COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp. No. 91 of 2020

B E T W E E N

SUCULOO SAMUEL MILLER

Intended Appellant

AND

THE COMMISSIONER OF POLICE

Intended Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Isaacs, JA
The Honourable Madam Justice Bethell, JA

APPEARANCES: **Mr. Parkco Deal, Counsel for the Intended Appellant**

Mr. Terry Archer, Counsel for the Intended Respondent

DATES: **9, 28 October 2020**

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Criminal appeal – Bail pending appeal – Extension of time - Possession of an unlicensed firearm and ammunition – Magistrate's Record – Guilty plea - Sections 15 & 29 of the Court of Appeal Act – Sections 108, 200, 233 & 235 of the Criminal Procedure Code – Section 102 of the Magistrates Act – Section 90 of the Evidence Act

On 3 August 2020, acting on information received, a team of officers went to Jolly Roger Drive, Taino Beach, Grand Bahama where they encountered the intended appellant. The officers searched his person and discovered a firearm tucked in his waist; the firearm was loaded with ten live rounds of ammunition. As a result thereof, the intended appellant was arrested and charged with possession of an unlicensed firearm and ammunition. Two days later, the intended appellant appeared before the Magistrate's Court and pleaded guilty; he was sentenced to nine months' imprisonment with respect to the firearm offence and fined $2,000.00 or six months imprisonment with respect to the ammunition offence.

The intended appellant now seeks bail pending appeal (by application filed on 7 September 2020) and leave to appeal conviction out of time (by application filed on 11 September 2020). The basis of the proposed appeal is that his plea was not unequivocal and that the Magistrate failed to enquire whether he was entering the plea voluntarily. His plea was not unequivocal, he says, because he was promised by the investigating officer that if he were to plead guilty, he would only get a small fine.

Held: Application for bail pending appeal dismissed. Extension of time application dismissed.

per Isaacs, JA: Section 29 of the Court of Appeal Act provides for the grant of bail pending appeal upon the application of an appellant. In the present case, when the intended appellant filed his application for bail pending appeal on 7 September 2020, he had not yet filed an appeal and was not, therefore, an appellant. As such, the Court could not consider his application for bail pending appeal.

It is settled law that in considering an application for an extension of time the factors to be considered are the length of the delay, the reasons for the delay, the prospect of success and the prejudice, if any, to the respondent.

Section 233 of the CPC bars an appeal against conviction following a guilty plea. In such a case an appeal may only lie as against sentence, unless the plea was equivocal.

Regarding the intended appellant's prospect of success, there is nothing in the Magistrate's record which indicates that the intended appellant said anything which would have put the Magistrate on inquiry into the voluntariness or otherwise of the guilty plea. The Magistrate not including in his record that the intended appellant was not asked if he was pleading under any sort of oppression or duress does not fall afoul of section 200 of the CPC.

Attorney General v Omar Chisholm MCCrApp. No. 303 of 2014 considered
Charles McDonald v. R Criminal Appeal No. 58 of 2000 (unreported) mentioned
Jean and Others v. Minister of Labour and Home Affairs and Others (1981) 31 WIR 1 mentioned
Karchav v The Commissioner of Police [2015] 2 BHS J. No. 6 considered
Krste Pavlovski and Andrew Smith v The Commissioner of Police MCCrApp. Nos. 32 & 33 of 2016 considered
Petit v. Regina [2016] 1 BHS J. No. 95 mentioned
Sherry v The Queen [2013] UKPC 7 applied
The People at the Suit of the Director of Public Prosecutions v Kelleher [2016] IECA 277 considered

per Barnett, P: As per section 233 of the CPC this Court may only entertain an appeal against conviction on a guilty plea where the plea was equivocal or not made voluntarily. In the present case there is nothing on the Record which suggests that the plea was equivocal; further, there is nothing in the Record which indicates that the intended appellant ever told the Magistrate about the alleged promise by the officer. The proposed appeal has no prospect of success.

R v West Kent Quarter Sessions Appeal Committee, Ex parte Files [1951] 2 All ER 728 applied
Ziyang Li et al v COP MCCrApp. No. 175 of 2019 applied

J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Isaacs, JA:

1. The applicant sought bail pending appeal by filing an application on 7 September 2020. His detention in custody came after he had appeared unrepresented before S&C Magistrate Charlton Smith ("the Magistrate") and pleaded, "Guilty", to possession of an unlicensed firearm and ammunition on 5 August 2020; and he was sentenced by the Magistrate to nine months' imprisonment for the firearm offence and fined $2,000.00 or six months' imprisonment for the ammunition offence.

2. He filed a notice of application for extension of time within which to appeal conviction on 11 September 2020. The Notice of Appeal he is required to give pursuant to section 235 of the Criminal Procedure Code ("the CPC") was not filed within the time limited for appealing from a decision of a Magistrate. Thus, for the appeal to be heard, the intended appellant requires the leave of the Court. Hence, the extension of time application ("the EOT") is being made for that purpose.

Background

3. On 3 August 2020, sometime around 8:35pm, a team of police officers consisting of Sergeant 2274 Dames, Police Constable 4259 Richards, W/Corporal 3168 Ranger and D/C 3494 Burrows, acting on information received, went to Jolly Roger Drive, Taino Beach, Grand Bahama where they observed a sliver and blue Dodge truck LP #GA8365 parked in the driveway of a condo with the engine running and unoccupied. The officers proceeded to make inquiries and while doing so a male identified as Samuel Miller D.O.B. 7/10/85 of #7 Ganymede Drive, Arden Forest came and identified himself as the owner of the truck. The officers informed him that he was suspected of having Dangerous Drugs and Firearms in his possession. A search of his person was then done. The officers discovered a black 9mm Ruger pistol tucked in his waist. This was removed from his waist. The weapon contained a magazine loaded with ten (10) live rounds of 9mm ammunition. As a result, he was arrested and cautioned in reference to possession of an unlicensed firearm and ammunition. Miller told the officers that he had the weapon for his protection. He was subsequently charged with Possession of an Unlicensed Firearm and Ammunition.

Hearing in Magistrate's Court

4. On 5 August 2020, the intended appellant appeared before the Magistrate who recorded on the court's docket, rather tersely, the account of the proceedings. I reproduce the more salient parts of the Record:

> **"NATURE OF OFFENCE:**
>
> **POSSESSION OF AN UNLICENSED FIREARM: Contrary to section 5(B) of the Firearm Act Chapter 213.**
>
> **Particulars are:**
>
> **That you on Monday 3rd August, 2020 at Freeport, Grand Bahama were found in possession of a black .9mm Ruger pistol s/n382-49016, not being the holder of a special license in the prescribe (sic) form, from the Licensing Authority, authorizing you to possess the same.**
>
> **POSSESSION OF AMMUNITION: Contrary to section 9(2)A of the Firearm Act chapter 213.**
>
> **Particulars are:**
>
> **That you on Monday 3 August, 2020 at Freeport, Grand Bahama were found in possession of ten (1) .9mm rounds of ammunition, not being the holder of a firearm certificate in force at the time, authorizing you to possess the same.**
>
> ---
>
> **Date of Arraignment: 5th August, 2020**
>
> **Ruling**
>
> **As to Count(s)**
>
> **Defendant appeared in custody, unrepresented, entered guilty plea. Defendant has no known antecedent (sic). Defendant was found with a loaded Firearm in his waist during a National Lockdown. Defendant is convicted on his plea.**
>
> **He is sentenced on Count One to serve nine (9) months at Bahamas Department of Correctional Service (sic).**

On Count Two - He is fined $2,000.00 or six (6) months at Bahamas Department of Correctional Service (sic). Sentence to run consecutively.

Firearm and ammunition is (sic) confiscated to the Crown."

Application for Bail

5. Section 29(1) of the Court of Appeal Act ("the CAA") states:

> **"29. (1) Subject to the provisions of the Bail Act, the court may, if it sees fit upon the application of an appellant, admit him to bail pending the determination of his appeal." [Emphasis added]**

6. The Court may grant "an appellant" bail pending appeal but that means there must have been an appeal filed in the Court's Registry. On 7 September 2020, when the intended appellant applied for bail pending appeal, he had not yet filed an appeal. Thus, he was not "an appellant"; and in the circumstances the Court could not consider his application for bail.

7. In the premises, the application for bail was doomed to fail. Thus, the application is dismissed.

Application for an Extension of Time Within Which to Appeal

8. The intended appellant was convicted and sentenced on 5 August 2020. He filed his notice of application for extension of time within which to appeal conviction on 11 September 2020. His notice is out of time and, therefore, late. Section 235(2) of the CPC provides:

> **"235. 2) An appellant, within seven days after the day upon which the decision was given from which the appeal is made, shall serve a notice in writing, signed by the appellant or his counsel, on the other party and on the magistrate's court of his intention to appeal and of the general grounds of his appeal:**
>
> **Provided that any person aggrieved by the decision of a magistrate's court may upon notice to the other party apply to the court to which an appeal from such decision lies, for leave to extend the time within which such notice of appeal prescribed by this subsection may be served, and the court upon the hearing of such application may extend such time as it deems fit." [Emphasis added]**

9. Section 235 reveals that a person has seven days within which to give his notice of appeal from a magisterial decision; and the Court has the discretion to extend the time for appealing.

10. The intended appellant's application to extend the time within which to appeal ("the EOT application") sets out the grounds for the application. They are as follows:

> **"(i) The delay is not inordinate;**
>
> **(ii) Reason for delay—once I was convicted, I was taken to the Custody Suite, Freeport, Grand Bahama and told by the police officers that I will be sent to the Department of Correction (sic) Services, Nassau, New Providence as soon as possible, however, days later I was still at the Custody Suite, Freeport and police officers told me that the country was in a total lockdown because of the Covid-19 pandemic. I requested a phone call to contact my wife and once I was allowed to call, I instructed her to contact an Attorney and instruct them to come and see me;**
>
> **(iii) The prospects of success at my appeal are good because the Law says my plea must be unequivocal;**
>
> **(iv) There is no prejudice to the Respondent."**

11. Ground (iii) above states a trite principle of law, to wit, a defendant's plea of guilty, must be unequivocal. However, it does not explain how the plea was equivocal. It is usual to exhibit to the affidavit in support of the EOT application a draft notice of appeal which would outline therein the grounds on which the intended appellant intends to rely.

12. On 11 September 2020 the intended appellant filed an affidavit, sworn by Parkco Deal, counsel for the intended appellant, in support of the EOT application; and at paragraphs 20 to 22, Mr. Deal speaks to the issue of prospects of success. He averred as follows:

> **"20. I have consulted Mr. Shurland and based on our discussion I verily believe that having regard to the circumstances, the Applicant has a good prospect of his Appeal being successful.**
>
> **21. That considering the Applicant's Appeal is against the decision of a S&C Magistrate I verily believe that there is no perceptible prejudice to the Respondent should this Honourable Court exercise its inherent discretion to extend the time for Appealing this matter.**

22. That I verily believe that the Applicant has an arguable Appeal and that Leave to Appeal should be granted in the circumstances. I therefore depose this affidavit in support of the Summons filed herewith."

13. The intended appellant had earlier provided the basis for his contention that his appeal stands a good prospect of success in his attorney's averments at paragraphs 6, 7 and 11 of his affidavit in support of the intended appellant's EOT application. I set them out:

"6. That I attended the Custody Suite on the 13th August 2020 and held a conference with the Applicant and he told me that, on the 5th August 2020. He was arraigned before S&C Magistrate Charlton Smith sitting at Court No. 2 where he plead guilty because Sgt. Smith, the Investigating Officer, promised and persuaded him that if he plead guilty, he guarantee (sic) that he will only get a small fine and that he honestly believed Sgt. Smith had the power and authority to make that decision.

7. Further, he was not represented by Counsel at his arraignment and recalled what the Magistrate said. The Applicant was never asked whether he was threatened, promised or induced to enter a guilty plea.

…

11. That again I visited the Applicant on the 14th August 2020 when he gave me further instructions to start the Appeal process. He gave his reason that Sgt. Smith mislead (sic) him and had he not been under duress he would have plead not guilty. Nevertheless, Sgt. Smith was very effective in persuading him that he would only get a small fine if he plead guilty to the charges."

14. It appears, therefore, that the intended appellant alleges that he relied on representations made by the police to enter his guilty plea hence, his plea was not unequivocal.

15. As we were desirous of expediting the hearing of the matter, we determined to hear the intended appellant's EOT application. Moreover, we did so because Counsel had indicated to the Court that they could argue the case on the material at hand and the matter was a short one.

16. Counsel for the intended appellant, Mr. Deal, directed the bulk of his submissions to the intended appellant's prospects of success. We consider that this was the correct course because in our view, this is the most important of the four factors we are called upon to consider on an EOT application. In **Attorney General v Omar Chisholm** MCCrApp. No. 303 of 2014, Adderley, JA stated at paragraph 12 of his judgment:

> **"12. It is settled that in exercising its discretion whether to grant or refuse an extension of time the court considers four things: the length of the delay, the reason for the delay, the prospect of success, and the prejudice, if any, to the respondent."**.

17. While the importance of the three other factors may have varying strength in a particular application, we deem them of negligible effect in this case because the length of delay was only some thirty-three days and the explanation for the delay was reasonable in the circumstances, to wit, it was due in the main to the restrictions imposed in response to the Covid-19 pandemic and the quarantining of the intended appellant's Counsel for a period of time. Moreover, I perceived no prejudice inuring to the intended respondent should the application succeed.

18. In delivering the judgment of the Privy Council in an appeal from the Court of Appeal of Guernsey, that is, **Sherry v The Queen** [2013] UKPC 7, Lady Hale held, inter alia, at paragraph 14 that:

> **"14. The Board accepts that the merits of any proposed appeal are relevant to an application to extend time. At the very least, it must be shown that there is some merit in the proposed appeal before a court will consider whether the delay can be excused. If the appeal has no prospect of success, then it is in no-one's interest to allow it to proceed, however short or understandable the delay. Conversely, if the appeal is bound to succeed, the court may look more kindly upon the reasons for the delay. But even in such a case it is by no means inevitable that permission will be granted…."**

19. Mr. Deal's submissions followed closely the grounds laid out in the intended appellant's application for bail pending appeal; the main thrust being that, **"[t]he Appellant's plea was equivocal in that he was promised that if he pleaded guilty the court would only give him a fine as opposed to a penal sanction"**. The only other place where the intended appellant makes this allegation is in the 11 September 2020 affidavit at paragraphs 6 and 11. It may be of some significance that he does not produce any draft grounds of appeal as a part of the

documents supporting his EOT application to demonstrate why his appeal is bound to succeed. We are being asked to presume that this alleged promise will form a part of the intended appellant's grounds.

20. Mr. Deal also took issue with the Magistrate's apparent failure to ascertain whether the intended appellant was entering his guilty plea of his own free will.

Discussion

21. Section 200 of the CPC sets out the procedure to be adopted by a magistrate where a defendant pleads "Guilty" to a charge. It reads:

> **"200. If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him and the court shall convict him and pass sentence upon or make an order against him unless, after hearing anything which may be said by or on behalf of the accused, whether in mitigation or otherwise, there shall appear to the court to be sufficient cause to the contrary."**

22. The Magistrate's record reflects, inter alia, the following:

> **"Defendant appeared in custody, unrepresented, entered guilty plea. Defendant has no known antecedent (sic). Defendant was found with a loaded Firearm in his waist during a National Lockdown. Defendant is convicted on his plea."**

23. This laconic record may have been sufficient to satisfy the requirement of section 108(1) and (2) of the CPC because those sub-sections state:

> **"108. (1) Every judgment in a summary trial, except as otherwise expressly provided by this Code or any other law, shall be written by the magistrate in English and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by such magistrate in open court at the time of pronouncing it:**
>
> **Provided that in a case in which the accused person has admitted the truth of the charge and has been convicted, it shall be sufficient compliance with the provisions of this**

> **subsection if the judgment contains only the finding and sentence or other final order and is signed and dated by the magistrate at the time of pronouncing it.**
>
> **(2) In the case of a conviction the judgment shall specify the offence of which, and the section of the law under which, the accused person is convicted and the punishment to which he is sentenced or other lawful order of the court upon such conviction."**

24. The intended appellant's complaint amounts to this, as I understand his case: 1) the Magistrate failed to enquire if I was entering a guilty plea voluntarily; and 2) the Magistrate failed to comply with section 200 of the CPC.

25. In relation to the Magistrate failing to ascertain the voluntariness or otherwise of the plea, the Magistrate has recorded that the intended appellant entered a guilty plea. There is no requirement for a magistrate to do anything more than be satisfied that the defendant admits the truth of the charge. In that regard the defendant's plea of guilty is such an admission. The fact that the Magistrate has not made it a part of his record that the intended appellant was not asked if he was pleading under any sort of oppression or duress, does not fall afoul of section 200 of the CPC. It is notable that the intended appellant does not allege that he offered any explanation to the Magistrate as to why he was entering a guilty plea. It is not unknown in this jurisdiction for a defendant upon being arraigned to respond to the charge, "Guilty, with explanation"; which response would then put a magistrate on notice that further probing is necessary.

26. The record of the Magistrate may have included the words, "the defendant admits the truth of the charge" but in my view, his not having done so, is not fatal to the intended appellant's convictions and sentences.

27. In relation to what is to be recorded by a magistrate upon a guilty plea, all that the proviso to section 108 requires, is that the magistrate's judgment contain:

> "…**only the finding and sentence or other final order and is signed and dated by the magistrate at the time of pronouncing it**".

28. The Magistrate's record reveals the following:

> **"…Defendant was found with a loaded Firearm in his waist during a National Lockdown….**

…

He is sentenced on Count One to serve nine (9) months at Bahamas Department of Correctional Service (sic).

On Count Two - He is fined $2,000.00 or six (6) months at Bahamas Department of Correctional Service (sic). Sentence to run consecutively."

29. In my view, the Magistrate has complied with section 108 of the CPC as his references to counts one and two identifies the sentences to the counts previously mentioned in the Magistrate's record, to wit: **"POSSESSION OF AN UNLICENSED FIREARM: Contrary to section 5(B) of the Firearm Act Chapter 213."** and **"POSSESSION OF AMMUNITION: Contrary to section 9(2)A of the Firearm Act chapter 213."**

30. The side note to section 102 of the Magistrates Act reads, "Record of court proceedings"; and the section states:

> **"102. (1) Notwithstanding anything to the contrary in any law where adequate equipment is provided for recording mechanically the evidence and proceedings in any cause or matter, whether civil or criminal, heard before a magisterial or coroner's court, the presiding magistrate or coroner, as the case may be, may proceed to have such evidence and proceedings recorded by that equipment.**
>
> **(2) Save as provided in subsection (1) the provisions of section 77 of the Supreme Court Act shall mutatis mutandis apply to the mechanical recording of such evidence and proceedings."**

31. It appears that the Magistrate took his own notes so what he has recorded is the record of the court. Bearing in mind that the record reveals that the intended appellant pleaded, "Guilty" to the charges, he is not permitted to challenge his conviction. Section 233 of the CPC states:

> **"233. No appeal shall be allowed in a case in which the accused person has pleaded guilty and has been convicted by a magistrate's court on such plea, except as to the extent or legality of the sentence."**

32. I recognise that the majority of the Court, differently constituted, in the conjoined appeals **Krste Pavlovski and Andrew Smith v The Commissioner of Police** MCCrApp. Nos. 32 & 33 of 2016 appeared to have gone behind the guilty pleas of the appellants. The Court had regard to affidavits filed by the appellants that called into question the correctness of the magistrate's record and whether their pleas were unequivocal. One of the appellants deposed

that he **"told the magistrate that a friend who was partying on the boat with us asked to use the safe and he must have put them there."** Allen, P dissented from the decision of the majority.

33. In their judgment, the majority delved into the interviews of the appellants with the police and found that what was said there did not jibe with the magistrate's note that the appellants "were interviewed and admitted possession". The Court ultimately quashed the convictions, set aside the sentences and ordered a new trial before another magistrate. Paragraph 27 of the judgment provided salutary advice for courts where an undefended accused pleaded guilty. The majority said, inter alia:

> **"27. Where an undefended accused pleads guilty, care should be taken to ensure that he understands the elements of the crime for which he was pleading especially where the depositions suggest that he may have a good defence. The magistrate cannot simply ignore what was said in a pre-trial statement where on its face there is some doubt as to the unequivocal nature of the plea…."**

34. Allen, P in her dissent, relied on section 233 of the CPC, section 90 of the Evidence Act, the record of the magistrate, the appellants' and the magistrate's affidavits, and concluded that there was no equivocation in the appellants' pleas.

35. An interesting aspect of **Pavloski**, was the submission said to have been made by the appellants' counsel, Mr. Wayne Munroe, QC. At paragraph 60 Allen, P said, inter alia:

> **"60. Moreover, Mr. Munroe, QC, who only recently became counsel of record, submitted that the affidavits, filed by both sides, were extraneous and ought not to be considered in the determination of the appeal. I am in complete agreement with this submission…."**

36. In **Karchav v The Commissioner of Police** [2015] 2 BHS J. No. 6, the appellant, having pleaded guilty to the charges, attempted to appeal his conviction. While delivering the judgment of the Court (differently constituted) Conteh, JA said at page 5:

> **"We have had the benefit of reading the magistrate's notes on the appellant's arraignment on 18th February. From these it is clear that the appellant pleaded guilty to**

> **the charges, as recorded in the magistrate's handwriting, following which he was convicted. There was no ambiguity or equivocation about his pleas on 18th February, and it is manifest that the appellant speaks and understands English, but, more importantly, he was represented by counsel on his arrangement (sic) and plea."**

37. I readily accept that the intended appellant was not represented by Counsel on his arraignment as Mr. Karchav was and that that is a distinguishing feature between the two cases.

38. As it pertains to the intended appellant's assertion that he was assured by the police officer that if he pleaded guilty to the charges he would only receive a small fine, there is no document that memorialises that event. At page 6 of his judgment in **Karchav**, Conteh, JA said:

> **"We are also not, however, satisfied that there was an agreement, as alluded to in paragraph 7 of the appellant's affidavit, between the appellant and the prosecuting officer that certain things would be done if he pleaded guilty and that this elicited the guilty pleas. This is for the simple reason that there was no evidence of any such agreement, as is required by law in section 4(2) and section 9(1) of the Criminal Procedure (Plea Discussion and Plea Agreement) Act of the Statute Laws of The Bahamas, and no such agreement or evidence of it was put before us."**

39. I hold the view that persons who plead guilty in the magistrates' courts are caught by section 233 of the CPC and are permitted to appeal against sentence only. It must be remembered that the right of appeal is a statutory construct. So, if there is a statutory limitation on an appeal from the magistrates' courts, we cannot go behind such limitation. If I may be permitted to use an analogy, applications for habeas corpus are generally - different considerations arise in extradition cases - limited to a scrutiny of the document authorising the person's detention. Hence, unless there is a defect on the face of the document, the court cannot go behind the document to impugn it: **Jean and Others v. Minister of Labour and Home Affairs and Others** (1981) 31 W.I.R. 1; and **Charles McDonald v. R** Criminal Appeal No. 58 of 2000 (unreported).

40. Continuing the analogy, the magistrate's record is the document on which the Court relies in an appeal from a magistrate. Given the great numbers of cases heard by magistrates,

pandemonium and gridlock would ensue if persons were allowed to augment a magistrate's record with their own account of what transpired before the magistrate. This would open the floodgates to appeals which Parliament, by section 233, saw fit to limit; thus making an end run around Parliament's intention.

41. I would accept that where both parties to the appeal are in agreement that a magistrate's record is incomplete, the Court should be mindful of their views. However, where, as in this case, there is a conflict of affidavits as to what transpired before the magistrate, the Court must be guided by the magistrate's record. To hold otherwise invites resolution of factual issues by affidavits, a course of action discouraged by the courts due to the unsuitability of that procedure in adversarial proceedings.

42. I hold, like Allen, P did in **Pavloski**, that section 90 of the Evidence Act is of some moment in the present appeal. Section 90 states:

> **"90. Where a person is proved to have done any act in any official or judicial capacity, the court shall presume, until the contrary is shown, that all circumstances had happened and all conditions were fulfilled which were necessary to give validity to such act."**

43. Additionally, section 104(4) of the CPC provides:

> **"104. (4) Except as may be otherwise expressly provided by any written law, a court shall not be required to record its performance or fulfilment of any duty or function prescribed under, the provisions of this Code:**
>
> **Provided that —**
>
> > **(a) where there is nothing in the record of the proceedings before a court to indicate that the court has performed or fulfilled any duty or function so prescribed, the court shall be deemed to have complied with those requirements unless the contrary is proven; and**
> >
> > **(b) the failure by a court to comply with any of those requirements shall not in any way vitiate the trial of an accused person unless a court to which an appeal is made considers that by reason of the accused person not having had the benefit of legal representation, the accused person is shown to have been prejudiced by that failure."**

Conclusion

44. Although I find that the Magistrate's record was terse, I am unable to find that his failure to record that the intended appellant admitted the truth of the charge or that the facts were read, in the face of the Magistrate recording that the intended appellant was found with a firearm in his waist, leads me to conclude that the facts were indeed read and the intended appellant pleaded, "Guilty". Further, the recording of the fact that the intended appellant had no antecedents suggests that representation was made to the Magistrate in mitigation of sentence as it is unlikely that the Magistrate would have independent knowledge of that state of affairs.

45. I might add that given the leniency of the sentence imposed by the Magistrate, he must have been sufficiently impressed by the information provided to him about the character of the intended appellant, that he chose to emphasise that element of his sentence over that of either specific or general deterrence; and to give effect to the intended appellant's early plea of guilt.

46. Even if I am wrong to conclude that the Magistrate's failure to record that the intended appellant admitted the truth of the charges, I am satisfied that no injustice has occurred in this case for the simple reason that the intended appellant's complaint is the failures of the Magistrate. He does not impugn the accuracy, veracity or voluntariness of the record of interview ("the ROI") produced as a result of his questioning by the police. It is only at paragraph 6 of the written submissions of Mr. Deal that any suggestion is made that "before he gave a formal Record of Interview" Sergeant 1849 Smith told him:

> **"6. …not everyone who is charged with possession of firearm has to go to jail ... I will check to see if you have any antecedents, once you have none, I will check with the prosecution to ensure you only get a fine but you will have to plead guilty."**

47. The timing of this alleged inducement, that is, when it was alleged to have been given, is not referred to by the intended appellant save that he says it was made by the investigating officer. However, at paragraph 6 of the affidavit filed on 11 September 2020, sworn to by Mr. Deal on behalf of the intended appellant averred, inter alia:

> **"6.** …**He was arraigned before S&C Magistrate Charlton Smith sitting at Court No. 2 where he plead guilty because Sgt. Smith, the Investigating Officer, promised and persuaded him that if he plead guilty, he guarantee (sic) that he will only get a small fine and that he honestly believed Sgt. Smith had the power and authority to make that decision."**

48. Significantly, the intended appellant did not instruct his Counsel that he was induced to make the ROI by the representation of Sergeant Smith, but merely that such representation, if made, persuaded him to plead, "Guilty".

49. The issue of competing, conflicting affidavits arises once more because the intended respondent has filed three affidavits in response to the intended appellant's affidavit in order to refute his claims that he was induced to enter a guilty plea. I refer only to the ROI exhibited to Police Constable 4862 Stewart's affidavit to illustrate two matters. First, Stewart not Smith was the investigating officer as the intended appellant recalled; and second the ROI discloses a full confession to the offences charged and an explanation for his possession of the firearm and ammunition.

50. Although somewhat lengthy, I set out the handwritten ROI; at least the allegation and the questions and answers:

> **"It is alleged that you Samuel Miller at 8:35pm on Monday 3rd August, 2020 while in the area of Jolly Rodger Drive, Taino Beach was found in possession of a black .9mm Ruger pistol s/n 382-49016 with a magazine of (10) live .9mm rounds of ammunition. Not being the holder of a Firearm Licensing Certificate possessing (sic) you to have same. You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence.**
>
> **Ques 1 Do you understand what was just read over to you?**
>
> **Ans 1 Yes sir. S.M.**
>
> **Ques 2 Can you read and write the English language?**
>
> **Ans 2 Yes sir. S.M.**
>
> **Ques 3 Do you wish to have a lawyer present in this record of interview?**
>
> **Ans 3 No sir. S.M.**
>
> **Ques 4 State your full name and date of birth for the record?**
>
> **Ans 4 Samuel Suculoo Miller D.O.B. 07/10/85. S.M.**
>
> **Ques 5 Where were you on Monday 3rd August, 2020? (sic) at 8:35pm?**

Ans 5 Do not recall. S.M.

Ques 6 I put it to you that you were in fact at Jolly Rodger Drive, Taino Beach on Monday 3rd August, 2020 at 8:35pm. What do you have to say?

Ans 6 It's a possibility I'm not sure about the time that's why I said I don't recall. S.M.

Ques 7 Do you own a silver and blue Dodge truck?

Ans 7 It's blue and tan. S.M.

Ques 8 Were you approached by police officers on Monday 3rd August, 2020 at 8:35pm on Jolly Rodger Drive, Taino Beach?

Ans 8 Yes. S.M.

Ques 9 Did the officers search you?

Ans 9 Yes. S.M.

Ques 10 Did the officers find anything illegal on you?

Ans 10 Yes. S.M.

Ques 11 What did the officers find?

Ans 11 A firearm. S.M.

Ques 12 Can you describe the firearm the officers found on you?

Ans 12 A black firearm. S.M.

Ques 13 Who does the firearm belong too (sic)?

Ans 13 Me. S.M.

Ques 14 I now show you a black .9mm Rugar Pistol s/n 382-49016 with a magazine of (10) live .9mm rounds of ammunition. Do you recognize this firearm?

Ans 14 Yes I recognize this firearm and the ammunition. S.M.

Ques 15 Where do you recognize it from?

Ans 15 The firearm I purchased and the ammunition which the police would of (sic) found in my possession. S.M.

Ques 16 What was your reason for purchasing the black .9mm Rugar pistol and the ammunition?

Ans 16 To provide protection from (sic) me and my family through hard times and past transgressions. S.M.

Ques 17 Do you own a license the (sic) permits you to carry a firearm in the Commonwealth of the Bahamas?

Ans 17 No sir. S.M

Ques 18 Do you know it is illegal to carry a firearm without a license in the Commonwealth of the Bahamas?

Ans 18 Yes sir. S.M.

Ques 19 When did you purchase the firearm and ammunition?

Ans 19 Right when the pandemic started somewhere around May or March. S.M.

Ques 20 Who did you buy the firearm and ammunition from?

Ans 20 A man known to me as T. S.M.

Ques 21 Do you know the address of the man you only know as T?

Ans 21 No sir. S.M.

Ques 22 Can you describe the man you only know as T's appearance?

Ans 22 Regular build dark. S.M.

Ques 23 How much did you purchase the firearm and ammunition for?

Ans 23 $1,000.00 for the firearm and ammunition. S.M.

Ques 24 I put it to you that the reason you had the firearm and ammunition in your possession was to committ (sic) a crime. What do you have to say about this?

Ans 24 False. Not true. S.M.

Ques 25 Do you wish to give a written statement under caution?

Ans 25 No sir. S.M.

Ques 26 Do you wish to read and sign this record of interview so no one will add alter or correct any of your answers?

Ans 26 Yes Sir. S.M."

51. Each answer given by the intended appellant is initialled; and at the end of the ROI he has placed his signature and the date along with the two police officers.

52. It is clear that any explanation the intended appellant proposed to make to the Magistrate about finding and taking the firearm to the police is inconsistent with his ROI; which said ROI is in no way impugned by the intended appellant in his sworn affidavit.

53. Section 15 of the CAA states:

"15. (1) The court, upon an appeal under section 14, may adjourn the hearing of the said appeal, and may upon the hearing thereof —

(a) subject to subsection (2) of this section, allow the appeal on any of the grounds set out in subsection (1) of section 14;

(b) dismiss the appeal;

(c) vary or modify the decision of the magisterial court;

(d) remit the matter with the opinion of the court thereon to the magisterial court; or

(e) make such other order in the matter as it may think just, and may, by such order, exercise any power which the magisterial court might have exercised, and such order shall have the same effect and may be enforced in the same manner as if it had been made by the magisterial court.

(2) The court may notwithstanding that it is of the opinion that the point raised in the appeal <u>might be decided</u> in favour of the appellant, dismiss the appeal if the court considers that no miscarriage of justice has actually occurred." [Emphasis added]

Disposition

54. While the Court must be astute to ensure that an accused person is afforded a fair trial, two matters must be borne in mind. First, the accused is guaranteed a fair trial and not a perfect trial: **Petit v. Regina** [2016] 1 BHS J. No. 95 (per Isaacs, JA at para. 37).

55. In **The People at the Suit of the Director of Public Prosecutions v Kelleher** [2016] IECA 277 the Irish Court of Appeal at paragraph 10 referred to an extract taken from Prof. O'Malley's in the Criminal Process (Dublin, 2009) where he notes at paragraph 404, p. 63:

> **"10. …As the Canadian Supreme Court has said with reference to its own charter of rights and freedoms:**
>
> > **'A fair trial however should not be confused with a perfect trial or the most advantageous trial possible from the accused's perspective … What constitutes a fair trial takes account not only of the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process … what the law demands is not perfect justice, but fundamentally fair justice.'"**

56. Second, we must not allow form to triumph over substance; particularly in circumstances where there is no prejudice that inures to the accused as a result of the alleged shortcoming.

57. In all the circumstances of this case, I am satisfied that the convictions and sentences imposed on the intended appellant in this case are not unsafe or unsatisfactory. If I am wrong, I would invoke the proviso to section 15(2) of the CAA to sustain the convictions and sentences.

58. Thus, the application for bail is refused; and the EOT application is refused. As a consequence, the convictions and the sentences imposed by the Magistrate are affirmed.

59. Before leaving this judgment, I wish to add that Magistrates are the bulwark of our judicial system, to wit, they bear the onerous burden of hearing the vast majority of criminal cases brought before the courts. This fact, however, does not derogate from a magistrate's duty to faithfully observe the statutory requirements governing the conduct of criminal trials. Magistrates should be more concerned with the quality of their work rather than the volume of cases disposed of. The old adage, "Haste makes waste", is apropos in the circumstances since the work done in a trial may all be undone on an appeal due to the failure of the court to perform a function mandated by the CPC, Magistrates Act or some other statute.

60. I would therefore urge Magistrates to inquire whether the defendant accepts the facts when read to the court and record his or her answer. If the plea is unequivocal, make that finding then go on to record the conviction.

The Honourable Mr. Justice Isaacs, JA

61. I agree.

The Honourable Madam Justice Carolita Bethell, JA

Judgment delivered by The Honourable Sir Michael Barnett, P

62. I have read in draft the judgment of Isaacs, JA and I agree that this application should be dismissed.

63. Regarding the intended appellant's prospect of success on his application for an extension of time, the ability to appeal a conviction after a guilty plea is constrained by Section 233 of the Criminal Procedure Code.

64. In **Ziyang Li et al v COP** MCCrApp. No. 175 of 2019 in dismissing an appeal against conviction after a guilty plea, this Court (differently constituted) said:

> **"15. …if a guilty plea is equivocal and therefore not in fact a guilty plea or if it was not made voluntarily and therefore a nullity, the Court of Appeal may entertain an appeal from a conviction made in such a circumstance…"**

65. In my judgment, it is only in those circumstances can this Court entertain an appeal against conviction after a guilty plea.

66. There is nothing on the Record which suggests that the plea was in any way equivocal. The intended appellant accepts that he pleaded guilty and intended to plead guilty.

67. The intended appellant argues that his plea was not voluntary as it was made after he was promised by a police officer (not the prosecutor) that if he pleaded guilty, he would only receive a fine and would not be sentenced to prison. The officer who is alleged to have made the promise has denied that he ever made any such promise. There is nothing in the Record which indicates that the intended appellant ever told the Magistrate after he was convicted that he was promised that he would only receive a fine upon pleading guilty.

68. The ground that the conviction should be set aside because the guilty plea was only made as a result of that promise is unsustainable.

69. I agree with the observation of Lord Goddard CJ in **R v West Kent Quarter Sessions Appeal Committee, Ex parte Files** [1951] 2 All ER 728 where he said:

> **"…I know of no authority, and certainly no statute, which says that where a person has pleaded Guilty he can go to quarter sessions and ask the court of quarter sessions to inquire whether he intended to plead Guilty or whether he did not. If that sort of thing were allowed, it would be opening the door very wide indeed. Numerous people would then, at any rate for the sake of getting the sentence suspended, go to quarter sessions and say: "I pleaded Guilty in the court below. I never thought I would get six months. I now want to appeal, not only against sentence, but also against conviction…."**

70. In my judgment there is simply no prospect of success on this proposed appeal and I agree that the application for an extension must be dismissed.

The Honourable Sir Michael Barnett, P