In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: 64

D.S (a young offender)

Appellant

-v-

THE QUEEN

Respondent

REASONS FOR DECISION

(In Court)[1]

Appeal against Sentence – Unlawfulness of Indeterminate Period of Corrective Training (Young Offenders Act 1950)

Date of Hearing: 13 December 2017
Date of Judgment: 13 December 2017
Reasons: 19 February 2018

Mr. Saul Dismont, Marshall Diel & Meyers Limited, for the Appellant
Mr. Javone Rogers, Office of the Director of Public Prosecutions, for the Respondent

JUDGMENT delivered by S. Subair Williams A/J

[1] These Reasons were handed down without a hearing as indicated at the end of the appeal hearing. The Judgment was delivered ex tempore.

Introduction and Summary

1. The Appellant, a male young offender, was convicted in the Magistrates' Court on his guilty pleas for offences involving burglary[2] (of various school buildings) contrary to sections 339(1)(a)-(b) of the Criminal Code on Information 17CR00028-29. These offences occurred between July and November 2016 when the Appellant was a child of 15 years of age. The Appellant had attained the age of 16 by the time he was convicted and sentenced. (This Court was informed by Crown Counsel that these offences were committed while the Appellant was serving a probation sentence for the offence of taking a vehicle without consent ('TWOC')[3]) The burglary offences were committed by the Appellant while he was on bail in respect of various traffic offences (16TR000570: Failing to stop a vehicle when required by a police officer; 16TR000571: Driving a motorcycle while disqualified by reason of age; and 16TR000570: No third party insurance).

2. The Appellant later pleaded guilty to the burglary offences in addition to the traffic offences on which he had been previously bailed. The sentence hearing was initially deferred on 28 April 2017 pending further observation of the Appellant's compliance with his ongoing probation sentence in respect of the TWOC offence. However, on 7 July 2017 he was sentenced by the learned Magistrate, (Wor. Tyrone Chin) to concurrent terms of corrective training sentences on his guilty pleas.

3. The Magistrate did not specify the term of corrective training when passing sentence and his sentence remarks are examined further in this Judgement. However, the Warrant of Commitment describes the sentences as concurrent terms of '9 months to 3 years' of corrective training.

4. The Appellant appealed the sentence of corrective training by a Notice of Appeal filed on 11 October 2017. His application for an extension of time within which to appeal was granted by this Court on 2 November 2017. The Appellant was then released from serving his corrective training sentence and placed on bail by the Magistrates' Court on 7 November 2017 pending these appellate proceedings.

5. The central issues for determination in the present appeal were whether the learned Magistrate erred in passing an unlawfully indeterminate sentence of imprisonment or a manifestly excessive sentence, albeit that the latter was not pleaded in the Notice of Appeal.

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[2] Counsel for both sides erred in stating that the Appellant had been convicted in the Magistrates' Court on the offence of willful damage (which is otherwise an offence contrary to section 448 of the Criminal Code). The Warrants of Commitment signed by the learned Magistrate (Wor. Tyrone Chin) at pages 9 and 10 of the Appeal Record should be amended to correctly correspond with the offences contained in the Amended Informations (17CR00028 and 17CR00029) on pages 13 and 14 of the Record.

[3] The Record of Appeal does not report the previous conviction of taking a vehicle without consent. The Descriptive and Conviction Form at page 23 of the Record reports a single conviction from 2014 for the offence and willful damage.

6. The Crown's general position was that it would not object to the success of the appeal, but only because it would be unfair to resend the Appellant to serve a remainder term of corrective training given the passage of time since he was admitted to bail on 7 November 2017 and the fact that the Appellant had been compliant with those bail conditions. The Crown was prepared to consent to the Appellant being remitted to the Magistrates' Court for re-sentencing to a non-custodial sentence but would not accept that the sentence passed was unlawfully indeterminate or even manifestly excessive.

7. After hearing submissions on appeal from Counsel, I made the following decisions:

   (i) the appeal against sentence was allowed and the sentence to corrective training was quashed; and
   (ii) a sentence of 3 months' probation was substituted

8. I now give reasons for those decisions.

Notice of Appeal against Sentence

9. The Notice of Appeal pleaded the following grounds against sentence:

   1) The Sentencing Magistrate erred in sentencing the Appellant without first informing him of his right to a legal representative of his choice or legal advice from duty counsel or Legal Aid Counsel, as required by s. 7 of the Legal Aid Act 1980, and s. 7 of the Bermuda Constitution.

   2) The Sentencing Magistrate erred in sentencing the Appellant to corrective training without considering that it was a custodial penalty akin to imprisonment that required a consideration of all sanctions other than imprisonment, as required by JS v Fional Miller [2012] SC (Bda) 32 App and s. 55 of the Criminal Code Act 1907.

   3) The Sentencing Magistrate erred in sentencing the Appellant to an indeterminate period of imprisonment, as has already been established in the case of JS v Fiona Miller [2012] SC (Bda) 32 App

10. Counsel for the Appellant further argued that the term served thus far (between 7 July 2017 and 7 November 2017 ie 4 months) in corrective training already exceeded the range of sentence one would expect to be imposed on a person of adult age for the same offences. This argument was made in support of the un-pleaded and alternative ground that a 3 year term of corrective training would have been manifestly excessive in all circumstances.

The Grounds of Appeal

Ground 1

Duty of Court to inform Young Offender of right to Counsel in Criminal Proceedings

11. While the Crown broadly submitted that this was not a meritorious ground of appeal; no oral arguments were presented by either side on this first ground. As this ground was not argued, I made no findings on Ground 1.

12. All the same, I find that the subject of representation of a child and/or a young offender in Court proceedings warrants some judicial remark.

13. Mr. Dismont pleaded section 7 of the Legal Aid Act 1980 which provides:

> "*7(1) Where an unrepresented accused person appears before a magistrate's court charged with a criminal offence that is specified in the Second Schedule*[4]*, the magistrate shall, before requiring the accused person to plead to the charge or remanding him or otherwise dealing with him according to law-*
>
> *(a) inform him that he has the right to obtain legal advice from duty counsel or Legal Aid Counsel; and*
>
> *(b) afford him, if he so requests, an opportunity to obtain such advice before he pleads to the charge or, where the charge is one in respect of which he has an election whether to be tried summarily, before he so elects or before any evidence is called.*
>
> *(2) Where-*
>
> *(a) An unrepresented accused person appears before a magistrate's court charged with a criminal offence that is not specified in the Second Schedule; and*
>
> *(b) It appears to the magistrate that the interests of justice require that the accused person should have legal advice made available to him,*
>
> *the magistrate shall, before requiring the accused person to plead to the charge or remanding him or otherwise dealing with him according to law-*

[4] The offence of Burglary contrary to '*section 354(2)*' of the Criminal Code is specified in the list of offences under the Second Schedule. However, section 354(2) of the Criminal Code pertains to the offence of dishonest procurement of valuable security under the heading of '*Suppression, etc. of documents*'. In any event, Burglary contrary to section 339 would be covered by the Second Schedule which broadly applies to any offence which "*on a first conviction the offender may be liable to imprisonment for 5 years or upwards*." Under section 339(3) Burglary carries a maximum penalty of a $10,000 fine and/or 5 years imprisonment (which is applicable to a first conviction).

(aa) inform him that such advice can be made available to him from duty counsel or Legal Aid Counsel; and

(bb) afford him, if he so requests, such an opportunity as is described in paragraph (b) of subsection (1).

(2A) As soon as a decision has been made to detain a person at a police station, correctional institution or other similar place the person in charge of the police station, correctional institution or other similar place, as the case may be, shall inform the first mentioned person that he has a right to obtain advice and representation for the purpose of any interview from the duty counsel or Legal Aid Counsel.

(3) In this section-

"duty counsel" means a counsel whose name appears on the appropriate roster maintained by the Committee;

"unrepresented" means not represented by counsel."

14. Mr. Dismont also referred to the Constitution of Bermuda.[5] Section 6(2)(d) which provides: "*(2) Every person who is charged with a criminal offence- (d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice or, where so provided by any law, by a legal representative at the public expense*.".

15. Criminal conduct involving young offenders is governed by the Young Offenders Act 1950. Section 40 of the 1950 Act allows for a parent of an offender to attend Court at all stages of the proceedings:

40(1) Where a child charged with any offence is brought before a court or is for any other reason brought before a court, the parent or guardian of the child may attend at the court by or before which the case is heard or determined during all stages of the proceedings and shall, if he can be found, be required so to attend at court unless the court is satisfied that it would be unreasonable to require his attendance.
(2) Where is child is arrested, the police officer in charge of the police station to which he is brought or some other police officer shall cause the parent or guardian of the child, if he can be found, to be warned to attend at the court before which the child is to appear.
(3) The parent or guardian whose attendance is to be required under this section shall be the parent or guardian having the actual possession and control of the child.
Provided that if that person is not the father of the child, the attendance of the father of the child may be so required.

[5] In apparent error, Counsel referred to section 7 of the Constitution in Ground 1.

(4)…

16. There are no other provisions in the 1950 Act dealing with the right of representation of a young offender. Perhaps, this warrants some legislative review. However, it may be useful to cross reference the Children Act 1998 for insight on the provisions dealing with the representation child litigants in Family Court proceedings (which are recognizably distinguishable from criminal proceedings involving young offenders.) The purpose of the Children Act 1998 is stated in section 5: "*The purposes of this Act are to protect children from harm, to promote the integrity of the family and to ensure the welfare of children*." Section 6 of the 1998 Act makes the welfare of the child the paramount consideration in Family Court proceedings.

17. The child-representation provisions in the Children Act 1998 do not strictly apply to young offenders in criminal proceedings but they are of notable interest in considering the general importance of representation of children and young persons in Court proceedings. Section 35(1) of the 1998 Act makes it mandatory in Family Court proceedings for the Court to appoint a litigation guardian for a concerned child unless the Court is satisfied that it is not necessary to do so in order to safeguard the interests of that child. Section 35(3) empowers the Court to appoint Counsel to represent a child in circumstances where no litigation guardian has been appointed and the child has sufficient understanding to instruct Counsel and wishes to do so. Under such circumstances, the Court's appointment of Counsel is on the condition that it appears to the Court that it would be in the child's best interests.

18. On the face of these various provisions, it is apparent that the Court should always give consideration to whether a child litigant (in criminal and/or family proceedings) should have the benefit of some form of representation or support ie. a parent, a guardian or Counsel. Section 7 of the Legal Aid Act, (requiring all litigants appearing in the Magistrates' Court who are charged with specified (type) offence(s) (which covers the offence of burglary) to be told by the Magistrate of their right to obtain legal advice from Duty Counsel or Legal Aid Counsel before entering a plea) equally applies to young offenders.

19. For the avoidance of doubt, my findings in this appeal are wholly without regard to this first ground of appeal as these points were not argued by Counsel.

Ground 2

Corrective Training is a Custodial Sentence akin to Imprisonment:

20. The averment in Ground 2 is that the distinction between corrective training and a custodial sentence is fictitious.

21. Mr. Rogers did not raise a serious challenge to Mr. Dismont's submission that corrective training is akin to imprisonment. He accepted the obvious parity; however, he also argued that the rehabilitative component in corrective training elucidated a relevant material difference.

22. Section 37 of the Young Offenders Act 1950 provides:

> "***Relation of sentences of detention to corrective training and imprisonment***
> *37 Where a person who is sentenced under section 5 to be detained in the care of the Director or during Her Majesty's pleasure, or under section 16(j) to be detained for a period specified in the sentence, or who is being so detained as aforesaid, in respect of a conviction of an offence has been sentenced in respect of a conviction of another offence to the care of the Director or to undergo corrective training or to be imprisoned, then while that person is so detained as aforesaid that latter sentence shall, to the extent that it requires him to be detained in the care of an approved society or in a senior training school or to be imprisoned, cease to have effect*."

23. While seemingly cumbersome in its construction, section 37 appears to draw a natural parallel between corrective training and imprisonment which is distinguished throughout the 1950 Act from the system of detaining a child in a secure facility under sections 5 and 16(j). Corrective training cannot be lawfully imposed on a child offender of 16 years or less. It can however be ordered on young person who has attained the age of sixteen years but is under the age of eighteen years, as defined at section 2(1). Section 43(1) provides: *"(1) Where a young person is convicted of an offence punishable with imprisonment, the court may sentence him to undergo corrective training*."

24. Sweeping away any scraps of doubt, the learned Chief Justice, Ian RC Kawaley, in *JS (a child) v Fiona Miller [2012] BDA LR 30* at paragraph 20 held: "*It is obvious from the scheme of the Young Offenders Act that a sentence of corrective training is a custodial penalty akin to imprisonment*…"

25. In my judgment, it is as clear to me now as the position was to this Court in 2012 that a corrective training sentence is a form of imprisonment which is applicable to young persons between the age of 16 and 18 years. It is a system of detention which deprives an offender of his liberty. The fact that there may be sophisticated programs in place and regular stages of assessment focused on rehabilitating the offender does not make it any less of a prison sentence.

26. This ground of appeal alone was not a sufficient bedrock for the quashing of the sentence of corrective training. The Court had to go further and to consider whether the corrective training sentence imposed was an unlawfully indeterminate term of imprisonment or a manifestly excessive term of imprisonment, which I come to deal with further below.

Grounds 3

The Corrective Training sentence passed was an unlawfully indeterminate prison term

27. Mr. Dismont argued the learned Magistrate (Wor. Tyrone Chin) erred, as he did in *JS (a child) v Fiona Miller [2012] BDA LR 30*, in handing down an indeterminate corrective training sentence. Both Mr. Dismont and Mr. Rogers relied on the warrants of commitment in their references to the sentence of '9 months to 3 years'.

28. Mr. Rogers presented two alternative arguments. Firstly he argued that a sentence of '9 months to 3 years' of corrective training was to be regarded as a sentence of 3 years imprisonment with the opportunity for an earlier release after 9 months had been served.

29. The prosecutor's alternative argument was made in efforts to justify the indeterminate nature of the corrective training sentence. He said that corrective training sentences systematically provided trainees with various stages of assessment. Successful completion of each stage is requisite to release prior to the 3 year period. Mr. Rogers concluded that one cannot determine from the outset when the rehabilitation of the offender will have been, if at all, successfully achieved. It was on this analysis that he attempted to sanitize a sentence range of 9 months to 3 years.

30. At pages 7-8 of the Record, the Magistrate's sentencing remarks are numerically recorded. At paragraph 8, Wor. Chin in passing sentence simply stated:

    "*The Court orders in its place **a period of corrective training** for the probation breaches and for 17CR00028/29 confirms its mental health assessment order dated 21 April 2017.*"

31. It seems to have been overlooked by Counsel for both sides that the learned Magistrate did not specify a sentence of 9 months to 3 years in his Order at the sentence hearing. This sentence range first appears in the Warrants of Commitment on pages 9 and 10 of the Record, which are flawed on the face of the documents in the statement of the charges before the Courts.

32. At page 72 of the Record, there is an email correspondence from the Deputy Director of Public Prosecutions, Cindy Clarke, to the learned Magistrate's assistant dated Monday 10 July 2017 (the sentence having been passed on Friday 7 July 2017). The email reads as follows:

    "*It was brought to my attention that Wor. Chin sentenced (the Appellant) to Corrective Training last Friday for "18m-3 years".*

Please bring the attached case to his attention for me please, and ask His Worship if it is his intention that the maximum period to serve 3 years' training (as opposed to an indeterminate sentence)

If he deems it necessary, please advise me of the date he would like to list the matter again for clarification of the sentence…"

33. Astonishingly, by email reply dated 18 September 2017 from the learned Magistrate's assistant to the Deputy Director of Public Prosecutions, Wor. Chin replied:

"*Good Afternoon Ms. Clarke,*
Firstly, we extend our sincerest apologies for the delay in getting a response to the below email. Magistrate Chin has responded as follows:-

"It should be an indeterminate sentence." "

34. At page 74 of the Record, there is a letter dated 21 September 2017 from the Deputy Solicitor General, Shakira Dill-Francois of the Attorney General's Chambers to the learned Magistrate which reads in its most notable parts:

"*Upon receiving the attached Warrant of Commitment, the Department of Corrections queried whether the sentence contained therein was imposed in error. This is because in the case of JS (a child) v Fiona Miller [2012] BDA LR 30 (attached) the Chief Justice opined at paragraph 2 that the court is required to specify 'a period not extending beyond three years'; the Chief Justice further stated at paragraph 22 that, "in my judgment the statute requires any sentence of corrective training to specify the "maximum period of corrective training" the court is requiring the young offender to serve. Any sentence of corrective training should on its face specify what the maximum period of corrective training is.'*

Recently, Corrections had been receiving Warrants of Commitment which specify a fixed period of corrective training, such as two (2) years, in accordance with the case of JS (a child). Based on the aforementioned, we are writing on behalf of Corrections to confirm whether it is the intention of the court to amend the Warrant of Commitment to reflect a fixed period in accordance with the ruling of the Chief Justice.

If it is the intention if (sic) the Court to do so, kindly contact the undersigned…so that the young offender can be brought back before the Court so that the sentence can be amended."

35. There are no written replies disclosed in the Record which suggest that the Court replied to this letter from Ms. Dill-Francois.

36. It is surprising that the Court's attention was not drawn to any of these correspondences between the Magistrates' Court and the DPP's Office and the AG's Chambers during the appeal hearing.

    Even putting aside the email reply on behalf of Magistrate Chin seeking to clarify his 7 July 2017 sentence in this case: (*"**It should be an indeterminate sentence***.") the Magistrate's failure to specify a duration of corrective training at the 7 July 2017 sentencing hearing (***The Court orders in its place a period of corrective training…***) severely cripples Mr. Rogers' attempts to distinguish *JS v Fiona Miller* on the basis that in *JS v Fiona Miller* Wor. Chin passed a sentence with no term specification: *("**The Court sentences [JS] to a period of corrective training***.")

37. In my judgment, the sentence passed was clearly indeterminate. Indeterminate sentences in relation to this particular form of sentence were examined thoroughly by the learned Chief Justice in *JS v Fiona Miller.* At paragraphs 20-22 Kawaley CJ held:

    "20… *It is the function of the courts to specify what the maximum duration of a custodial term should be and this function cannot be assumed by the Executive nor delegated by any other public authority. In addition it is an inherent requirement of any form of sentence that there be sufficient certainty as to what the scope of the penalty is. This requirement applies as much in the case of conditional discharges, fines, probation orders and community service order as it does to custodial terms. Section 61 of the Act prescribes three years as the maximum period of corrective training. It does so in the following terms:*

    Period of corrective training

    61(1) Subject to section 59(2), a person sentenced to undergo corrective training shall, unless sooner released under section 62, be detained in a senior training school for a period not extending beyond 3 years after the date of his sentence; and such period, in relation to a person sentenced to undergo corrective training, is in this Part referred to as his 'maximum period of corrective training'.
    (2) A person, upon the expiration of his maximum period of corrective training, shall, subject to section 62, be released."

    21. Section 61(1) expressly requires the sentencing court, when sentencing a young offender under section 43 "to undergo corrective training" to specify "a period not extending beyond three years". Section 62 deals with release on parole, possible after nine months from the date of sentence.

    22. Although it may well be useful to mandate the pursuit of certain types of training, in my judgment the statute requires any sentence of corrective training to specify the "maximum period of corrective training" the court is requiring the young offender to

serve. Any sentence of corrective training should on its face specify what the maximum period of corrective training is."

38. In my judgment, the sentence is to be quashed under this ground of appeal on the basis that it is akin to an unlawfully indeterminate period of imprisonment.

Three (3) years of Corrective Training would have been manifestly excessive

39. On the remote possibility that I erred in finding that the sentence passed was indeterminate (and that the sentence passed was in fact 3 years of corrective training), I addressed my mind as to whether a 3 year maximum sentence would have been manifestly excessive in all circumstances of this case. (Sensibly, no objection was made by the Crown to my consideration of the excessiveness of the sentence, albeit that this was not a pleaded ground of appeal.)

40. As I found that a corrective training sentence is akin to imprisonment, it followed that the learned Magistrate was duty-bound to comply with section 55 of the Criminal Code in addition to all of the other relevant sentencing principles in Part IV of the Criminal Code. Section 55(1) provides: "*A court shall apply the principle that a sentence of imprisonment should only be imposed after consideration of all sanctions other than imprisonment that are authorized by law*." Section 55(2) lists the numerous factors to which the Court must have regard before passing sentence.

41. I had particular regard to the Summaries of Evidence and to all of the sentencing considerations listed under section 55 of the Criminal Code and found that the maximum 3 year term of corrective training would have obviously been manifestly excessive in punishing the Appellant for the burglary and traffic offences before the Court.

42. Counsel, after some probing from the Bench, agreed that in quashing the sentence, I should proceed to substitute a sentence instead of remitting the matter to the Magistrates' Court for sentencing. I substituted a period of 3 months' probation with conditions under 70A and 70B as specified in the Probation Order dated 13 December 2017.

Case Management of Appeals

43. The Court did not have the benefit of skeleton arguments or written submissions from Counsel in this matter. The case management hearing fixed was delisted by a Court administrator at Counsel's request but without the express approval of the Registrar. Unfortunately, this resulted in the appeal being heard without directions for the exchange of written arguments and authorities.

44. Case management hearings in criminal appeals ought not to be delisted merely by agreement between Counsel. The express written approval of the Registrar, Acting Registrar or Assistant Registrar is required for the delisting of fixtures in criminal appeals.

Conclusion

45. The appeal was allowed and the sentence of 9 months to 3 years of Corrective Training was quashed.

46. A sentence of 3 months' probation was substituted by this Court.

47. Counsel, having indicated a likely request to be heard on the issue of costs, must file a Form 31D within 14 days of the date of this Judgment. Failing which, no order as to costs is made.

Dated this 19th day of February, 2018 _____

SHADE SUBAIR WILLIAMS
ACTING PUISNE JUDGE