IN THE SUPREME COURT OF BERMUDA
Criminal Jurisdiction
2016: No. 33

THE QUEEN

v.

TIFFANY DAWN EATHERLEY

Dates of Sentencing Hearing: 6th December 2018
Date of Sentence: 11th December 2018

Counsel for the Prosecution: Ms. Cindy Clarke
Counsel for the Accused: Ms. Elizabeth Christopher

Sentence - Perjury – Sections 119 & 120 of the Criminal Code – Conditional Discharges (section 69 of the Criminal Code)

SENTENCE

Ruling of Acting Puisne Judge Juan P. Wolffe

1. On the 5th December 2018 the Defendant pleaded guilty to the offence of Perjury, contrary to section 119 of the Criminal Code Act 1907 (the "Criminal Code").

2. The Prosecution's Summary of the Evidence stated that in furtherance of another investigation on the 16th December 2009 the Bermuda Police Service had reason to search the Defendant's premises and that during that search a bullet hole was discovered in the bottom right area of the freezer door of the refrigerator. Upon further forensic examination of the freezer door a bullet round was found inside of the rear electrical elements. On the 31st December 2009 the Defendant gave a witness statement as to who

discharged the firearm that resulted in the bullet being lodged in her refrigerator door (the "Defendant's Interview"). As a result of the Defendant's Interview a suspect by the name of Zakai Cann was arrested and prosecuted for the offences of (i) possessing a firearm, and (ii) discharging a firearm. On the 14th April 2014 the Defendant was called by the Prosecution to given sworn oral testimony at the trial of Mr. Cann, however her testimony was false in a material particular *to wit* she stated that she could not identify the person who possessed and discharged a firearm at her premises. The Defendant continued with this false testimony the next day on the 15th April 2014 and as a direct result of the Defendant's false testimony, the Prosecution says, Mr. Cann was acquitted on both counts as the prosecution's case relied heavily on the identification evidence provided by the Defendant in her police interview.

3. Referring to several authorities Ms. Clarke seeks to persuade me that the appropriate sentence for the Defendant would be one of imprisonment for a period of between six (6) weeks and three (3) months, but that given the "specific and unusual circumstances" of this case (Ms. Clarke's words) that such term of imprisonment should be suspended for a period of time.

4. On behalf of the Defendant Ms. Christopher submitted that given the "extraordinary" circumstances of this case (Ms. Christopher's words) that a sentence at the other end of the sentencing spectrum is warranted, that being one of a Conditional Discharge under section 69 of the Criminal Code ("Section 69").

5. As to what exactly should be the appropriate sentence for the offence of perjury, it is patently obvious that the legislative authors of section 119 of the Criminal Code intended to treat offenders who have committed perjury with considerable harshness. No doubt it is because the offence of perjury strikes at the core of our criminal justice system with adept precision. This is underscored by the sentencing tariffs for perjury as set out in section 120 of the Criminal Code where a perjury offence carries a maximum sentence of a fine of $50,000 and/or five years imprisonment on a summary conviction; and on indictment the maximum sentence is one of an "unlimited" fine and/or ten (10) years

imprisonment. Interestingly, only a miniscule fraction of offences in the Criminal Code or any other piece of legislation in Bermuda for that matter carries a sentence of an unlimited fine (it may very well be that it is the only offence), thus reinforcing the seriousness of the offence.

6. Having said this, and this pertains to virtually every criminal matter that comes before the Court, each case turns on its own factual matrix. As far as the progression of proceedings go, it has to be said that the case at bar has unique circumstances which should, and will, figure quite prominently in the sentence which I will eventually impose. It is for this reason that it is necessary to chronicle the extensive nine (9) year factual history of this matter.

History of Proceedings

7. The below history has been gleaned from the Magistrates' Court record, the pertinent Supreme Court records, and from the submissions of Prosecution and Defence Counsel at the sentencing hearing. It is as follows:

- **16th December 2009:** After the search of her premises the Defendant is arrested on suspicion of possession of a firearm and ammunition and is taken to the Police Station where she was held in police custody for five (5) days.

- **21st December 2009:** The Defendant is taken to the Magistrates' Court where she answered to charges of possession of a firearm and ammunition (Case No. 09CR00982). She was denied bail and held on remand at the Co-ed Correctional Facility ("Co-ed").

- **21st December 2009:** The Defendant's name and picture appears in the online edition of the Royal Gazette daily newspaper under the heading ***"Breaking News: Two in court on gun charges"***. In the photo that accompanied the article the Defendant is flanked by police officers and is in handcuffs (Ms. Christopher

produced the article at the sentencing hearing). Ms. Christopher submitted that in large part it was this publication of the Defendant's name, photo, and alleged offences that considerably compromised the Defendant's safety, and which led to her having severe difficulties in finding suitable accommodation for her and her children and in finding steady employment over the past nine (9) years. This will be addressed more later.

- **31st December 2009:** Whilst being held on remand at Co-ed the Defendant is visited by police officers who carried out a thirty-seven (37) minute interview of the Defendant (the Defendant's Interview). In the interview, the Defendant gave evidence, *inter alia*, as to: when and how the said bullet came to be lodged in her refrigerator door; Mr. Cann having possession of a firearm and discharging the bullet into her refrigerator; how she reacted when the bullet was discharged; how Mr. Cann reacted after the bullet was discharged; how she concealed the bullet hole in the refrigerator by covering it with a magnet; her phone messaging with Mr. Cann on the 15th December 2009 and on that date Mr. Cann coming to her premises wearing clothing which she thought may have gun residue on it (the DNA of Mr. Cann was eventually found on a jacket left at the Defendant's resident). Apparently, a Mr. Gary "Fingers" Cann ("Fingers") was murdered on the 15th December 2009 (My intent is not to be disparaging but I will use Mr. Gary Cann's nickname to distinguish him from Mr. Zakai Cann who has the same last name, and also because this is the name used in the Defendant's Interview).

  For all intents and purposes it was a fairly extensive interview, and it appears that the Defendant was attempting to recollect as much as possible (the transcript of the Defendant's Interview appears on pages 186 to 201 of the Court record).

- **31st December 2009:** The Defendant is released from Co-ed, no doubt because of the assistance that she gave to the police in her interview.

- **February 2010:** The Prosecution entered a *Nolle Prosequi* in favour of the Defendant in respect of the possession of firearm and ammunition charges that she answered to on the 21st December 2009. Presumably, this was as a result of the police and Prosecution being satisfied of the veracity of the contents of the Defendant's Interview, that the contents therein furthered the police investigation into the murder of Fingers, and, that the Defendant may not have committed the offences charged.

- **3rd November 2012:** Mr. Cann returned to Bermuda by way of extradition proceeding. Ms. Clarke confirmed that the Defendant's Interview was used in the extradition proceedings of Mr. Cann.

  On an unknown date after the return of Mr. Cann to Bermuda the Defendant met with the police and informed them that she is afraid to testify at any trial of Mr. Cann. Her words to the police were apparently ***"They have guns".***

- **April 2014:** As the trial of Mr. Cann approaches police attempt to contact the Defendant so that she may give evidence at his trial. Being fearful for her family the Defendant tries to evade police.

- **8th April 2014:** The Defendant swears an affidavit averring that the contents of her interview were untrue ("First Affidavit")(appears on page 202 of the Court record). Particularly, that: Mr. Cann did not discharge a firearm; she was not present in her kitchen when she heard a firearm being discharged; Mr. Cann and ten (10) other people were in her kitchen on the material night; she did not remember what she said in her police interview; she rambled on in her interview about things which she heard from others; by using Mr. Cann's name she did not believe that he would be charged with any offences; and, that she is embarrassed that she caused Mr. Cann grief and that because of her an innocent man is facing trial.

- **10th April 2014:** The Defendant swears a second affidavit stating that the First Affidavit was not made out of fear for her life or for the life of others ("Second Affidavit")(appears on page 205 of the Court record).

- **14th and 15th April 2014:** The Defendant is called as a witness at the trial of Mr. Cann, who was charged with possessing a firearm and discharging a firearm, and during her sworn oral testimony she commits the offence of perjury (the details of which are set out earlier).

- **16th April 2014:** The Defendant appeared in Magistrate's Court and faced the charges of: Perverting the Course of Justice, Perjury, Making a False Statement, Making Contradictory Statement with intent to Mislead (Case No. 14CR00192). After a series of mentions a Long Form Preliminary Inquiry (the "First LFPI") was elected by the Defendant and it was fixed to be heard on the 7th November 2014.

- **7th November 2014:** The First LFPI did not proceed and it is unclear from the Court record as to the reasons why. The First LFPI was then fixed for the 5th December 2014.

- **4th December 2014:** The Prosecution made an application for the preferment of a Voluntary Bill of Indictment to the Supreme Court and the First LFPI was adjourned pending the outcome of the Prosecution's application. The Supreme Court acceded to the Prosecution's application and the said Voluntary Bill became Case No. 41 of 2014 and set out the following counts: (i) Attempting to Pervert the Course of Justice; (ii) Perjury; (iii) Making Contradictory Statements with Intent to Mislead; and (iv) Making False Declarations and Statements. A trial date of 18th May 2015 was scheduled.

- **19th May 2015:** The Court heard an application by the Defendant to quash Indictment No. 41 of 2014 and that application succeeded. The matter was

remitted back to the Magistrates' Court for the hearing of the First LFPI, but apparently the Supreme Court ordered that the Prosecution could lay new charges if it deemed it necessary to do so.

- **21st May 2015:** The Prosecution laid Information No. 15CR00265 alleging against the Defendant two (2) counts of Effecting a Public Mischief contrary to section 132 of the Criminal Code. It is unclear from the Magistrates' Court record what administratively became of the Information No. 14CR00192 which formed the basis of the First LFPI. But in any event, the Defendant elected a second LFPI which was scheduled for Information No. 15CR00265 for the 21st December 2015 (the "Second LFPI").

- **21st December 2015:** The Second LFPI commenced, evidence was heard, and the matter was adjourned for continuation to the 18th January 2016.

- **18th January 2016:** Ms. Clarke, on behalf of the Prosecution at the time, made an application under section 23 of the newly minted Criminal Justice and Procedure Act 2015 which came into force on the 15th December 2015 (the "CJPA"). In essence, the CJPA, *inter alia*, repealed Long Form Preliminary Inquiries. The Learned Magistrate The Worshipful Tyrone Chin, who had conduct of the Second LFPI, adjourned the matter to the 25th January 2016 to consider his decision on the Prosecution's application.

- **25th January 2016:** Ms. Christopher and the Prosecution submitted to the Court written submissions as to the CJPA issue. The Learned Magistrate did not deliver his Ruling and the matter was adjourned to the 22nd February 2016 so that he could deliver his Ruling taking into consideration the recent CJPA submissions of Counsel.

- **22nd February 2016:** The Learned Magistrate ruled that the Second LFPI should continue. The Second LFPI was adjourned to the 9th May 2016.

- **9th May 2016:** For reasons unclear on the Magistrates' Court record the matter did not proceed on the 9th May 2016 and the Second LFPI was set to continue on the 7th June 2016.

- **23rd May 2016:** The matter was brought forward by the Court and the Second LFPI was set to continue on the 26th July 2016.

- **20th July 2016:** The Learned Magistrate was handed the newly decided authority of ***R v. Daymon Simmons & Sabian Hawyard, Case No. 20 of 2016*** in which Simmons J., on the 18th July 2016, addressed how Voluntary Bills of Indictment preferred prior to the coming into force of the CJPA should be treated after its enactment. Following ***Simmons & Hayward*** and the provisions of the CJPA the case at bar was sent to the Supreme Court for its next arraignment session commencing on the 1st September 2016.

- **22nd August 2016:** The Prosecution lay Indictment No. 33 of 2016 (the case at bar) alleging the two (2) Counts of Effecting Public Mischief. Particularly, that on the 31st December 2009 the Defendant wilfully and knowingly made to a DC 299 Desilva, a false statement (i.e. the Defendant's Interview) which alleged that there were reasonable grounds for suspecting that a person (i.e. Mr. Cann) had committed an offence.

- **1st September 2016:** The Defendant appears in the Arraignment Session and Ms. Christopher indicates that the Accused intends to make an application for dismissal under section 31 of the CJPA ("Section 31"). The Defendant did not enter a plea on this occasion.

- **15th September 2016:** Matter was mentioned so that directions can be ordered for the section 31.

- **1st November 2016:** Matter was heard in the Arraignment Session and then set for 12th December 2016 for the section 31.

- **12th December 2016:** It is unclear from the Court record as to what occurred on this date.

- **3rd January 2017:** Matter was heard in the Arraignment Session where dates in January 2017 were canvassed for the section 31. A trial date was also scheduled for the 22nd May 2017.

- **1st March 2017:** Matter was heard in the Arraignment Session and still the section 31 had not been heard, and it is unclear from the Court record as to the reasons why not. The trial date of 22nd May 2017 was confirmed and the section 31 was scheduled for 17th March 2017.

- **17th March 2017:** Ms. Christopher indicated to the Court that she intends to make a section 31 as well as an application for a stay for an abuse of process due to delay (the "stay application"). The section 31 was therefore not heard and directions were ordered in respect of the filing of pleadings. Dates for the section 31 and the stay application were to be submitted once all directions were complied with by the parties.

- **22nd May 2017:** This was supposed to have been the trial date but it would appear that the section 31 and the stay application had not as yet been heard. It is unclear from the Court record as to whether the directions ordered on the 17th March 2017 had been complied with by the parties.

- **2nd June 2017:** It is unclear from the Court record as to what occurred on this date which most likely was an Arraignment Session.

- **14th August 2017:** The Court writes to Prosecution and Defence Counsel requesting dates for the section 31 to be heard.

- **2nd October 2017:** Ms. Christopher requests dates for the section 31 and the stay application to be heard and the date of 11th October 2017 appears to have been fixed.

- **11th October 2017:** The section 31 and stay application commenced but were not completed.

- **December 2017 (unclear day):** The section 31 and stay application continued.

- **8th January 2018:** The matter appeared in the Arraignment Session and a continuation date of the 16th January 2018 was fixed for the section 31 and the stay application.

- **16th January 2018:** The hearing of the section 31 and the stay application continued.

- **March 2018 (unclear day):** By a decision of Simmons J. the section 31 and stay application were dismissed.

- **30th May 2018:** The Prosecution indicated that they were in a position to proceed to trial and the matter was set for mention at the next Arraignment Session of 1st June 2018.

- **1st June 2018:** At the Arraignment Session the matter was set for trial for the 16th July 2018.

- **16th July 2018:** The trial did not proceed and it is unclear from the Court record as to why not. A trial date of 5th November 2018 was then fixed.

- **28th September 2018:** The Court writes to Counsel requesting that the trial date of 5th November 2018 be brought forward, however in response the Prosecution indicated that a key Prosecution witness was unavailable for that date.

- **16th October 2018:** The Court wrote to Counsel requesting that the trial of this matter be moved up to the 29th October 2018, and the Prosecution responded that this was possible. It is assumed that Ms. Christopher also agreed to this earlier trial date as the matter was indeed fixed for the 29th October 2018.

- **30th October 2018:** Ms. Christopher indicated to the Court that: the Defendant wished to renew her application in respect of a stay for abuse of process caused by delay; she was awaiting disclosure of a material statement and of a ruling which was made in the trial of Mr. Cann; and, that she would be starting another trial and will be appearing before the Court of Appeal. The matter was adjourned to the 31st October 2018.

- **30th October 2018:** As requested by the Defence, the Prosecution filed Further and Better Particulars of the two (2) counts of Effecting Public Mischief.

- **5th November 2018:** Ms. Christopher makes an application for an adjournment of the trial on the basis that she was having difficulty making contact with a crucial potential defence witness and therefore the Defendant could not properly put forth her defence. The Prosecution did not object to the adjournment and the Court reluctantly granted the adjournment. Ms. Christopher also indicated that the Defendant still wished for a stay application to be made. The stay application and the trial, if it were to proceed, were both scheduled for the 3rd December 2018.

- **3rd December 2018:** A Karlandra Smith, along with her attorney Mr. Marc Daniels, appeared in Court. Mr. Daniels indicated to the Court that Ms. Smith

was contesting a subpoena that was served on her on or about 19th November 2018 by the Defence. By agreement between the parties no substantive submissions were made on this day and the trial was set to commence the next day on the 4th December 2018.

- **4th December 2018:** The Jury was selected in the trial but the Jury were excused for the day so that Ms. Christopher may make submissions as to the stay application.

- **5th December 2018 at 11.19am:** The Court dismisses the stay application, and Counsel request an adjournment so that discussions can take place between them.

- **5th December at 12.20pm:** The Prosecution make an application to amend the Indictment to include as Count 3 the Perjury offence. Without objection from the Defence the Indictment was amended accordingly, the Defendant plead guilty to the Perjury count, and the Prosecution asked that Counts 1 and 2 on the Indictment be left on the file and not to be proceeded with at this time. As a result, the selected Jury was discharged from carrying out any further duties and the matter was adjourned to the 6th December 2018 so that the Court may hear sentencing submissions.

8. It is accepted by both the Prosecution and the Defense that the above expansive circumstances of this case are unlike many other matters that come before the criminal courts. Indeed, Ms. Clarke characterized the circumstances as "unique" and "exceptional", and Ms. Christopher referred to the circumstances of this case as being "extraordinary" (although their reasons for their respective descriptions differed). Without casting any outright or exclusive blame on the Prosecution or on the Defence as to how this matter unfolded since December 2009 (as some blame can be distributed amongst both the Prosecution and the Defence) it has to be said that the full progression of this matter through the criminal justice machinery has been somewhat uncommon.

9. It should be pointed out that where I have indicated that the Court record is unclear as to what transpired on a particular date it should not be taken to mean that nothing occurred or that nothing was recorded. CourtSmart is the official record and while I did not have the occasion to listen to the audio recording of CourtSmart it is entirely likely that it would have recorded what in fact transpired. I actually consulted the hardcopy paper version of the Court record which may not be as complete as the audio recording of CourtSmart, but I am satisfied that the paper Court record for the most part is an accurate reflection of what transpired and I am reinforced in this position by virtue of the fact that the submissions of Counsel as to the chronology of this matter accorded with the above chronology.

Sentencing Principles and their applicability to the Case at Bar

10. It is often routine for Prosecution and Defence Counsels to make references to sections 53 to 55 of the Criminal Code ("Sections 53 to 55") when advancing sentencing submissions. Sections 53 to 55 set out the "Purpose and Principles of Sentencing" and at times it appears that such references to sections 53 to 55 are made in a passing or rote manner by Counsel, or is done to just check the boxes (this should not be seen as a criticism). With its history and circumstances, the case at bar is the quintessential type of cases in which the necessity for sections 53 to 55 is truly and fully manifested. So much so that it is unavoidable to set out sections 53 to 55 in their entirety. Sections 53 to 55 provide that:

> ***"Purpose***
>
> ***53 The fundamental purpose of sentencing is to promote respect for the law and to maintain a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives—***
>
> ***(a) to protect the community;***
>
> ***(b) to reinforce community-held values by denouncing unlawful conduct;***

(c) to deter the offender and other persons from committing offences;

(d) to separate offenders from society, where necessary; to assist in rehabilitating offenders;

(e) to provide reparation for harm done to victims;

(f) to promote a sense of responsibility in offenders by acknowledgement of the harm done to victims and to the community.

Fundamental principle

54 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Imprisonment to be imposed only after consideration of alternatives

55 (1) 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.

(2) In sentencing an offender the court shall have regard to—

(a) the nature and seriousness of the offence, including any physical or emotional harm done to a victim;

(b) the extent to which the offender is to blame for the offence;

(c) any damage, injury or loss caused by the offender;

(d) the need for the community to be protected from the offender;

(e) the prevalence of the offence and the importance of imposing a sentence that will deter others from committing the same or a similar offence;

(f) the presence of any aggravating circumstances

(i) relating to the offence or the offender, including— evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factors;

(ii) evidence that the offender, in committing an offence, abused a position of trust or authority in relation to the victim;

(g) the presence of any mitigating circumstances relating to the offence or the offender including—

(i) an offender's good character, including the absence of a criminal record;

(ii) the youth of the offender;

(iii) a diminished responsibility of the offender that may be associated with age or mental or intellectual capacity;

(iv) a plea of guilty and, in particular, the time at which the offender pleaded guilty or informed the police, the prosecutor or the court of his intention so to plead;

(v) any assistance the offender gave to the police in the investigation of the offence or other offences;

(vi) an undertaking given by the offender to co-operate with any public authority in a proceeding about an offence, including a confiscation proceeding;

(vii) a voluntary apology or reparation provided to a victim by the offender."

11. In relation to section 53 the applicable subsections are (a), (b), (c), and (g). As alluded to earlier, the offence of perjury goes to the very heart of the criminal justice system. Those who have the audacity to commit perjury should be treated harshly as their conduct could compromise the integrity upon which the criminal system operates. In this regard, I wholeheartedly endorse the opinion of Chapman J. in ***R v. Ahmed Noor Ellahi (1979) 1 Cr.App.R(S.)*** who stated:

> ***"It has been said over and over again that perjury is one of the comparatively few offences which inevitably attract a sentence of imprisonment however good may be the character of the person who commits it, because it totally undermines the whole foundation of the administration of justice. Unless courts can rely on people telling the truth in the witness-box, the administration of justice will become quite impossible."***

12. Therefore, an unequivocal message must be sent to offenders and would-be offenders that telling falsehoods in judicial proceedings should not be treated with the proverbial "slap on the wrist". What the Defendant did on the 14th and 15th April 2014 during the trial of Mr. Cann was egregious and her conduct must be denounced with the utmost lucidity. Her only saving grace, and this may be stretching it, is that in a sense her crime was a "victimless" one in that there was no harm done to any one person in particular. I do not foresee Mr. Cann claiming that he was victimized as a result of the Defendant

committing perjury because if the Defendant told the truth at his trial the chances of him being found guilty would have been greater (I will say more about this later).

13. In respect of section 55, I have already made mention of the acute nature and seriousness of the offence of perjury (buttressed by the comparatively high maximum sentences set out in section 120), the potential damage caused to the criminal justice system by the Defendant (damage or loss should not only be confined to physical or financial injury to a person), and, the vital need to deter others from committing the same offence.

14. As to the Defendant's good character as per section 55(2)(g)(i), the authority of ***Devon Hewey v. Dujon Reid-Anderson [2016] Bda LR 116***) definitely suggests that this will not amount to a mitigating factor in perjury offences. Baker P. quoted at paragraph 30 that:

> ***"In our view previous good character is not a mitigating circumstance in offences of this nature which are deliberately targeted at the heart of the criminal justice system……"***

15. The words of Baker P. undergirds the position that the Courts should treat perjury offences with maximum firmness.

16. As to the prevalence of the offence, although acts of perjury most likely occur on a frequent basis in all the Courts of Bermuda, not many of them see the light of day in the Courtroom (the Prosecution were only able to produce the one case of ***Hewey v. Dujon Reid-Anderson***). However, the fact that acts of perjury do not come before the Courts on a regular basis should not diminish the seriousness of the offence or the need for the Courts to treat offenders severely when they do come before the Court. As Roskill J. said in ***Davies (1974) 59 Cr.App.R. 311***:

> ***"It is often said that there is too much perjury committed in courts, and it is regrettably true as everyone sitting in court knows. But it is one thing to suspect that perjury has been committed and another thing to***

prove it. Perjury is not always easy to prove. Perjurers are not easily brought to justice. When they are they must be punished."

17. As to whether the Defendant is solely to blame, her conduct is punctuated by the fact that she told falsehoods in the First and Second Affidavits just prior to Mr. Cann's trial, and, that she maintained the lie over the course of two days of oral testimony on the 14th and 15th April 2014. She may very well have reasons for lying, and I will deal with this shortly, but this does not distract from the fact that she alone violated the truth when she gave her sworn oral evidence.

18. As to whether there are any aggravating features in this case I agree with the Prosecution that it should be taken into consideration that Mr. Cann was acquitted of the offences for which he was charged (which were serious ones) . However, I do not ascribe as strong a correlation between the Defendant lying and Mr. Cann being acquitted as does the Prosecution. Patently, there is some correlation because it appears that the Defendant, given the contents of her 31st December 2009 interview, would have been the Prosecution's "star" witness at Mr. Cann's trial and had she told the truth the likelihood of Mr. Cann being convicted would have increased (although not guaranteed). But as is the case with many trials, there may have been many other factors coupled with the Defendant's lies that may have led to Mr. Cann's acquittal.

19. It is because of possible other factors which may be at play in a trial that I do not fully accept the Prosecution's position that it was because the Defendant lied in Mr. Cann's firearms trial that Mr. Cann was acquitted in a subsequent trial where Mr. Cann was tried for the murder of Fingers. There are just too many other possible variables which may have led to Mr. Cann's acquittal in the murder trial.

Mitigating features

20. Ms. Christopher did not fully address me on whether the Defendant is entitled to the normal discount as a result of her guilty plea (Ms. Clarke did however submit that the

Defendant was entitled to such a discount). While the facts of this case go back some nine (9) years it cannot be sustainably argued that the Defendant was the primary cause of the elapse of time and/or that she did not plead guilty at the earliest opportunity. Over the nine (9) year span the Defendant faced other related charges and was discharged from charges, was successful in a section 31 application, and was unsuccessful in two (2) stay applications. She should not be fully faulted as she was simply utilizing the processes afforded to her under the law (there does not appear to be any indication that the Defendant's applications were frivolous). Presumably, it was as a result of discussions between Ms. Clarke and Ms. Christopher on the 5th December 2018, after the Court dismissed the stay application, that the offence of perjury first appeared on this Indictment. Given that it was on this same day that the Defendant pleaded guilty to perjury, and that the Prosecution decided not to proceed with the original two counts on the Indictment (i.e. Effecting Public Mischief), I see no reason why the Defendant should be deprived of any discount for her guilty plea which in my mind was made at the earliest opportunity.

21. As to whether the Defendant is regretful and remorseful for the offence I had the opportunity of observing the Defendant's demeanour during her *allocutus* and I am satisfied that her expressions of regret and remorse were genuine. Her tears were not "crocodile tears" and her words did not appear to be rehearsed or contrived. She is therefore entitled for some discount in this regard.

22. The overwhelming majority of Ms. Christopher's mitigation submissions honed in on the past nine (9) years that the Defendant has been before the Courts, and how this time span has affected the Defendant's life. Specifically, that:

- Back in December 2009 the Defendant was in her 20's and by April 2014 she had two (2) sons and was concerned about their safety and security as well as hers (the Defendant is now 33). The Defendant was unable to go to the western end of the Island as Mr. Cann lived in the Somerset area, and that it was alleged that Mr. Cann was associated with the "M.O.B."

["Money Over Bitches"] gang and that Fingers was associated with the rival "Parkside" gang. According to Ms. Christopher, the Defendant was receiving threats from the family and friends of both Mr. Cann and Fingers. It was because of this that she thought that she was making the right decision to perjure herself at the trial of Mr. Cann.

- When she gave evidence at Mr. Cann's trial on the 14th and 15th April 2014 she was five (5) month's pregnant with her third child. The Defendant now has four (4) children ages 12, 11, 4, and 1.

- The Royal Gazette newspaper article precipitated a downward spiral in December 2009 whereby the Defendant could not and still cannot secure consistent employment or accommodation. The Defendant was therefore compelled to form her own cleaning services but this is sporadic. As to housing, the Defendant continuously has to move from premises to premises as she is unable to secure long term accommodation.

- In her *allocutus* the Defendant stated that if her name is "Googled" then the Royal Gazette newspaper article would appear in the search engine.

- Also as a result of the newspaper article she attracted a level of "notoriety" [my word] as many persons thought that she was the one who implicated Mr. Cann, and at the same time many other persons thought that she was in some way involved in the murder of Fingers or in the cover-up of his murder (Ms. Christopher states that the police were considering charging the Defendant with the offence of accessory after the fact for the murder of Fingers).

- In her *allocutus* the Defendant stated that as she was in the cell area of the Court awaiting to ascend to the Court for this sentencing hearing that

someone who was also in custody made a worrying comment to her about her involvement in this matter.

- Between 2012 and 2014, whilst Mr. Cann was being held into custody, the Defendant was being called a "snitch".

- The Defendant's Interview was of immense assistance to the police in that it was used to have Mr. Cann extradited to Bermuda, and to bring charges against Mr. Cann. Additionally, it was the clothing collected from the Defendant's premises which DNA evidence was obtained and used as part of the case against Mr. Cann.

- When the Defendant was held in police custody and then remanded to the Co-ed facility in December 2009 she left behind two (2) children to be cared for.

- Proper witness care systems were not put into place to assist the Defendant (who was a crucial Prosecution witness in the case against Mr. Cann) with dealing with the pressure of giving evidence in a serious matter.

23. There is some credence to the submissions of Ms. Christopher. I accept that when the Defendant gave her statement to police back in December 2009 that it was her genuine intention to tell the police everything that happened to her, whether or not it implicated Mr. Cann. Indeed, the police and the Prosecution must have saw significant value and veracity in the Defendant's Interview as the Prosecution entered a *Nolle Prosequi* in favour of the Defendant, and the police used the Defendant's Interview for the extradition proceedings and the eventual charging of Mr. Cann. Despite the Defendant lying at Mr. Cann's trial some four and a half years later should not deprive her of whatever discount she may be entitled to under section 55(2)(g)(iv) of the Criminal Code for assisting the police with the investigation into the murder of Fingers. I do not think that it was the

Defendant's intention to help or hurt either Mr. Cann or Fingers, she simply was telling the police what happened. For that she should be given some credit.

24. Further, whilst I am reluctant to do this, I will take Judicial Notice of (i) the spectre of fear which hangs over some persons who have witnessed a crime, and (ii) the affect which adverse publicity may have on persons in our small community. Since the emergence of gang warfare in recent years in Bermuda, and because of the devastating violence and loss of life which has resulted, there has been a widespread reluctance of witnesses to come forward to tell the police what they saw and heard. This fear has been made real by incidents of threats of violence and acts of actual violence towards potential witnesses. We often hear in these Courts the common lexicon *"snitches get stitches"*. To be clear, it is <u>not</u> my view that telling untruths in a judicial proceedings because one is fearful of the consequences amounts to a mitigating circumstance which I should take into consideration in sentencing the Defendant. However, the Defendant's legitimate fear provides a useful and credible understanding as to why she decided to lie. It was not as if she lied to evade implicating herself and I am not satisfied that she purposely lied to exonerate Mr. Cann. I accept that she committed perjury because she was in fear of her and her children's safety.

25. There is also some weight in Ms. Christopher's submissions that the Defendant's life has been deleteriously affected by the bad publicity that she has received since December 2009. Regrettably, there was a time (including the year 2009) when accused persons were walked in handcuffs across the public street from the old police station to the old Magistrates' Court building on Parliament Street in the City of Hamilton to answer charges. While the accused were being walked across the street paparazzi would invariably take pictures of the accused and those pictures would frequently appear on the sensationalized front pages of the Royal Gazette. The unfortunate result was that accused persons were often deemed to be found guilty by the court of public opinion well before they were able to properly put forth their defence in a Court of law, and, their lives were inevitably negatively affected as members of the public were able to put a name to a face because of the publication of photos. In a small place like Bermuda the consequential

effect could be devastating for the accused person, and it was partly for this reason that accused persons are now afforded a modicum of anonymity with the location of holding cells in new Dame Lois Browne-Evans Building. I therefore accept Ms. Christopher's submissions that since December 2009 the Defendant's life has been in turmoil in terms of finding employment and accommodation.

26. To be clear, I am in no way whatsoever suggesting that the effects of any bad publicity for an accused amounts to mitigation, because it does not. However, along with the nine (9) year factual history of this case, I am entitled to take into consideration that all of the circumstances of this matter has hung over the Defendant like the "Sword of Damocles" and that to some degree she was subjected to a level of public scrutiny and attention which she otherwise would not have today if she was charged with an offence.

Appropriate Sentence

27. In support of her submissions that the appropriate sentence in this case is one of 6 weeks to 3 months imprisonment suspended for a period of time Ms. Clarke referred to the authorities of ***R v. Joseph Feldman (1981) 3 Cr.App.R. 20 (1981)*** and ***R v. Ahmed Noor Ellahi (1979) 1 Cr.App.R(S.)***. ***Feldman*** and ***Ellahi*** are the reinforcement rods for the Prosecution's proposition that offences of perjury ***"must be punished by imprisonment, save in very exceptional circumstances" (Skinner J. in Feldman)***, and that ***"It has been said over and over again that perjury is one of the comparatively few offences which inevitably attract a sentence of imprisonment….." (Chapman J. in Ellahi)***. Ms. Christopher submits that a conditional discharge is appropriate in the circumstances of this case. I will address Ms. Christopher's submissions first.

Conditional Discharge

28. Section 69 of the Criminal Code provides that:

"Conditional and absolute discharge

> ***69 (1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, the court may, if it considers it to be in the best interests of the offender and not contrary to the public interest, instead of convicting the offender, by order direct that the offender be discharged absolutely or on conditions prescribed in a probation order made under section 70A or 70B."***

29. The day after the Court heard sentencing submissions in Court Ms. Christopher sent to the Court by email a three (3) page extract from "Martins Annual Criminal Code 2016" ("Martins") and the local case of ***Lori Dubell and Barry Richards, Case No. 33 of 2009***. Asked by the Court if she and Ms. Clarke wished to be heard further in respect of the extract from Martins and the case of ***Dubell*** Ms. Christopher informed the Court that she and Ms. Clarke agreed that no further hearing was necessary. The extract from Martins is basically a recitation of the section 730 of the Canadian Criminal Code ("Section 730") which to some degree mirrors our section 69, however it is difficult for me to determine exactly what principle, other than the general principles set out in the cited case of ***R v. Fallofield [1973] BCJ No. 559***, that Ms. Christopher wishes to bring to my attention, or what legal point she is actually making. Since ***Fallofield*** is cited in ***Dubell*** I will focus my attention on parts of the Martins extract that refer to ***Fallofield***.

30. In ***Dubell***, Ground CJ. listed the Canadian Court's conclusions in ***Fallofield*** as to how section 730 should be applied. They were:

> ***"(1) The section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or life or by death.***
>
> ***(2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.***

(3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.

(4) The second condition precedent is that the court must consider that a grant of discharge is not contrary to the public interest.

(5) Generally, the first condition would presuppose that the accused is a person of good character, without previous convictions, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and thus the entry of a conviction against him may have significant adverse repercussions.

(6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of discharge provisions."

31. Ground CJ. also cited the case of ***R v. Moreau (1992) 76 CCC (3d) 181 (Que C.A.)*** in which Rothman J.A. stated:

"It would be difficult, and probably unwise, to attempt a definition of the categories of cases where an absolute or conditional discharge could appropriately be granted. But without attempting an exhaustive definition, I believe a discharge under s. 736 should be considered a sentencing option where the conditions of the section are met and where, having regard to the nature of the offence and the age, characteristics and circumstances of the accused, the registering of a criminal conviction, in itself, would have a prejudicial impact on the accused that is disproportionate to the offence he or she committed."

32. Dealing with points 1 and 2 of ***Fallofield*** whilst it may be that a conditional discharge can be applied to any offence and that it is not limited to a trivial violation I would respectfully conclude that as one travels along the seriousness scale towards the more serious offences that the possibility of a conditional discharge being meted out becomes less likely. The reasoning is that the more severe the offence the more deterrent effect the ultimate sentence must have. As said earlier, by virtue of the sentencing tariffs set out in section 120, and as the authorities of ***Hewey and Reid-Anderson***, ***Ellahi***, and ***Feldman*** highlight, the offence of perjury is extremely serious as it, like no other offence, undermines the pillars of the criminal justice system.

33. In respect of whether it would be in the best interests of the Defendant that she is granted a conditional discharge an argument can be made that without a conviction her chances of securing employment and accommodation may be improved for her and her four (4) children. The Defendant may have suffered some repercussions over the nine (9) year history of this matter, however persons who commit serious offences such as perjury run the real risk of having a conviction entered against their names. Those who contemplate committing a serious offence should think twice as their lives may be altered drastically if convicted. Furthermore, even if a conviction would have a prejudicial impact on the Defendant this would pale in comparison to the serious offence of perjury which she committed.

34. But even if it would be in the best interests of the Defendant to be granted a conditional discharge it certainly will not be in the public interest for her to be granted a conditional discharge. I will reiterate, the offence of perjury is very serious and therefore a clear and unequivocal message must be sent to those who commit perjury, or are thinking about committing perjury, that the processes of the Courts should not be compromised and that all steps should be taken to ensure that the integrity of the Courts is maintained. Granting the Defendant a conditional discharge would be contrary to the public interest in that it would send the wrong message that one would be treated leniently if they, by lying in Court, put a sledgehammer to the foundations of our criminal justice system.

35. Additionally, the case at bar can be distinguished from ***Dubell*** where an absolute discharge was granted after an appeal of a ten (10) day immediate imprisonment meted out by a Learned Magistrate. The Appellant in ***Dubell*** pleaded guilty to the importation of an empty 9 mm magazine under the Firearms Act 1973. Apparently, the magazine was found in a black "fanny pack" strapped around her waist when she arrived in Bermuda on a commercial flight and when asked about it by the authorities she said that she had forgotten that it was there. However, earlier when customs officer search the bathroom trash bins of the commercial plane they found nine (9) live rounds of 9mm Luger ammunition. Eventually the Appellant admitted that the magazine and ammunition belonged to a gun for which she had a license for in her home state of Florida. She explained that once she realized that she had the clip of ammunition on the plane she panicked and discarded the live rounds in the bin. The Appellant was 61 years old, of previous good character, and she was fearful that a conviction would impact her real estate license and hence her ability to earn a living.

36. The distinguishing elements between the case at bar and the Appellant in ***Dubell*** are:

(i) Ground CJ. found that Ms. Dubell did not import the magazine deliberately where in this case the Defendant well knew that she was going to lie and in fact lied in Court on the 14th April 2014, and, she continued the lie the next day. Indeed, Ground CJ. indicated that had the importation been deliberate then a more severe penalty would have been called for.

(ii) Ground CJ. was of the opinion that the facts of ***Dubell*** pointed to the offence as ***"being an unfortunate error by a hapless individual".*** Later on in his decision Ground CJ. stated ***"Obviously the courts have got to be able to distinguish between the hapless and the wicked"***. Not to suggest in anyway whatsoever that the Defendant in this case was or is "wicked" but

there is nothing in the case at bar to suggest that the Defendant was hapless and that her lying in judicial proceeding was an unfortunate error.

(iii) Ground CJ. emphasized that by not charging the Appellant with possession of the nine (9) rounds of ammunition that the prosecution must have accepted that the Appellant did not have the necessary intent to import the ammunition. Ground CJ. went on to say that the Appellant should have been sentenced on the basis that she had no ulterior intent. As said earlier, the Defendant clearly intended to perjure herself when she gave her oral evidence and this is evident in what she said in her First and Second Affidavits sworn a few days before giving her oral evidence at Mr. Cann's trial.

37. It is for the above reasons that I reach the conclusion that a sentence of a conditional discharge in this case would not be appropriate. Ultimately, a conditional discharge for the offence of perjury would not sufficiently denounce the Defendant's unlawful conduct. Accordingly, I shall move to entering a conviction against the Defendant.

38. I will now turn to whether a period of imprisonment or other sentence is warranted in this matter.

Period of Imprisonment

39. I concur with Chapman J. in ***Ellahi*** that even those with erstwhile good character should still face the possibility of being incarcerated for perjury. However, the unique circumstances of this case are such that in the spirit and intent of section 55 I am prompted to also consider sanctions other than immediate imprisonment. Further, the authorities seem to suggest that there are other relevant factors to be taken into consideration when passing sentence for the offence of perjury.

40. President of the Court of Appeal Justice Baker, in ***Hewey and Reid-Anderson***, listed the features to be taken into account in perjury cases. Such as: the period over which the offences were committed and their persistence; the degree of planning; the serious nature of the trial in which the false evidence was given, and the considerable significance of the false evidence to the outcome of the trial. In the case at bar:

- The Defendant may have hatched the plan to lie at Mr. Cann's trial only a few days prior to the beginning of April 2014 with the swearing of the First and Second Affidavit and at a time when it was obvious to her that the Prosecution required her to attend Court and give evidence against Mr. Cann. Once she decided to lie though she carried through with the lie with some persistence over two days of oral testimony on the 14th and 15th April 2014.

- It does not appear that there was significant degree of planning or sophisticated planning, and the Defendant's lying did not involve the aiding, abetting, or coaxing of anyone else to lie.

- There should be absolutely no issue that the nature of the trial in which the false evidence was given was near the higher end of seriousness as it involved the possession and discharging of a firearm.

- As to whether the Defendant's lies affected the outcome of Mr. Cann's trial I addressed this issue earlier when dealing with the Prosecution's submissions that this constituted an aggravating feature this case. Suffice it to say, there was some correlation between the Defendant's perjury and Mr. Cann's acquittal in his firearms trial.

41. However, though still serious, the actions of the Defendant can be distinguished from the conduct of the appellants in ***Hewey and Reid-Anderson***, ***Ellahi*** and ***Feldman***. In ***Hewey***

and Reid-Anderson, Mr. Hewey was found guilty by a Jury of counselling or procuring a Lavon Thomas to give false evidence that Mr. Hewey was not the person on a bike from which shots were fired at him. Baker P. noted ***"The case against Hewey depended essentially on whether the jury believed Thomas"***, and when Mr. Thomas took the stand his evidence was in line with the false evidence given to him by Mr. Hewey. In my view, Mr. Hewey's conduct was purposeful and designed to coax another to lie so that Mr. Hewey himself would be found not guilty of the offences charged. Therefore, it is obvious to me that the conduct of Mr. Hewey is far more egregious than that of the Defendant who, as I stated earlier, lied to protect herself and her children and not to lead to a not guilty verdict for Mr. Cann (although I accept that this may have been the consequence of the Defendant's perjury).

42. The facts of ***Ellahi*** can also be distinguished from the case at bar. The appellant in ***Ellahi*** paid a small sum of money to a person to give false evidence at his trial for a motoring offence and he was charged with the offence of aiding, abetting and procuring another to commit perjury. As in ***Hewey and Reid-Anderson***, the conduct of the appellant in ***Ellahi*** involved the coaxing of another to commit an offence which ultimately led to the appellant's acquittal and costs being ordered against the police for bringing the relatively minor traffic offence against the appellant. In my view the conduct of the appellant in ***Ellahi*** is more egregious than the conduct of the Defendant in this case who lied to protect herself and her children, and she did not lie purposely to secure an acquittal of Mr. Cann.

43. Like the perjury offence in ***Hewey and Reid-Anderson*** and ***Ellahi***, the perjury in ***Feldman*** contained an element of sophisticated planning which does not exist in the case at bar. In ***Feldman***, the perjury related to the compulsory examination by an examiner and a Registrar into the affairs of two companies and in which the appellant wrongly testified that he had never been adjudicated bankrupt and that he had never paid less than 100 pence in the pound to his creditors. The case at bar does not have the same level of sophistication as the perjury in ***Feldman***, and it is clear that in ***Feldman*** the appellant's reason for committing perjury was to conceal his conduct of acting as a director whilst an

undischarged bankrupt. As said earlier, in the case at bar the Defendant was not seeking to exonerate herself from any criminal or nefarious conduct, but to protect herself and her children.

44. Applying the authorities of ***Hewey and Reid-Anderson***, ***Ellahi***, and ***Feldman*** I conclude that the appropriate sentence in the case at bar is one of a term of imprisonment. ***Feldman*** provides that save in "very exceptional circumstances" that the offence of perjury must be punished by imprisonment. I see no "very exceptional circumstances" in this case. However, given the Defendant's plea of guilty at the earliest opportunity; the unique circumstances of this case including the assistance which the police and Prosecution obtained from the Defendant's Interview; the extensive nine (9) year history of this matter; and, that the Defendant is not someone from whom the community needs to be protected from for a period of time, any sentence of imprisonment should not exceed the sentences meted out in the cited authorities. It will be noted that following Baker P. in ***Hewey and Reid-Anderson*** I did not deem the Defendant's previous good character to be a mitigating fact in this case.

45. Further, while I appreciate that the Defendant was held in police custody and on remand at the Co-Ed facility for a total of fifteen (15) days from 16th December 2009 to 31st December 2009 in respect of Case No. 09CR00982 which ended in the filing of *Nolle Prosequi*, her loss of freedom in December 2009 forms part of the history of the case at bar. The factual nexus is that the Defendant's Interview was obtained while she was on remand at Co-ed in December 2009 and it was used in the extradition proceedings and charging of Mr. Cann for the firearms offences. Therefore, the Defendant's confinement for those fifteen (15) days in December 2009 (which included Christmas 2009) should be taken into consideration in my sentencing for the offence of perjury in the case at bar.

Sentence

46. In sentencing the Defendant I take into consideration the following: the unique circumstances of this case; the Defendant's plea of guilty; the seriousness of the offence

of perjury; the mitigating and aggravating features of this case; the submissions of Counsel; and the contents of the above paragraphs. I therefore sentence the Defendant as follows:

> **Imprisonment for a period of one (1) month with time in custody to be taken into consideration.**
>
> **In consideration of the one-third (1/3) discount normally and routinely applied by the Department of Corrections for those serving periods of incarceration this will effectively amount to "time served" for the Defendant. I therefore order that the Defendant serve no further period of incarceration.**

47. It has to be said that but for the unique circumstances of this case I would have imposed a longer period of incarceration, particularly if the Defendant proceeded to trial and was found guilty by a Jury. In fact, the appropriate starting point on a guilty plea, and without the unique circumstances of this case, should probably be twelve (12) months immediate imprisonment.

48. I also considered fining the Defendant however given the Defendant's insecure employment the payment of any fine would have amounted to an almost impossible order for the Defendant to comply with. I therefore make no such order.

Dated the 11th day of December, 2018

The Hon. Acting Justice Juan P. Wolffe