

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 12/2013

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)**

KEITH HARPER v R

**Ms Catherine Minto instructed by Nunes Scholefield, DeLeon & Co for the
appellant**

Leighton Morris for the Crown

19 June, 2 and 11 July 2014

LAWRENCE-BESWICK JA (Ag)

[1] On 2 July 2014, we allowed this appeal and set aside the sentence of imprisonment. This is the fulfillment of our promise to provide the reasons for that decision.

[2] On 28 July 2008, in the St Catherine Resident Magistrate's Court, the learned Resident Magistrate, Her Honour Mrs Dunbar-Green, imposed on the appellant, Mr Keith Harper, a sentence of \$2000.00 or 30 days imprisonment and also an additional 30

days imprisonment, for using a motor cycle without insurance. This is an appeal by Mr Harper against the additional sentence of imprisonment of 30 days.

Background

[3] The record of the proceedings does not disclose any statement by the prosecutor or the appellant concerning the circumstances of the offence. There is no indication of a plea having been made in mitigation, nor indeed of an opportunity being given to the appellant to make such a plea. The record however discloses that five unnumbered informations were before the court charging careless driving, no motor vehicle insurance, unlicensed motor vehicle, unregistered motor vehicle and no certificate of fitness and that the appellant pleaded guilty to all the charges. The learned Resident Magistrate noted that Mr Harper was represented by counsel Ms Catherine Minto who stated that the accused was in breach of the law and asked for the court's understanding. However, in Ms Minto's written submissions in this court, counsel denied that she represented Mr Harper on that day.

[4] The record indicates that "[d]ocuments tendered on Accused's [sic] man [sic] behalf suggest that he has certificate of fitness and registration certificate". However, based on a statement by the police officer, the magistrate was awaiting verification of the documents by the relevant authorities, and she entered pleas of not guilty on the informations concerning those documents.

[5] The guilty pleas were accepted on the informations charging the appellant with using a motor vehicle without motor vehicle insurance and with careless driving.

Respectively they state that Keith Harper:

“did unlawfully use a motor vehicle to wit a motorcycle Registered 3432F along Port Henderson Main Road in the parish of St Catherine without there being in force in Relation to such user a Policy of Insurance a [sic] such security in respect of third party risk as complies with requirements of the motor vehicle (third Party Risk) [sic] Law, in contravention of section 4 (1) of the said Act contrary to Section 4 (2) of the motor vehicle insurance third party Risk [sic] Act.”,

and that he

“did drive a motor vehicle to wit motor cycle Registered 3432 F on a public road to wit Port Henderson main road contrary to section 32 (1) of the Road Traffic Act.”

[6] The learned Resident Magistrate then proceeded to impose sentences for those two offences.

Grounds of appeal

[7] The grounds of appeal are:

- “1. The Learned Resident Magistrate erred, when she exercised her discretion to impose a sentence of thirty (30) days imprisonment on the count contained in the Information charging the Appellant for unlawfully using a motor cycle registered 3432F without there being in force in relation to such a user a policy of insurance in respect of third party risks and in contravention of sections 4(1) and 4(2) of the MOTOR VEHICLE [sic] (THIRD PARTY RISKS) ACT, *in the circumstances of this case.*

2. The proceedings against the Appellant contain material irregularities and amount to a substantial miscarriage of justice.” (emphasis in original)

The sentences

[8] The learned Resident Magistrate recorded four reasons for imposing the sentences:

- “1. The Court considers that the offence is not an isolated one. It is committed along with four (4) others to which the Accused man pleaded guilty in the presence of an Attorney-at-Law (note the plea of ‘not guilty’ was entered by [sic] Resident Magistrate in respect of three of those for verification of documents). Other charges [sic] likely, coming out of same set of circumstances.
2. The fine of \$2000 is considered inadequate to punish the offence related to Insurance given the importance of insurance in the event of injury or loss caused by motor vehicle accidents.

(The Sentence is permitted by section four [sic] S4 (2) of the Motor Vehicle Insurance Third Party Risk [sic] Act. S27 of the Road Traffic Act classifies a motor cycle as a ‘motor vehicle’).
3. The Accused man drove carelessly as well. This indicates that he put other road users at risk of harm or loss.
4. There are other informations pending in relation to offences arising out of the same set of facts.”

[9] In a separate document entitled “Reasons for Sentence” the learned magistrate stated that she had imposed the sentences based on five considerations. Those were the four as stated above with the additional consideration being that:

"The Accused produced no documents suggesting that the motor vehicle had ever been insured. He was, therefore found to have been willfully without insurance coverage. The Court made a distinction between an Accused who produced a recently expired document along with a reasonable explanation, and one who never had any insurance from the outset. The Accused man fell within the latter category."

Submissions

[10] Counsel for the appellant, in her written submissions, stated that the Resident Magistrate had failed to strike a balance between features which would tend to aggravate the offence and those which operated as mitigating features.

[11] Further, according to counsel, "no evidence was taken in relation to the actual or factual [sic] circumstances leading to the charges". Counsel indicated that she would be seeking the leave of this court to supplement the record by admitting into evidence the appellant's affidavit which had been used in support of his application for bail pending appeal. However, this course was not pursued because at the start of the hearing of this appeal, Mr Morris for the Crown indicated that he would not "strenuously" oppose the appeal. In those circumstances Ms Minto made no oral submissions on behalf of the appellant, seemingly finding it unnecessary to do so.

Sentence of 30 days imprisonment

[12] Mr Morris agreed with Mr Minto's written submissions that although the learned Resident Magistrate had the power to impose the sentences which she had imposed, she ought to have demonstrated a regard for "other factors" where she considered

imprisonment as being necessary. Counsel submitted that regard should be had as to whether or not the appellant had pleaded guilty, had made restitution or had any previous convictions. However, the Resident Magistrate only contemplated aggravating factors, and there was no indication whether the appellant had benefitted from a discounted sentence for having pleaded guilty at the first opportunity.

[13] On behalf of the appellant, Ms Minto's further written submission was that a person convicted under section 4(2) of the Motor Vehicles Insurance (Third Party Risks) Act "shall (unless the court for special reasons thinks fit to order otherwise ...) be disqualified for holding or obtaining a licence ...". She argued therefore that there must have been special reasons to account for the fact that the Resident Magistrate did not impose that sentence. Her conclusion was that those reasons ought to have been considered in the appellant's favour in the determination as to whether a custodial sentence was to be imposed.

Material Irregularities

[14] Mr Morris submitted that whilst it was not ideal that the appellant had been sentenced on the same day that he was accused of having committed the offences, it was not a fatal irregularity. He asserted that the test was whether or not the appellant was deprived of fairness in the circumstances. However, counsel for the Crown stated that he was unable to determine whether the procedure adopted by the Resident Magistrate in imposing sentence was appropriate because of the absence of the procedure from the record.

[15] Indeed, in her written submissions to this court, Ms Minto referred to an affidavit sworn to by the appellant, which she described as providing the “only opportunity the appellant has had to give sworn evidence in relation to the complete factual circumstances leading to his sentence”. Counsel complained that the appellant had been arrested and was brought before the court on the same day and was not informed of his right to obtain counsel in circumstances where the learned magistrate was about to impose a custodial sentence on him without an attorney-at-law. She challenged the accuracy of the learned Resident Magistrate’s note where it had been recorded that the appellant had been pleaded in the presence of counsel.

[16] In her written submissions, Ms Minto further argued that as it concerns the offences of the motor cycle not being licensed or registered or having a certificate of fitness, there had been no informations laid or tickets issued for them. It was therefore inappropriate for the magistrate to regard those as charges against the appellant.

Analysis and Discussion

A. The sentencing process

[17] Counsel have correctly agreed that the sentencing process was not in accordance with the general principles of sentencing. Those principles have been “well formulated and generally accepted” and guide the method by which the aim of sentencing is achieved. This was the view expressed by Harrison JA (as he then was) in **Regina v Everalld Dunkley** RMCA No 55/2001 delivered 5 July 2002 where this court reiterated the purpose of sentencing. Harrison JA said, at page 3 that:

“The aim of the sentence is to satisfy the goals of:

- (a) Retribution;
- (b) Deterrence;
- (c) Reformation and
- (d) Protection of the society

or any one or a combination of such goals, depending on the circumstances of the particular case.”

[18] There the court outlined a methodical approach to achieving the aim of sentencing.

“The sentencer commences this process after conviction by determining, at the initial stage, the type of sentence suitable for the offence being dealt with. He or she first considers whether a non-custodial sentence is appropriate, including a community service order. If so, it is imposed. If not, consideration is given to the other options, ranging from the suspended sentence to a short term of imprisonment. This is the approach adopted in England, and generally employed in Jamaica, as a useful guide to sentencing and outlined in the case of **R v Linda Clarke** [1982] 4 Cr. App. R (S.) 197.” (page 3)

In **Everald Dunkley** the appellant had been sentenced to 12 months imprisonment for obtaining money by false pretences. This court commented that the Resident Magistrate had wrongly applied the accepted principles of sentencing. Further, the magistrate had commenced the sentencing process by considering the maximum custodial sentence that could be imposed whereas the circumstances did not warrant the imposition of the maximum sentence. The starting point had therefore been incorrect. The court continued:

"The factors to be considered in mitigation of a sentence of imprisonment are whether or not the offender has:

- (a) pleaded guilty;
- (b) made restitution or
- (c) has any previous conviction.

These factors must be considered by the sentencer in every case **before** a sentence of imprisonment is imposed." (page 4) (emphasis supplied)

[19] We now consider the approach taken by the learned magistrate in the instant case. The first consideration is whether a non-custodial sentence would be appropriate. The Resident Magistrate viewed a non-custodial sentence as inadequate (page 3 of record). She stated that she wished to protect society from harm that could potentially arise from persons using motor vehicles without insurance. The magistrate ought, however, to have considered any factor that would have affected whether a non-custodial sentence alone was appropriate. We will now consider some of these factors.

Plea of Guilty

[20] It is long established that a plea of guilty is regarded as an indication of remorse and regret at having committed an offence (see **Everald Dunkley** and **R v Delroy Scott** (1989) 26 JLR 409). Here the appellant pleaded guilty on the same day that he was arrested, that is, on the first opportunity available to him.

[21] The Motor Vehicles Insurance (Third-Party Risks) Act provides that a person who uses a motor vehicle without insurance is

"liable to a penalty not exceeding two thousand dollars or to imprisonment, with or without hard labour, for a term not

exceeding six months, or to both such penalty and imprisonment, and a person convicted of an offence under this section shall (unless the Court for special reasons thinks fit to order otherwise and without prejudice to the power of the Court to order a longer period of disqualification) be disqualified for holding or obtaining a licence for a period of twelve months from the date of the conviction.” (section 4(2))

The learned magistrate made no reference to the appellant’s early expression of remorse, and must therefore be taken to have not considered it. Instead of considering the appropriateness of a non-custodial sentence in the circumstances, she proceeded to impose the maximum fine or a period of 30 days imprisonment as well as a term of 30 days imprisonment, and thereby fell into error.

Antecedents/ Mitigating factors

[22] The next relevant factor referred to in **Everald Dunkley** which is to be considered before a sentence of imprisonment is imposed is whether the appellant has any previous convictions. Here there is no record of the magistrate having been provided with information as to whether the appellant had previous convictions. He should therefore have been sentenced as if he had none. The antecedents should have been considered by the magistrate before imposing a custodial sentence. In omitting this consideration of the appellant having a previously unblemished criminal record the learned magistrate again fell into error.

[23] Similarly, there is no indication that the appellant was given the opportunity to invite the learned Resident Magistrate to consider any factors that would or might

mitigate the sentence. The learned Resident Magistrate sentenced the appellant without reference to his antecedents and to any relevant favourable characteristics he may have had. Indeed, there was no information about the age of the appellant, or any circumstances peculiar to him. It must therefore be taken that in imposing a custodial sentence the magistrate had erroneously paid no attention to these important factors which ought to have been considered before she imposed a custodial sentence.

Other factors

[24] Regrettably the record indicates that the only factors considered by the learned magistrate were those that would aggravate the sentence for the offence. She referred to two categories of the offence of using a vehicle without insurance and distinguished between an accused person who produced a recently expired insurance document and one who never had any insurance from the outset. She placed the appellant in the latter category which she appeared to regard as the more serious category. It appears that this categorization contributed to her decision to impose a custodial sentence. However the record does not disclose that the appellant had been given an opportunity to explain the circumstances in which he came to be committing the offence. The learned magistrate therefore had no basis to conclude as to the extent of the seriousness of his omission to have insurance whilst using his scooter motorcycle, and to regard it as being worthy of a custodial sentence.

[25] In addition, the learned magistrate did not impose a disqualification for holding or obtaining a driver's licence and in the absence of an explanation must be taken to

have had special reasons to think it fit not to do so. These reasons ought to have been considered in the determination of the appropriateness of a non-custodial sentence, but there is no reference to what they were, and the magistrate must therefore be taken to have not considered them in relation to whether a non-custodial sentence should be imposed. The result was that the magistrate thereby fell into error.

[26] It is true that the learned magistrate stated further that she viewed the fine as being inadequate. However, regardless of how inadequate the sentence may appear to be to the magistrate, the sentencing process must be guided by prescribed principles.

Pending offences

[27] The Resident Magistrate's reasons for imposing the sentence which she did, included the existence of pending offences. The pending charges appear to be those which were on the unnumbered informations that were before the court and for which the Resident Magistrate had entered pleas of not guilty. There is no challenge to the submission of the appellant's counsel that the appellant was never summoned to court to answer those pending charges, yet the reasons for the sentence include a reference to their existence. Sentencing must be based on existing facts, not on allegations that are unproven. These pending charges should not have been considered in the sentencing process and should not have been used to bolster reasons for imposing a custodial sentence. In considering those pending charges the learned Resident Magistrate therefore fell into further error.

B. Record of proceedings

[29] It bears repeating that an obligation rests on the Resident Magistrate to accurately record the proceedings including facts or allegations related by the prosecutor and the accused or his representative. It is only then that the basis for the acceptance of a plea of guilt will be evident and also the basis for the sentence which is imposed.

[30] The absence of any such record in these proceedings resulted in this court having sparse material on which to determine the basis for the reasoning of the learned Resident Magistrate.

Conclusion

[31] There is no gainsaying that the Resident Magistrates' Courts are very busy and that there must be adjudication on several issues in less than ideal circumstances. Nonetheless, every effort should be made to ensure that in placing an accused person before the court he is given sufficient time to seek legal advice, if he so chooses, and to present mitigating factors for the court's consideration, *moreso* where there is the likelihood of him being deprived of his liberty. Here, the prosecution itself was not ready for proper presentation of the matter as evidenced by the absence of numbers on the informations and by the fact that offences were pending and not in a state of readiness to be properly placed before the court. There is nothing apparent on the record to provide a reason for what could properly be regarded as the indecent haste

with which the appellant was sentenced to a term of imprisonment on the same day on which he was arrested by the police for using his motor cycle without insurance.

[32] The magistrate fell into error in failing to consider firstly if a non-custodial sentence would have been appropriate. A proper consideration of the factors in paragraphs [20] to [29] ought to have resulted in the learned Resident Magistrate imposing a non-custodial sentence in the particular circumstances of this case. Instead she considered factors which aggravated the offence, with no regard to any mitigation of the offence and she relied on extraneous circumstances for which she had been provided with no proof.

[33] We therefore allowed the appeal and varied the sentence to the extent that the 30 days imprisonment is set aside.