In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2018: 18

FIONA MILLER
(Police Sergeant / Informant)

Appellant

-v-

TAFARI WILSON

Respondent

JUDGMENT

Prosecution Appeal against Sentence – Governing Principles on Suspended Sentences
Conspiracy to Import Controlled Drug Cannabis
Whether Magistrate erred in Suspending Custodial Sentence
Whether the recall of the Respondent into Custody on Appeal is just in all circumstances

Date of Hearing:	20 November 2018
Supplemental Submissions:	27 November 2018
Date of Judgment:	10 December 2018

Ms. Kenlyn Swan, On behalf of the Director of Public Prosecutions, for the Appellant
Mr. Eugene Johnston, (Smith Bean & Co) for the Respondent

JUDGMENT delivered by Shade Subair Williams J

Introduction

1. The Respondent, a male Bermudian national, was convicted in the Magistrates' Court by learned Magistrate, Mr. Khamisi Tokunbo, on Information 16CR00245 for the

offence of conspiracy to import the controlled drug cannabis, contrary to section 4(3) of the Misuse of Drugs Act 1972 as read with section 230(1) of the Criminal Code. Having been tried and convicted, he was sentenced on 11 May 2018 to a custodial sentence of two years of imprisonment suspended for 2 years in addition to a fine of $5000.

2. By Notice of Appeal filed on the same day on which sentence was passed, 11 May 2018, the Crown sought to appeal the sentence imposed on the ground that it was manifestly inadequate.

3. The appeal was heard before me on 20 November 2018 and I allowed Counsel the opportunity to file supplemental submissions on a narrow point of law by 27 November 2018. Having reserved judgment, I informed the parties that I would provide my decision together with the reasons set out below.

Summary of the Facts

4. The Respondent was convicted for having conspired to import 427.5 grams of cannabis at a high-end street value of $21,375.00.

5. The broad facts of the case are helpfully outlined at paragraphs 1-2 in the previous judgment of learned Assistant Justice, Mr. Delroy Duncan, in *Tafari Wilson v Fiona Miller (Police Sergeant) [2018] SC (Bda) 6 App (23 January 2018)*:

"*On the 14th November 2015, the Respondent Tafari Wilson attended the Air Canada Office at the L.F. Wade Airport to collect a package. The shipping documents identify James Anderson in Toronto, Canada as the person who sent the package. The package is addressed to Cathy Wilson, Unit 4, 5 Christopher Close, Devonshire Parish. Cathy Wilson is the Respondent's mother.*

On the 18 November 2015, Mini Max Forwarders Limited delivered the package to the Respondent at his home address, Unit 1, 4 Christopher Close Devonshire Parish. The package contained 427.5 grams of the controlled drug cannabis concealed in pillows found among other household items."

Summary of Competing Arguments for Resolution

6. Crown Counsel, Ms. Kenlyn Swan, submitted that the offence of conspiracy to import cannabis, subject to exceptional cases involving small quantities where a presumption of personal use arises, is one which invariably attracts an immediate custodial sentence. In such cases, on her contention, a suspended sentence is only given in exceptional circumstances which extend beyond standard mitigating factors.

7. Mr. Eugene Johnston on the other hand argued that there are varying levels of conspiracy offences involving cannabis and that an immediate custodial sentence would not always be the appropriate level of sentence. On this basis, the Court need not cite exceptional circumstances in exercising its discretion to suspend a custodial sentence. As an alternative argument, Mr. Johnston contended that the Respondent's previous clean record constituted, in and of itself, an exceptional circumstance upon which the learned magistrate could rely in suspending the Respondent's custodial sentence. Counsel further submitted that globally the sentence would have been manifestly excessive had an immediate custodial sentence of 2 years imprisonment in addition to the $5000 fine been imposed.

8. Also on Mr. Johnston's submissions, the Crown never objected during the sentencing hearing to the imposition of a suspended sentence. Consequently and as a matter of fairness, the prosecution ought to be precluded from advancing such objections for the first time on appeal.

9. On the subject of post-sentencing factors, Mr. Johnston submitted in broad terms that an appellate Court is empowered with a wide discretion in deciding whether or not to recall an offender at liberty into custody upon appeal, notwithstanding any finding that the lower Court erred on the point argued. I gave leave for Counsel to file supplemental written submissions on this narrow point alone. However, the further written submissions filed by Mr. Johnston did not address this issue but instead were received as a second bite at the cherry.

10. In the Crown's supplemental written submissions, the prosecutor shifted from her original position (that the term of the prison sentence should not be altered save to remove the suspension order) to inviting this Court to substitute an immediate custodial sentence ranging between a term of 12 and 18 months. The prosecutor's new stance was advanced on the basis that the Court should have regard to the doctrine of double jeopardy which would arise if this Court were to recall the Respondent into custody without lending weight to the $5000 fine already paid.

11. The Crown, having lowered their suggested range of sentence, effectively narrowed the disputed issues down to the question of when a suspended sentence may properly be imposed and whether the recalling of the Respondent into immediate custody would be just and appropriate in all circumstances.

Analysis and Decision

The Correct Range of Sentence

12. In determining the correct range of sentence I have had regard to reported appeal judgments from sentencing decisions imposed in the Magistrates' Court.

13. In *Hewey v Raynor (Police Sergeant) [2012] Bda LR 66* the Appellant had been convicted upon his early guilty plea in the Magistrates' Court on a count of importation of 4.7 pounds / 2165.9 grams of cannabis. The Crown submitted that the correct range of sentence was 18 months to 3 years before the magistrate imposed a sentence of 18 months' imprisonment. Mr. Hewey appealed to the Supreme Court against his sentence on the basis that the learned magistrate erred in refusing to suspend the sentence of imprisonment because he attached insufficient weight to his abandonment of the cannabis at the airport collection point. On appeal, the learned Chief Justice, Mr. Ian Kawaley (as he then was), found that the suggested range of sentence was appropriate in an ordinary importation case where the offender followed through with the collection of the controlled drugs. However, on account of Mr. Hewey's abandonment of the cannabis, Kawaley CJ reduced the sentence to 12 months imprisonment on appeal.

14. In *Valisa Holder v The Queen [2017] SC (Bda) 70 App (14 September 2017)* the Appellant was tried and convicted in the Magistrates' Court for counts of importation and possession with intent to supply of 1101.85 grams of cannabis. The Crown submitted that the appropriate range of sentence was 18 months to 3 years' imprisonment. The prosecutor argued that the appropriate sentence for Ms Holder was one of 3 years imprisonment since little weight should be attached to a drug courier's previous good character (a common and necessary feature for a drug mule) and since Ms. Holder provided no investigative cooperation or assistance.

15. The learned magistrate passed a sentenced of 2½ years imprisonment and Ms Holder appealed on the grounds that her sentence was harsh and excessive. Following the Court's previous assessment of the pre-discount basic sentence in *Fiona Miller (PS) v Lauren Davis [2014] Bda LR 15* the Court applied the broad discretion given to it under section 18(3) of the Criminal Appeal Act 1952 and quashed the sentence of 2½ years imprisonment (30 months) and substituted a sentence of 22 months' imprisonment.

16. In *Fiona Miller v Amanda Henry-Huggins [2017] SC (Bda) 70 App (14 September 2017)* (heard jointly on appeal with *Holder v The Queen*) the Crown appealed on the ground that the sentence of 2.5 years' imprisonment was manifestly inadequate for a defendant convicted after trial for having imported and possessed with intent to supply 10,896.8 grams of cannabis. (Notably, the learned Magistrate was minimally

assisted by the Crown in its submissions at the sentence hearing whereas Ms Henry-Huggin's Defence Counsel submitted that a 3 year sentence against a 10 year maximum sentence would be the correct sentence to impose.)

17. In a comparative analysis of both appeals, the learned Chief Justice at paragraph 3 of his judgment observed:

"*Despite the importance of sentencing judges exercising their statutory discretion in each case, drug importation cases usually have quite similar features. The courier frequently has no previous convictions, is a victim of unfortunate circumstances and appears to be deserving of some sympathy from the Court. Absent unusual features, such as significant cooperation with the authorities, a consistent approach to sentencing ranges will usually be required*."

18. On appeal in *Miller v Amanda Henry-Huggins* the learned Chief Justice opined that 4-6 years was in fact the more appropriate range for an offender tried and convicted of importing 10,896.8 grams of cannabis under summary jurisdiction.

19. Having considered both the previous persuasive decisions of this Court and the previous binding decisions of the Court of Appeal, I find that the appropriate range of sentence in the case of Mr. Wilson who was tried and convicted for having imported 427.5 grams of cannabis is indeed a custodial sentence ranging between 12 and 18 months.

Governing Principles on Suspend Sentences

20. The statutory position on suspended sentences is contained in section 70K of the Criminal Code. Subsections (1)-(2) provide as follows:

"*Suspended sentence of imprisonment*
70K (1) If a court sentences an offender to imprisonment for 5 years or less it may order that the term of imprisonment be suspended in whole or in part during the period specified in the order ("the operational period"), which period shall not exceed 5 years, if the court is satisfied that it is appropriate to do so in the circumstances.

(2) A court shall not make an order under subsection (1) if it would not have sentenced the offender to imprisonment in the absence of power to make an order suspending the sentence."

21. When section 70K was brought into force on 29 October 2001 it provided a broad and discretionary test requiring the Court to merely satisfy itself that it would be appropriate in the circumstances of the case to impose a suspended order. However,

Bermuda case law has clearly developed a set of legal principles on how such judicial discretion should be exercised.

22. At page 3 of the Court of Appeal decision in *The Queen v Gregory Millington Johnson [2004] Bda L.R. 63* Evans JA clarified that mitigating factors were relevant on the question of whether a custodial sentence should be imposed and, in the affirmative, its duration. He stated:

The Court emphasises that mitigating factors are relevant to the length of a sentence of imprisonment, as well as to the question whether a custodial sentence should be imposed at all. The purposes of sentencing which justify a sentence of imprisonment under sections 53 and 54 of the Criminal Code Amendment Act 2001 must nevertheless be balanced against mitigating factors, including those listed in section 55 and, more generally, what were called the "interests of the individual" in the Court's judgment in George Rush v Richard Vivian (above). These and other relevant matters have to be taken into account when assessing the length of sentence of imprisonment, just as section 55 of the 2001 Act requires them to be taken into consideration by the Court before any sentence of imprisonment is imposed.

23. Turning specifically to the proper exercise of the power to suspend a prison sentence, Evans JA held at page 4:

The power to suspend a sentence of imprisonment was considered by the Court in Earl Kirby v Kevin McDonald Rogers Crim App 32/1991 (22nd November 1991) and in Kenrick James v Grant Russell Forbes Crim App 9/1994 (7 June 1995). In the earlier judgment, reference was made to Giles v Outerbridge Crim App 12/1991 where a sentence of 2 years was not regarded as "manifestly inadequate" upon the Crown's appeal. In Earl Kirby v Kevin McDonald Rogers, however, the Court held that the power to suspend should be exercised only in "exceptional" [1] *circumstances, and it allowed the Crown's appeal against a sentence of 12 months' imprisonment suspended for 12 months, and substituted a sentence of immediate imprisonment for 3½ years. In Kenrick James v Grant Russell Forbes (above) a sentence of 6 months' imprisonment was increased to 18 months, and the Court observed:*

> *"There are no such exceptional circumstances as would warrant suspension. As was also said in Kirby v Gibson: "A suspended sentence will hardly be a deterrent to others".*

It cannot be said that "exceptional circumstances" exist in the present case. The judge erred, in this Court's view, in holding that certain mitigating factors which

[1] In Kirby (informant) v Rogers 1991 Criminal Appeal No. 32 Denys Roberts, P is reported as having said at page 4 of his judgment "*In each case, having decided that a custodial sentence of not more than two years is otherwise appropriate, the judge concerned must then consider whether there are special circumstances which justify the suspension of a sentence of imprisonment*."

undoubtedly are present enabled him to suspend the sentence of three years' imprisonment which, absent those factors, he regarded as appropriate for this offence. Rather, having determined that a sentence of imprisonment was inevitable, following the guidance given by sections 53-55 of the 2001 Act, he should have fixed the period of imprisonment, taking all the circumstances both of the offence and of the offender, into account. Only then was it necessary to consider whether the sentence should be suspended, and it was immediately apparent that there were no special or exceptional circumstances which could justify that course.
..."

24. The previous case law cited by the Court of Appeal in *R v Gregory Millington Johnson* all pre-date the Criminal Code Amendment Act 2001 which introduced s. 70K. Prior to the 2001 amendments, the Courts were empowered to suspend a custodial sentence under section 56A(1) of the Criminal Code which provided:

"*…a court which passes a sentence of imprisonment for a term of not more than two years for any offence may order that the sentence shall not take effect unless, during the period specified in the order, being not less than one year and more than two years from the date of the order, the offender commits in Bermuda another offence for which he is sentenced to imprisonment, and thereafter a court having power to do so orders under section 56B that the original sentence shall take effect.*"

25. In the earlier decision of *Kirby (Informant) v Durham [1989] Bda LR 1* the Court of Appeal, in its interpretation of section 56A(1), stated the following at page 6 of its judgment:

"*What it amounts to is this: if the offender behaves himself during the so-called "operational period", he does not suffer any punishment at all for the original offence; and even if he is sentenced to imprisonment for another offence committed during the operational period, it does not follow as a matter of course that the suspended sentence shall then take effect. The court has very wide powers under section 56B.*

So far as the statute is concerned, within the parameters of subsection (1) of section 56A, the discretion of the court to suspend a custodial sentence is not fettered in any way. But in practice, it is only in exceptional circumstances that a court should consider suspending such a sentence. On the other hand, we do not think that it would be helpful if we were to attempt to enumerate the circumstances in which courts of law should consider ordering the suspension of a custodial sentence. The defendant's age, the fact that he is a first offender are, of course, factors to be considered. The court may form the view that the offence under consideration is of "a one-off nature", and that it is highly unlikely that the defendant will get involved in further criminal activity. Some extreme emergency in the family of the offender may have occurred, and the court may be disposed to suspend the sentence as a pure act of mercy.

These and other situations readily come to mind; but, as we have said, courts should not, as a general rule, suspend a custodial sentence otherwise than in exceptional circumstances."

26. It is clear from the previous decisions of the Bermuda Court of Appeal that the requirement for special or exceptional circumstances to justify the Court's suspension of a custodial sentence prevailed as a matter of practice prior to and subsequent to the 2001 amendments to the Criminal Code. The legal requirement for such special or exceptional circumstances has been sourced purely from the jurisprudence of the Courts and not any legislation creating judicial power to suspend prison sentences.

27. This binding line of judicial reasoning was more recently interpreted in Chief Justice Kawaley's judgment in *Miller (Police Sergeant) v Joshua Crockwell [2012] Bda LR 56* where he also cited *R v Okinikan [1993] 2 ALL ER 5 at 8d-g* which brought section 5(1) of the UK Criminal Justice Act 1991 under review. Section 5(1) (now repealed) provided:

"*A court shall not deal with an offender by means of a suspended sentence unless it is of the opinion – (a) that the case is one in which a sentence of imprisonment would have been appropriate even without the power to suspend the sentence; and (b) that the exercise of that power can be justified by the* ***exceptional circumstances*** *of the case*."

28. Lord Taylor of Gosforth CJ observed in *R v Okinikan* (supra):

"*The significant amendment is the new emphasis on the exceptional nature of a suspended sentence. Parliament has given statutory force to the principle that a suspended should not be regarded as a soft option, but should only be imposed in exceptional circumstances*".

29. When considering the meaning of exceptional circumstances, Taylor CJ stated:

"*This court cannot lay down a definition of 'exceptional circumstances'. They will inevitably depend on the facts of each individual case. However, taken on their own, or in combination, good character, youth and an early plea are not exceptional circumstances justifying a suspended sentence. They are common features of many cases. They may amount to mitigation sufficient to persuade the court that a custodial sentence should not be passed or to reduce its length. The statutory language is clear and unequivocal*."

30. Section 5(1) of the UK Criminal Justice Act 1991 substituted s 22(2) of the Powers of Criminal Courts Act 1973. Subsections (1) and (2) provided:

"*22 (1) Subject to subsection (2) below, a court which passes a sentence of imprisonment for a term of not more than two years for an offence may order that the sentence shall not take effect unless, during a period specified in the order, being not less than one year or more than two years from the date of the order, the offender commits in Great Britain another offence punishable with imprisonment and thereafter a court having power to do so orders under section 23 of this Act that the original sentence shall take effect; and in this Part of this Act "operational period", in relation to a suspended sentence, means the period so specified.*

(2) A court shall not deal with an offender by means of a suspended sentence unless the case appears to the court to be one in which a sentence of imprisonment would have been appropriate in the absence of any power to suspend such a sentence by an order under subsection (1) above."

31. The former Bermuda Criminal Code provision under s. 56A(1) was, in relevant part, a direct lift from the now repealed UK section 22(2) of the Powers of Criminal Courts Act 1973. It is, therefore, unsurprising that the Bermuda case law took to the same approach to suspended sentences as the UK case law. During the operative period of section 5(1) of the UK Criminal Justice Act 1991 which specified the requirement for exceptional circumstances, the Bermuda case law continued to mimic the English case law approach which embraced the requirement for exceptional circumstances prior to and during the operative period of section 5(1) of the 1991 UK Act. Equally, the reported Bermuda case law position, dating back to 1989, latched on to the requirement for exceptional circumstances to justify a suspended sentence. This requirement was unchanged by section 70K of the Bermuda Criminal Code as seen by the 2004 Court of Appeal decision delivered by Evans JA in *The Queen v Gregory Millington Johnson* (supra) which relied only on previous case law pre-dating the introduction of section 70K.

32. In *Miller (Police Sergeant) v Joshua Crockwell* (*supra*) Kawaley CJ, in referring to the out-dated section 5(1) of the UK 1991 Act, stated at page 9 of his judgment:

"*This statutory restriction on the power to suspend sentences of imprisonment no longer exists in the United Kingdom as another case placed before the Court by Crown Counsel, R v Carneiro [2007] EWCA Crim 2170, makes clear. Toulson LJ (giving the judgment of the English Court of Appeal described the proper approach to the decision to suspend a sentence of imprisonment in the following terms:*

"[15] There is no absolute embargo on a judge suspending a sentence for an offence of this kind if there is proper ground to do so, nor is there any statutory requirement that there should be exceptional circumstances. However, once it is recognised that ordinarily the appropriate sentence for an offence of this kind does involve immediate

custody, there has to be some good reason for the judge to at differently in a particular case for simple reasons of consistency."

33. Section 5(1) of the UK 1991 Act was repealed and the current statutory powers of the Courts in the UK to impose a suspended sentence appears at section 189(1)[2] of the Criminal Justice Act 2003 which reads:

"*189 Suspended sentences of imprisonment*
[(1) If a court passes a sentence of imprisonment for a term of (at) least 14 days but not more than 2 years, it may make an order providing that the sentence of imprisonment is not to take effect unless-

(a) during a period specified in the order for the purposes of this paragraph ("the operational period") the offender commits another offence in the United Kingdom (whether or not punishable with imprisonment), and
(b) *a court having power to do so subsequently orders under paragraph 8 of Schedule 12 that the original sentence is to take effect*."

34. Plain to see, as observed by Toulson LJ in *R v Carneiro* (*supra*), section 189(1) of the 2003 UK Act does not specify any restriction or requirement for exceptional circumstances. This would mute any argument which is aimed to wholly distinguish the English case law from the Bermuda case law position as neither section 189(1) in the UK nor section 70K in Bermuda provide an express statutory requirement for special or exceptional circumstances.

35. Counsel in *Miller v Crockwell* (supra) submitted that Toulson LJ in *R v Carneiro* (*supra*) established the correct test for imposing a suspended sentence which requires the presence of good reason. At first glance, substituting the 'exceptional circumstances' requirement for a 'good reason' test arguably departs from the binding position set down by the Court of Appeal in *R v Gregory Millington Johnson* (supra).

36. In expressing the views of the Court in reply to Counsel's submission in *Miller v Crockwell* (supra) that the test for the exercise of judicial discretion is the presence of "good reason" as stated in *R v Carneiro* (*supra*), Kawaley CJ stated at page 9:

"… *I agree, subject to one important caveat.*

The courts may set down sentencing guidelines for specific categories of cases which mandate the imposition of immediate custodial sentences save in exceptional cases. Such guidelines have been laid down in relation to, inter alia, offences involving serious violence in cases such as R v Johnson [2004] Bda LR 63 (CA). It is true that such cases can be read as suggesting, more broadly, that exceptional circumstances

[2] Section 189(1) came into force in the UK on 3 December 2012

are always required to justify suspending a custodial term. But in my judgment such an interpretation of those cases is not supported by a straightforward construction of section 70K of the Criminal Code; nor is it supported by more recent and highly persuasive authority English Court of Appeal authority.

Accordingly, I find that the suspension test found in section 70K(1) of the Criminal Code – whether "it is appropriate to do so in the circumstances"- is not a rigid test at all but depends on the circumstances of the case. If the offence is one for which an immediate custodial sentence is the only appropriate sentence irrespective of standard mitigating circumstances, then exceptional circumstances are required for suspending the expected sentence. Thus in R v E [2008] EWCA Crim 91, the English Court of Appeal found that for offences in relation to which a custodial sentence "inevitable", exceptional circumstances must be found to justify a suspension (paragraph [18]). If, on the other hand, the offence falls into the category of offence where an immediate custodial sentence is appropriate (but not essential) and the sort of sentence which ordinarily would be imposed, then "there has to be some good reason for the judge to act differently in a particular case for simple reasons of consistency": R v Carneiro [2007] EWCA Crim 2170.

The bar for what constitutes "good reason" may be lower still if the sentencing judge determines that an immediate custodial sentence is appropriate for a particular offender in circumstances where there is no established sentencing tariff according to which an immediate custodial sentence would "ordinarily" be imposed at all. Ms Mulligan for the sentencing appeal Appellant was bound to concede that she had found no judicial precedents capable of supporting an established practice of imposing immediate custodial terms on offenders under 21 years of age at the time of committing offences similar to that for which the Respondent was convicted…"

37. It is clear that on Kawaley CJ's admirable interpretation of the Court of Appeal decision in *R v Johnson* the 'exceptional circumstance' requirement does not rigidly apply to all cases. The Court in *Miller v Crockwell* interpreted *R v Johnson* in a way which was consistent with the principles enunciated in *R v Carneiro,* thus keeping the Bermuda case law position in relatively the same proximity that it has long had with the English case law on suspended sentences.

38. Having had careful regard to the construction of section 70K in combination with persuasive English case law together with the binding decisions of the Bermuda Court of Appeal, I agree that the *Miller v Crockwell* approach is a correct one.

39. There are no formal judicial sentencing guidelines in Bermuda which suggest that offenders guilty of importing cannabis should expect to receive an immediate custodial sentence. However, previous case law does make it clear that importation of

any drug in quantities consistent with a presumption or finding that there is an intention to supply will invariably result in an immediate custodial sentence.

40. In this case the Court must reconcile two competing arguments: One argument is that an immediate custodial sentence will ordinarily be imposed on any offender who has been convicted for conspiracy to import a quantity of cannabis or any other drug where there is sufficient evidence to find that the drugs in question were not intended for personal use only. This supports the Crown's contention that a custodial sentence should only be suspended in exceptional circumstances when applying the reasoning laid down in *Miller v Crockwell*. The Crown says that no such exceptional circumstances arose in the case of Mr. Wilson. The competing argument in support of the Respondent's case is that if an exceptional circumstance is required, then the one-off nature of this offence by Mr. Wilson who is of previous good character constitutes such an exceptional circumstance, following the Court of Appeal's remarks in *Kirby v Durham* (supra). Mr. Johnston sought to distinguish the one-off offence from how offenders are treated in the category of courier cases where a previous clean record is routinely seen, as was observed in *Fiona Miller v Amanda Henry-Huggins* (*supra*).

41. In my judgment, this offence falls within the category of cases where previous case law dictates that an immediate custodial sentence is the only appropriate sentence irrespective of standard mitigating circumstances such as a previous clean record. Thus, the learned magistrate ought not to have suspended the sentence without having based his decision to do so on an exceptional circumstance.

42. However, the scope of what may be referred to as 'exceptional circumstances' is neither rigid nor restrictive. Following the *Kirby v Durham* (supra) approach, I agree that the one-off nature of an offence may be considered, in appropriate cases, as an exceptional circumstance. Such cases will invariably apply to first time-offenders, but not necessarily to any first-time offender as the facts of the particular case and the gravity of the offence will be important factors for the exercise of the Court's discretion in determining whether the case is indeed appropriate for a suspended sentence.

Whether the sentence imposed was 'manifestly inadequate'

43. A suspended sentence of imprisonment is, as a starting point, a sentence of imprisonment which can only be properly imposed after consideration has been duly given to all lawful sentence alternatives in compliance with section 55 of the Criminal Code.

44. In assessing the adequacy of the sentence imposed in appeal terms, this Court must first determine whether a term of imprisonment of 2 years (together with a $5000 fine) was manifestly inadequate.

45. On the Crown's initial case, a wrongly imposed suspension on the custodial term passed rendered the overall sentence manifestly inadequate. This argument was undermined by the prosecutor's subsequent but sensible concession that the appropriate range of sentence in this case is actually 12-18 months' imprisonment.

46. The real issues for resolve by this Court are two-fold:

    (i) Was the suspended sentence wrongly imposed?
    (ii) If so, did it render the sentence imposed manifestly inadequate?

47. I have found that the learned magistrate ought not to have suspended the sentence without having based his decision to do so on an exceptional circumstance. In his judgment, the magistrate did not expressly cite any reasons for having suspended the sentence. However, the Respondent's then Counsel submitted to the Court that the Respondent was a man of previous and impressively good character and was further reported to be at low risk of reoffending. This, in my judgment is a sufficient basis upon which the magistrate could have properly found that the offence was committed on a one-off basis and thus exceptional in circumstance.

48. Thus, it is perhaps unnecessary for me to resolve whether a wrongly imposed suspension would have resulted in the passing of a manifestly inadequate sentence. Notwithstanding, I have considered this alternative position.

49. In my judgment, the correct range of sentence in this case is 12-18 months' imprisonment. However, the learned magistrate sentenced the Respondent to a term exceeding the correct range when he passed a sentence of 2 years imprisonment. The excessiveness of the sentence was heightened by the order for payment of a $5000 fine. It is, therefore, difficult to find any favour in the Crown's argument that the sentence passed was inadequate, let alone *manifestly* inadequate.

50. In *Cousins v Kirby* (*supra*) the Court of Appeal on appeal from the Supreme Court's appellate jurisdiction stated at pages 186-187 of their judgment:

    "*One of the principal arguments before Wade Ag.J., as it was cited before us, was that the sentence was out of line. Mr. Kawaley cited Paul Desilva v The Queen Cr. App. 42 of 1985, in which the Court at pp.6-7 cited six cases, four of importation of cannabis and two of possession of cannabis with intent to supply. In four of the case(s)…terms of imprisonment of 3 years were imposed, though the quantity of cannabis seized was substantially more than the quantity seized in this case. In the case of Desilva itself the quantity seized was 13 lbs and the Court upholding a sentence of 3 years imprisonment was of the view that it erred if anything on the low side.*

In dealing with this argument, Wade Ag.J. correctly concluded following Edwin Llewellyn Fox v R., Cr. App. 2 of 1986 that the proper approach was not to take case by case arguing disparity, but to decide whether right thinking members of the public knowing all the facts and looking at what had happened, would conclude that something had gone wrong with the administration of justice and that a particular convicted person had been treated unfairly. She concluded that this was not such a (sic) the case and dismissed the appeal.

The correctness of her approach is confirmed 'by the case of Wayne Graveney v Peter Duffy (Police Inspector), No. 43 of 1989, decided on 6th December 1989 before Ward (A.) J. The facts were strikingly similar to the facts of this case. Graveney a 23 year old cleaner on a cruise ship was found on a search to have 428.5 grams of cannabis in two packages, one in each sock. He was sentenced to 3 years imprisonment by the magistrate and this was confirmed on appeal.

Mr. Kawaley's submissions appeared to be based on the foundation that Desilva (supra) propounded guidelines to which it was desirable that reference be made and reasons given for departure therefrom. This does not appear to us to be the case."

51. Concluding their judgment in *Cousins v Kirby*, the Court of Appeal found that while the sentence was considered to be severe, an appellate tribunal ought not to interfere with a sentence imposed unless it was manifestly excessive. Accordingly, they dismissed the appeal.

52. Accordingly, this Court would not interfere with a sentence imposed by the lower Courts on the basis of any finding that sentence passed was merely inadequate. An appellate Court will only intervene where the sentence is found to have been *manifestly* inadequate. As stated by Evans JA in *R v Jason Damian Brown [2012] Bda LR 21 page 3 para 6*: "*This may mean, for example, that the Supreme Court Judge would decide not to quash the original sentence in a case where, in his or her independent view, the sentence might have been marginally different from the one the Magistrate imposed*."

53. In *Hewey v Raynor* (*supra*) the learned Chief Justice, Mr. Ian Kawaley, (as he then was) observed at page 3 of his judgment:

"*The freedom the Court has in appeal against sentence by a convicted person under section 18(3) of the Criminal Appeal Act 1952 is accordingly far greater than it is in relation to an appeal by the Crown under section 4A of the Criminal Appeal Act 1952. The Court's powers in such a case are delineated by section 19A of the Criminal Appeal Act 1952, which provides as follows:*

"19A On an appeal under section 4A against sentence, the Supreme Court shall, if it thinks that the sentence imposed is manifestly inadequate or excessive, quash the

sentence imposed by the court of summary jurisdiction, and impose such other sentence as may be warranted in law in substitution therefor, and in any other case shall dismiss the appeal."

This Court has previously held that manifestly inadequate means obviously inadequate- obvious to the appellate tribunal that the sentence is much too low…It is a failure to apply right principles": LA Ward CJ in Taylor v Smith [1999] Bda LR 63 (applying the unreported decision of the Court of Appeal for Bermuda in Plant (R) v Robinson, Criminal Appeal 1983:1). The statutory scheme is explicitly designed to restrict the ability of the Crown to seek a more severe sentence on appeal but to facilitate the ability of a convicted person to secure a more lenient sentence on appeal. Under section 18(3), material not before the Magistrates' Court cannot be used to increase a convicted person's sentence where he appeals; it can be used as a basis for reducing his sentence."

Whether an Respondent at liberty should be recalled into custody upon appeal

54. I have had regard to the line of authorities subsequently placed before me by the prosecutor, which were of real assistance. In previous cases, the Bermuda Court of Appeal had regard to the likely impact of recalling a defendant into custody upon appeal. In *R v Millington* (*supra*) the Crown successfully appealed against the passing of a suspended sentence of 3 years' imprisonment for the offence of wounding with intent to cause grievous bodily harm. At pages 3-4 of the judgment delivered by the learned Evans JA, the Court of Appeal held:

"*The length of a sentence of imprisonment must depend primarily upon the severity of the injury, the manner in which it was caused, and the general circumstances of the offence. We can see no reason to depart from the Court's previous rulings that the normal range of sentence for this offence, subject always to mitigating and aggravating factors, is from three to five years.*

The Court emphasises that mitigating factors are relevant to the length of a sentence of imprisonment, as well as to the question whether a custodial sentence should be imposed at all. The purposes of sentencing which justify a sentence of imprisonment under sections 53 and 54 of the Criminal Code Amendment Act 2001 must nevertheless be balanced against mitigating factors, including those listed in section 55 and, more generally, what were called "the interests of the individual in the Court's judgment in George Rushe v Richard Vivian… These and other relevant matters have to be taken into account when assessing the length of a sentence of imprisonment, just as section 55 of the 2001 Act requires them to be taken into consideration by the Court before any sentence of imprisonment is imposed.

Adopting this approach in the present case, the Court has no doubt but that a sentence of imprisonment should be imposed and that the judge was entitled to specify

a period of three years. Inevitably, the fact that he did impose that sentence was overshadowed by his further order that the sentence should be suspended under section 70K of the 2001 Act. But the question whether to suspend a sentence of imprisonment does not arise until the sentence has been passed, and it is first necessary to determine what the period of imprisonment should be, in light of all the circumstances of the case.

In the Court's view, there were certain mitigating factors which justified reducing the sentence to less than three years (though a plea or acknowledgment of guilt was not among them), and to these must be added the facts that (1) the defendant was given his liberty when the order suspending his sentence was made, and he now faces the prospect of being recalled to custody after a period of three to four months, and (2) during that period he has completed some 40 hours of Community Service, out of the 500 hours ordered by the judge. Taking all these matters into account, the Court considers that the sentence of imprisonment can properly be reduced to fifteen months, with time spent in custody taken into consideration.

55. The question on whether the recalling of the Respondent into immediate custody would be just and appropriate in all circumstances will depend on the particular facts of the case. As a first consideration, the appellate Court will naturally look to the extent of disparity between (a) the correct range of custodial sentence which accords with the nature of the offence and the offender and (b) the custodial sentence which was imposed at first instance. The period of time during which the Respondent has been at liberty from the passing of his sentence up to the hearing of the substantive appeal may also be of particular relevance, especially where considerable delay has occurred. Of course, where the Respondent has fully or substantially complied with additional sentencing penalties such as a fine, probation period, or community service then the appellate Court will take such matters into account before exercising its discretion on the sentence for substitution.

56. In some cases it will be appropriate and even necessary for the Court to also take into consideration any new developments, post-sentencing, which relate to the Respondent personally. For example, a respondent who has a vulnerable dependant in his or her care, or a respondent who has secured employment and notable financial responsibilities, may reasonably expect not to be recalled into custody where the appellate Court is otherwise satisfied that in all circumstances it would be in the interest of justice for that respondent to maintain his or her liberty.

57. Alternatively, the appellate Court may determine, as it did in *R v Millington*, that the interest of justice requires a Respondent to be recalled into custody but on a reduced immediate custodial term.

Whether it is fair for the Crown to raise objections to a Suspended Sentence for the first time on Appeal

58. Before sentence was passed by the learned Magistrate and before Defence Counsel made oral submissions, the Crown submitted that the appropriate sentence would be an immediate custodial term ranging between 2½ - 4 years imprisonment.

59. Defence Counsel at the sentencing hearing, Ms Simone Smith-Bean, subsequently submitted that the Court's sentence should take into account the pending but visible shifts in domestic and international law in respect of the decriminalization of cannabis. Ms Smith-Bean also brought it to the magistrate's attention that Mr. Wilson was a man of previous good character and that the Social Inquiry Report before him advised that Mr. Wilson was at low risk of reoffending. Counsel further stated that the Respondent was particularly active in the community in a way which beneficially impacted others. On this basis, Ms Smith-Bean asked for the learned magistrate to suspend any custodial sentence that he would be minded to impose.

60. The Crown would have been entitled to address the magistrate on points of law arising out of the defence request for a suspended sentence. However, the prosecutor was not called upon for a reply and made no attempt to be heard in reply on Defence Counsel's request for any custodial sentence to be suspended.

Disposition

61. Having found that the learned magistrate sentenced the Respondent to a term of imprisonment which exceeded the high end of the appropriate range of imprisonment (12-18 months), it follows that I reject the Crown's ground of appeal that the sentence imposed was manifestly inadequate. The order to suspend the 2 year prison sentence in this case was incapable of converting the sentence into a manifestly inadequate one.

62. Considering the quantity of cannabis involved in this case (427.5 grams) and given that the Respondent's previous good character was the only real mitigating factor available to him, a custodial sentence at the lower-middle end of the 12-18 month range would have been appropriate.

63. The learned magistrate ought not to have imposed a suspension on the custodial sentence without expressly referring to an exceptional circumstance as a basis for so doing. However, in this case I have found that it was open to the magistrate to properly find that the offence committed was of a one-off nature and that in this case it would be appropriate to suspend the sentence for that exceptional reason. I should emphasize here (so not to depart from the English Court's characterization of previous good character as a standard mitigating factor in *R v Okinikan* (supra)) that not all

offences committed by first-time offenders will be considered to be one-off type cases and the mere fact of previous good character will not always lead to a finding that the offence committed was on a one-off basis. The Court will invariably make an assessment on the offender's likelihood to re-offend, his age, his lifestyle and any other relevant factors which may assist the Court in the exercise of its discretion.

64. In this case, I need not determine whether it would have been unfair to recall the Respondent into custody. Notwithstanding, I have addressed my mind to this alternative position. The Respondent was sentenced on 11 May 2018, nearly seven months ago. Had he been initially sentenced to an appropriate term of immediate imprisonment, he would have likely become eligible for release by now or in the very near future. For this reason, I considered that it would have been unfair, in any event, to require him to renounce his liberty at this stage and to prolong the custodial end-date several months beyond what would have been his original release date, had the sentence not been suspended. Nonetheless, I have found that a suspended sentence was justifiable in this case.

65. I am also mindful that the broad discretion given to this Court under section 18(3) of the Criminal Appeal Act 1952 is greater than the Court's discretionary powers under section 4A where the prosecution brings the appeal. I feel bound to remark, albeit in *obiter*, that it was open to the Crown to address the learned Magistrate in the first instance on the law as it relates to the proper application of suspended sentences. Having failed to have done so, it was hardly fair for the prosecution to raise these objections for the first time on appeal at this belated stage.

Conclusion

66. The Crown's appeal on the ground that the sentence imposed was manifestly inadequate is accordingly dismissed.

67. Notwithstanding, I quash the sentence of imprisonment 2 years' imposed by the learned magistrate and substitute a lower term of 13 months' imprisonment suspended for 13 months. I have not interfered with the magistrate's order for the payment of a $5000 fine.

Dated this 10th day of December 2018 _____

SHADE SUBAIR WILLIAMS
PUISNE JUDGE