Neutral Citation Number: [2025] CA (Bda) 19 Crim

Criminal Appeal No. 12 of 2025

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA
SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON. CHIEF JUSTICE LARRY MUSSENDEN
CASE No. 23 of 2023

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 22/07/2025

Before:

JUSTICE OF APPEAL THE HON IAN KAWALEY

JUSTICE OF APPEAL THE HON NARINDER HARGUN

-and-

ACTING JUSTICE OF APPEAL THE HON SHADE SUBAIR-WILLIAMS

- - - - - - - - - - - - - - - - - - - -

Between:

LARRY BENJAMIN

Appellant

-and-

HIS MAJESTY THE KING

Respondent

Appearances:
Mr Philip Perinchief, PJP Consultants, for the Appellant
Ms Cindy Clarke, Director of Public Prosecutions, for the Respondent

Hearing date: **19 June 2025**
Date of Decision: **20 June 2025**
Reasons delivered: **22 July 2025**

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Appeal against sentence of immediate imprisonment-causing grievous bodily harm when driving under the influence of alcohol contrary to section 35(b) of the Road Traffic Act 1947- appropriate general sentencing tariff- approach to suspended sentences-weight to breach of defendant's constitutional right to a trial within a reasonable time-whether prohibition on driving can be imposed as a condition for bail-Road Traffic Act 1947, section 35- Traffic Offences Penalties Act 1976, Schedule 1-Criminal Code section 70K-Bail Act 2005, section 4(4)-Bermuda Constitution section 6(1)

REASONS FOR DECISION

KAWALEY JA:

Introductory

1. By an Information for an Indictable Offence dated 23 August 2023, the Appellant was charged by the Police with offences of causing grievous bodily harm by driving while impaired and with excess alcohol in his blood contrary to sections 35(a) and 35 (b) of the Road Traffic Act 1947. The offences were alleged to have been committed on 19th October 2018. He appeared in Magistrates' Court on 29 September 2023 when he was bailed to appear in Arraignment Court on 1 November 2023.

2. After being arraigned in the Supreme Court over 5 years after the date of the offences, through no fault of his own, on or about 29 February 2024 the Appellant applied to stay the criminal proceedings on the grounds that his constitutional right to a trial within a reasonable time under section 6(1) of the Bermuda Constitution had been infringed and the continuance of the proceedings would be an abuse of process. After an initial hearing on 1 March 2024, a successful recusal application was made in respect of Justice Alan Richards on or about 29 May 2024. On or about 30 January 2025, the constitutional stay application was assigned to Assistant Justice Kenlyn Swan-Taylor. She heard it on 3 February 2025 and delivered a Ruling on 3 March 2024 holding:

    (a) the Appellant's constitutional right to a trial within a reasonable time had been infringed;

    (b) the criminal proceedings should not be stayed because a fair trial was still possible and their continuance would not be an abuse of the process of the Court; and

(c) an application under section 31of the Criminal Jurisdiction and Procedure Act 2015 seeking to dismiss the charges on the grounds that there was on the papers no case to answer should be dismissed.

3. On 20 March 2025, the Appellant appeared before the Chief Justice and pleaded guilty to causing grievous bodily harm when driving with excess alcohol in his blood contrary to section 35 (b) of the Road Traffic Act 1947 on 19th October 2018. On that date, the Chief Justice ordered a Social Inquiry Report ("SIR") and on 24 March 2025 suspended the Appellant from driving until he was sentenced as a condition of his bail. On 3 June 2025, for the reasons set out in his written Sentencing Remarks, the Chief Justice imposed the following sentence on the Appellant (who was now aged 66) including a discount for the unconstitutional delay:

(a) 9 months immediate imprisonment (including a discount of three months for delay); and

(b) 4 years disqualification from driving (including a deduction of one year from the obligatory 5 years) but with effect from the date of sentence.

4. The most significant point of sentencing principle articulated by the Chief Justice, in a case where it appears that the Prosecution suggested a fine and probation would be appropriate and the Defence contended that at worst a custodial sentence should be suspended, was that an immediate sentence of imprisonment was appropriate for this type of offence. The Appellant's expedited appeal against this sentence was heard on 19 June 2025. Although we agreed with the general sentencing principle articulated by the Chief Justice, on 20 June 2025 we allowed the appeal against sentence and

(a) substituted a suspended sentence of imprisonment for the immediate custodial term of 9 months' imprisonment; and

(b) changed the commencement date for the period of disqualification from the date of sentence to the date when the Appellant's suspension from driving began, 24 March 2025.

5. These are the reasons we promised to give for that decision.

The Supreme Court sentencing decision

6. The following extracts from the Chief Justice's Sentencing Remarks explain the main reasons for his specific sentencing decision and the appropriate tariff he considered was appropriate for similar offences:

"*5. The Traffic Offences (Penalties) Act 1976 (the 'TOPA') sets out that for this offence the following apply: Head 5 - On Indictment, for a first offence, a maximum period of imprisonment of 7 years. I accept that this is your first offence for this charge. Head 6 - On Indictment, for a first offence, an obligatory disqualification of 5 years and a discretionary maximum of 7 years. Head 7 – On Indictment, for a first offence 10 - 12 points…*

7.A Victim Impact Statement of Mr. Gibson states that he has suffered pain, scarring and specific pain when using his dominant hand for writing. He explained that the accident has had an emotional impact on him…

17.I have taken into account all the circumstances, the statutory requirements, the SIR, the case authorities, the Victim Impact Statement and the mitigation and allocutus on your behalf. The Courts have to take a strong stand in respect of offenders who cause injury to others, having consumed alcohol. I note that there are non-stop appearances in the Magistrates Court for driving under the influence of alcohol. On occasion, misfortune happens when someone who is driving under the influence causes someone else to be injured. In this case, Mr. Gibson was using the road when you collided with him. As a result he has suffered serious injuries, scarring and ongoing pain when he uses his dominant hand to write. He has also suffered emotional effects. Thus, I am not prepared to accept the cases of suspended sentences which were placed before me as they did not involve driving under the influence of alcohol. In my view, any person who appears charged with the offence of causing grievous bodily harm whilst driving under the influence of alcohol should expect an immediate custodial sentence. The maximum sentence is 7 years although this case is not one for a maximum sentence as you are not the worst offender and this is not the worst kind of its case.

18. Taking into account all the circumstances, I accept that you were given an indication to execute a move by a courteous driver but I find that you did not carry out further checks yourself to see if it was safe to do so. Had you not had the alcohol in your system, the outcome at that precise time might have been different. In any event, I take the presence of alcohol to the level that it was and the injury to be very serious factors. In respect of the actual driving decision, that is on the low end in that it was a single act of attempting to cross the oncoming lane that resulted in the collision.

19. The cases put before now indicate a final sentence generally of imprisonment of 1 year. If I were sentencing you after trial, I would have taken as my starting point a sentence of imprisonment of 18 months on Count 2. Giving you a third off for your guilty plea would result in a sentence of 18 months less 6 months for a sentence of 12 months imprisonment.

> *20. I have accepted the submission that a reduction in sentence is an appropriate remedy in respect of a declaration of delay in these proceedings. The Ruling of Swan AJ set out that the offence took place on 19 October 2018 but that it was nearly 5 years before the file was passed to the Department of Public Prosecutions after which the matter proceeded on a timely basis from August 2023 to the present date. In my view, had the matter proceeded on a timely basis from the start it is likely that you would have been sentenced and such sentence completed. In those circumstances I would reduce the sentence of imprisonment by one quarter, that is 3 months, such that your sentence is 9 months imprisonment. I am not satisfied that there are any reasons to impose a suspended sentence.*" [Emphasis added]

7. Although we do not have a proper record of the submissions which were made before the Supreme Court, it seems clear that they were advanced in a materially different way from the way they were advanced before this Court. In the Supreme Court:

   (a) the Prosecution did not contend an immediate sentence of imprisonment was appropriate and in fact proposed a fine combined with probation;

   (b) the Defence would have been understandably unprepared to make the case for a suspended sentence; and

   (c) as result the Chief Justice was never properly addressed as to the appropriateness of suspending the sentence and understandably concluded that grounds for suspending were not made out.

8. Before us, Mr Perinchief's main mission was to demonstrate that an immediate custodial sentence was inappropriate and the DPP accepted that it was open to the Chief Justice to set the tariff (of 12 months' immediate imprisonment on a guilty plea) in the way he did. Because the Chief Justice's central analysis was obviously sound, it was far easier for us to focus on what on appeal was the central question: did the circumstances of the case justify suspending the term of imprisonment which would otherwise be appropriate?

Findings: the appropriate sentence starting point for causing serious injury while driving under the influence of alcohol

9. Mr Perinchief ended his submissions with a plea for guidance as to the appropriate sentencing approach on the grounds that inconsistent past practice made it difficult to properly advise clients. In my judgment the most obvious difficulty the Appellant faced in obtaining reliable advice as to the likely sentencing result if he pleaded guilty was that:

   (a) it will invariably be surprising at worst and/or disappointing at best if an immediate custodial sentence is imposed when the Prosecution are not seeking such a sentence;

(b) it required a careful and nuanced reading of past similar cases to elucidate what the starting sentence would ordinarily be but even then, it was impossible to discern from the available records what the circumstances of those cases were; and

(c) there were no local precedents for an accused person being convicted and sentenced after having established that his constitutional right to a trial within a reasonable time had been infringed.

10. Certificates of conviction and sentence in four cases involving guilty pleas and section 35 of the Road Traffic Act were placed before the Court:

(a) S. Smith (2009, 1 year's imprisonment, 9 months suspended for 9 months);

(b) N. Sabanayagan (2008, 1 year's imprisonment suspended for 1 year);

(c) A. Ambrosini (2011, 12 months' imprisonment);

(d) J. Guishard (2010, 12 months' imprisonment-convicted of the more serious offence involving dangerous or reckless driving under section 24(2) as well).

11. In each case, 1 year or 12 months' imprisonment was considered appropriate. Ms Clarke submitted that the norm was shown to be 12 months' imprisonment, whether served in full or suspended in whole or in part. So, factoring the legal consideration that a suspended sentence is only imposed when a sentence of imprisonment is *prima facie* appropriate, the appropriate tariff was rightly found by the Learned Chief Justice to be 12 months imprisonment. Assuming all these cases were put before him, it was clear that in two out of four cases (for reasons which are unclear from the bare certification of the sentences imposed for the relevant offence) the sentences imposed were suspended to some extent. This does not alter the fact that persons who plead guilty to such offences should expect an immediate custodial sentence of 12 months imprisonment, or 18 months following a trial. It suggests that the basic sentence following a guilty plea for this category of offence is a sentence of that term and that a positive case must be made out to justify a more lenient sentence.

12. No further judicial guidance is required beyond that given by Chief Justice Mussenden in this case:

> "…*In my view, any person who appears charged with the offence of causing grievous bodily harm whilst driving under the influence of alcohol should expect an immediate custodial sentence…*"

Whether the sentence should have been suspended

13. The critical question on this appeal is one which was not fully argued before the Chief Justice because of the unusual constellation of circumstances referred to above ([7]). The question is not the one the Learned Chief Justice was seemingly invited to answer, whether an immediate sentence of imprisonment was the appropriate starting point. Rather the question is whether assuming the starting assumption is that a 12 months' term was appropriate, grounds for` displacing that starting assumption could be made out.

14. The principles governing suspended sentences were referred to briefly in oral argument and more fully considered after judgment was reserved at the end of the appeal hearing. Section 70K of the Criminal Code provides as follows:

> *"(1) If a court sentences an offender to imprisonment for 5 years or less it may order that the term of imprisonment be suspended in whole or in part during the period specified in the order ("the operational period"), which period shall not exceed 5 years, if the court is satisfied that it is appropriate to do so in the circumstances*." [Emphasis added]

15. For reasons of consistency, there must be good reason for suspending a sentence when a custodial sentence is generally required. In a passage approved by this Court 9 years ago, Toulson LJ in the English Court of Appeal noted that "*there has to be some good reason for the judge too act differently in a particular case for simple reasons of consistency*": *R v Carneiro* [2007] EWCA Crim 2170. In *R-v-Bell* [2016] CA (Bda) 21 Crim, Sir Scott Baker P opined as follows:

> "*30. The requirement for exceptional circumstances to suspend the sentence was never a statutory one in Bermuda, although it was applied in practice by the Bermuda courts for a number of years. Having considered the authorities, we are satisfied that such a gloss should not be put on the interpretation of section 70K. The section says the Court can impose a suspended sentence if it is satisfied it is appropriate to do so in the circumstances. We adopt the words of Toulson LJ in Carneiro which seem to us to be equally applicable in this jurisdiction.*
>
> *31. There was, in our judgment, good reason for the judge to suspend the sentence in the present case. In particular, there was little likelihood of the respondent re offending; it was two years since the offence had been committed and he had shown himself to be leading a good and law abiding life since then and the offence itself, albeit serious, a very much one off incident.*" [Emphasis added]

16. In the present case, Mr Perinchief submitted it was appropriate to suspend the sentence of imprisonment (if it was found to be appropriate in principle) because of the following key considerations:

(a) the Appellant was a 66 year old bus driver with a low risk of reoffending, who because of the offence and the delay in the criminal proceedings during which he had seemingly been suspended from bus driving (although the offence had occurred when driving a private vehicle), would by reason of his age likely be unable to work again;

(b) the unconstitutional delay (supported by a declaration that the Appellant's rights under section 6 (1) of the Constitution had been breached) was an unprecedented and unusual circumstance which justified either a non-custodial sentence or a full suspension. (The DPP agreed this was an unusual feature in this case); and

(c) the Appellant had not been responsible for any of the delay before he was committed to the Supreme Court almost 5 years after the offence. He could only be blamed for the period between November and 2023 and February 2024 when his partially successful constitutional motion was filed. That took roughly a year to determine because of the apparent challenge of assigning the case to a non-conflicted Judge.

17. These points only emerged with any clarity in the course of exchanges between the Court and counsel in the course of very productive and focussed oral argument. Like the Learned Chief Justice, we were referred to the important decision of the Hon. Kenlyn Swan-Taylor AJ, which we took time to carefully review after the appeal hearing. She most importantly concluded as follows:

> "*54. Taking the guided proposition from Boolell, following a breach of the accused convention right to a fair trial within a reasonable time, it will be appropriate to stay proceedings where there can no longer be a fair trial or it would be unfair to try him*
>
> *55. Section 6(1) of the Bermuda Constitution Order 1968 allows the secure protection of law, in that any person charged with a criminal offence shall be afforded a fair trial within a reasonable time. Despite this, the authorities suggest that the court's discretion to stay proceedings for an abuse of process should be exercised sparingly.*
>
> *56. The delay in this matter thus far, has caused the unreasonable delay as the Applicant has been deprived of his right to be tried within a reasonable time and I make a declaration that his right has been infringed.*
> *57. However, there is nothing before me that persuades me that there has been any substantial effect or material prejudice to exercise my discretion to stay the proceedings as a result of this delay. On the balance of probability, I find that the*

> *Applicant is capable of receiving a fair trial and I find that it will not be unfair for him to be tried.*
>
> *58. For the reasons stated, I have determined that the trial must proceed in the interest of justice and if convicted, there is sufficient remedy to address such declaration. Therefore, the application to stay proceedings for abuse of process must fail.*" [Emphasis added]

18. Quite properly, the Judge did not trespass on the criminal trial judge's discretion to consider, in the event of conviction, what relief it was appropriate for the Appellant to receive at the sentencing stage. The Learned Chief Justice's Sentencing Remarks suggest that the abuse of process judgment was only referenced in general terms. We received no clear guidance from counsel about the correct judicial approach to granting relief for a breach of the constitutional right to a fair trial at the sentencing stage. The constellation of unusual factors in the present case nonetheless provoked a strong instinctive response that good cause for suspending the Appellant's sentence had been made out in the course of the appeal hearing.

19. The abuse of process Ruling referred to one local case on the breach of the constitutional right to a trial within a reasonable time in the criminal context, *Robinson and Wallington-v-DPP* [2019] SC (Bda) 60 Civ (Assistant Justice Delroy Duncan). That case followed this Court's guidance in *Giles* and the *Attorney General v Hall* [2004] Bda. L.R. 26 (Evans JA) on the approach to evaluating whether delay had infringed a criminal defendant's rights under section 6 (1) of the Constitution. The *Robinson* case provides comprehensive guidance on:

    (a) how the Court determines whether unconstitutional delay has occurred in the criminal context; and

    (b) how the Court determines whether the appropriate remedy is a stay (one applicant in that case, who had been in custody for two years, had proceedings against them stayed and a retrial was ordered).

20. Swan-Taylor AJ placed pivotal reliance as regards the governing principles in relation to constitutional delay complaints on the Privy Council decision in *Boolell v. The State (Mauritius)* [2006] UKPC 46. That case provides useful guidance because it directly addressed the appropriate sentencing remedy was for a criminal defendant who made out a valid constitutional. The conclusion was as follows:

> "*39. The Board must therefore determine the remedy which is to be afforded to the appellant. In the light of its finding that the trial was not unfair, the Board does not consider that the conviction should be set aside. On the other hand, their Lordships would not regard it as acceptable that the prison sentence imposed by the*

Intermediate Court should be put into operation some 15 years after the commission of the offence unless the public interest affirmatively required a custodial sentence, even at this stage. This is not such a case, and their Lordships will set aside the prison sentence and substitute for it a fine of Rs 10,000.

40.The Board will accordingly allow the appeal and make a declaration that the appellant's rights under section 10(1) of the Constitution of Mauritius to a trial within a reasonable time have been infringed. A fine of Rs 10,000 will be substituted for the sentence of imprisonment."

21. On superficial analysis, that case was quite different to the present one because the delay was far longer. However, in that case:

    (a) The barrister appellant was convicted following a trial in the Magistrates Court in Mauritius on one count of swindling involving dishonoured cheques;

    (b) Lord Carswell noted at the outset that: "*It was conceded by counsel for the prosecution that the lapse of time, some twelve years, would without more give rise to a breach of the constitutional provision, but he submitted that the delay was largely the fault of the appellant and that he could not in the circumstances take advantage of it to claim a breach of his constitutional rights*" ([5]);

    (c) he further found: "*In their Lordships' opinion it is undeniable that the delay in completing the trial was caused to a considerable extent by the actions of the appellant. It is quite apparent from consideration of the history of the proceedings that he deliberately made numerous attempts to exploit and abuse the legal system, making inappropriate use of his legal knowledge and experience*…" ([35]);

    (d) he also noted: "*There has been no material before the Board which would suggest that the case was unusually complex for a prosecution of this type*" ([37]).

22. The following five features of the two cases which were similar and different on balance combined to support rather than undermine the case for suspending the sentence:

    (a) in *Boolell*, the delay between the date of offence and the date of sentence was 15 years, mostly caused by the accused's own delaying tactics. In this case the delay between the date of offence and sentence was approximate 6.5 years, none of which can fairly be attributed to the Appellant's fault;

(b) in *Boolell*, the delay between the date of offence and an information being laid in court (a period for which the State was solely responsible) was only 2 years compared with nearly 5 years in the present case;

(c) in *Boolell*, the charge was a straightforward one. In this case the offence was also a straightforward one;

(d) in *Boolell,* th*e* appellant was convicted of an offence of deliberate dishonesty. Here, the Appellant's offence was one of strict liability with no element of even carelessness required to prove the charge;

(e) in *Boolell* the appellant was convicted following a trial. In this case the Appellant pleaded guilty promptly after the conclusion of his constitutional application;

(f) in *Boolell*, the appellant seemingly served no part of his six months' long term of imprisonment pending appeal. In the present case, the Appellant's sentence of 9 months' imprisonment was activated on 3 June 2025. By the time our Order of 20 June 2025 suspending that sentence of imprisonment was perfected after 5pm that day, the Appellant had served nearly 3 weeks in custody, what is often referred to in the jargon of sentencing judges as a 'short sharp shock'.

23. For these reasons, I was satisfied that for the purposes of section 70K of the Criminal Code, it was "*appropriate… in the circumstances*" to fully suspend the sentence of 9 months imprisonment imposed on the Appellant in the Supreme Court on 3 June 2025 for contravening section 35 (b) of the Road Traffic Act on 19 October 2018.

24. I should add that this outcome justifies the Crown's general position in the Supreme Court that an immediate custodial sentence was not appropriate. It also vindicates the modified position that Ms Clarke adopted before this Court, accepting that the Learned Chief Justice's overarching position that the basic sentence this category of offence is term of imprisonment with a term of 12 months. Had argument before him focussed on the question of whether an admittedly appropriate sentence of imprisonment should be suspended or not, he might well have reached a similar conclusion to that reached by this Court.

The power to impose disqualification and disqualification commencement date

25. Mr Perinchief submitted that the Supreme Court had no power to make an order of disqualification otherwise than under the Traffic Offences (Penalties) Act 1976. The DPP in her oral reply advanced a concise and compelling response. The Learned Chief Justice did not impose a discretionary disqualification where a mandatory disqualification was

specified and outside the usual sentencing context. He merely imposed a lawful bail condition.

26. There are two reasons why Ms Clarke's submissions on this point could only properly be accepted. Firstly, the Chief Justice himself in his Sentencing Remarks stated:

> "*3… On 24 March 2025, as a condition of your bail, I suspended you from driving all vehicles pending sentence…*"

27. Secondly, although imposing this sort of bail condition may have been unusual, if not entirely novel, the jurisdiction to impose it clearly exists. Section 4 of the Bail Act 2005 provides in relation to a person granted bail:

> "*(4) He may be required to comply, before release on bail or later, with such requirements as appear to the court to be necessary to secure that—*
>
> *(a) he surrenders to custody;*
>
> *(b) he does not commit an offence while on bail;*
>
> *(c) he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person;*
>
> *(ca) he wears electronic monitoring equipment that will enable his movements and location to be monitored;*
>
> *(d) he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence;*
>
> *and in any Act, 'the normal powers to impose conditions of bail' means the powers to impose conditions under paragraph (a), (b), (c) or (ca).*" [Emphasis added]

28. Mr Perinchief's alternative argument was that the Appellant's disqualification period should have started from 25 March 2025 when he was suspended from driving rather than starting from the date of sentence over two months later. Ms Clarke indicated that as no reasons were given for not giving the Appellant credit for that earlier period of "disqualification", she would not object to the commencement date being adjusted to start from that earlier date.

29. Our decision that the disqualification period should commencement from 25 March 2025 was based an instinctive application by analogy of the general sentencing rule that time served before sentence should be taken into account. This conclusion was reached in the unusual context of:

(a) adjusting the primary sentence to take into account a breach of the Appellant's constitutional rights; and

(b) a primary finding that meant that the Appellant (a 66 year old who, traffic record apart, was of previous good character, had served nearly 3 weeks of a sentence of imprisonment which should have been fully suspended.

30. Applying a more rigorous legal analysis to the position which would exist in the standard case, the Learned Chief Justice was correct to view the disqualification as starting from the date when it was actually imposed (3 June 2025). Where an accused is suspended from driving as a condition of their bail, that is not (as Mr Perinchief rightly argued) a valid disqualification under the Traffic Offences Penalties Act 1976 at all. It was common ground that it was open to the Chief Justice to reduce the obligatory 5 year disqualification period to 4 years by way of affording a remedy for the breach of the Appellant's section 6 (1) rights. On this basis it was also possible (and in our judgment appropriate) to adjust the disqualification commencement date.

HARGUN JA

31. I agree.

SUBAIR WILLIAMS JA

32. I also agree.

33. I would only add that in *R v Bell* this Court, having adopted the words of Toulson LJ in *R v Carneiro*, approved the "good reason" test for the application of a suspended sentence under section 70K. As Toulson LJ put it [para15]:

> "*There is no absolute embargo on a judge suspending a sentence for an offence of this kind if there is proper ground to do so, nor is there any statutory requirement that there should be exceptional circumstances. However, once it is recognised that ordinarily the appropriate sentence for an offence of this kind does involve immediate custody, there has to be some good reason for the judge to act differently in a particular case for simple reasons of consistency*."

34. The question as to whether there is "good reason" to suspend a custodial term requires the Court to have regard to all circumstances of the case.