

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CRIMINAL SIDE**

3
4 **SCA: 0023 of 2021**
5

6
7 **THOMAS MICHAEL**

8
9 **v.**



10
11 **REGINA**

12
13 **Appearances:**

Mr. Ben Tonner Q.C. for the Appellant

14 **Mr. Greg Walcolm for the Respondent**

15 **Before:**

Justice Cheryll Richards Q.C.

16 **SCA Hearing:**

19th May 2021

17
18 **Judgment Delivered:**

20th May 2021
19

20 **HEADNOTE**

21 ***Criminal Law –Failure to comply with Regulation 3 of the Control of Covid-19***
22 ***Regulations - Appeal (against Sentence) from the Summary Court to the Grand Court.***

23
24
25 **SUMMARY COURT APPEAL JUDGMENT**

1 1. On the 6th May 2021 the Appellant was charged with a single offence of Failing to
2 Comply with **Regulation 3(3)(b)(ii)** of the **Control of Covid-19 Regulations**, 2021. The
3 Particulars are that he, on the 23rd day of March 2021 within the jurisdiction of the
4 Cayman Islands, being a tourist visitor or other visitor that for the purpose of surveillance
5 by the Medical Officer of Health was subject to the directions of the Medical Officer of
6 Health under s.34 of the **Public Health Act** (2021 Revision), failed to comply with such
7 directions as provided by the Medical Officer of Health by tampering with or removing
8 a fitted wristband.

9

10 2. Regulation 3 is in part in the following terms:

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12 “(3) Subject to paragraph (5), where a person under paragraph (1) arrives in
13 the Islands, if —

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(b) the person is a tourist visitor or other visitor, the person shall, for such period from the date of arrival as may be determined by the Medical Officer of Health, which period shall be no less than fourteen days, for the purpose of surveillance by the Medical Officer of Health —

i. be managed by the Medical Officer of Health at a place specified by the Medical Officer of Health; and

ii. be subject to such directions as are provided by the Medical Officer of Health; and

(c) the person tests positive for the virus or shows respiratory symptoms or symptoms of the virus, the person shall be managed at a place and in such manner as specified by the Medical Officer of Health until the Medical Officer of Health determines that the person is no longer a health risk to the public.

(4) Where, upon arrival in the Islands, a person under paragraph (1) is allowed to isolate at a private residence in accordance with paragraph (3) and there are other occupants who reside at the private residence who intend to stay at the residence during the period of isolation with the person, those occupants shall, for the purpose of the control of the spread of the virus, and



1 **THE FACTS OF THE CASE**

2
3 6. The facts of the case may be summarised as follows:

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5 7. The Appellant is a Canadian National. He is 42 years old, a film maker by occupation.
6 He arrived on Island for temporary work purposes on the 20th March 2021. He has a
7 temporary work permit from the 11th March 2021 through to the 9th June 2021. He
8 travelled with his wife, two young children ages 2 and 3 years old and a nanny. By virtue
9 of the said **Regulations**, he was required to quarantine for a period of 14 days and elected
10 to do so with his family at a private residence. The residence was located at Old Robin
11 Road, North Side. Grand Cayman. He was fitted with a wristband and issued a cell
12 phone to allow for the monitoring of his movements during the period.

13
14 8. He signed an agreement headed “*Phased Opening of our Borders Programme,*
15 *Monitoring Technology: Participants Agreement to Terms and Conditions*”. The terms
16 to which he agreed included the following:

17
18 *“You will not leave your place of isolation unless you have received advance*
19 *authorisation from the Medical Officer of Health or in the case of an emergency. If*
20 *there is an emergency that requires you to leave your place of isolation, you will*
21 *telephone 911 to inform them of the emergency and of your current location. If you*
22 *have a question or concern about an essential task that may require you to leave*
23 *your place of isolation, you will seek specific guidance from the monitoring and*
24 *compliance team using the contact details that have been provided to you.*

25
26 *You will take appropriate precautions to protect the mobile device issued to you as*
27 *part of the programme from damage or loss. You will also ensure this mobile device,*
28 *at all times:*

29 ...

30 ...; and



1 *Remains in the same room as you within your place of isolation.*

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4 *You will not attempt to tamper with or remove the wristband fitted to you, and*
5 *you will ensure it remains powered on at all times. You will not fully submerge*
6 *your wristband in water or any other liquid for more than 30 seconds, including*
7 *in a sink, bathtub, swimming pool or spa.”*

8
9 9. Three days later, at about 2pm on the 23rd March 2021 the Travel Cayman Mobile
10 Compliance Team (MCT) went to the residence to do compliance checks. On arrival
11 they observed three adult persons along with two children on the outside of the premises
12 in a communal area. As they approached and were within 15 to 20 feet from them, they
13 observed that two of the adults, the Appellant and another were not wearing white GPS
14 wristbands.

15
16 10. On getting closer to them, the team identified themselves. The adults looked towards
17 them in startled way and almost immediately all three returned hurriedly inside the house
18 with the two children and closed the door. The team knocked on the door for what is
19 described as an extended period. Thereafter the Appellant and the others presented
20 themselves wearing wristbands. It was noticed that the bands appeared to have been
21 tampered with and were damaged. Photographs were taken of this.

22
23 11. Following receipt of a report from the MCT, the police attended the location. The
24 Appellant was told of the report and asked to give an account. He denied the allegations.
25 The Police observed the wristband which he wore and it appeared to have been stretched.
26 The MCT confirmed that the devices had been registering on the monitoring system as
27 tampered/damaged since his arrival on Island hence the reason that the compliance check

1 was made. Photographs were provided showing several phone messages with the words
2 “*Damaged Tag Alert.*” The Appellant and the nanny were warned for intended
3 prosecution and cautioned.

4
5 12. An investigation was undertaken in the course of which the Police obtained CCTV
6 footage from the Monitoring Center in Atlanta. These were dated 21st March 2021 and
7 showed that none of the three adults were wearing wristbands at that time. The
8 wristbands had been tampered with and removed since the first day of the Appellant’s
9 quarantine period.

10
11 13. CCTV footage from two separate cameras for the 23rd March at 2:03pm was also
12 received. This showed the individuals hurrying to enter the house and that they were not
13 wearing wristbands.

14
15 14. On the 28th April 2021, the Appellant wrote a letter to the Prosecution in which he
16 admitted to the offence. He gave details of his family’s medical issues including a recent
17 diagnosis of his wife. He said that shortly after arriving at the residence, the youngest
18 child received cuts from the wristband of his wife and that of the nanny. Both children
19 wanted to be in the pool for hours each day and as a result of the concern for submerging
20 the bracelet they made the decision to remove them in order to use the pool. He said that
21 they only went in the sand a couple times for a few moments to look at the ocean and
22 believed that this was allowed under the rules. They had not been in contact with any
23 other person. On the arrival of the compliance officers they had panicked and lied.





1 15. The Appellant had received his first vaccination against the Covid-19 virus before his
2 arrival and his second while here. He said also that they were taken to a government
3 facility to complete their quarantine. They had to pay the cost of this facility in addition
4 to the costs for the rental house. His estimate is that the entire incident has cost him some
5 \$150,000.00. He has also suffered professionally as he had not been allowed to complete
6 his work engagement.

7
8 16. In a further letter dated 7th May 2021 he gave additional details as to his wife's medical
9 condition and said that because of this she would be unable to care for their children on
10 her own.

11
12 17. Four letters attesting to his honesty, good personal and work ethics, and good character
13 were provided to the Summary Court and are also before this Court.

14
15 **THE GROUNDS OF APPEAL**

16
17 18. The Appellant's notice of appeal is dated 14th May 2021 and contains four grounds of
18 appeal as follows:

19 i. The Honourable Chief Magistrate misdirected himself in law in relation to
20 the Cayman Islands Sentencing Guidelines and relevant case authority, and
21 sentenced the defendant on an improper basis.

22
23 ii. The Honourable Chief Magistrate erred in directing himself that only a
24 sentence of imprisonment would be appropriate in cases of breaches of
25 Regulation 3 of the Control of COVID-19 Regulations 2021.



- 1 iii. The imposition of an immediate term of custody is manifestly excessive,
2 arbitrary and disproportionate to the criminality of the offending.
3
4 iv. The imposition of an immediate term of custody will have very significant
5 detrimental effects on the family of the defendant who require his presence
6 to assist with the care of his two young dependent children ‘F’ and ‘B’.
7 (aged 3 years and 2 years respectively) owing to his wife’s medical
8 condition.

9 **THE CASES**

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19. Both Counsel have referred extensively to the Grand Court and Cayman Islands Court of Appeal (CICA) judgments in the case of *Mack and Ramgeet v. The Queen*¹. In that case, the CICA considered an appeal against a sentence of four months’ imprisonment. This sentence had been imposed by the Grand Court following an appeal by the Prosecution against the lower sentence of Community Service and costs of quarantine which had been imposed by the Summary Court. The Grand Court had concluded that the sentence imposed was unduly lenient and wrong in principle.

20. In that case, the first Appellant was an 18 year-old United States citizen who had travelled to the Cayman Islands to visit her boyfriend, the second Appellant, aged 24 years old. On the day following her arrival, the first Appellant contacted public health officials and requested that her wristband be changed as it was too tight. On the following day she removed her wristband and travelled with the second Appellant to a

¹ *CICA* - Criminal Appeals 027/20 unreported judgment dated 14th judgment 2021 and 28/20; *Grand Court*: - SCA# 0028/20 and 29/20, unreported judgment dated 14th December 2020.



1 Jet Ski competition event in South Sound, Grand Cayman. They remained there for some
2 seven hours interacting with a number of persons who attended the event.

3
4 21. The Appellate Court allowed the appeal in part, varying the sentence imposed by the
5 Grand Court from four months' imprisonment to two months' imprisonment in respect
6 of each Appellant.

7
8 22. The Appellate Court noted that the Legislature had increased the sentence for breaching
9 the quarantine requirement from six months' imprisonment to two years and that this
10 must be taken to reflect the importance which is attached to complying with this
11 requirement and the seriousness with which it regarded any breach. The Court said that
12 the will of Parliament is something which a court is bound to take into account when
13 passing sentence for any breach of Regulation 3.

14
15 23. The Court also made a number of observations in its judgment including the following:

16
17 (i) For several reasons the offending required the imposition of an immediate
18 sentence of imprisonment.

19
20 (ii) The safety and normality of life achieved by the Cayman Islands will be
21 imperiled by those who come to the Islands from elsewhere unless the most
22 stringent safeguards are in place and are enforced.

23
24 (iii) The requirement to quarantine is a critical element in that safeguarding. Any
25 breach of it is inevitably a matter of considerable seriousness. It places lives at
26 risk. Any sentence must seek to deter others who are tempted to breach the

1 quarantine requirements. The impact of personal circumstances is bound to be
2 limited. The protection of the public must be of paramount importance.

3
4 24. The Court concluded that the breach in that case was deliberate, planned and sustained.
5 The sentences imposed were not contrary to the principles set out in the *Alternative*
6 *Sentencing Act* and were in accordance with s.4(a)(i) and (9ii). Imprisonment was
7 proportionate to the gravity of the offending.

8
9 25. The Court reduced the sentence on the basis that, in circumstances where there were no
10 sentencing guidelines, and this was the first case of its kind which had been considered
11 by a higher Court, the Appellants may not have appreciated the seriousness with which
12 the Courts regard their conduct and the possible sentence outcome.

13
14 26. The Court stated:

15 *“However, as we emphasise, that is not likely to be the position as far as any future*
16 *case is concerned. The seriousness of any breach of Regulation 3 is now clear, as is*
17 *the appropriate sanction”*
18

19 THE ALTERNATIVE SENTENCING ACT

20
21 27. The *Alternative Sentencing Act* sets out the purpose of punishment, the principle of
22 proportionality and the need to consider all available sanctions, other than imprisonment,
23 that are reasonable in the circumstances of each case. A convicted person should not be
24 deprived of his liberty if less restrictive sanctions may be appropriate in the
25 circumstances of the case. Section 4 states in part:



1 “A court shall, in imposing a punishment under this Law, take into account the
2 following principles —

3 (a) that the fundamental purpose of punishment is to contribute, along
4 with crime prevention initiatives, to respect for the law and the
5 maintenance of a just, peaceful and safe society by imposing just
6 sanctions that have one or more of the following objectives —

7 (i) to denounce unlawful conduct;

8 (ii) to deter the convicted person and other persons
9 from committing offences;

10 (iii) to separate convicted persons from society, where
11 necessary;

12 (iv) to assist in rehabilitating convicted persons;

13 (v) to provide reparations for harm done to victims or
14 to the community; and

15 (vi) to promote a sense of responsibility in convicted
16 persons, and acknowledgment of the harm done to
17 victims and to the community;

18 (b) that a punishment must be proportionate to the gravity of the
19 offence and the degree of responsibility of the convicted person;”
20 ...”



21
22 **THE JUDGMENT OF THE LEARNED CHIEF MAGISTRATE**

23
24 28. In his judgment on the instant case, the learned Chief Magistrate referred to the
25 *Alternative Sentencing Act* and the *Cayman Islands Sentencing Guidelines* noting that
26 the *Guidelines* provide as follows:

27
28 “.... the court must balance a number of competing interests and objectives,
29 tailoring the punishment to the individual circumstances of the offender whilst
30 ensuring that the punishment is commensurate with the seriousness of the offence.

31 ...

32 In considering the seriousness of any offence, the court will consider the offender’s
33 culpability in committing the offence and any harm which the offence caused, was
34 intended to cause or might foreseeably have caused.”
35

36 29. Defence Counsel who appeared in the Summary Court submitted to that Court, and the
37 Court agreed, that the *Guidelines* as to curfew breaches assist. The Court nevertheless
38 stated that as was noted by the Grand Court in the earlier case of *Mack and Ramgeet*,
39 the landscape has changed considerably since those *Guidelines* were issued.

1 30. The learned Chief Magistrate reminded himself that guidelines are not tramlines and that
2 a departure from the recommended sentence might be warranted. The Court stated that
3 the curfew guidelines provided “*a framework for sentencing*” and referred to the
4 approach/matrix thereunder of Harm and Culpability.

5
6 31. As to Culpability, that Court identified three factors which merited a finding of higher
7 culpability in the instant case:

- 8 i. Deliberate act;
- 9 ii. Attempt to avoid detection;
- 10 iii. Activity over a sustained period of time.



11
12
13 32. The Court found that none of the reasons provided by the Appellant for his behaviour
14 held up to scrutiny. The accidental scratching of one of the children by the wristband
15 leading to the child being afraid of it could have been dealt with by the adults covering
16 the wristbands with fabric and or long sleeved shirts as was the case when the nanny
17 presented herself to the officers. The concern about submerging the wristband in the pool
18 while swimming and that he followed the property owner’s advice to remove it while in
19 the pool was not considered a meritorious explanation. Swimming in the pool was an
20 option, not a necessity. In any event the Appellant could have been transparent and
21 sought advice from the authorities. He did not do so.

22
23 33. No factors of lower culpability were identified. The Court said that the breach was not a
24 minor one, the explanations were not reasonable and the Appellant did not have a
25 genuine misunderstanding of the rules.

1 34. The Court next considered the level of Harm and adverted to the general principles in
2 the **Guidelines** which provide *inter alia* as follows:

3 “Some offences cause harm to the community at large (instead of or as well as to an
4 individual victim) and may include economic loss, harm to public health or safety,
5 or interference with the administration of Justice. This may be particularly relevant
6 where the offence has a potential impact on the tourist or financial industries of the
7 Islands or is committed at a time of community vulnerability such as during, or in
8 the aftermath of a hurricane, or during a period of widespread public disorder.”
9 (emphasis added)
10

11 35. The Court categorized the Harm as one of lesser harm and noted that there was a clear
12 distinction between this aspect of the case and the case of **Mack and Ramgeet**.

13
14 36. The Court stated:



15
16 “In this case there is no evidence that there was actual physical harm caused or risk
17 of harm to any individuals or that the defendant left the environs of his quarantine
18 location or mingled with members of the public. This aspect of the case stands in
19 contrast to the facts in Mack & Ramjeet where the defendants deliberately attended
20 a public event that was “heavily crowded” with hundreds of people in attendance
21 for approximately seven hours interacting with members of the public including a
22 young child. The risk of harm, on those facts, was obvious and severe.”
23

24 37. The Court nevertheless held that the categorisation of lesser Harm in the instant case did
25 not mean that the risk of harm caused by this offending is insignificant. The Court stated
26 that the Appellant removed the only practical mechanism to track and enforce
27 compliance with this country’s quarantine system which is

28
29 “... a system put in place to allow a select category of travelers to enter our islands
30 on strict conditions that are meant to minimize the risk to our local population.”
31

32 38. The Court expressed the view that the reference to “most stringent safeguards” by the
33 Appellate Court in its judgment must include the use of a wristband, which must be
34 viewed as a “critical element in that safeguarding.”
35



1 39. The Court stated:

2
3 *“... the risk to our community is that once that monitoring device is removed, an*
4 *individual who has arrived here from overseas is free to roam in public without*
5 *immediate detection- ‘imperiling’ this country’s safety and normality’.”*
6

7 40. The Court concluded that tampering or removing surveillance devices strikes at the heart
8 of the phased re-opening programme and the Appellant had committed a grave offence.

9
10 41. The Court determined that it was a case of higher Culpability and lesser Harm and
11 adopted a starting point of 6 months custody.

12
13 42. From that starting point the Court found no aggravating factors.

14
15 43. In mitigation the Court took into account the following in relation to the Appellant:

- 16 • Financial impact;
- 17 • Professional impact;
- 18 • Emotional impact;
- 19 • Personal circumstances;
- 20 • Genuine remorse;
- 21 • No previous convictions;
- 22 • Previous good character;
- 23 • Significant health issues in the family;
- 24 • Significant child care issues.

25
26 44. In light of all the mitigating factors, a substantial reduction of 75% was granted. This
27 reduced the sentence to 45 days which was further reduced by one-third in respect of
28 credit for his guilty plea, for a total sentence of 30 days’ imprisonment.



1 45. The Court next considered whether despite the custody threshold having been passed, a
2 sentence of immediate imprisonment was inevitable.

3
4 46. The Court referred to the relevant provisions of the *Alternative Sentencing Act* and
5 reminded itself of the general guidance as to the principle of proportionality in the
6 *Guidelines* - that a sentence passed should be proportionate to the gravity and
7 seriousness of the offence.

8
9 47. The Court then referred to the judgment of the appellate Court including the statement
10 that:

11
12 *“The seriousness of any breach of Regulation 3 is now clear, as is the*
13 *appropriate sanction.”*
14

15
16 48. The Court concluded that those statements applied with equal force to the offence before
17 the Court and that accordingly the sentence *“must be one of immediate custody.”*

18
19 **SUBMISSIONS ON APPEAL**
20

21 49. Before this Court, Counsel on behalf of the Appellant argued three grounds of appeal
22

23 **GROUND 1 – MISAPPLICATION OF GUIDELINES**
24

25 50. In respect of Ground 1, the Appellant submits that the learned Chief Magistrate was
26 wrong to apply the *Sentencing Guidelines on Breach of Curfew* without adjusting same
27 in the Appellant’s favour. In particular that the Chief Magistrate should have adverted
28 to the fact that the Appellant did not breach any curfew or quarantine. He adhered to the
29 fundamental requirement of continued isolation.

1 51. Thus it is argued that the starting point was too high because the Chief Magistrate did
2 not make this distinction in the Appellant’s favour and that, as the starting point was too
3 high the resulting prison sentence is manifestly excessive.

4
5 52. Counsel submitted that it is common ground that the Appellant removed the wristband
6 so that he could enjoy time with his family within the quarantine premises and that there
7 is no evidence of an intention to leave the premises, let alone an actual departure. This
8 is in direct contrast to breach of curfew and breach of quarantine cases where there are
9 breaches of isolation requirements.



10
11 53. Counsel submitted:

12
13 *“It is not suggested that the wearing of a wristband is unimportant but it is not at*
14 *the same level of importance as the requirement to remain in isolation. The wearing*
15 *of a wristband is a measure which may be used to monitor compliance with the*
16 *requirement to isolate, it is not a breach of isolation itself.”*

17
18 54. In summary the submission is that the Chief Magistrate should have distinguished
19 between, a breach of isolation on the one hand which could have put lives at risk, and a
20 breach of the **Regulations** falling short of a breach of isolation.

21
22 55. The Respondent in reply submitted that the approach of the learned Chief Magistrate
23 was correct in law and that the sentence imposed was not manifestly excessive, arbitrary
24 or disproportionate to the criminality or offending.

1 56. Prosecuting Counsel for the Respondent argues that a review of the learned Chief
2 Magistrate’s judgment shows that he did not strictly apply the *Sentencing Guidelines*
3 *on Breach of Curfew* to the case. Counsel said that the Chief Magistrate was well aware
4 of the absence of offence specific guidelines and that he took a holistic approach in that
5 he considered:

- 6 i. The sentencing principles in the *Alternative Sentencing Act* which included
7 reminding himself that all possible sentences including non-custodial
8 sentences should be considered.
- 9 ii. The legislative intent as reflected in an increase in the maximum sentence
10 for this offence.
- 11 iii. The general guiding principles for sentencing offenders, in particular as to
12 the aims of sentencing and determining the seriousness of an offence.

13
14 57. It is further argued by the Respondent that the learned Chief Magistrate limited reliance
15 on the *Sentencing Guidelines on Breach of Curfew* to determining the seriousness of
16 the offence, and there was no reliance on the starting points or sentencing ranges. In
17 taking the approach of determining seriousness as a first step, the learned Chief
18 Magistrate was acting in accordance with the *Cayman Islands Sentencing Guidelines*
19 and that his conclusions as to higher Culpability and lesser Harm were correct in the
20 circumstances of this case. These conclusions are said to demonstrate a clear
21 appreciation of the sentencing principles and the particular offence for which the
22 Appellant was sentenced.



1 58. This Court notes that the Chief Magistrate plainly stated that the guidelines for sentence
2 on breach of curfew were being referenced as a framework in terms of the factors leading
3 to conclusions as to Harm and Culpability. The starting points under those guidelines
4 were patently inapplicable and were not so referenced by the Chief Magistrate.

5
6 59. The Summary Court was alive to, and detailed, the factual differences in the cases and
7 clearly had in mind that there had not been a breach of isolation requirements. There was
8 focus on the seriousness of tampering with the monitoring device.

9
10 60. The level of seriousness was assessed in the context of the arrangements under the
11 **Regulations** where the device is the only method of monitoring persons who are to be
12 quarantined.

13
14 61. Notably the Chief Magistrate adopted a starting point of six months, in contrast to the
15 starting point of 15 months, which had been used as a starting point by the Grand Court
16 in the cited case. It appears that the Summary Court, in selecting a much lower starting
17 point of less than one half of that selected in the case of **Mack and Ramgeet**, was drawing
18 a sharp and clear distinction between the harm levels in that case and the instant case.
19 This is not only indicative of adjustment made by the Summary Court to the instant case,
20 but it illustrates that the adjustment was made in favour of the Appellant.

21
22 62. The Respondent submitted that there is no clearer demonstration that the Chief
23 Magistrate was aware that this was not a breach of isolation or quarantine requirements.
24 This is a submission which is accepted by this Court.



1 **GROUND 2- NON-CONSIDERATION OF SENTENCING OPTIONS**

2
3 63. In respect of Ground 2, the Appellant submitted that the learned Chief Magistrate was
4 wrong to use the remarks of the CICA to compel him to impose a period of imprisonment
5 and that other sentencing options should have been considered in circumstances where
6 Parliament envisaged a range of sentencing options rather than a mandatory sentence.
7 The Appellant’s submission is therefore that the learned Chief Magistrate fell into error
8 in considering himself bound by the decision of the Appellate Court.

9
10 64. In response it is submitted by the Respondent that the learned Chief Magistrate did not
11 consider that the CICA judgment in *Mack and Ramgeet* precluded him from imposing
12 a non-custodial sentence. Counsel submits further that while the Chief Magistrate
13 considered that the case provided guidance, it is clear that there was an analysis of the
14 particular offending and consideration of all sentencing options.

15
16 65. It appears to this Court that the Chief Magistrate considered what had been said by the
17 CICA, identified and recognised the differences in the cases, and asked himself the
18 question whether the statements made therein applied to the instant case. The Chief
19 Magistrate concluded that they did. In summary, it does not appear that it can be said
20 with any force that the Chief Magistrate applied the dicta from the cited case without
21 consideration that the statements made therein by the CICA may not be applicable to the
22 instant case. This view is fortified when it is noted importantly that the Chief Magistrate
23 concluded his judgment in the following way:



1 *“To some, our guidelines appear overly constrained and mathematical.*
2 *Consequently, I have also considered this case in general terms to determine*
3 *whether the sentence is inappropriate or overly harsh; it is not. I have concluded*
4 *that it is the shortest term proportionate to the gravity of the offence and the degree*
5 *of responsibility of the defendant. A term of immediate imprisonment is a severe*
6 *sentence but it is properly so to denounce this type of crime and to deter like-minded*
7 *individuals.”*
8

9
10 **GROUND 3 - FRESH EVIDENCE**

11
12 66. In respect of Ground 3, Counsel for the Appellant has put forward a change in
13 circumstances. The charge against the nanny was dropped on Friday 14th May 2021
14 following the sentencing of the Appellant. She left the jurisdiction on Saturday 15th May,
15 2021 to return to Canada. It is said that the dependents of the Appellant are now in a dire
16 situation as their main carer and breadwinner is in prison. Counsel asks the Court to
17 weigh this in the balance in evaluating whether the sentence is manifestly excessive.

18
19 67. In response to this ground the Respondent did not disagree that the nanny has now left
20 the jurisdiction. Counsel submitted that at the stage of sentencing of the Appellant, the
21 nanny was still before the Court and there could have been no expectation that she would
22 have been available to provide assistance to the Appellant’s wife in the care of the
23 children. Counsel submitted that this should not be considered as a change in
24 circumstances and further that this can be easily remedied by the Appellant’s family
25 hiring another nanny. Counsel for the Appellant in reply submitted that this would
26 require a stranger to look after the children and that there is no money to pay for a new
27 employee.





1 **CONCLUSIONS**

2
3 68. Consideration has been given to all the submissions made and to the impassioned plea
4 made by the Appellant himself before this Court. He is deeply remorseful, admits an
5 error in judgment, and is of previously impeccable character. He beseeched this Court
6 to allow him to go home to his wife and two young children.

7
8 69. The Court's task on the hearing of this appeal is to consider whether the sentence
9 imposed by the Summary Court is unjustified in law, founded upon a wrong factual
10 basis, based upon matters which should not have been taken into account or is arbitrary,
11 manifestly excessive or wrong in principle.

12
13 70. The historical perspective of the breach of curfew offences as reviewed by Counsel for
14 the Appellant is accepted. Breaches of the "hard curfew" related to breaches of the
15 curfew imposed under the *Police Act*. These applied to nightly curfew restrictions and
16 24-hour lockdowns. Counsel noted that these attracted sentences of imprisonment in
17 some cases, while breaches of the soft curfew were those under the *Public Health Act*.
18 Those breaches usually occurred during the day time hours and in practice attracted
19 standard penalties of fines of \$500.00. The essential nature of those offences was that
20 they constituted a breach of the mandated period of isolation. Those offences have given
21 way to what is a different kind of offence, i.e. breaches of a mandatory quarantine.

22
23 71. Counsel referenced the case of *R v. Terjanian (Pascal) and Gurunian (Christina)*²,
24 which involved the prosecution of two Canadian visitors to the Island. They left their
25 quarantine location multiple times on various entertainment excursions. They were

² In the Summary Court of the Cayman Islands on the 23rd November 2020

1 fined \$1,000.00 on guilty pleas. This was at a time when the fine was \$10,000.00 before
2 the provisions had been amended.

3
4 72. Counsel argued that the cited case of *Mack and Ramgeet* was at a time when the Covid
5 rate was soaring in the United States and vaccines had not yet been available. The actions
6 of those Defendants in that case posed a significant risk of harm to the community. This
7 is in contrast to the present case.

8
9 73. Both breaches of quarantine and breaches of curfew were breaches of a fundamental
10 requirement to isolate from society. In this case the Appellant remained in isolation and
11 did not leave the vicinity of the premises at any stage. This, said Counsel, is not to be
12 directly equated with breaching quarantine itself.

13
14 74. Counsel said that albeit that the learned Chief Magistrate recognised the difference, he
15 leaned heavily on those *Sentencing Guidelines on Breach of Curfew*. This, Counsel
16 submitted, led the lower Court to conclude in error that a starting point of 6 months was
17 required. The essential submission is that since the Appellant did not leave the premises
18 at all, this offence is less serious than a breach of curfew would be and the elements of
19 Culpability are not transferable.

20
21 75. Counsel said that there is no disagreement with the careful manner in which the learned
22 Chief Magistrate dealt with aggravating and mitigating circumstances. The mistake is in
23 respect of the starting point.





1 76. The **Guidelines** provide general guidance that the culpability of the offender in the
2 particular circumstances of an individual case should be the initial factor in determining
3 the appropriate sentence for the offence. Each case must of course be determined on its
4 own facts.

5
6 77. This was a deliberate breach of the **Regulations** which was sustained, as it continued for
7 three days. There was a consciousness of guilt when on the arrival of the MCT the
8 Appellant hurried into the house, replaced his wristband and lied when questioned. By
9 these actions, he attempted to evade detection.

10
11 78. The Chief Magistrate rightly, in this Court's view, considered the reasons for the
12 removal, before concluding on the aspect of Culpability. Reasons *may* have served to
13 reduce the level of Culpability. In this case they did not and do not.

14
15 79. Counsel was asked directly by the Court whether there was disagreement with the three
16 factors which the Chief Magistrate considered indicative of higher Culpability. Counsel
17 responded that these are factors³ which even if accepted should not move the matter into
18 a higher Culpability range and, while serious, this is not at the level which should give
19 rise to a custodial sentence. When regard is had to the core purpose of the legislation, as
20 well as to the circumstances of the offending, this is not a submission which is accepted
21 by this Court.

22
23 80. The Chief Magistrate then went on to consider the aspect of Harm and adverted to the
24 **Guidelines** where harm to the community is reviewed. Undoubtedly it is the case that
25 this is a time of continued vulnerability for the community. **Regulation 3** expressly

³ Paragraph 31 above

1 states the purpose of it, which is to control the spread of the virus. Visitors are required
2 to be managed by the Medical Officer of Health and to be subject to such directions as
3 are provided by that Officer for the purpose of surveillance. The Appellant signed an
4 agreement with specific terms to which he agreed.

5
6 81. As the Respondent submitted, the maximum term applies both to failure to quarantine
7 as it does to a failure to follow directions. The legislature made no distinction in the
8 maximum penalties.

9
10 82. With respect to Harm, one aspect of the Appellant's argument is plainly correct - the
11 offending in the instant case in the range of seriousness is less serious than the offending
12 in the cited case. The breach did not involve leaving the quarantine premises or
13 interaction with other people such that it posed harm to members of the public. The Chief
14 Magistrate rightly in this Court's view categorised it as one of lesser harm.

15
16 83. Is the criminality at the level of seriousness such that a custodial sentence is
17 proportionate to the offending?

18
19 84. In this Court's view it is. The entirety of the quarantine monitoring process rests on the
20 wearing of the wristband. It is the only means to track and monitor the whereabouts of
21 persons in quarantine and to be able to identify whether there are any breaches. The
22 monitoring process in the Cayman Islands will become unworkable if wristbands are
23 subject to ad hoc removal.

24
25 85. In a carefully reasoned judgment, the Chief Magistrate demonstrated that he:





- 1 ▪ was mindful of the provisions of the *Alternative Sentencing Act*;
- 2 ▪ appreciated that there was a distinction between curfew offences and this at
- 3 hand and that the curfew guidelines could only be of limited assistance;
- 4 ▪ appreciated the factual distinction between the *Mack and Ramgeet* case and
- 5 the instant case;
- 6 ▪ considered whether an immediate custodial sentence was appropriate and or
- 7 proportionate to the offending;
- 8 ▪ considered the principles set out in the *Cayman Islands Sentencing*
- 9 *Guidelines*;
- 10 ▪ considered whether the custody threshold had been passed; and
- 11 ▪ had in mind that the passing of the custody threshold did not mean that a
- 12 sentence of imprisonment was inevitable.

13
14 86. Given the range of matters considered by the Chief Magistrate, and the holistic approach
15 taken in his Reasons for Sentence, there is nothing to suggest that he fell into error in his
16 application of the law and principles to the facts at hand.

17
18 87. No complaint is made of the Chief Magistrate’s assessment of aggravating and
19 mitigating factors.

20
21 88. In respect of Ground 2 the Appellant argued that the learned Chief Magistrate considered
22 himself bound by the statements made in the cited case which related to an egregious
23 breach of the isolation requirements, and, that the learned Chief Magistrate took the
24 words of the CICA quite literally as meaning that those words related to any breach of
25 **Regulation 3** whatsoever, and therefore covered all circumstances - thus requiring
26 custody. The Appellant submits further that this, in the face of the *Alternative*



1 *Sentencing Act* - which is that custody is a last resort – is not correct. In this case, it is
2 not correct that custody must be imposed.

3
4 89. It is difficult to accept this submission as being an accurate reflection of what the Chief
5 Magistrate actually did. This is not borne out on an examination of the judgment itself.
6 The judgment is clear that the Chief Magistrate was assessing the seriousness of the
7 instant case and the particular circumstances of it. The Chief Magistrate reminded
8 himself that an immediate custodial sentence could still be avoided. There would have
9 been no need to do this if he considered himself bound by the cited case. Significantly
10 the Chief Magistrate thereafter considered the case outside of the *Guidelines* and in
11 general terms - with the conclusion that the sentence imposed was the shortest possible
12 term proportionate to the gravity of the offending and the degree of responsibility of the
13 Appellant.

14
15 90. In closing Counsel submitted that in layman’s terms, this was no more than removing a
16 wristband to go into the pool with the children. It does not follow that any breach must
17 be followed by a term of imprisonment and it cannot be right that taking a ~~wrist band~~
18 wristband off is as serious as breaching quarantine.

19
20 91. The short answer to this the Chief Magistrate did not treat this case in the same way as
21 a breaching quarantine. There was a significantly lower starting point and the clear
22 recognition that the level of Harm was lower.

23
24 92. In conclusion, the Appellant submits that the learned Chief Magistrate fell into error.

25
26 93. Upon a careful review of the judgment, this Court has not identified an error.

27



1 94. Even, (which is not accepted), if it is that the Chief Magistrate leaned too heavily upon
2 the *Sentencing Guidelines on Breach of Curfew* as is urged, this Court does not
3 consider that the resulting sentence is disproportionate to the gravity of the offending
4 and to the degree of responsibility of the offender.

5
6 95. The state of near normalcy albeit within a “bubble” which has been achieved by the
7 community has been hard fought and is the result of the response of residents and visitors
8 alike who have followed the rules and directions. The community has remained closed
9 for a significant period of time. The monitoring system in place which is imposed by the
10 *Regulations* is a significant step towards a phased re-opening and return to full
11 normalcy. What is said to be no more than the removal of a wristband to go into a pool
12 with children must be viewed in the context of the monitoring system, what it is designed
13 to achieve and the reason for its imposition, i.e. the stated purpose of the legislation. It
14 is the view of this Court that removal of a wristband in this context strikes at the heart
15 of the monitoring system and, if undeterred, will render the system unworkable and
16 pointless. It is a stringent safeguard. A breach of a direction relative thereto, is a serious
17 one.

18
19 96. The Chief Magistrate considered the seriousness of it and by the way in which he treated
20 the case, properly identified it as lower on the scale of seriousness than a breach of an
21 isolation requirement.

22
23 97. The Appellant has asked this Court weigh in the balance the new factor of the now
24 confirmed absence of the assistance of the nanny to assist the wife of the Appellant with
25 the care of the young children. She is suffering from a debilitating illness. She has written



1 a letter to this Court detailing her circumstances and all that she has said is taken into
2 account.

3
4 98. This new factor is treated as a new element and consideration is given to whether this
5 change tilts the balance and, if it does, is it in such a way that the term of imprisonment
6 should not be imposed. Is it a further mitigating factor in relation to the offender's
7 circumstances which would cause this Court to pass an alternative sentence?

8
9 99. It is noted that much of these circumstances as to medical and care concerns were already
10 considered by the Chief Magistrate. The Appellant's letter of 7th May 2021 was before
11 the Chief Magistrate. It stated:

12
13 *"Should I be sent to prison, there is no way my wife could care for our children on*
14 *her own. Because Canada requires 2 weeks of quarantine upon arrival, she wouldn't*
15 *even be able to return home to Canada to seek help from her family."*

16
17 100. In the case of ***Mack and Ramgeet*** the CICA expressed the view that the impact of
18 personal mitigation was bound to be limited in circumstances where the protection of
19 the public was of paramount importance. The Chief Magistrate took a different approach
20 in this case, reflecting no doubt an appreciation of the difference in the circumstances of
21 the two cases. The Chief Magistrate accepted that there was substantial mitigation and
22 concluded by applying a 75% discount.

23
24 101. Does this new element of the absence of the nanny, change the balance? In this Court's
25 view, it does not. The balance of factors must include the gravity of the offending as
26 against the personal circumstances. The gravity of the offending is reflective of the
27 purpose of the legislation, the continued vulnerability of the community and the nature

1 of the breach. When all the factors including this new factual element are weighed, in
2 this Court's view the sentence imposed remains proportionate to the offending and to
3 the degree of responsibility of the offender.

4
5 102. As an aside, it is noted that in his letters of 28th April and 7th May 2021, the Appellant
6 spoke of having many dear friends on Island. Four letters have been provided from
7 residents on Island on his behalf. Far from the family being alone, there is a clear sense
8 from these letters of at least emotional support to the family.

9
10 103. Counsel added a final point. It does not appear that this was raised before the Chief
11 Magistrate and Counsel was very clear that the Appellant does not seek to argue that
12 there was a lack of clarity in the offence. It is that at the end of the agreement there is a
13 note that some breaches of directions may amount to an offence under the Law and
14 **Regulations**. While Counsel's central point in highlighting this was that all breaches are
15 not treated equally, this does also put into focus whether there is a need for the
16 responsible persons to consider greater specificity in the agreement.

17
18 104. Having considered all the submissions made, and the material provided, the appeal
19 against the sentence imposed by the Summary Court is dismissed. The sentence of 30
20 days' imprisonment is affirmed.

21
22 **Dated this 20th day of May 2021**



23
24 **Honourable Justice Cheryll Richards Q.C.**
25 **Judge of the Grand Court**
26