



# In The Supreme Court of Bermuda

## APPELLATE JURISDICTION

2018: No. 037

**BETWEEN:**

**KADEEM ABRAHAM**

**Appellant**

**-and-**

**FIONA MILLER  
(POLICE SERGEANT)**

**Respondent**

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**Before:** **Hon. Assistant Justice Elkinson**

**Appearances:** **Mr Marc Daniels, Marc Geoffrey Ltd., for the Appellant**  
**Ms Nicole Smith, Department of Public Prosecutions, for the Respondent**

**Date/s of Hearing:** **27 March 2019**

**Date of Judgment:** **1 April 2019**

## **JUDGMENT**

*Appeal against Conviction – Attempting to convey a cell phone to a prisoner contrary to Section 26(b) of the Prisons Act 1979 – Whether Magistrate complied with the statutory requirements concerning his Judgment in writing – Whether Magistrate erred in allowing the Crown to cross-examine the Appellant on matters that had been ruled subject to public interest immunity – Whether Magistrate reversed the burden of proof or drew adverse inferences from witnesses not called by the Appellant – Whether Magistrate*

*properly assessed the credibility of the Appellant and complied with Section 83(5) of the Criminal Jurisdiction and Procedure Act 2015*

## **Background**

1. The Appellant was convicted after a lengthy trial in the Magistrates Court of the offence of attempting to convey an article, namely a cell phone, to a prisoner in contravention of Section 26(b) of the Prisons Act 1979. The Appellant was a Corrections' Officer and had been working at the Westgate facility in the remand housing unit. At approximately 4 o'clock in the afternoon the Chief Corrections' Officer approached Mr. Abraham. He had come by "*certain information*" an hour earlier and based on that he asked Mr. Abraham to come with him to the boardroom in the administrative area. There, in the presence of another officer, he asked Mr. Abraham if he had anything on his person. He denied he had anything. He emptied his pockets and from the last pocket which he emptied, on prompting from the Chief Corrections' Officer who had noticed a small bulge, he produced a blue and white mayonnaise packet that was wrapped in plastic wrap. Inside this packet there was a very small cell phone. The Appellant told the Chief Corrections' Officer the name of the person who had given him the package and that he had been asked to give it to another inmate in the maximum security area of the prison. However, he said that he had accepted this for the purpose of examining it later, not knowing that it contained a cell phone. He said he would have examined it when he got the opportunity to do so. It is not clear from the evidence what he then would have done if he had discovered the cell phone.

## **The Evidence in the Magistrates' Court**

2. When the Learned Magistrate wrote his Judgment, he did so by setting out the evidence of witnesses and then sometimes making observations on the questions and answers. The last few pages of the Judgment set out findings of facts that the Magistrate was relying on and then, after reciting who the witnesses were and what witness statements were read in, that the court had read final submissions from counsel for the parties, the Magistrate concluded with finding the Defendant

guilty “... *beyond reasonable doubt of attempting to convey a cell phone to a prisoner in contravention of Section 26(b) of the Prisons Act 1979.*”

3. Section 26 of the Prisons Act 1979 states as follows: -

**Conveying prohibited articles into prison**

26. Any person—

- (a) who conveys, introduces, or attempts to convey or introduce, or causes to be conveyed or introduced, any article, commodity or thing into a prison in contravention of prison rules; or who conveys or attempts to convey, or
- (b) causes to be conveyed, any article, commodity or thing to a prisoner (whether or not within a prison) in contravention of prison rules; or
- c) who enters or attempts to enter into communication with a prisoner (whether or not within a prison) in contravention of prison rules, commits an offence against this Act:

Punishment on summary conviction: imprisonment for 12 months or a fine of \$2,000 or both such imprisonment and fine;

Punishment on conviction on indictment: imprisonment for 2 years.

4. The fact of the Appellant being in possession of the mayonnaise packet with the cell phone in it is not in any way in dispute. The Appellant accepted that he had this package and that it was given to him by a remand prisoner for delivery to that person’s cousin in the maximum security unit.
5. Mr. Daniels on his behalf submitted that the conviction should be overturned and set out various grounds of appeal. In relation to the first ground of appeal, he submitted that the Learned Magistrate did not take into account the fact that the Appellant, as a Corrections’ Officer, had taken possession of the package and, as the Appellant said in evidence, was at some stage going to “... *search this item..*” once he had concluded his duties in securing the remand prisoners. Mr. Daniels submitted that the Judgment of the Learned Magistrate did not properly set out how the credibility, of not only the Appellant but also of the two Corrections’ Officers who also gave evidence, was assessed. He submitted that it was unclear

whether the Learned Magistrate took into account that the Appellant was doing his job when he took possession of the packet from the remand prisoner with an intent to “... *search this item...*”

6. Mr. Daniels advanced a second ground of appeal which related to the Chief Corrections’ Officer stating that he had been acting on information received which led him to challenge Mr. Abraham and subsequently find the cell phone. The Appellant had not been allowed to ask questions as to where that information came from. This is the public interest immunity exception which exists so as to preserve the confidentiality of sources that lead to investigation or discovery of criminal activity. However, the Magistrate allowed the Crown to subsequently ask the Appellant a question in cross-examination as to whether he thought that the finding of the cell phone on him and the fact that the Chief Corrections’ Officer had received information that Appellant was doing something improper was a coincidence. The Appellant responded, “*Yes.*”
7. Mr. Daniels submitted that this question should not have been allowed and was unfair to the Appellant. Under the strict rules of cross-examination, it may be inappropriate to illicit opinion evidence from a witness but this particular question being asked cannot be considered in any way a miscarriage of justice or any other basis to question the overall findings in the Judgment of the Learned Magistrate.
8. Mr. Daniels in respect of his third ground of appeal raised the spectre of a breach of the constitutional rights of the Appellant when the Learned Magistrate made reference to the fact that the Appellant did not call his co-worker as a witness on his behalf. Whilst the Crown at trial did raise the issue that the President of the Prison Officers’ Association, who attended at the prison at the time of this incident and the Appellant’s arrest, had not intervened or represented his interest, it was submitted by Mr. Daniels that this line of questioning by the Crown was not appropriate.

9. The Learned Magistrate in his Judgment did make reference to the fact that the co-worker was not called but nothing turns on this. There is no reference in the Judgment to the failure to call the President of the Prison Officers' Association or that the Magistrate in any way considered that the Appellant should have done more to proclaim his innocence. Insofar as Mr. Daniels submitted that Ms. Smith on behalf of the DPP should not have asked certain questions, it is noticeable in the Record of Appeal that objections were not made to every "*inappropriate*" question, as some of those questions are now described by Mr. Daniels. In fairness to Mr. Daniels, it should be pointed out that he was not counsel for the Appellant at the start of the trial and that at one stage Appellant represented himself. However, in respect of this line of questioning the Appellant was legally represented at that time.
10. Whether the co-worker was called or not, the issue of Appellant's credibility and how it was assessed by the Magistrate must be seen in the light of the actual evidence that was given by the Appellant himself at trial.
11. Ms. Smith put it to the Appellant in her cross-examination of him that he had named the person who had given him the package and the person to whom he had been requested to deliver it to. She then asked him the most pertinent of questions:-
- Question** - "*You were aware you were conveying the package ... (from the remand prisoner to the prisoner in the maximum security unit)?*"
- Answer** - "*That is correct.*"
- Mr. Abraham's answer constitutes the components of the offence and his guilt.
12. The offence under Section 26(b) of the Prison Act 1979 is committed when any person, and that includes a Corrections Officer, attempts to convey an article, in this case a cell phone, to a prisoner contrary to the prison rules. The court below heard evidence of the proper procedure that is to be followed and there appears to be no question that specified immediate action should have been taken by Mr.

Abraham upon receiving into his possession the package from the remand prisoner. On its face, what he did is inexcusable, not only in the light of the training which he had received and what the rules are, but common sense.

13. Whilst not referred to specifically on this Appeal, Rule 44 of the Prison Rules 1980 clearly sets out the procedure to be followed. The prisoner should be stopped and immediate notice given to the Commissioner of Prisons. Even if Mr. Abraham failed to notice that the mayonnaise packet contained a hard inflexible object, mayonnaise, coming under the category of food, is in any event a prohibited article under Rule 42 of the Prison Rules 1980.
14. It is not surprising that the Learned Magistrate rejected the defences of the Appellant and, insofar as he accepted the evidence of the Crown and found those witnesses credible, it was the Appellant's own evidence as to what he did and what he was attempting to do, in the face of his training and the rules, which led the Magistrate to find him guilty beyond reasonable doubt of the offence.
15. Ms. Smith in her written and oral submissions set out responses to the arguments supporting the various grounds of appeal made by the Appellant on this Appeal and in particular the attack on how the Magistrate set out his Judgment. Her submissions clearly demonstrated that there was no viable basis to challenge the Magistrate's Judgment.
16. Whilst not set out in the most ideal of formats, I am satisfied that the Crown answered the complaint that Section 83(5) of the Criminal Jurisdiction Procedure Act 2015 had not been complied with. This provision requires that the Magistrate's final Judgment in writing should include:
  - (a) The point or points for determination
  - (b) The decision made on such points
  - (c) The reasons for the decisions

17. Our former Chief Justice, Dr. Ian Kawaley, in the decision of **Whitehurst v Miller [2017] SC (Bda) 31 App.**, considered the extent to which Magistrates should comply with the provisions of Section 83(5) of the Criminal Jurisdiction Procedure Act 2015 in the light of European Court decisions and Bermuda's own Constitution. His conclusions were referenced by my brother Assistant Justice, Delroy Duncan, in the case of **Tafari Wilson v Fiona Miller (Police Sergeant) [2018] SC (Bda) 6 App.** and he concluded the following:

*“19. The law unquestionably imposes an obligation upon a Magistrate to provide a reasoned decision at the end of a criminal trial. The reasons must enable the parties to understand how the court resolves the questions which determine the guilt or innocence of the accused. However, the reasons need not be elaborate.”*

18. Given the particular facts of this case, the evidence of the Appellant himself and the strict rules which operate within the prison, the main question for the Magistrate to answer was whether the Appellant had attempted to convey an article to a prisoner in contravention of prison rules.
19. Based on the evidence which was given at the trial, in particular that of the Appellant, the Magistrate was clearly satisfied that the Appellant was guilty beyond a reasonable doubt and there can be no question that the Magistrate considered, as one can see from his Judgment, the relevant legal principles although they may have been somewhat obscured by the form of the Judgment. His comments on the evidence establish the points he was determining and his decision on those points and the reason why he found the Appellant guilty; that he did not believe his excuse that he only received the package “... to search this item ...” at a later time. I am satisfied that Section 83(5) of the Criminal Jurisdiction Procedure Act 2015 has been complied with. The decision of the Magistrate was correct and, in the light of the evidence given, not least by the Appellant himself, little elaboration was needed.

**Finding**

20. I dismiss the Appeal and I remit this matter to the Magistrates' Court for sentencing.

Dated this 1<sup>st</sup> day of April, 2019

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**JEFFREY P. ELKINSON**  
**ASSISTANT JUSTICE**