COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp. No. 82 of 2021

B E T W E E N

ROBIN JEANTIL

Appellant

AND

THE COMMISSIONER OF POLICE

Respondent

COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp. No. 83 of 2021

B E T W E E N

RECHARD CHARLES aka RACHARD CHARLES

Appellant

AND

THE COMMISSIONER OF POLICE

Respondent

BEFORE: **The Honourable Madam Justice Crane-Scott, JA**
The Honourable Mr. Justice Evans, JA
The Honourable Madam Justice Bethell, JA

APPEARANCES: **Ms. Christina Galanos, Counsel for the Appellants**

Ms. Stephanie Pintard, Counsel for the Respondent

DATES: **15 July 2021; 30 August 2021**

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Criminal appeal – Voyeurism - Appeal against sentence – Whether sentence unduly severe — Guilty plea before a magistrate – Whether appellants precluded from also raising ground against

conviction - Section 233 of the Criminal Procedure Code - Section 5A(5) of the Sexual Offences Act

On 22 June 2021, the appellants appeared before the Marsh Harbour Magistrate's Court where they each pled guilty to the offences of trespass (count one) and voyeurism (count three). The sentence imposed on count one was a fine of $50.00 or 14 days imprisonment, and on count three 6 months' imprisonment.

Following the imposition of their sentences, the appellants both appealed raising identical grounds against sentence. They each subsequently filed amended grounds of appeal, ground 1 of which was an obvious attempt to overturn the appellants' convictions, notwithstanding section 233 of the Criminal Procedure Code (CPC) which prohibits an appeal against conviction following a guilty plea. They further complained (ground 2) that the sentence of 6 months' imprisonment was unduly severe. The Crown opposed the appeal on both grounds.

Held: Appeal allowed on ground 2. The appellants' custodial sentences of 6 months imprisonment imposed in respect of count 3 (voyeurism) quashed. Fine of $300.00 imposed on each appellant, to be paid in 14 days, or in default, imprisonment of 3 months.

Ground 1 was incompetent in that it was an obvious attempt to overturn the appellants' convictions, notwithstanding their guilty pleas. Section 233 of the CPC expressly prohibits this Court from entertaining an appeal from a Magistrate's Court in which an accused has pleaded guilty and been convicted on such plea, except as to the extent or legality of the sentence. Ground 1 was duly dismissed.

As is well known, a sentence is unduly severe if it falls outside the range of sentences which the sentencing judge, applying his mind to all the relevant factors, and having regard to like cases, could reasonably consider appropriate. The offence of voyeurism is undoubtedly a serious offence involving an invasion of privacy. However, the mitigating factors in this particular case outweighed the aggravating factors. Accordingly, the imposition of a 6-month custodial sentence on these appellants, who were both young men of previously good character, was not only severe, but unduly severe. Appeal allowed on ground 2.

Commissioner of Police v. Edmund Lewis Jr. Magistrate's Court Case No. 224/2015 considered
Commissioner of Police v. Alicia Forbes & Dennis Watson Magistrate's Court Case No. 1548/2020 considered
Donovan Rolle v Commissioner of Police MCCrApp. No. 145 of 2016 mentioned

REASONS FOR DECISION

Delivered by The Honourable Madam Justice Crane-Scott, JA:

Introduction

1. On 15 July 2021, after hearing the contending arguments, we allowed the appellants' appeals against sentence on ground 2 on the basis that the imposition by the learned magistrate of a custodial sentence of 6 months imprisonment was unduly severe.

2. After quashing the appellants' custodial sentences, we substituted a fine of $300.00 on each appellant to be paid in 14 days, or in default, imprisonment of 3 months.

3. We had promised to provide brief reasons for our decision and do so now.

Background

4. On 22 June 2021 the appellants appeared before Magistrate Ancella Evans in the Marsh Harbour Magistrate's Court and were arraigned in connection with the following offences:

> **"Count #1**
> **Trespassing: contrary to section 160(2) of the Penal Code, Ch. 84.**
>
> **Particulars are:- That you on Sunday, 6 June, 2021 at about 1:30 am while at White Sound, Elbow Cay, Abaco being concerned together, did enter upon the premises of Jennie St. Luc situated Centre Line Road at the rear of Willie's Bar and Restaurant against the will and permission of said premises owner.**
>
> **Count #2**
> **Willful Damage: contrary to section 328(1) of the Penal Code, Ch. 84.**
>
> **Particulars are:- That you on Sunday, 6 June, 2021 at about 1:30 am while at White Sound, Elbow Cay, Abaco being concerned together, did intentionally and unlawfully cause material damage to (1) window screen in the amount of $64.00, the property of Jeannie St. Luc.**

Count #3
Voyeurism: contrary to section 5A(1)(a)(i) of the Sexual Offences Act, Ch. 99.

Particulars are:- That you on Sunday, 6 June, 2021 at about 1:30 am while at White Sound, Elbow Cay, Abaco did surreptitiously observe Jeannie St. Luc at her residence situated Centre Line Road while engaged in explicit sexual activity."

5. The charge of Willful Damage was withdrawn by the prosecutor and the appellants were duly acquitted of count 2 in accordance with section 230 (2) (b)(i) of the Criminal Procedure Code, Ch. 84. Both appellants, however, pleaded guilty to counts 1 and 3 and were sentenced as follows:

"For Count 1 (trespassing) – the defendants are each fined $50.00 or 14 days at the Bahamas Department of Corrections (BDCS).

For Count 3 (voyeurism) – the defendants are each sentenced to 6 months at Bahamas Department of Corrections (BDCS). The sentences are to run concurrently if the fine is not paid for Count 1."

The Grounds of Appeal

6. On 28 June 2021, the appellants filed separate appeal notices raising two identical complaints against their sentences. Subsequently, on 9 July 2021, the appellants each filed a Notice to Amend in identical terms, identifying 3 grounds of appeal. During the course of arguments counsel for the appellants, Ms. Galanos, re-amended the grounds, abandoning ground 2. She relied on the remaining 2 grounds of appeal as follows:

"Ground 1 – That some material irregularity substantially affecting the merits of the case was committed in the course of the proceedings in that the learned Magistrate erred when she proceeded to conviction and sentence without giving the Appellant(s) an opportunity to make a plea in mitigation.

~~Ground 2~~ – Abandoned.

Ground 2 – That the sentences passed were unduly severe."

7. Ground 1: We were satisfied that ground 1 was incompetent in that it was an obvious attempt to overturn the appellants' convictions notwithstanding their guilty pleas, on the basis that the learned magistrate failed to give the appellants an opportunity to make a plea in mitigation. In our view, it was impossible to establish that the appellants were not permitted to make a plea in mitigation of sentence simply by looking at the transcript. More importantly, section 233 of the CPC expressly prohibits this Court from entertaining an appeal from a Magistrate's Court in which an accused has pleaded guilty and been convicted on such plea, except as to the extent or legality of the sentence. Ground 1 was duly dismissed.

8. Ground 2: Counsel for the appellants, Ms. Galanos, submitted that the 6-month custodial sentence which the magistrate imposed in respect of count 3 was unduly severe.

9. In support of her submissions that the 6-month custodial sentence was unduly severe, Ms. Galanos laid over for our consideration two written Magistrate's Court's decisions and a Nassau Guardian newspaper report, where the convicts had not been imprisoned, but had been given non-custodial sentences in the form of fines in one case, a compensation order in another case, and a conditional discharge and community service at the other end of the range.

10. For her part, counsel for the respondent, Ms. Pintard, submitted that the sentence was not unduly severe and that we should not interfere since the magistrate reasonably exercised her discretion, giving weight to the relevant aggravating and mitigating factors with the aim of general deterrence.

11. As is well known, a sentence is unduly severe if it falls outside the range of sentences which the sentencing judge, applying his mind to all the relevant factors, and having regard to like cases, could reasonably consider appropriate. [See **Donovan Rolle v Commissioner of Police** MCCrApp. No. 145 of 2016.]

12. The magistrate gave the following reasons for her decision. She said:

"Reasons
By their own admission, the defendants intentionally violated the privacy of the virtual complainant. Further, it is clear that they had no regard for her privacy. Their actions were disgraceful and unjustifiable.

The court has taken into account the defendants' early guilty plea, youth and lack of previous convictions and for this reason, the court did not impose the maximum sentence. However, the intentionality of their actions cannot be ignored. A strong message must be sent to would-be offenders."

13. We noted that by virtue of section 5A(5) of the Sexual Offences Act (the Act), a person convicted of an offence under section 5A of the Act is liable on summary conviction to a maximum term of imprisonment of 3 years. However, it became clear that notwithstanding the Act, non-custodial sentences have been imposed in other Magistrate's Courts in cases where the circumstances of the offences were far more egregious than what occurred in the current case.

14. In **Commissioner of Police v. Edmund Lewis Jr.** Magistrate's Court Case No. 224/2015 for example, Lewis had been charged with child pornography and 2 counts of voyeurism under the Sexual Offences Act. The evidence before the magistrate was that Lewis had used a cellular phone to surreptitiously produce a video-recording of a 17 year old girl as she was engaged in sexual intercourse. The recording was subsequently seen on the internet. The voyeurism charges were withdrawn; however, Lewis was convicted of child pornography following the trial after which he was given a conditional discharge for 2 years and ordered to perform 50 hours of community service organized by the Department of Social Services.

15. In **Commissioner of Police v. Alexia Forbes & Dennis Watson** Magistrate's Court Case No. 1548/2020*,* both defendants pled guilty before a S & C Magistrate to voyeurism and intentional libel. The outline of facts revealed that Watson had made a video-recording of the complainant, as she was naked and in an uncontrollably drunken state. He kept the video-recording in his cellphone where it was subsequently seen by Forbes, who had been looking through Watson's phone. In a fit of jealousy, Forbes posted the video-recording on Watson's WhatsApp social media status. Following mitigation, the magistrate accepted the guilty pleas and convicted both defendants. In sentencing the defendants, the magistrate determined that non-custodial sentences were the appropriate punishment. Forbes was fined $1,000.00 or 6 months in default for voyeurism and $500.00 or 6 months in default for intentional libel. Watson was fined $500.00 or 6 months in default for the voyeurism offence.

16. Ms. Galanos further laid over a Nassau Guardian report of 12 May 2020 in which, Trevor Brown, an 18-year-old 12th grade student, had, on 11 May 2020, pled guilty to 2 counts of voyeurism and been ordered to pay monetary compensation to the complainant or in default, spend 12 months in prison. In Brown's case, the outline of facts revealed that he had not only

invaded the complainant's privacy by secretly viewing her in the act of sexual intercourse but had posted a videorecording of the complainant and her partner in a WhatsApp group.

17. We noted that while the offence of voyeurism is undoubtedly a serious offence involving an invasion of privacy, the facts in all three of the above Magistrate's Court cases were decidedly more serious than those in the current case where the two appellants had only peeped through the complainant's window. This led us to conclude that the mitigating factors in this particular case outweighed the aggravating factors. Accordingly, the imposition of a 6-month custodial sentence on these appellants who were both young men of previously good character, was not only severe, but unduly severe.

Disposition and Order

18. For all the above reasons, ground 1 was dismissed. We, however, allowed the appeal on ground 2, having found that in the circumstances of this particular case, the appellants' custodial sentences of 6 months in respect of count 3 (voyeurism) were unduly severe. We accordingly quashed the custodial sentences and substituted a fine of $300.00 on each appellant to be paid in 14 days, or in default, imprisonment of 3 months.

19. As we stated on 15 July 2021, we would ordinarily have imposed a fine of $350.00 for the offence. However, we reduced the fine to $300.00 to take account of the time which the appellants had already spent in custody relative to the (now quashed) 6-month custodial sentence which had been imposed.

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Evans, JA

The Honourable Madam Justice Bethell, JA