**[2016] JMCA Crim 16**

**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 10/2015**

**BEFORE: THE HON MR JUSTICE BROOKS JA**
**THE HON MRS JUSTICE MCDONALD-BISHOP JA**
**THE HON MISS JUSTICE WILLIAMS JA (AG)**

**DWAYNE STRACHAN v R**

**Leroy Equiano for the appellant**

**Jeremy Taylor and Gavin Stewart for the Crown**

**12 November, 14 December 2015, 19 January and 13 May 2016**

**MCDONALD-BISHOP JA**

[1] This is an appeal brought by Mr Dwayne Strachan, the appellant, against sentence imposed on him on 18 March 2015 at a "night court" sitting of the Resident Magistrate's Court for the parish of Saint Catherine held at Greater Portmore. He was sentenced by the learned Resident Magistrate to 20 days imprisonment at hard labour following a plea of guilty to an information that charged him with breaching his tenant's quiet enjoyment in contravention of section 27 of the Rent Restriction Act.

[2] The particulars of the offence were that on Tuesday, 3 June 2014, he "entered premises located at Southborough rented to Latoya Bailey and re-rented the premises with all her belongings breaching her quiet enjoyment contrary to section 27 of the Rent Restriction Act".

[3] He was not represented by counsel in those proceedings.

[4] On 19 January 2016, after hearing submissions and considering a social enquiry report requested by this court, we ordered as follows:

> "1. Appeal against sentence allowed.
>
> 2. Sentence of 20 days imprisonment set aside and a sentence of seven days substituted therefor.
>
> 3. Sentence is reckoned to have commenced on 18 March 2015 (and has already been served)."

[5] We promised then to reduce our reasons for our decision to writing and to produce them at a later date. These are our reasons.

**The factual background**

[6] The facts that are taken as constituting the background to the conviction of the appellant are those that have been relayed by the learned Resident Magistrate as part of the record of proceedings. In outline, those facts are as follows:

(a) On 28 April 2013, the complainant, Latoya Bailey, rented a one bedroom dwelling house from the appellant in Southborough, Portmore in the parish of Saint Catherine at a rental of $16,000.00 monthly, inclusive of

light and water. The complainant was employed in the parish of St James and as such would, at times, be absent from the rented premises.

(b) On 27 September 2014 (evidently, an error, seems that it should be 2013) the complainant had outstanding rent for the appellant and she advised him that she would be late in paying him. During that month she left home for a day. Upon her return her electricity supply was disconnected, causing food items in her refrigerator to be spoilt. She complained to the appellant and he apologized and promised to restore her electricity supply. The complainant subsequently told him she would be leaving home at 8:30 am. She, however, overslept and did not leave as planned. While she was in the room, the appellant came in with her kitchen knife in his hand and upon seeing that she was there he said, "Me think you neva deh ya".

(c) Up to December 2013, the complainant was in arrears with her rental payments and so on 17 December 2013, she paid the appellant $20,000.00. She then left for Montego Bay.

(d) In January 2014, the appellant went inside the complainant's room, without her permission, and conducted a search. He found telephone numbers for one of her friends and for her aunt who resides in the United States of America. He called them. He subsequently sent the complainant several text messages, one of which advised her that he had obtained

permission from the court to sell her belongings. She at no time received a notice to quit from him.

(e) The complainant subsequently went to the dwelling house [apparently in June 2014 (date not stated)] but was unable to gain access as the lock to the grill had been changed. She was unable to retrieve her furniture or important documents. She made a report to the police about the appellant's actions. She then went to the St Catherine Resident Magistrate's Court's office in Spanish Town on 6 June 2014, where she initiated court proceedings against the appellant.

[7] The appellant was later summoned to appear in court to answer to the information that was laid against him. He pleaded guilty and was sentenced.

[8] Following the filing of his appeal, the appellant was granted bail by this court, pending the determination of the appeal. By the time he was bailed, he had already served seven days of the 20 days imprisonment that was imposed on him.

**Grounds of appeal**

[9] The appellant filed three grounds of appeal as follows:

"1. The Appellant did not get a fair trial.

2. The evidence provided did not support the finding of guilt.

3. The sentence was manifestly excessive in the circumstances."

**The proceedings on appeal**

[10] At the first hearing of the appeal on 12 November 2015, Mr Equiano, who appeared for the appellant, indicated to the court that grounds one and two would not be pursued because the narrative given by the appellant, as to the procedure that took place in court, coincided with the learned Resident Magistrate's report that the appellant had pleaded guilty. The conviction was, therefore, not contested. In the circumstances, leave was granted to the appellant to abandon grounds one and two.

[11] The appellant's discontentment, as Mr Equiano pointed out, related solely to the sentence. His complaint, as set out in ground three, was that the sentence of the court was manifestly excessive in the circumstances.

[12] In support of the appeal, the appellant filed an affidavit on 6 November 2015, in which he deposed to certain matters that he stated he had indicated to the learned Resident Magistrate at the time of the hearing but which were not included in the record of proceedings. He also explained his reason for entering the guilty plea and the circumstances in which he did so. We observed that some of the matters he spoke of in his affidavit were not reflected in the record of the proceedings transmitted to this court.

[13] The question arose as to whether, indeed, the learned Resident Magistrate was mindful of all the facts asserted by the appellant in his affidavit at the time she sentenced him. We thought it only fair that the learned Resident Magistrate should be

given an opportunity to see what the appellant was contending and to give her the opportunity to respond to his assertions.

[14] Also, in the light of the appellant's assertions, it was necessary for this court to ascertain the version of events on which the learned Resident Magistrate had sentenced him. The question whether he was sentenced on his version or the complainant's version became a live consideration in the light of his guilty plea, there being no indication that a "Newton hearing" was conducted by the learned Resident Magistrate to solve, what appeared to be on the face of the appellant's affidavit, disputed questions of fact. Therefore, the resolution of this issue was important in order for this court to properly determine the appropriateness of the sentence that was imposed.

[15] Consequently, on 12 November 2015, the first date set for the hearing of the appeal, the following orders were made:

> "1. The appeal is taken out of the list and set for 14 December 2015.
>
> 2. The registrar of this court shall send to the learned Resident Magistrate a copy of the affidavit of Mr Dwayne Strachan filed herein on 6 November 2015, and require from her an affidavit in response on or before 7 December 2015, which affidavit shall exhibit a copy of the notes of proceedings taken at the time of the hearing before her which shall be certified by the Clerk of the Courts for the parish of Saint Catherine.
>
> 3. The registrar shall provide copies of the learned Resident Magistrate's affidavit to the attorneys-at-law for the appellant and the respondent.

4. The appellant's bail is extended to 14 December 2015."

[16] We will pause here to renew, what is by now clichéd, the call that the contemporary notes of the proceedings taken at the time a person has pleaded guilty and is being sentenced are to be transmitted to this court as part of the record of the proceedings. See **Marc Wilson v R** [2014] JMCA Crim 41 at paragraphs [21]-[25]. It is worth repeating that it puts the court at a grave disadvantage when the record of proceedings does not include those notes and it also contributes to the delay in the disposal of matters when the hearing has to be adjourned to procure them. We ask that the Clerks of the Courts, whose statutory responsibility it is to transmit the record of proceedings, do constantly bear this requirement in mind.

[17] We now continue. An affidavit from the learned Resident Magistrate, responding to the appellant's affidavit and exhibiting the contemporaneous notes of the proceedings, was filed on 7 December 2015, in accordance with the orders of the court. The learned Resident Magistrate, in her affidavit, indicated, among other things, that both the appellant and complainant were present and that at no time did the appellant take issue with any aspect of the facts presented by the Clerk of the Court. The learned Resident Magistrate further deposed that at no time during this exercise did the appellant bring to the court's attention some of the matters he spoke of in his affidavit. She stated that both he and the complainant were allowed to speak and he did not give the slightest indication that he did not understand any word or phrase used. According

to her, "…both parties were expressive and seemingly intelligent and neither expressed any misunderstanding of any aspect of the proceedings".

[18] Upon receipt of the learned Resident Magistrate's affidavit and the notes of proceedings duly exhibited to it, the appellant filed no affidavit in response and Mr Equiano at the hearing on 14 December 2015, indicated to the court that the appellant has accepted the prosecution's case and would not pursue the matter any further as he had breached the law and that is accepted.

[19] The court therefore accepted the record of the proceedings and the affidavit of the Resident Magistrate as a true representation of what transpired at the time the appellant was pleaded and sentenced. It was against that background that the single ground of appeal was considered.

**The submissions**

[20] Mr Equiano, in submitting on behalf of the appellant that the learned Resident Magistrate erred in sentencing the appellant to a term of imprisonment, drew the court's attention to paragraph 7 of the "Reasons for Sentencing". Therein, the learned Resident Magistrate stated:

> "The term of imprisonment is considered even in the absence of information relating to character, home surroundings, mental condition and other considerations usually contained in a Social Enquiry Report. As the relevant legislation in this case provides no alternative other than a term of imprisonment the Court is of the view that a Social Enquiry Report would be of little or no value to this case."

[21] Mr Equiano contended that the learned Resident Magistrate, in sentencing the appellant to a term of imprisonment that she viewed as mandatory, seemed not to have considered section 3(1) of the Criminal Justice (Reform) Act and for that reason was of the opinion that there was no provision in law for an alternative way of dealing with the appellant, other than by imposing a term of imprisonment.

[22] According to learned counsel, the learned Resident Magistrate identified what she considered to be mitigating circumstances that constrained her to impose a sentence of 20 days but she, however, felt constrained by the Rent Restriction Act and because of this constraint, failed to consider any alternative punishment to that of imprisonment. For that reason, he submitted, she also failed to give consideration to the appellant's character, home surrounding, mental condition and other factors, in accordance with section 3(3) of the Criminal Justice (Reform) Act.

[23] Mr Equiano further submitted that while the learned Resident Magistrate had identified the factors that are to be considered before a sentence of imprisonment is imposed, she, however, "erroneously interpreted the width of [her] sentencing powers by constraining the exercise of [her] discretion, when the law bestowed upon [her] the option to waive a custodial sentence where in the circumstances, as in the instant case, another sanction would be more appropriate".

[24] He pointed out that the appellant had served seven days of the sentence before being released on bail and, so, in the circumstances of this case, he should suffer no further punishment.

**Discussion and findings**

[25] The appellant was charged under section 27 of the Rent Restriction Act for breach of the complainant's quiet enjoyment. The section reads:

> "27. -(1) Except under an order or judgment of a competent court for the recovery of possession of any controlled premises, no person shall forcibly remove the tenant from those premises or do any act, whether in relation to the premises or otherwise, calculated to interfere with the quiet enjoyment of the premises by the tenant or to compel him to deliver up possession of the premises.
>
> (2) Every person who contravenes any of the provisions of subsection shall, upon summary conviction thereof before a Resident Magistrate, be liable to be imprisoned for any term not exceeding twelve months."

[26] The fact that the section prescribes imprisonment as the penalty does not necessarily mean that imprisonment is mandatory. The subsection must be read in light of the Criminal Justice (Reform) Act, which was promulgated in 1978 and which has progressively been amended over the years to introduce a range of non-custodial sentencing options.

[27] Section 3(1) reads:

> "Subject to the provisions of subsection (2), **where a person who has attained the age of eighteen years is *convicted in any court for any offence,* the court, instead of sentencing such person to imprisonment, shall deal with him in any other manner prescribed by law**." (Emphasis added)

Section 3(2), then, provides:

> "**The provisions of subsection (1) shall not apply where-**
>
> **(a) the court is of the opinion that no other method of dealing with the offender is appropriate; or**
>
> **(b) the offence is murder; or**
>
> **(c)** ***[Deleted by Act 6 of 2001.]***
>
> **(d) The person at the time of commission of the offence, was in illegal possession of a weapon referred to in the First Schedule, a firearm or imitation firearm."** (Emphasis added)

Section 3(3), on which Mr Equiano also relied, continues:

> "**Where a court is of opinion that no other method of dealing with an offender mentioned in subsection (1) is appropriate, and passes a sentence of imprisonment on the offender, the court shall state the reason for so doing; and for the purpose of determining whether any other method of dealing with such person is appropriate the court shall take into account the nature of the offence and shall obtain and consider information relating to the character, home surroundings and physical and mental condition of the offender."**(Emphasis added)

[28] The Criminal Justice (Reform) Act had introduced at its inception in 1978, some non-custodial sentencing options and after a series of amendments, it has since broadened the application of non-custodial sentencing options; introduced a new form of custodial sentences; and provided for more flexible arrangements for the service of sentences of imprisonment. All this was geared, largely, at reducing the burden on the

overcrowded prison system, while at the same time promoting the rehabilitation of offenders within the context of community-based justice.

[29] The Criminal Justice (Reform) Act is, indeed, an indispensable tool in the hands of the judiciary to be employed in the sentencing process and so sentencing judges at all levels and at all times should pay due regard to its provisions and give effect to them.

[30] As it relates to the instant case, the mere fact that the appellant was convicted for breach of the Rent Restriction Act, which attracts a penalty of imprisonment, did not oust the applicability of the provisions of the Criminal Justice (Reform) Act as the learned Resident Magistrate erroneously thought. In fact, the mere fact that imprisonment was being contemplated would have necessitated a consideration of the provisions of the latter Act.

[31] In addition to the Criminal Justice (Reform) Act, section 67 of the Justices of the Peace Jurisdiction Act would also have been a relevant provision for the consideration of the learned Resident Magistrate, even if, in the end, she was to view the penalty provided by that section as being inappropriate to serve the ends of justice. That statutory provision allows for a form of penalty other than imprisonment in circumstances where the statute creating the offence only provides for imprisonment as the penalty for that offence.

[32] Section 67 reads:

> "Where a court of summary jurisdiction has authority under a law to impose imprisonment for an offence punishable on summary conviction and has no authority to impose a fine for that offence that court, when adjudicating on such offence, may, notwithstanding if the court think the justice of the case will be better met by a fine than by imprisonment, impose a fine not exceeding one thousand dollars and not being of such an amount as will subject the offender under the provisions of Part V in default of payment of the fine to any greater term of imprisonment than that to which he is liable under the law authorizing the said imprisonment."

[33] The term "a court of summary jurisdiction" used in the statute means, according to the Interpretation Act, any justice or justices of the peace (with the requisite jurisdiction) or any Resident Magistrate sitting either alone or with other justices in a Court of Petty Sessions as well as a Resident Magistrate exercising special statutory summary jurisdiction. In **R v Oliver Junior** (1983) 20 JLR 131 at 132, it was further explained:

> "…In a recent decision of this court, the meaning of 'on summary conviction' was considered. In *R. v. Donovan Alexander & Albert Lee* (unreported) R.M.C.A. 40/81 dated 26th March 1982, at p. 5 of the judgement [sic], the court said this:
>
> > 'A court of summary jurisdiction in this country thus presents something of a dichotomy. From the point of view of the Resident Magistrate, he may thus sit as two justices of the peace or he may sit to exercise his special statutory summary jurisdiction. What is tolerably clear is that he is quite unable to exercise both jurisdictions simultaneously…' "

[34] This matter, which was brought pursuant to the Rent Restriction Act, would have involved an exercise by the learned Resident Magistrate of her special statutory summary jurisdiction and so section 67, which allows for the imposition of a fine, would, have been applicable, in principle. It does seem, however, that the provision for a fine of $1,000.00 is rather outdated and, so, is in need of urgent amendment to allow for an upward adjustment in the light of current realities within our jurisdiction. However, while the section may lack the requisite "teeth" necessary for its effectiveness, it is, at least, indicative of Parliament's intention that in cases triable by Resident Magistrates in the exercise of their summary jurisdiction, a fine may be imposed instead of imprisonment, even in situations where imprisonment is the only penalty prescribed by the statute that has created the offence. Section 67 is, indeed, a useful provision in the sentencing arsenal of the summary courts, but it needs some urgent attention to make it more effective, if the courts are to give effect to the true intention of Parliament to consider a fine as an alternate penalty to a term of imprisonment.

[35] In view of the foregoing provisions of the Criminal Justice (Reform) Act and the Justices of the Peace Jurisdiction Act, which empower a Resident Magistrate (in the exercise of summary jurisdiction) to impose another form of sentence other than a term of imprisonment, the learned Resident Magistrate would have erred when she formed the view that she was obliged by virtue of section 27(2) of the Rent Restriction Act to impose a term of imprisonment in sentencing the appellant and nothing else. This view then led her into error when she failed to consider whether other methods of dealing

with the appellant were appropriate in keeping with section 3(1) of the Criminal Justice (Reform) Act.

[36] We also agreed with Mr Equiano that the learned Resident Magistrate erred when she stated in paragraph 7 of her reasons for sentence that:

> "The term of imprisonment is considered even in the absence of information relating to character, home surroundings, mental condition and other considerations usually contained in a Social Enquiry Report. As the relevant legislation in this case provides no alternative other than a term of imprisonment the Court is of the view that a Social Enquiry Report would be of little or no value in this case."

[37] This statement of the learned Resident Magistrate clearly resulted from her misapprehension of the law, from the very outset, that no other type of sentence was applicable in the circumstances. For that reason, she failed to appreciate section 3(3) of the Criminal Justice (Reform) Act and the authorities that have treated with that provision. The section is clear that in cases that fall within the operation of section 3(1) of the Act, the sentencing court, for the purpose of determining whether any other method of dealing with an offender is appropriate, "shall take into account the nature of the offence and shall obtain and consider information relating to the character, home surroundings and physical and mental condition of the offender" (see paragraph [27] above). It means that due regard must be had to the nature of the offence as well as to the special circumstances of the particular offender.

[38] The learned Resident Magistrate was therefore obliged to obtain and consider information relating to the character and background of the appellant as stipulated by

the statute before sentencing him immediately to a term of imprisonment. Therefore, contrary to what she concluded, a social enquiry report, or any other report concerning the antecedents of the appellant, would have been quite useful and would have been of value in the sentencing process. The appellant was, in effect, denied the right to have his special circumstances as an offender given due consideration by the court.

**Approach of the court in treating with the appeal**

[39] In the light of the error of the learned Resident Magistrate and her consequent failure to have regard to the Criminal Justice (Reform) Act before sentencing the appellant, we found it necessary to apply the provisions of the Act in determining whether the sentence can be said to be manifestly excessive. The learned Resident Magistrate would have erred, in principle, thereby justifying this court's interference with the sentence she imposed. The issue for the consideration of this court was whether there was any other method that could have been employed in dealing with the appellant. We saw it necessary, in keeping with the law, to procure a social enquiry report to assist us in our deliberations. So, on 14 December 2015, the hearing was again adjourned to 19 January 2016 for a social enquiry report to be prepared and presented to this court.

[40] The report was received for the final hearing of the matter on 19 January 2016. The Probation After Care Officer was also in attendance. No questions were put to him and the report was agreed by the appellant, through his counsel, to be taken as

forming part of the record of proceedings. There was no objection by the Crown to any aspect of the report.

[41] The report proved favourable to the appellant. It disclosed that he is 40 years old, literate, industrious and with no previous criminal record. His employment record revealed that he has, generally, been gainfully employed. According to the report:

> "Mr. Strachan is a mature man, who from all indications has sought to equip himself with a life skill and has worked hard over the years to provide for himself and his family. He is married and the father of three children, unfortunately his marriage has broken down and his family life face with some challenges.
>
> The matter before the court seems to be Mr. Strachan's first encounter with the Criminal Justice System. Investigation has in fact not revealed any prior indiscretion or hostile behavior. Subject's community report speaks of an individual who has lived his life in accordance with societal expectations.
> …
>
> In summary Mr. Strachan from the community's standpoint and during the interview did not present himself as an arrogant or self seeking individual. He appears to be a productive citizen who is not deemed a high risk to society."

[42] An examination of the notes of the proceedings revealed that the learned Resident Magistrate was deprived of all this information concerning the appellant. Indeed, there was no information provided to her that pertained to the personal circumstances of the appellant. That omission, of course, was in keeping with her wrongly held view that his personal circumstances and background were not relevant to the sentencing process because the statute provided for imprisonment as the only penalty.

[43] What the learned Resident Magistrate, quite rightly, noted, to the appellant's credit, was that that he had pleaded guilty and had not wasted the court's time. She also, quite rightly, had regard to the principle that he was entitled to a discount in the sentence for the guilty plea. As she stated in paragraph 1 of her Reasons for Sentencing:

> "The accused pleaded guilty to the offence and did not waste the Court's time in proceeding to a trial. The Court is mindful that an early indication to plead guilty should result in a significant reduction in the penalty that would have been appropriate to impose had the accused been convicted after a trial. This reduction is usually between one-fifth and one-third.
>
> The relevant legislation gives the Court power to imprison the Accused for any term not exceeding twelve months."

[44] She also took into account as considerations of mitigation, as she was entitled to do, that the appellant was remorseful and that he had expressed a willingness to make restitution and to return the complainant's items. This is how she treated with those matters (paragraph 6 of her Reasons for Sentencing):

> "Given the aggravating circumstances of this case, the accused man's guilty plea and the provisions of the legislation the Court should really consider a one-third reduction of the maximum. However, considering his expression of remorse, his expressed willingness to make restitution and return the complainant's documents as well as other items the Court will impose a term of imprisonment of twenty (20) days."

[45] The learned Resident Magistrate also took into account the circumstances of the commission of the offence, as she was obliged to do. In imposing the term of imprisonment, she included as part of her reasons for doing so that the "series of

activities giving rise to the ways in which this offence was committed is of paramount consideration". According to her, "the acts of the Accused were deliberate and serious". There is no question that breach of section 27(1) of the Rent Restriction Act by a landlord is a serious matter that should not be condoned. It is outlawed by statute to the extent that a term of imprisonment is prescribed as a penalty. Such offences are therefore not to be taken lightly by the court. The peculiar circumstances of each case and each offender, must, however, be considered in determining the most appropriate sanction to be imposed for the particular breach.

[46] From the facts outlined to the learned Resident Magistrate, it was clear that the complainant was constantly in arrears of rent and was absent from the premises for a prolonged period without any contact with the appellant. It was also clear from both the interview of the complainant and the appellant by the Probation After Care Officer that the appellant was trying to locate her, hence his approach in calling persons associated with her and enquiring of her whereabouts. It was also borne out from the appellant's interview that at the time of his actions, he was unemployed and the rental from the premises was his only source of income. He was in need of money, he said, and so when he could not find the complainant and was not being paid his rent, he (ill-advisedly) decided to rent the premises to someone else.

[47] The complainant, for her part, reportedly admitted to the Probation After Care Officer, up to the date that she was interviewed, that she owed the appellant $74,000.00. Even more importantly, she also indicated that prior to him re-renting the

premises for which he was charged, she had stopped taking his calls because according to her, she was sick and he would constantly call and bother her for his rent. The complainant was, therefore, not making herself available for any discussions with the appellant concerning his outstanding rent and premises. All this information as to the complainant's conduct was not included in the notes of proceedings recorded by the learned Resident Magistrate. However, to the reasonable and objective observer, the complainant's conduct was what would have clearly provoked the action of the appellant. In fact, as the Probation After Care Officer observed and opined:

> "The aggravating factors seem to lie in Miss Bailey's reluctance to honour her rent obligations coupled with her protracted absence. The latter prevented the possibilities of discussions and amicable resolution of the situation."

[48] In all the circumstances, it is clear that the complainant was not, herself, without a fair degree of fault. So, while the conduct of the complainant would not have afforded the appellant a defence to the charge laid against him, it was, nevertheless, a relevant mitigating factor that should have been taken into account. This, however, was never a part of the learned Resident Magistrate's consideration in sentencing the appellant to a term of imprisonment because she did not have the benefit of a social enquiry report, which would have allowed for greater insight into the circumstances of the commission of the offence and the personal circumstances and conduct of the parties involved.

[49] It is also noted that while the learned Resident Magistrate had alluded to "series of activities giving rise to the way the offence was committed" by the appellant and that there were "aggravating circumstances of the case", she did not clearly identify what

those were for the benefit of this court. It is noted that the facts outlined to the court had made reference to two incidents in September "2014" (which it is believed should be "2013") when the electricity was disconnected and when the appellant went in the room of the complainant, believing she had left for the day. Reference was also made to an incident in January 2014 when the appellant searched the room rented to the complainant, apparently, in seeking to find information as to her whereabouts in order to contact her.

[50] Those matters were not connected to what transpired in June 2014 when the appellant re-rented the premises, but they were, nevertheless, placed before the learned Resident Magistrate as a part of the body of facts constituting the charge against the appellant (see outline of the facts at paragraph [6]). The disclosure of those facts that were unrelated to the charge before the court was unfortunate, especially when viewed against the background that the appellant had no legal representation and that he had pleaded guilty to an information that contained only one set of allegations against him. He was to have been sentenced strictly for the one offence to which he had pleaded guilty: see **R v Huchison** [1972] 1 All ER 936. We are not saying that the learned Resident Magistrate did not do so but it is not clear on the face of her Reasons for Sentencing how she treated with those unrelated adverse facts that were disclosed. Therefore, we cannot comfortably conclude that the appellant was sentenced strictly for the occurrences of 3 June 2014, for which he was charged on the information as constituting a single offence.

[51] Our concern with how the learned Resident Magistrate treated with those facts did not arise because it was raised specifically as a ground of appeal. However, in carrying out our function in determining whether the sentence was manifestly excessive, we had to take into account the facts as disclosed, pertaining to the commission of the offence, and weigh them against the antecedents of the appellant, among other things. The disclosure of the unrelated and, potentially, prejudicial facts has generated this measure of unease because the learned Resident Magistrate at no time in her Reasons for Sentencing had indicated that she had taken into account that the appellant has had no previous conviction which should have been a prime consideration in determining the appropriate sentence. In fact, Mr Equiano had placed before this court, the fact that the appellant has had no previous conviction as a substantial consideration that should have gone to his credit at the time he was sentenced. This omission on the part of the learned Resident Magistrate was, no doubt, based on her wrongly held view that the appellant's character was irrelevant to the sentencing process.

[52] In our view, the learned Resident Magistrate would have failed to take into account some relevant mitigating considerations, while, at the same time, may have taken into account irrelevant aggravating considerations. In the end, she would have failed to demonstrate that she had properly balanced all the relevant aggravating and mitigating factors that were thrown up in the circumstances of the case (including the personal circumstances of the appellant) before determining that a sentence of imprisonment was the most appropriate option.

[53] Furthermore, it is clear from the sketchy record of what was said by the appellant at the time of sentence that he was not able to put forward a proper plea in mitigation, as would have been the case had he been legally represented. For example, it was in his affidavit before this court, that he raised for the first time the fact that he had two minor children who would have been affected by his immediate incarceration on the night in question. He deposed that he had left them with his neighbor to attend court. We are confident that if he had counsel acting on his behalf at the time of sentencing, his domestic circumstances would have been placed before the learned Resident Magistrate in mitigation. The fact that he was unrepresented and, therefore, not mindful of how to present a proper plea in mitigation, would have rendered it even more imperative that serious consideration be given to his circumstances before sentencing him to prison.

[54] In **McC (A Minor)** [1985] AC 528, Lord Bridge, made a useful comment, within the context of treating with statutory provisions in the United Kingdom (UK), that is worthy of endorsement. The provision of the statute in question (article 15(1) of the Treatment of Offenders (Northern Ireland) Order 1976) was, basically, that a first time offender should be provided with legal aid, once sentence of imprisonment is being contemplated and that a custodial sentence should not be imposed for the first time on a defendant not legally represented unless the lack of representation was of his own choice. This provision is also now embodied in the UK Powers of Criminal Courts

(Sentencing) Act 2000 (PCC(S) A), section 83. His Lordship opined at page 552, in so far as is relevant to our consideration:

> "…The philosophy underlying the provision must be that no one should be liable to a first sentence of imprisonment…unless he has had the opportunity of having his case in mitigation presented to the court in the best possible light. For an inarticulate defendant, as so many are, such presentation may be crucial to his liberty."

[55] Even though there are no equivalent statutory provisions within our jurisdiction, the principle identified by Lord Bridge as the philosophy underlying the legislative provisions in the UK, nevertheless, makes good sense in the interests of justice. It follows then that a self-represented first time offender should be afforded every opportunity and assistance by the court in having his case in mitigation presented in the best possible light before a sentence of imprisonment is imposed on him. Indeed, where an immediate term of imprisonment is being considered for a self-represented first time offender, it is desirable that the court should give consideration to the assignment of a legal aid counsel (if the offender cannot afford to obtain his own legal representation) to assist with a plea in mitigation so that his case in mitigation can be presented in the best possible light and all possible alternatives to imprisonment can be explored.

[56] Except where it is mandated by law that imprisonment is the only form of penalty for a particular offence, a sentence of imprisonment should always be viewed as an option of last resort and, so, should only be imposed when it is absolutely clear that there is no other method of dealing with the particular offender. The need to do so

becomes even more compelling in cases where persons are first time offenders and are without legal representation. It means that all possible alternatives to imprisonment should always be first explored, unless a term of imprisonment is mandatory as a matter of law.

[57] We were not satisfied, given all the circumstances of the case and of the appellant, that there was no other method of dealing appropriately and justly with the appellant's ill-advised infraction, other than immediate incarceration. The alternative sentencing options provided for in the Criminal Justice (Reform) Act or by any other relevant statute should have been first contemplated as viable alternatives or options to immediate incarceration. We do accept that given the miniscule fine of $1,000.00, prescribed by section 67 of the Justices of the Peace Act, the imposition of a fine would have been ineffectual in achieving the ends of justice.

[58] We find it incumbent on us to seize the opportunity, at this juncture, to reiterate that section 67 of the Justices of the Peace Jurisdiction Act, which provides for the imposition of a fine of no more than $1,000.00 in summary convictions by Resident Magistrates (now Parish Judges) be re-visited by Parliament to allow for a more realistic alternative to imprisonment as is provided for in relation to indictable offences. If the overcrowding in our prisons is to be ameliorated, as recommended by several task forces reports on crime in this jurisdiction, then sensible and effective sentencing options must be made available to the judiciary, so that a sentence of imprisonment is reserved for serious breaches and for more high-risk offenders.

**Conclusion**

[59] We concluded that the sentence of 20 days imprisonment that was immediately imposed on the appellant was manifestly excessive in the light of the totality of the circumstances of the case, which include the appellant's favourable antecedents (his maturity, education, employment history, domestic circumstances and clean criminal record) and the provocative conduct of the complainant. The appellant had also been affected, at least, financially by the failure of the complainant to fulfill her contractual obligations.

[60] The appellant had gone about re-possessing his premises the wrong way, as he had admitted, without hesitation. His conduct, while inexcusable was, evidently, aberrant. He has shown genuine remorse and has offered to make restitution. He is for all practical purposes a first time offender who is regarded as a productive person who seems not to pose a risk to society. He could have been spared from immediate incarceration.

[61] We took into account, as urged on us by counsel on the appellant's behalf, that the appellant had served seven days imprisonment. We regarded that term of incarceration as being sufficient punishment in the circumstances of the case, having borne in mind that the complainant is still at liberty to pursue civil remedies for any losses allegedly sustained by her as a result of the conduct of the appellant. We also bore in mind that up to the disposal of the matter, there was no indication that the complainant had paid the outstanding rent. We accepted the submissions of Mr

Equiano, which was candidly endorsed by counsel for the Crown, Mr Taylor (in offering invaluable assistance to the court upon its invitation, for which we are grateful), that there is no useful purpose that could be served in sending back the appellant to serve the remaining 13 days in prison, in keeping with the sentence imposed by the learned Resident Magistrate.

[62] It is for the foregoing reasons that we allowed the appeal against sentence and made the consequential orders set out at paragraph [4].