

IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 15/2018
IND.0068/2015 &
SC#0490/2018

BETWEEN:

KURT W HAMANN

Appellant

- and -

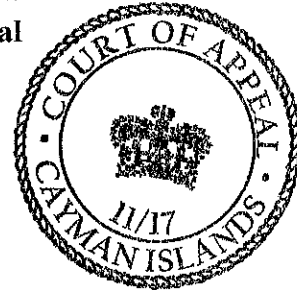
HER MAJESTY THE QUEEN

Respondent

BEFORE: The Rt. Hon Sir John Goldring, President
 The Hon Sir Richard Field, Justice of Appeal
 The Hon Dennis Morrison, Justice of Appeal

Date of Hearing: 6 September 2018

Appearances: Mr. John Furniss for the Appellant
 Mr. Patrick Moran for the Respondent



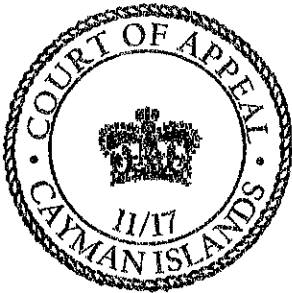
JUDGMENT

Transcript of oral judgment 6 September 2018
Approved and Released 11 October 2018

MORRISON JA:

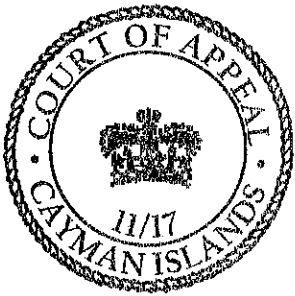
1. This is an application for leave to appeal against a total sentence of 24 months' imprisonment imposed in the Grand Court on 26 April 2018 in the following circumstances.

2. On 3 June 2016, the Applicant was given a suspended sentence in the Grand Court after he pleaded guilty to an offence of inflicting grievous bodily harm. The complainant's injuries, which were sustained on 19 August 2015 when he was hit in the face by the Applicant with a rock, required surgery. An ophthalmologist's report prepared several months after the incident indicated that the complainant continued to suffer from impaired vision in his left eye.
3. The terms of the sentence were:



- (i) 18 months' imprisonment suspended for two years;
 - (ii) 240 hours of community service to be completed within 12 months; and
 - (iii) a two-year supervision order with various conditions, including submission to random drug testing and attendance at counseling for substance abuse and anger management.
4. On 12 March 2018, the Applicant was charged with a total of seven offences committed on 24 September 2017. These offences fell into two categories. In the first category were the offences of driving under the influence of drugs, possession of ganja and consumption of ganja, all offences contrary to the Misuse of Drugs Act (2017 Revision). We will describe these as the 'ganja-related offences'. In the second category were the offences of driving without insurance, contrary to s.3 of the Vehicle Insurance (Third Party Risks) Law (2017 Revision); driving without being qualified, contrary to s.23 of the Traffic Law (2011 Revision); using a vehicle with an expired license, contrary to s.12 of the Traffic Law (2011 Revision); and using a vehicle without a certificate of roadworthiness, contrary to s.65 of the Traffic Law (2011 Revision). We will describe the offences in this latter category as the 'driving offences'.
5. On 3 April 2018, the Applicant pleaded guilty to all seven offences. The court was made aware of the fact that at the time these offences were committed the Applicant had been subject to the previous suspended sentence. The material before the court indicated that

the Applicant was in breach of almost all of the terms of the supervision order. The probation officer who had prepared the Social Inquiry Report on the occasion when the Applicant was previously before the court indicated that, of the 240 hours of community service which he ought to have done in 12 months, he had completed no more than 11 hours as of 1 September 2017. With this background in mind, the probation officer recommended that the Applicant should now be dealt with by the sentencing judge as follows¹:



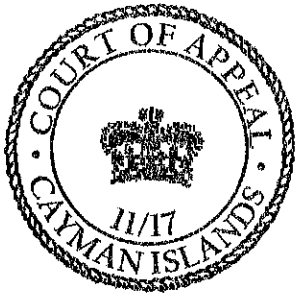
"... given the above-stated circumstances in relation to the breach of the Suspended Sentence with Supervision Order, the Court should now pass sentence on the Offender for the original offence in respect of which the Suspended Sentence with supervision was made. The offender is deemed unsuitable for supervision based sentence and it is hereby being recommended that the supervision component of his Order be revoked, accordingly".

6. On 24 April 2018, the Applicant was sentenced to a total of 24 months' imprisonment. This period of imprisonment was comprised of (i) the 18 months' custody originally imposed and suspended on June 3rd, 2016; and (ii) three concurrent sentences of six months each, to run consecutive to the 18 months for the ganja-related offences. The Applicant was disqualified from driving for 12 months for the offence of driving without insurance, but no separate penalties were imposed in respect of the other three driving offences.
7. The Applicant now contends that the total sentence of 24 months' imprisonment was manifestly excessive. On his behalf, Mr Furniss refers us to s.24(1) of *the Penal Code (2107 Revision)*, which is where the sentencing judge's power to activate the original sentence in the case of a suspended sentence is to be found. S.24(1) reads as follows:

"Where an offender is convicted in the Islands of an offence punishable with imprisonment committed during the continuance of the suspended

¹ Affidavit of Sophia Wilson-Leslie, sworn to on 19 October 2017, paragraph 4.
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sentence made under section 22(4) and either he is so convicted by or before a court having power under section 25 to deal with him in respect of such sentence or he subsequently appears or is brought before such a court, then, unless the suspended sentence has already taken effect, that court shall consider his case and deal with him by —



- (a) ordering that it shall take effect with the original term unaltered; (b) ordering that it shall take effect with the substitution of a lesser term for the original term; (c) substituting for the period specified therein a period expiring not later than two years from the date of the substitution; or*
- (d) making no order in respect to it,*

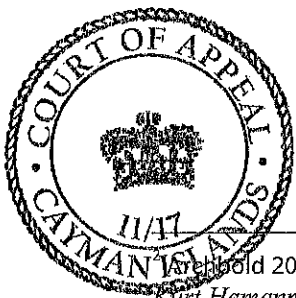
and it shall make an order under paragraph (a) unless it is of [the] opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent offence, and where it is of that opinion it shall state its reasons."

8. Mr Furniss submitted in his skeleton argument that, in all the circumstances of this case, the sentencing judge ought to have utilised option (b) above, by ordering that the suspended sentence should take effect with the substitution of a lesser term for the original term. However, it is fair to say that in his oral submissions before us he was perhaps a bit more guarded on the point, observing simply that this was one of the options now open to the court. In this regard, he pointed out that the offences to which the applicant pleaded guilty were of a different nature from that for which he received the suspended sentence, in that there was no violence involved; and that the ganja related offences on their own would ordinarily have been dealt with by fine or perhaps no more than a short term of imprisonment. Mr Furniss accepted that on the facts of this case the

sentencing judge would have had little option but to impose a sentence of imprisonment. However, he submitted that the full 18 months need not have been imposed, given the applicant's previous good character, the fact that some 15 months had elapsed after the suspended sentence was imposed, and the fact that the sentencing judge was imposing a consecutive term for the ganja related offences. Finally, Mr Furniss pointed out that the sentencing judge did not explicitly give the applicant credit for having pleaded guilty at an early stage.

9. In written submissions produced on behalf of the Crown, Mr Moran submitted that the sentencing judge was entitled to activate the 18-month suspended sentence, given the Applicant's non-compliance with the original sentence conditions, the fact that he had committed further imprisonable offences, and the views of the probation officer which we have set out above. However, Mr Moran submitted that the further period of imprisonment imposed by the sentencing judge may have been excessive in the light of the Applicant's early plea of guilty for which he would have been entitled to receive full credit.
10. As general guidance, Mr Moran very helpfully refers us to an extract from *Archbold*, under the rubric, "*Activation of suspended sentence*"². The learned editors make the point that, in considering whether to activate a suspended sentence in full or in part, the offender's record of compliance with the conditions of the suspended sentence is a factor to be taken into account in the exercise of the court's discretion. But the learned editors then go on to add an important caution in cases in which the sentencing judge decides to activate the suspended sentence in full:

"Where the judge proposes to implement a suspended sentence in full, and consecutively to the sentence to be imposed for the fresh offence, it is not legitimate to treat the seriousness of the fresh offence as aggravated by the mere fact that it was committed during the operational period of the suspended sentence ... a court must be careful to guard against treating the fact that the fresh offence was committed during the operational period of a suspended



²Archbold 2018, paragraph 5-555

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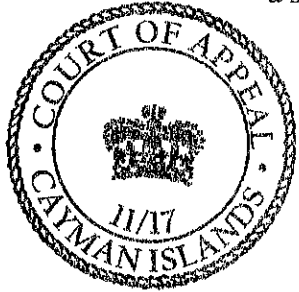
sentence as a further aggravating factor; that it was so committed is dealt with by the implementation of the suspended sentence; to increase the sentence for the new offence on this account would involve an element of double counting: R v Levesconte [2012] 2 Cr. App. R. (S.) 19, CA."

11. It is a matter of regret that we have not been shown any note of the sentencing judge's remarks when he passed sentence on the Applicant. However, it seems reasonable to assume that he may have been influenced by the Applicant's dismal record of compliance with the conditions of what could well be said to have been a generous sentence. In our view, that was an obviously relevant consideration for him to keep in mind in deciding whether to order that the original term should take effect unaltered or on a reduced basis. This was a matter entirely within the discretion of the sentencing judge and we are quite satisfied that there is no basis upon which this court could properly interfere with the sentencing judge's decision to order that the Applicant should serve the full 18 months originally imposed.
12. So the only remaining issue is whether the further sentences of six months' imprisonment imposed by the sentencing judge for the ganja-related offences can be said to have been manifestly excessive. In this regard, nothing turns, of course, on the sentencing judge's stipulation that those sentences should run consecutive to the 18-month suspended sentence which he activated: as the Cayman Islands Sentencing Guidelines (the Sentencing Guidelines) make clear, consecutive sentences would ordinarily be appropriate where the offences arise out of unrelated facts or incidents³.
13. More troubling perhaps is the question of whether six months' imprisonment, for what were, on the face of it, first-time ganja-related offences involving possession of a relatively small quantity of the drug, can be said to have been manifestly excessive.
14. A further relevant factor, as both Mr Furniss and Mr Moran pointed out, is that the Applicant's plea of guilty to the ganja-related offences would have entitled him to a discount of perhaps as much as one third on the sentence to be imposed. It is an

³ Cayman Islands Sentencing Guidelines, 2015, paragraph 6.2(a)
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unfortunate feature of the case that we have been left to speculate on whether, or to what extent, the sentencing judge took the guilty pleas into account.

15. We are therefore driven back to first principles. The Sentencing Guidelines indicate⁴ that a sentencing court -



"... must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that no other sentence can be justified for the offence."

16. Taken by themselves, we would not ordinarily view any single one of the ganja-related offences, including the offence of driving under the influence of drugs, as having crossed that custody threshold. However, potentially aggravating factors in this case included the number of offences, not limited to the ganja-related offences, to which the Applicant pleaded guilty, and the fact that, despite his youth, this was his second significant brush with the law in under two years. In these circumstances, we simply cannot say that the sentencing judge acted on any erroneous principle in deciding to impose concurrent sentences of six months' imprisonment for the ganja-related offences.
17. But, in the absence of anything to indicate that he did, we remain concerned as to whether the sentencing judge gave credit to the applicant for his early plea of guilty to all seven offences. In all the circumstances, therefore, we consider it right to reduce the period of six months' imprisonment by one third to reflect this fact⁵.
18. We therefore give leave to appeal and allow the appeal to the extent we have indicated. That is, the concurrent sentences of six months' imprisonment for ganja-related offences are varied to concurrent sentences of four months' imprisonment. These sentences are to run consecutively to the sentence of 18 months for inflicting grievous bodily harm. The Applicant will therefore serve a total period of imprisonment of 22 months.

⁴ Ibid, paragraph 3.2

⁵ As recommended in paragraph 10.5 of the Sentencing Guidelines in the case of a guilty plea entered at the earliest reasonable opportunity

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