IN THE SUPREME COURT OF BELIZE, A.D. 2016
(Criminal)

Inferior Appeal No. 7 of 2016
BETWEEN:

ROBERT FLORES **Appellant**

AND

THE POLICE **Respondent**

Before: **The Honourable Madam Justice Shona Griffith**
Date of Hearing: **11th August, 2017**
Appearances: **Ms. Christell Wilson, Senior Crown Counsel for the Director of Public Prosecutions; the Appellant unrepresented and in person.**

DECISION

Introduction

1. This is an inferior appeal arising from the conviction and sentence of the appellant Robert Flores, for the offence of Handling Stolen Goods, contrary to section 171 of the Criminal Code, Cap. 101 of the Laws of Belize. The appellant was charged on the 1st day of March, 2016 for the offence of handling stolen goods in relation to a quantity of alcohol valued at $372. The appellant pleaded guilty and was sentenced to 2 years imprisonment. The appellant, unrepresented from the inception, appealed and the Notice of Appeal was lodged on the 4th day of March, 2016. Unfortunately, the Magistrate's reasons for decision were not received by the Supreme Court until 3rd July, 2017 (there is no indication from the record as to when the reasons were submitted), however, the origin or justification for whatever delays there were in this matter are in the final analysis, immaterial to this Appellant. Having been received by the Supreme Court, processed and assigned, the appeal has been dealt with without further delay and its very brief determination is reduced into writing as required by law. Additionally however, this appeal raises issues of sentencing under the Summary Jurisdiction (Offences) Act, Cap. 98 which arise all too often. It is considered that these issues of sentencing would benefit from clarification by the Court.

2. The offence of Handling Stolen Goods, is an indictable offence made triable summarily by virtue of section 50(1) of the Summary Jurisdiction (Offences) Act, Cap. 98 of the Laws of Belize. This section provides as follows:-

> ***"****(1) The crimes created by the several sections of the Criminal Code, Cap. 101, mentioned in the Second Schedule shall be also be summary conviction offences and, subject to this section, shall be punishable accordingly without the consent of the person charged."*

Section 171 (handling), is listed in Schedule II as referenced above and as such is punishable according to section 50(4) of Cap. 98, which provides as follows:-

> *"(4) Subject to section 80 of the Summary Jurisdiction (Procedure) Act, Cap. 99, every person who is convicted by a court of summary jurisdiction of an offence created by any section of the Criminal Code, Cap. 101, mentioned in the Second Schedule shall be liable to a fine not exceeding three thousand dollars or to imprisonment for a term not exceeding twelve months,…"*

As a general rule therefore, the sentence applicable to all Criminal Code indictable offences triable summarily by virtue of their inclusion in schedule II of Cap. 98 is a fine not exceeding $3000 or to imprisonment not exceeding 12 months. There are provisos which follow regarding the application of the sentence in certain circumstances related to the offence of theft, none of which are applicable to the instant appeal.

3. In addition to the offences listed in Schedule II pursuant to section 50(1) of Cap. 98, section 51(1) of that Act also renders other indictable Criminal Code offences triable summarily but with the consent of the accused person. These other offences are listed in Schedule III of Cap. 98. (In this respect, it is noted for completeness that Schedule III also lists offences created under acts besides the Criminal Code. The offences under these other acts do not concern us in this appeal). With respect to any summary trial enabled by section 51(1), the Magistrate first has to be satisfied that the offence can appropriately be tried summarily - based inter alia on representations of the prosecutor or accused, the nature of the crime, as well as the absence of any factors which would render the crime of a grave and serious nature. Once so determined, the accused has to consent to the summary trial unlike section 50(1). In obtaining the accused's consent to summary trial, the Magistrate is required to advise the accused of his or her right to a trial by jury.

4. Indictable offences triable summarily pursuant to section 51(1) (set out below), and listed in Schedule III of Cap. 98 are punishable by $6000 fine, imprisonment of not more than 2 years, or to both a fine and imprisonment.

> ***51.–****(1) Where any person is charged before the court with any crime specified in the Third Schedule, the court, if it thinks it expedient to do so, having regard to any representation made in the presence of the accused by or on behalf of the prosecutor, or by or on behalf of the accused, the nature of the crime, the absence of circumstances which would render the crime one of a grave or serious character and all the other circumstances of the case, and if the accused, when informed by the court of his right to be tried by a jury, consents to be dealt with summarily, may, subject to the provisions of this section, deal summarily with the crime and if the accused pleads guilty to, or is found guilty of, the crime charged, may sentence him to be imprisoned for a term not exceeding two years or to a fine not exceeding six thousand dollars, or to both such fine and term of imprisonment,*
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> *Provided that with respect to the crimes numbered 12 (with reference to the crime of stealing), 13, 14, 17, 18, 19 and 20 in the Third Schedule, the consent of the accused person shall be necessary only where the amount of the money or the value of the property in respect of which the crime is committed exceeds fifty thousand dollars.*

Like section 50, there are also other provisos to section 51(1) regarding the offence of theft, which do not concern us in the instant appeal.

5. On first glance of Schedule III, it is evident that the offences therein listed are different to those contained in Schedule II, save for those numbered 12 through 20 (numbers 15 and 16 excepted). These offences in Schedule III numbered 12 through 20 (which include theft and handling stolen goods), are also listed in Schedule II. This duplication in inclusion in the Schedules begs the question as to why, but more importantly – as to which section is applicable given the difference in treatment of the offences under sections 50 and 51. The difference in treatment of the offences in the two Schedules arises (i) in relation to the requirement for consent of the accused person in section 51(1) and (ii) in respect of the greater penalty prescribed under section 51(1) – i.e. – to Schedule III offences. It is considered that the answer to the reason or purpose of the duplication of the offences number 12 through 20 (excepting numbers 15 and 16), lies in the first proviso to section 51(1), which is extracted above.

6. With respect to these duplicated offences, (all of which concern dishonesty related to property) - as stipulated in section 51(1) first proviso, the accused's consent is only required where the amount of money or value of the property involved exceeds $50,000. In other words, section 51(1) does not apply to these duplicated offences unless the value of the property or money involved exceeds $50,000. In all other cases (where the value of the property is less than $50,000), the duplicated offences remain triable summarily without the consent of the accused pursuant to section 50(1) and punishable pursuant to section 50(4). In the instant case therefore, the value of the property for which the appellant was convicted of handling being $372, the offence fell to be sentenced pursuant and only pursuant to section 50(4) of Cap. 98.

7. It was earlier stated that the penalty for offences triable summarily as enabled by sections 50 and 51 of Cap. 98 was a general rule. The following cases represent a limited number of circumstances in which the enabling authority for the mode of summary trial or the sentence to be imposed by the summary court, falls outside of sections 50 or 51 of Cap. 98.

    (i) There is duplication in a limited number of cases between scheduled offences and those prescribed under the Criminal Code as summary conviction offences. The duplicated offences are also subject to greater penalties under the Criminal Code, than those stipulated in either section 50 or 51 of Cap. 98. One such offence is that of Burglary, contrary to section 148 of the Criminal Code. This is included as a Schedule III offence, thus according to section 51(1), is triable summarily with consent of the accused. However this offence is also prescribed (by reference to punishment upon summary conviction), as triable summarily under the Criminal Code. Any possible conflict as a result of the duplication is expressly avoided as a result of section 148(5) which removes any requirement for the accused's consent to be tried summarily. Additionally, the penalty under section 50(4) is not applicable as section 148(6) establishes the supremacy of section 148 as against anything to the contrary in Cap. 98;

(ii) Besides offences listed in schedules II and III of Cap. 98, there are offences which are created solely as summary offences under the Criminal Code, for example section 69 – failure by a sex offender to comply with court orders for mandatory treatment or section 151(4) – taking conveyance (pedal cycle only) without authority. As these offences are not listed in either Schedule, the punishment of these summary offences is that prescribed by the Criminal Code;

(iii) There are also indictable offences specified by the Criminal Code as triable and punishable on summary conviction as well as on indictment (for example – section 147, Robbery or section 149 Aggravated Burglary). These offences, are not listed in either schedule II or III and as such it is clear that the power to try summarily and the summary penalty to be imposed arise only under the Criminal Code. No question of application of penalties under sections 50 or 51 of Cap. 98 therefore arise in relation to these offences.

(iv) There are of course offences created by other subject specific Acts (for example Fisheries, Forestry, Taxation, Road Traffic, Customs or Immigration), which all confer summary jurisdiction for the trial and punishment of offences created under those Acts. Likewise, no question of application of penalties under sections 50 or 51 of Cap. 98 arise in relation to these offences of other Acts.

8. With respect to the statutory regimes outlined in paragraphs 7(i-iii) above, magistrates must be alert to the sentences to be imposed or to any consents required to facilitate summary trials as may be appropriate. Additionally, with respect to amendments to sentences under the Criminal Code, up to this time, the penalties under sections 50(4) and 51(1) of Cap. 98 have not been amended. Therefore, unless the amended sentences under the Criminal Code arise in respect of an offence that properly falls to be sentenced upon summary conviction under the Criminal Code itself, (paragraphs 7(i-iii) above), such amended sentences do not apply to the Scheduled offences. Having said all that, the Court now returns to the matter of the instant appeal. As earlier stated in paragraph 2 above, the offence of Handling Stolen Goods, contrary to section 171 of the Criminal Code, is a Schedule II offence, triable summarily pursuant to section 50(1) of Cap. 98.

As such, the applicable penalty is a fine of $3000 or imprisonment of up to 12 months. The appellant herein was sentenced to 24 months in prison and as such there was a clear excess of jurisdiction upon sentencing. This sentence was wrong in law and is accordingly set aside.

9. As the appellant has already served in excess of what could have been his maximum sentence, there is nothing to be served by remitting the matter back to the magistrate for sentencing. The Court will exercise its power pursuant to the proviso to section 120(1) of Cap. 91 to impose an appropriate sentence. The Magistrate in his reasons acknowledged firstly that the sentence of 2 years was incorrect. Also, that albeit according to his antecedents, the appellant had been charged for a number of offences involving dishonesty, but as there was only one prior conviction for dishonesty, none of the other charges whether withdrawn or dismissed ought to have been taken into account in passing the sentence. Nonetheless, the Magistrate expressed that 'it is still worthy to mention that record number of times the defendant would have been before the Court's jurisdiction'. Aside from setting right the Magistrate's excess of jurisdiction upon sentence, two issues need to be addressed arising from the Magistrate's reasons. The first is that it can never be appropriate for a judicial decision to be rationalised after the fact - meaning - with hindsight when the matter has been appealed.

10. At this stage, the appellate court is not concerned with what the decision maker would nonetheless have decided after being seised with or accepting the knowledge of the error made at the time of decision. As a consequence, the post-scripted justification for the sentence which was incorrect to begin with, had no place in the Magistrate's reasons. Any opportunity to correct an error made would have to await the remittance of the matter to the Magistrate by the appellate Court, if deemed fit, upon determination of the appeal. The second issue which needs to be addressed, is the continued misapprehension of the Magistrate regarding applicable principles of sentencing, insofar as it seemed to be the case that the fact of the appellant's numerous appearances before the Court, had some bearing on the sentence that ought to have been imposed on the appellant. This view is incorrect.

The number of arrests, acquittals or appearances of a defendant before any court are not factors to be taken into account by a Court upon sentencing a convicted defendant. The assessment of a defendant's character for purposes of sentencing is to be adjudged only with reference to prior convictions[1].

11. In resolving the issue of the sentence now to be imposed by this Court, the matter is considered thus - the appellant had only one relevant conviction for dishonesty which was recorded twelve years prior in 2004. There was a conviction for assault 16 years prior (2000) and the only recent convictions on record were of traffic offences. The convictions for traffic offences are not taken into account for purposes of this offence of handling, thus the appellant is regarded as having a relatively clean record for the past twelve years. Additionally, the appellant pleaded guilty and ought to have received due consideration for not wasting the Court's time. However, even though the value of the property involved was relatively small ($372), the offence of handling stolen goods is not a minor offence. Additionally, although not recent, the prior convictions for dishonesty and personal violence cannot be disregarded, thus even with the guilty plea a sentence of imprisonment is considered warranted. The period of three months' imprisonment is found appropriate, having regard to the latent convictions for dishonesty and personal violence and plea of guilty.

12. One final observation in this matter is that the Magistrate's notes of evidence submitted as part of the record of appeal evidenced only that the appellant pleaded guilty, that 'the facts were admitted' and that a 2 year sentence was imposed. This is deficient note taking. Reference is made to the case of **Canterbury v Joseph[2]** from then British Guiana in which the duty of a magistrate to take notes was considered and explained. The relevant provision in Belize (identical to that under consideration in that case) is section 44(5) of the Summary Jurisdiction (Procedure) Act, Cap. 99.

[1] It is noted for good measure, that at the time of sentencing, any record of antecedents in the hands of the court, must be put to a defendant who should then be required to accept or reject it as accurate. Inquiries may follow in the event of a defendant's disavowal of the entire document or specific item. As prior convictions are a matter of record, disingenuous denials by a defendant can always be dispelled, but an error can result in a consequence to the detriment of a defendant's liberty and is best avoided by having the defendant accept the antecedents or require verification of the record if necessary.

[2] (1964) 6 WIR 205

This section mandates a magistrate to take notes of the evidence of the proceedings, or of such evidence considered material. In ***Canterbury v Joseph***, the Full Court (on Appeal) therein acknowledged the duty as a statutory one and stated that 'evidence' included, the prosecutor's statement of facts upon a guilty plea and any responses made by the defendant. It was stated that where there is a guilty plea, the statements of the prosecutor and defendant are vital as they provide the only basis for the Court to assess the appropriateness or otherwise of the sentence upon appeal. This case on the issue of the duty to take notes, as well as two like cases noted below[3], is commended by the Court for the attention of all magistrates.

Disposition

13. The sentence of 2 years imprisonment was in excess of the Magistrate's jurisdiction under section 50(4) of the Summary Jurisdiction (Offences) Act, Cap. 98. That sentence is accordingly quashed and a sentence of 3 months imprisonment is instead imposed. The appellant is entitled obviously to time served.

Dated this 22nd day of August, 2017.

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Shona O. Griffith
Supreme Court Judge.

[3] **Abiram v Ramjohn**, (1964) 7 WIR 208; **Sam v Chief of Police** (1965) 10 WIR 245