BARBADOS

IN THE SUPREME COURT OF BARBADOS

COURT OF APPEAL

Magisterial Appeal No. 001 of 2021

BETWEEN

DEAN GEORGE SCOTT APPELLANT

AND

THE COMMISSIONER OF POLICE RESPONDENT

Before: The Hon. Sir Patterson Cheltenham, KA, Chief Justice, The Hon. Rajendra Narine and The Hon. Margaret A. Reifer, Justices of Appeal

Dates of Hearing: 2021: February 24, 25

Date of Decision: 2021: March 24

Mr. Andrew Pilgrim QC and Ms. Michelle Russell for the Appellant

Mr. Oliver Thomas and Ms. Danielle Mottley for the Respondent

DECISION

REIFER JA:

The Appeal

[1] The Appellant Dean Scott has appealed a sentence handed down by the Chief Magistrate on 31 December 2020 on the sole ground that the sentence imposed was excessive.

[2] The Appellant pleaded guilty to having contravened paragraph 17 of the **Emergency Management (COVID-19) Curfew (No. 4) Directive 2020**, which directive requires every person to observe such physical distancing and associated protocols in the interest of public health in the island of Barbados, for the period 29 October 2020 to 27 March 2021. Every visitor to Barbados is required to comply with these protocols.

[3] The offence committed was that, being a person in quarantine at the Saint Lucy District Hospital Quarantine Facility, he did leave the premises without reasonable explanation.

[4] Non-compliance with this Directive is a punishable offence. The maximum punishment on summary conviction is a term of imprisonment for one (1) year or a fine of $50,000 or both.

The Statutory Framework

[5] The **Emergency Management Act Cap. 160 A (the Act)**, which is an "Act to provide for the effective organization and management of disasters and other emergencies in Barbados", did not cover public health emergencies such as the current COVID-19 pandemic. ln consequence, parliament on 28 March 2020 passed the **Emergency Management (Amendment) Act, 2020-7 (the Amendment)** which, *inter alia*, included "public health emergency" in the definition of "emergency" at **section 2** of **the Act**. The other major

consequence of the amendment is the insertion of a new **section 28A** legislating a process in the event of a "public health emergency" which includes, *inter alia*:

(1) A proclamation by the Governor General declaring that a public health emergency exists: **Section 28A (1)**. Such proclamation shall remain in force for one month but shall not exceed 6 months but may on a resolution of the House of Assembly be extended for a further period not exceeding 6 months: **Section 28A (2)**.

(2) **Section 28A (4)** and **(5)** empowers the Cabinet of Barbados to make such orders as it considers desirable in the public interest under the **Emergency Powers Act Cap. 161**, the **Quarantine Act Cap. 53**, the **Miscellaneous Controls Act Cap. 329**, and the **Health Services (Communicable and Notifiable Diseases) Regulations, 1969**.

(3) Cabinet is empowered under **Section 28A (4)** and **(5)** to delegate to the Prime Minister the power to make such Directives as may be required in the public interest.

[6] Pursuant to the above authority, **SI 2020 No.16 Emergency Management (COVID 19) Order (SI 2020 No.16)** was also passed on 28 March 2020 pursuant to the powers conferred on the Cabinet by **section 28A (4)** and **(5)**. It made provision, *inter alia*, for quarantine, the detention of persons, the isolation of "suspected to be persons infected with COVID-19", the imposition of physical distancing. It provided at **section 14(4)** that "The Prime Minister on the advice of the Chief Medical Officer may by virtue of this Order issue guidelines on physical distancing which shall have the force of law."

[7] By virtue of and under the authority of **SI 2020 No. 16** several directives have been issued. The Directive applicable to these circumstances, namely the conduct of the Appellant on 7 December 2020, is **Emergency Management (COVID-19) Protocol (No.4) Directive, 2020** issued on 29 October 2020. This Directive covers the period 29 October 2020 to 27 March 2021. The stated purpose of this Directive is to allow the Prime Minister on the advice of the Chief Medical Officer to direct persons to observe such physical distancing and associated protocols in the interest of public health as may be specified.

Background Facts

[8] The Appellant pleaded guilty as an unrepresented accused to the said offence on 30 December 2021, the offence having been committed on 7 December 2020. On that date, the Appellant was a person in quarantine at the Saint Lucy District Hospital Quarantine Facility (the Facility). The Appellant did not waste the Court's time after the charge was read to him, but pleaded guilty to the offence in the face of the unchallenged evidence that he left the facility in the company of a female to go to a neighbourhood shop to purchase a soft drink, a Fanta. His explanation was that he was refused a drink when he asked for one at the Facility and this lady took him to the shop to purchase the "Fanta".

[9] A concerned observer in the neighbourhood telephoned the Facility and a staff nurse made a report to the police, who apprehended and charged the Appellant.

The Sentence and the Magistrate's Reasons

[10] In his Reasons for Decision, it is clear that the Magistrate resolved to fine the Appellant in the sum of Bds. $6,000.00 for his "reckless" behaviour of leaving quarantine for a frivolous reason.

[11] He embarked on a summary Means Inquiry which elicited (1) that the only money in the Appellant's possession was an unspecified sum enough to purchase a return ticket to Jamaica and that he had no other resources with which to pay a fine, and (2) that his family in Jamaica was not prepared to help him because "he came to Barbados and do foolishness".

[12] He declined to impose a fine and instead imposed a sentence of six (6) months as "his inability to pay it had to send a strong message to this type of law breaker". Objectively, from this sentence it is reasonable to infer that the Magistrate addressed his mind to three of the classic sentencing principles of Retribution, Deterrence and Prevention, having considered "offence seriousness".

Discussion

[13] The issue arising for our consideration is whether the challenged sentence is 'proportional' in the circumstances as outlined (proportionality), taking into account the seriousness of the offence committed. Stated differently, whether the sentence imposed was commensurate with the seriousness of the offence. In so doing, we remind ourselves of several things.

[14] Firstly, in determining the appropriate sentence to impose on this Appellant, the court below is guided by statutory sentencing principles to be found in our **Penal System Reform Act Cap. 139 (Cap. 139)** principally at **sections 35** to **41** together with common law principles of sentencing. Special attention must be paid to the General judicial guidelines seen at **section 41**, particularly at **section 41 (2)(4)** which provides as follows:

> "4. Where a fine is imposed, the court in fixing the amount of the fine must take into account, among other relevant considerations, the means of the offender so far as these are known to the court, regardless whether this will increase or reduce the amount of the fine."

[15] A provision of similar import is to be found at **section 63** of the **Magistrate's Courts Act, Cap. 116A** as follows:

> "63. In fixing the amount of a fine, a magistrate shall take into consideration among other things the means of the person on whom the fine is imposed so far as they appear or are known to the Court."

[16] The record reveals that the court below took into account the means of the offender but ultimately declined to impose a fine.

[17] Secondly, **section 35** of **Cap. 139** requires that the court considers non-custodial sentences unless on a consideration of "offence seriousness" or in the case of violent or sexual offences, a custodial sentence is justified.

[18] Counsel for the Respondent submits, and it was accepted by this Court, that a community sentence as provided for at **section 33** of **Cap. 139** was not appropriate or practical given that the Appellant is a visitor to the island.

[19] **Section 35(4)** is pertinent to this matter. It raises the issue whether the court below acted in compliance with its provisions, which state as follows:

> "(4) Where a court passes a custodial sentence it is the court's duty
>
> (a) in a case not falling within subsection (3), to state in open court that it is of the opinion that either or both of paragraphs (a) and (b) of subsection (2) apply and why it is of that opinion; and
>
> (b) in any case, to explain to the offender in open court and in ordinary language why it is passing a custodial sentence on the offender."

[20] The importance of the court following this process is reinforced by **section 35 (5)** which provides:

> "(5) A court shall cause a reason stated by it under subsection (4) to be specified in the warrant of commitment and to be entered in the record of the court."

[21] The statutory language reinforces the importance of giving reasons as an integral part of the sentencing process.

[22] Thirdly, we remind ourselves of the appellate function or approach on the hearing of this magisterial appeal. In summary, this approach accords a measure of respect to a decision of the lower court. It is only where the lower court is found to have committed an obvious mistake of fact, or an error of principle or followed a seriously defective procedure that an appeal court will disturb its decision.

The Parties' Submissions

[23] This matter was argued and answered solely from the perspective of the excessiveness (proportionality) of the sentence.

[24] The Appellant's arguments in summary cover, *inter alia*, two substantive points: (1) that there was an insufficient examination of the Appellant's means by the magistrate and (2) that the overarching principle of **Cap. 139** (specifically **section 35**) is that a custodial sentence is a last resort and the magistrate failed to follow this fundamental rule of sentencing when he took a quantum leap from his consideration of a fine to the imposition of a custodial sentence. He argued that by so doing the magistrate had already determined that a custodial sentence was not commensurate with the offence. Counsel

made reference to two case authorities: **Jeffrey Adolphus Gittens v The Queen [2010] CCJ1 (AJ)** and **Tate v Short 401 US395 (1971)**.

[25] Counsel for the Respondent submitted that the sentence imposed was proportionate having regard to the gravity of the case or seriousness of the offence and that the magistrate's sentencing approach was consistent and fair in that he has given similar treatment to other accused persons in such circumstances. This last appeared to be in direct response to Mr. Pilgrim QC's submission that the court had previously determined a fine to be commensurate with the seriousness of the offence.

[26] After a consideration of the aggravating factors, namely that the Appellant's reason for leaving quarantine was frivolous, that he was a visitor to this island, that he showed no remorse and that he came into close proximity to other persons, and the sole mitigating factor of the Appellant's early guilty plea, counsel for the Respondent argued that the sentence should be upheld and the appeal dismissed. In his submission the magistrate had clearly demonstrated how he assessed the circumstances of this case and arrived at his sentence. In his view, the Appellant's reckless act and frivolous reason for infringing the regulations had weighed heavily on the court's mind and it sought to determine a sentence not just to punish the Appellant but to deter potential offenders.

[27] Counsel relied on the following case references: **Winston Joseph v The Queen, Benedict Charles v The Queen** and **Glenroy Sean Victor v The Queen Criminal Appeals Nos. 4, 8 and 7 of 2000, R v Sargeant (1975) 60 CR App R 74** and **Benjamin v R (1964) 7WIR 459**.

Conclusions

1. **Offence Seriousness**

[28] The seriousness with which our Parliament considers a breach in the COVID-19 protocols is reflected in the penalty legislated, namely a maximum of one year's imprisonment or a fine of $50,000 or both. Our island, the region and the world is currently being ravaged by the pandemic caused by the outbreak of the COVID-19 virus. The creation of offences consequent on the breach of COVID-19 protocols is one of several measures taken by this and other jurisdictions across the globe to mitigate the severity of this global pandemic by deterring certain behaviours. Adherence to these protocols must be encouraged and persons discouraged from reckless behaviours that can potentially increase the spread of the virus.

2. **Was there compliance with section 35 of Cap. 139?**

[29] The determination of a sentence commensurate with the offence has to be determined in the context of the law, namely, **Cap. 139** and common law principles of sentencing. In that regard, it does not appear from the record

before us, the Reasons for Decision and Notes of Proceeding, that there has been compliance with statutory and common law principles of sentencing.

[30] The Caribbean Court of Justice in **Jeffrey Gittens v The Queen [2010] CCJ 1 (AJ)** underscored the importance of compliance with **sections 35** and **36** of **Cap. 139**, and in particular **section 35 subsection (4)**. At paragraph [14] their Honours state in an interpretation of our **Cap. 139**:

> "Sub-section (3) of section 36 is similar to section 35(4) in that it imposes on a sentencing court which forms the opinion that the normal sentence commensurate with the seriousness of the offence should be extended as a necessary protection for the public, an obligation to state that opinion and the reasons for it in open court and to explain to the offender why he has received the sentence passed on him."

[31] In short, the imposition of a non-custodial sentence should receive the court's consideration first and a custodial sentence should be reserved for the most serious offences. The court must consider all the circumstances in order to determine whether a non-custodial sentence is appropriate, or on a consideration of "offence seriousness" and the aggravating and mitigating factors, whether to impose a custodial sentence.

[32] In **Teerath Persaud v The Queen BB 2018 CCJ 2 (Teerath Persaud)**, their Honours acknowledged that the sentencing judge begins by fixing a starting point, which is a notional point within the normal range and from there

increase or decrease the sentence to allow for aggravating or mitigating features of the case.

[33] **Teerath Persaud** also re-enforces the fact that a discount for an early guilty plea, as in this case, is dealt with separately from the other mitigating factors to be considered.

[34] In the well-known case of **R v Pierre Lorde (2006) 73 WIR 28** at paragraphs [9] to [12] this Court (per **Simmons CJ** as he then was) outlined, per curiam, how a court should approach the imposition of a custodial sentence and determine a sentence commensurate with the seriousness of the offence.

[35] It is clear from the record that the magistrate failed to comply with the requirements of **Cap. 139**, and more specifically, to properly take into account the early guilty plea after considering the aggravating and mitigating factors, in the manner mentioned above.

[36] A careful perusal of the reasons given indicate that there was a sufficiency of evidence before the magistrate to permit him to fine the Appellant. The magistrate made an abrupt decision to impose a custodial sentence when his initial inclination was to impose a fine. There was in effect a quantum movement by the magistrate and no basis was detected in his reasons for this altered approach.

[37] **Cap. 139** sets out at **sections 41 (1)** and **(2)** general statutory guidelines which must underpin the decision of a court when imposing a custodial sentence. There is nothing in the record that permits this Court to appreciate the process adopted by the learned magistrate in imposing a custodial sentence.

[38] **Cap. 139** is a reforming statute that introduces modern perspectives in sentencing and, in particular, it lays down specific parameters which are to be observed before a custodial sentence is imposed. The old instinct of using imprisonment as the first line of punishment has now been replaced by the introduction of more enlightened measures designed, inter alia, to rehabilitate an offender, and keep him in the community.

[39] The conduct of the Appellant, in the context of the pandemic COVID-19 with its presence in the local community, was correctly categorised as reckless by the magistrate. This Court equally frowns on his conduct and agrees with the characterisation used by the magistrate. In the context of these troubling times where health officials are daily battling an unseen but deadly viral enemy, persons in quarantine or elsewhere must adhere strictly with the guidelines laid down by health officials to curtail the spread of COVID-19.

Disposal

[40] This Court is persuaded that the magistrate erred in imposing a custodial sentence.

[41] In view of the premises, the appeal is allowed. The sentence of the court below is varied in accordance with the provisions of **section 14** of the **Criminal Appeal Act Cap. 113A**.

[42] The order of the Court is that the time served to date be deemed as an adequate sentence in the circumstances. The Appellant is to be freed on the rising of the Court subject to any health protocols applicable to him arising from his stay at Her Majesty's Prison, Dodds.

Chief Justice

Justice of Appeal **Justice of Appeal**