quebec Court of Appeal, per Rothman JA). Chief Justice Ground then went on to say this at paragraph 11 (of his own Judgment):

> "*Obviously the courts have got to be able to distinguish between the hapless and the wicked, but that is a responsibility they face every day, and it is rarely either good sense or good policy to punish both alike*."

11. In the present case it is impossible to determine with any degree of clarity on what factual basis the Respondent was sentenced. Having said that, and despite the very valiant efforts of Mr. Rogers to distinguish broadly similar cases relied upon by the Appellant, it is at the very least strongly arguable that the discharge imposed in the present case was contrary to the public interest having regard to the seriousness of such offences and the normal way in which they are dealt with.

12. In the absence of a complete record the most the Court can say is that the Learned Senior Magistrate erred in law in failing to record reasons for his discharge decision. To that extent the appeal is allowed on a point of law under section 4 of the Criminal Appeal Act 1952.

13. But having regard to the deficiencies in the record to which I referred at the beginning of this Judgment, I would propose to make no other order. So the decision of the Learned Senior Magistrate imposed on August 22, 2012 stands and the Respondent retains the benefit of the conditional discharge which was imposed on that date.

Dated this 30th day of January 2014, _____

IAN R.C. KAWALEY CJ