In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2018: No. 014

BETWEEN:

RAMON BLANCHETTE

Appellant

-and-

FIONA MILLER
(POLICE SERGEANT)

Respondent

Before: **Hon. Assistant Justice Pettingill**

Appearances: **Ms Smith Bean, Smith Bean & Co., for the Appellant**
Ms Jaleesa Simons, Department Of Public Prosecutions, for the Respondent

Date of Hearing: **26 April 2019**

Date of Judgment: **2 May 2019**

JUDGMENT

Introduction

1. This is a Sentence Appeal in accordance with s.3 of The Criminal Appeal Act 1952 by the Appellant Raymond Blanchette against the ruling of the Senior Magistrate of two and a half years' imprisonment in relation to the offence of burglary contrary to section 339 of The Criminal Code 1909, ("The Code").

2. The matter is in fact more complex than would appear at first blush in relation to a sentence Appeal from the Magistrates Court on the basic ground that the sentence imposed was "manifestly excessive" and accordingly warrants consideration of the entire factual matrix related to the sentence which is now the subject of Appeal.

Background

3. The Appellant first appeared before the Magistrates Court on October 31st 2012 to answer to charges related to Burglary which were set out in joined Information's, namely Information No. 12CR000755 ("Information No. 755") and subsequently on November 23rd 2012 Information No. 12CR00800 ("Information No. 800"). He entered pleas of not guilty initially and subsequently changed his plea to guilty and was sentenced on 30 July 2013.

4. The Learned Magistrates ruling sets out an important part of the history of the matter at page 10 of The Appeal Record:-

> *3. The trials did not proceed on the subsequently scheduled dates and on the 29th May 2013 the Defendant plead guilty to all counts on the respective Informations. A Social Inquiry Report was ordered and on the 30th July 2013 The Worshipful Khamisi Tokunbo sentenced the Defendant after hearing submissions from the Prosecution and from the Defendant's then attorney Mr. Dante Williams. Magistrate Tokunbo sentenced the Defendant as follows:*
>
> ***Information No. 12CR00755 (No. 755):***
> *(i) Two (2) years imprisonment*
> *(ii) Payment of $200 restitution*

Information No. 12CR00800 (No. 800):

(i) Three (3) years imprisonment on both counts to run consecutive to Information No. 12CR00800.

4. Hence, the Defendant was sentenced to a total of five (5) years imprisonment. However, Magistrate Tokunbo, recognizing the progress that the Defendant had made post-conviction, ordered that three (3) years of the five (5) years be suspended for three (3) years. The effect of this was that the Defendant was to serve two (2) years of the five (5) year imprisonment with the remaining three (3) years suspended.

5. The Appellant was further sentenced to a period of probation for three years which contained a number of conditions to be adhered to subsequent to his release from prison with the proverbial Sword of Damocles' hanging over his head in the form of a three year suspended sentence in relation to the Second Information N. 800.

6. For reasons that are entirely unclear, and for which no explanation was forthcoming from the Record, the Appellant was incarcerated for some twenty-five months in relation to the sentence of two years handed down on the First Information No. 755.

7. The Appellant was released from prison on August 28th 2015 and did not have any contact with Probation Services until December 17th 2015, when he was finally contacted by the Department of Court Services ("DCS"). The Learned Magistrate indicated in his ruling that he found the Appellant blameless for this lack of contact over the four month period and, it regrettably does appear to this Court that the apparent obligation on Prison Services to contact DCS in relation to the imminent release of Mr. Blanchette did not occur. It was also accepted by the Learned Judge that when he was finally approached by DCS in December 2015 at his place of employment, that the Appellant clearly had no interest in now participating in probation and was non-compliant.

8. It is evident from the record that the Appellant was effectively non-compliant with the terms of the Probation Order for the remainder of 2016 through 2017 when the Crown commenced proceedings on August 24th 2017, in accordance with s.70CA of The Code for the discharge of the Probation Order. After a series of delays and adjournments, two of which appear to have been the fault of the Appellant after nonappearance, (although I note he was bailed by the Court on these occasions) the Learned Magistrate ultimately dealt with the Breach Application on February 21st 2018.

9. There can be no doubt that the Appellant was non-compliant with the Probation Order and the Court fully concurs with the finding of the Learned Magistrate in reaching the conclusion that he did in discharging the Probation Order on the 21st February 2018. It is also unequivocally clear that Mr. Blanchette was the author of his own fate in this regard in facing a further period of incarceration as a result of the ruling.

The Applicable Law

10. The sentencing aspect of this Appeal relates to s.70CA (2)(a)iii which states:-

> *(2) if it is proved to the satisfaction of the Magistrates Court before which a probation appears or is brought under this section that the probationer is in breach of any of the conditions of the probation order, then The Magistrate may–*
>
> *(iii) discharge the order and deal with him for the offence in respect of which the probation order was made, in any way in which the court could deal with him if the court had just convicted him of that offence; and where the order was made under section 70(1)(b), the court in so dealing with the probationer, shall take into account any period of imprisonment that he has served.*

11. Consequently, the Learned Magistrate was well within his power to discharge the Probation Order and deal with the Appellant in relation to Information No. 800 which included two counts suspended for three years.

12. However, it is important to note that the Learned Magistrate did not in fact invoke the suspended sentence in accordance with s.70k (5) of The Code which states:-

> *(5) Where an offender whose term of imprisonment has been suspended under this section is convicted of a further offence which is committed during the operational period and for which he is sentenced to imprisonment, the court which sentences the offender for the further offence shall order that the suspended sentence shall take effect unless sit is of the opinion that it is unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the further offence.*

This was logical given that the Appellant had not been "convicted of a further offence".

Consequently, any appeal ground related to the foregoing section is without merit.

13. It appears that counsel for the Appellant mounted part of the appeal argument on the basis that s.70k was wrongly applied. I take the view that this error may be in part attributed to the fact that the Learned Magistrate indicated in his sentence ruling on the breach at page 7 of the Record that :-

> *"Referring to the 5 year sentence imposed by Magistrate Tokunbo I will use the remaining 3 years of as a starting point in respect of any period of incarceration which I would impose…"*

14. With respect, in the interest of clarity for my ruling in this Appeal, the above comment by the Learned Magistrate related to:

a) The two year sentence of imprisonment on Information No. 755; and

b) The suspended sentence of three years in relation to Information No. 800.

15. The Magistrate goes on to conclude that he will sentence the Appellant to two and a half years imprisonment giving him credit for six months for which it appears that he was clean (i.e. did not test positive for drugs) and was at least to some degree compliant with the Probation Order for drug testing.

16. I note at this juncture the Learned Magistrate did not mention or take into account, "*any period of imprisonment that the Defendant had already served*" as he indicated he would do in his initial discharge of the Probation Order on February 21st (see page 18 of The Record). As a matter of Law, he was in fact bound to do this by the wording of s.70CA (2)(a)(iii) which states:-

*"...**shall** take into account any period of imprisonment that he has served."*

17. Consequently, the Appellant began a second period of imprisonment, this time for two and a half years related to the combined Information's No. 755 and No. 800 for which he originally pleaded guilty on May 29th 2013 and was sentenced on 30th July 2013, effectively meaning that he was receiving in total a sentence of four and a half years actual imprisonment relating to the original sentencing on the two information's. Offences which carry a five year maximum on summary conviction as mandated by s.339 of The Code.

18. Ms Simons for the Crown argued fairly that the sentence imposed of two and a half years was not out of line with sentences that the Appellant had received previously for like offences or on normal sentencing guidelines for these types of offences.

19. Ms Smith-Bean effectively made the point, without including it in a particularized Ground of Appeal, that the total impact of the sentence was "harsh and excessive" given the amount of time that the Appellant was now going to serve and in fact had served.

20. I have no doubt that the Learned Magistrate was completely correct in his assessment of the extent of Breach of Probation and that it was quite appropriate for the Appellant to receive a further custodial sentence. However, there are two concerns that do arise which in my assessment warrant further consideration:-

i) The delay between periods of incarceration and addressing the Probation Breach.

I am here cognizant of the overriding principles of the Bermuda Constitution Order 1968 s.6(1):-

"*If any person is charged with a criminal offence…the case shall be afforded a fair hearing* ***within a reasonable time."***

i) The totality principle to be considered in relation to the sentence of two and a half years re: Information No. 800 combines with the two year sentence on Information No.700.

21. I take the view that there is no question that the Appellant had to feel the steel of the Sword of Justice when it came to his flagrant disregard to compliance with the Probation Order. I also am mindful that the Learned Magistrate indicated his intention of taking into account any period of imprisonment and was in fact bound to do so by s.70CA. In my view, such account should not have been just for Information No. 800, for which he was now being sentenced as result of the Probation Breach but also, for the time served in relation to Information No. 755 as they were dealt with together at the initial sentencing hearing in July 2013.

22. In my view, without casting aspersions on any Department, the history of this matter really calls into question issues of the appearance of fairness and the due administration of justice. For a litany of reasons, the disposition of dealing with the Appellant simply did not occur in what the Court regards as a reasonable time and it candidly smacks as contrary, to what must be a modern developed approach to Justice, to imprison a man for two years, have him free for over two years and then imprison him again for two and a half years in relation to the same sentencing matter from 2013 on the combined Information's.

23. Charging Information's are often joined in this manner for the sake of the administration of justice and with a view to dealing with an offenders expeditiously in relation to matters that are closely associated in time or are of a similar nature as these were. It is respectfully called a Court of "Summary" Jurisdiction for a reason. In this instance, I accept that the probation issue was a lawful intervening factor which caused delay but, it was unreasonably protracted in my assessment given all the circumstances of this case.

21. The Appellant has now served over a year of the two and a half year sentence handed down by The Learned Magistrate effectively as a result of the non-compliance with the probation element of the original sentence in 2013. In all of the circumstances, and for the reasons I set out above, I find that the Appeal should be allowed and the sentence of two and a half years be reduced to such period as to allow for the immediate release of the Appellant.

Dated 2 May 2019

MARK PETTINGILL, JP
ASSISTANT JUSTICE