Criminal Appeal No. 2 & 3 of 2025

IN THE COURT OF APPEAL
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING
AS AN APPELLATE COURT
THE HON. JUSTICE JUAN WOLFFE
CASE NUMBER 22CR00102 and 22CR00101

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 21/11/2025

Before:

THE RT HON SIR CHRISTOPHER CLARKE, PRESIDENT

THE RT HON DAME ELIZABETH GLOSTER DBE, JUSTICE OF APPEAL

and

THE RT HON SIR GARY HICKINBOTTOM, JUSTICE OF APPEAL

Between:

SHUJA MUHAMMAD **Appellant**

AND

THE KING **Respondent**

Appearances:
Ms. Elizabeth Christopher of Christopher's, Counsel on behalf of the Appellant
Mr. Adley Duncan of Department of Public Prosecutions, Counsel for the Respondent

Hearing Date: 13th November 2025
Handing Down date: 21st November 2025

APPROVED JUDGMENT

CLARKE P

1. On **20 January 2023** Shuja Muhammed ("the appellant") was convicted in the Magistrates' Court in Case 22CR00102 of the offence of intruding on the privacy of a child in such a way as to be likely to alarm insult or offend and in fact alarming insulting or offending the said child contrary to sections 199 (2) and (2A) of the *Criminal Code*. The offence was said to have been committed on 25 February 2020. On **30 January 2023**, the appellant, through his then attorney, Bruce Swan, filed a notice of intention to appeal to the Supreme Court.

2. On **2 March 2023** the appellant was convicted in the Magistrates Court in Case 22CR00101 on two counts of sexual exploitation contrary to section 182A of the *Criminal Code.* The offences were said to have been committed between one August and 30 September 2021. **On 9 March 2013** Bruce Swan, on behalf of the appellant, filed a notice of intention to appeal to the Supreme Court.

3. The progress, if that is the right word, of the two appeals thereafter was set out by Justice Wolffe in his ruling of 20 January 2025 and I set it out again below, with some added detail derived from a perusal of the orders made.

4. On **10 August 2023** the matter was scheduled, but the appellant did not appear. He had been remanded in custody and had been since 7 March 2022. On **29 August 2023** he did appear and, as the judge put it, "*from that point the opportunity to seek alternative counsel was granted by the court*". It is apparent that the appellant had fallen out with his counsel in relation to the presentation of his case before the Magistrates Court and sought different representation. Thereafter he appeared in court on a couple of occasions in which he indicated that he was going to make a bail application. A bail application was heard in **November 2023** and was denied. After that the matter was mentioned on a couple of occasions.

5. On **20 March 2024** the appellant, who was unrepresented and in custody, was given leave by Justice Wolffe to perfect his grounds appeal on receipt of the Court Smart recordings of two trial dates. He was also ordered to file and serve submissions in respect of his appeals by Wednesday 15 May 2024; the Respondent was ordered to file and serve a Reply by Wednesday 22 May 2024; and the appeal in both matters was ordered to be heard on 29 May 2024.

6. On **15 May 2024** the appellant filed additional grounds of appeal.

7. On **29 May 2024** Ms Elizabeth Christopher *"appearing as a friend of the court appeared for the appellant*" (to use Wolffe J's words). Assistant Justice Kenlyn Swan Taylor ordered, *inter alia,* that the two cases should be adjourned to Thursday 30 May 2024 and that Ms Christopher should provide via e-mail the sections of the legislation and any authorities which she relied upon. This was not done. On this occasion Ms Christopher was in court on another matter and was attempting to assist. She had also met the appellant previously at the Westgate Correctional Facility in connection with this case. The recital to the order of 29 May 2024 begins with the words "*UPON HEARING Counsel for the Appellant, Miss Elizabeth Christopher as friend of the court…"*

8. On **30 May 2024** AJ Kenlyn Swan Taylor ordered the appellant to file and serve written submissions on or before 10 June 2024. This was not done. She also ordered that the case should be mentioned on 18 June 2024 to ensure compliance with her order and to set a hearing date. The appellant was released on bail.

9. On **18 June 2024** Wolffe J gave the appellant leave to file a subpoena on Mr Bruce Swan and ordered that the matter be mentioned on Friday 28 June 2024 to set a hearing date. This order, records that it was made- "*UPON HEARING Counsel for the Defendant, Ms Elizabeth Christopher…"* as does the order referred to in the next paragraph. The orders referred to paragraphs 10, 13, and 14 below record that they were made "*UPON HEARING Counsel for the Appellant, Ms Elizabeth Christopher…"*

10. On **28 June 2024** Wolffe J gave the appellant leave to amend his grounds of appeal and submissions if necessary. This was not done. The appeal was fixed for hearing on 2 October 2024.

11. On **30 September 2024** the prosecution wrote to the court, copying in Miss Christopher, stating that they had not received submissions from the appellant. No response came from Ms Christopher. The appeal was adjourned due to the Appellant's noncompliance with the orders of the court. The failure of Ms Christopher to respond was wholly unacceptable.

12. A legal aid certificate was granted to the appellant on **24 October 2024** at a time when Ms Christopher was engaged in a long jury trial. The grant of this certificate was communicated to her by email on **6 November 2024.** Ms Christopher said that it was not until then that she represented him. But it is plain that the Court had understood that she was acting on his behalf on and after 18 June 2024 and was fixing dates for the hearing of the appeals.

13. On **1 November 2024** Wolffe J, upon hearing Ms Christopher and Counsel for the Crown, ordered the appellant to file and serve submissions within 21 days and that the appeal should be heard on 18 December 2024. By that date the appellants had not perfected any grounds of appeal and no submissions had been filed.

14. On **18 December 2024** Ms Christopher made an application for an adjournment which Wolffe J reluctantly granted. At that hearing he expressed how frustrating it was that an adjournment was being sought and that the appellant had not complied with the orders of the court. An order was made for submissions to be filed by 31 December 2024 and the appeal was set for hearing on 20 and 21 January 2025.

15. On **13 January 2025** the prosecution wrote to the court indicating, once again, that it had still not received the appellant's submissions. On the morning of **20 January 2025** Ms Simmons – Fox, who appeared for the prosecution, informed the court that she had still not received any submissions. Ms Christopher said that she had sent them the previous evening and she also stated that the grounds of appeal had been amended.

16. The sequence of events set out above is nothing short of lamentable. The Court had fixed four different dates for the hearing of the appeal namely 29 May, 2 October and 18 December 2024 and 20 January 2025. The appellant had not produced submissions for any of these hearings. Ms Christopher said that she had sent her submissions to the prosecution on the evening of 19 January 2025; but for some reason they do not seem to have arrived. They were re-sent in a drop box at 0952 at a time when the judge had retired to consider his ruling which he gave at about 10.10.

17. This state of affairs caused the judge to make the ruling appealed from in the following terms:

> "*It is conduct such as this which brings the justice system to a halt. Being mindful of the matter of Kenneth Williams it is imperative that the court controls its processes and ensures that the proper administration of justice is done and is carried out. This requires the court to take steps to deal with the continuous noncompliance of court orders. On previous occasions Miss Christopher has stated that the appellant should not be penalised for the noncompliance as it was not his fault. That excuse only goes so far. At some point it is imperative that a client ensures that the attorney is doing what they're supposed to do and as ordered and, if not, make a decision as to whether they wish for that attorney to continue to represent them. The appellant has seen on at least 4 occasions' instances of noncompliance, and on at least one occasion heard the court give harsh words because of the noncompliance. It was therefore on him to ensure that Miss Christopher, or any attorney, acted on his behalf expeditiously."*
>
> *1n the circumstances, and primarily due to the serious noncompliance of the appellant in respect of several orders made by the court, I hereby dismiss the appellant's appeals in respect of case numbers 4 and 10 of 2023."*

18. Wolffe J dismissed the two appeals and ordered that the matter should be remitted to the Magistrates Court for sentencing on 31st January 2025. The judge extended bail. That hearing has not in fact taken place because of the appeals to this court.

Ms Christopher's submissions

19. Ms Christopher for the appellant submits, firstly, that by virtue of section 13 A of the *Criminal Appeal Act 1952*, which deals with appeals from courts of summary jurisdiction to the Supreme Court, before the Registrar can set a date upon which an appeal will be heard the appeal has to be perfected. It is only perfected when, *inter alia*, the appellant has finalised his grounds of appeal (section 13 A (2) (b); and served them along with supporting submissions and authorities to the court and to the respondent (section 13 A (2) (c), The day upon which an appeal is heard should be at least 10 days from the time that the appeal is perfected (section 13 A (3). On that basis the appeal ought not to have been set down.

20. Insofar as Ms Christopher submitted that an appeal cannot be set down unless and until the appeal has been perfected, I do not agree. The logical consequence of such a submission would be that an appellant, or his counsel, could delay the setting of a date upon which an appeal from a court of summary jurisdiction to the Supreme Court could be heard indefinitely, by failing to finalise the grounds of appeal or to serve submissions or authorities. Whilst I accept that section 13A restricts the circumstances in which the Registrar may set down an appeal, I would not regard that section as precluding the fixing of a date for the hearing by a Justice of the Supreme Court as happened in the present case on four occasions, the last of which was 18 December 2024. It does not surprise me that reliance was not placed on this section at any of the hearings at which dates for the hearing of the appeals were fixed.

21. Secondly, Ms Christopher submits that the judge did not take into account or alternatively give due weight to a number of matters which form part of the overriding objective as stated at paragraph 1.1 of the *Criminal Procedure Rules 2013*. In particular she relies upon the fact that the overriding objective is that criminal cases should be dealt with justly [1.1. (1)] and that dealing with criminal cases justly includes, *inter alia*, acquitting the innocent and convicting the guilty [1.1. (2) (a)]; recognising the rights of a defendant particularly those under section 6

of the Bermuda Constitution [1.1. (2) (c)]; and dealing with the case in ways that take into account (i) the gravity of the offence alleged; (ii) the complexity of what is in issue and (iii) the severity of the consequences for the defendants and others affected [1.1.(2) (g)]. I will return to these considerations later in this judgment.

The submissions for the Crown

22. Mr Duncan for the Crown accepts that the learned judge plainly had the overriding objective at the forefront of his judicial mind in making the order to dismiss which he did and, in particular, that he heeded the judicial mandate to deal with cases efficiently and expeditiously. I agree. But Mr Duncan felt obliged to concede that a Supreme Court judge exercising appellate jurisdiction does not have the power summarily to dismiss an appeal in the present circumstances, namely when both the defendant and his attorney appear at the time fixed for the hearing of the appeal.

23. As to that, Mr Adley Duncan submits that whilst the Supreme Court exercising original jurisdiction possesses an inherent jurisdiction to regulate the court's process, a Supreme Court judge exercising appellate jurisdiction derives his power from the *Criminal Appeal Act 1952* which itself regulates the use of that power. The relevant sections of the Act are Sections 16, which prescribes the procedure and related powers for the hearing of appeals; Section 18 which prescribes the judges' powers upon hearing appeals; and section 24 which concerns the abandonment of appeals.

24. There is, he submits, no provision in those sections or elsewhere in the *Criminal Appeal Act 1952* which gives the Supreme Court power summarily to dismiss an appeal without hearing argument on it; nor does that power exist at common law.

25. That that is the position in England appears from the case of *Pod more v Director of Prosecutions* (1996) Lexis 5679. In that case an appeal to the Crown Court from the Magistrates Court was dismissed without hearing the evidence. The appellant was absent but his legal representative was present with instructions to contest the appeal. The court accepted, following a decision in *R v Croydon Crown Court ex parte Clair* [1986] 83 CR App Rep 202 that, if an appellant was represented, then, in the absence of any application to abandon the appeal, the court should proceed to rehear the evidence; and that the court had no power to dismiss the appeal without doing so. The Crown Court, faced with a situation where the appellant had not appeared in person but was appearing by counsel, had no right to treat the situation as if the appellant was not before the court at all. It was thus not permissible for the court to dismiss the appeal summarily without first hearing evidence and adjudicating.

26. A further decision in the same field is that of *Lawal and The Crown Court at Cambridge and the Director of Public Prosecutions* [2023] EWHC 466 Admin. In that case the Cambridge Crown Court sitting at Peterborough dismissed an appeal against conviction in the Magistrates Court in the absence of the claimant who did not appear there, without hearing evidence. The appeal had been dismissed when the appellant was about an hour away from the Crown Court to which he was on his way. A number of cases were considered, including *ex parte Clair*, in which it had been held that the court could not dismiss an appeal when the appellant was present or when he was represented without hearing the evidence, and where the refusal to hear the appeal in those circumstances was held to be wrong.

27. By contrast in that case the appellant was neither present nor represented. Accordingly, as the Administrative Court held, the Crown Court did have the power to strike his case from the list. But, as it also held, the decision to strike out his case from the list at 11:46, when he was about an hour away from the Court and on his way, rather than to further adjourn was unreasonable. Accordingly, the decision of the Crown Court was quashed, and the Crown Court was directed to hear the appellant's appeal.

28. I am satisfied that Sections 16, 18 and 24 do not give a Supreme Court judge jurisdiction to dismiss an appeal when the appellant or his attorney appears at the date fixed for the hearing without hearing whatever submissions they then seek to make. These are not, however, the only provisions potentially applicable.

The Criminal Procedure Rules

29. Rule 3.4 of the *Criminal Procedure Rules 2013* provides as follows:

> **"Court's case management powers**
>
> 3.4 (1) In fulfilling its duty under rule 3.2 the Court may give any direction and take any step actively to manage a case unless that direction or step would be inconsistent with any legislation, including these Rules, or applicable case law.
>
> (2) In particular, the Court may—
>
> (a) nominate a judge to manage the case;
> (b) give a direction on its own initiative or on application by a party;
> (c) ask or allow a party to propose a direction;
> (d) for the purpose of giving directions, receive applications and representations by letter, by telephone, video conference or by any other means of electronic communication, and conduct a hearing by such means;
> (e) give a direction—
> (i) at a hearing, in public or in private, or
> (ii) without a hearing;
> (f) fix, postpone, bring forward, extend, cancel or adjourn a hearing;
> (g) shorten or extend (even after it has expired) a time limit fixed by a direction;
> (h) require that issues in the case should be determined separately, and decide in what order they will be determined; and
> (i) Specify the consequences of failing to comply with a direction.
>
> (3) The Court may give a direction that will apply in the Magistrates' Court if the case is to continue there.
>
> (4) Any power to give a direction under this Part includes a power to vary or revoke that direction.
>
> (5) If a party **fails to comply with a rule or a direction**, the Court may—

(a) fix, postpone, bring forward, extend, cancel or adjourn a hearing;

(b) Impose such other sanction as may be appropriate.

In the course of the submissions to us we raised the question as to whether the judge had jurisdiction to dismiss the appeals in this case on the footing that that was an appropriate sanction. That question raises yet further questions,

30. Rule 2.1 of the *Criminal Procedure Rules 2013* provides as follows:

> **"When the Rules apply**
>
> 2.1. (1) In general, the Criminal Procedure Rules 2013 apply in all cases filed in—
>
> (a) the Supreme Court's original jurisdiction; and
>
> (b) the Magistrates' Court criminal jurisdiction in relation to an offence triable either way where summary trial has been elected."

31. That rule *prima facie* renders Rule 3.4. (5) (b) inapplicable in a case where the Supreme Court's appellate jurisdiction is involved. However, section 15 (1) of the *Criminal Appeal Act 1952* provides:

> **"Supplemental powers of Supreme Court**
>
> 15 (1) The Supreme Court of its own motion, or upon the application of the appellant or the respondent in an appeal, or upon the application of any person who under section 14 is made an additional party to an appeal, may, if it appears to the Court to be necessary or expedient in the interests of justice, exercise in connection with the hearing of the appeal any or all of the following powers, that is to say:
>
> (a) …;
> (b) …;
> (c) ….;
>
> and the Supreme Court may in addition **exercise, in relation to any proceedings taken before the Court in its appellate jurisdiction under this Act, any ancillary or supplemental powers which the Court finds it necessary or expedient to exercise in connection with any such proceedings, being powers which for the time being are exercisable by the Supreme Court in its original criminal jurisdiction**.

32. In my judgment, section 15 (1) of the *Criminal Appeal Act 1952* gives the Supreme Court, although acting in its appellate jurisdiction, power to impose such sanction as it thinks may be appropriate in circumstances in which it finds it necessary or expedient so to do. Although this section was not referred to by the judge, or by Counsel, it nevertheless gave the judge jurisdiction to make the order that he did if he was satisfied that that order was appropriate and that it was necessary or expedient to make it. The power of sanction arises when there is a failure to **comply** with a rule or a direction, as was the present case where submissions were ordered to be filed by 31 December 2024.

33. In those circumstances it is necessary to consider whether the judge's decision to dismiss the appeals is open to challenge. In my judgment it is.

34. There were, of course a number of relevant considerations.

35. The first, which was clearly in the forefront of the judge's mind. Was the need for cases to be dealt with expeditiously? No legal system should tolerate with equanimity prolonged delays in the resolution of appeals. Delay imposes great strain both on the appellant whose claim that he has been wrongly convicted has not been determined and on the victims of crime for whom there is no finality until any appeal has been finally determined. In his ruling the judge said that he was acutely aware, as I am sure he was, of the seriousness of this matter not only for the appellant but also for the victims in the case. Further, if hearings cannot take place on the appointed date and the hearing is adjourned, other litigants whose cases could have been heard on that date will have lost the opportunity for their case to be heard then.

36. The second is that the court cannot tolerate, and must do all it can to prevent, the sequence of events that occurred in this case where its orders were repeatedly disobeyed by counsel, and hearing dates had to be postponed on that account.

37. The third is that the effect of dismissing the appeal without any hearing as to what is said to be an error in the court below means that the rights of the appellant to have his appeal determined on the merits by a court of competent jurisdiction, will have been rendered nugatory; and the aspects of the overriding objective to which Ms Christopher refers will not have been fulfilled.

38. It is not apparent to me that he took sufficiently into account:

    (a) that the effect of dismissing the appeals was that the appellant would remain convicted of serious crimes of which, by his two appeals, he sought to show that he was innocent;

    (b) that the failure to comply with the orders of the court, whilst in one sense a failure of the appellant, since it was he who was ordered to comply with them, was, in essence, the responsibility of his advocate Ms Christopher who knew what orders were being made and repeatedly failed to ensure that those orders were complied with or that she was ready and able to present the case on the first three of the dates fixed for the hearing, or, on occasion, even to communicate with the prosecution or the Court;

    (c) that the ability of someone in the position of the appellant to procure compliance by his attorney with orders of the Court to provide submissions, to communicate with the court and to be in a position to advance the appeals at the date fixed by the Court is limited; Wolffe J observed that it was for the appellant "*to ensure that Miss Christopher, or any attorney, acted on his behalf expeditiously";* an appellant can, of course, terminate the engagement of his attorney; but he would then have to find another one (an exercise not without difficulty) and to ensure that the legal aid authorities would transfer the legal aid certificate to a new attorney; and

(d) that, whilst of course Counsel are deemed to be aware of procedural obligations imposed by statute and the Rules, none of the orders of the court expressly said that, in the event of non-compliance, the appeal would or could be dismissed.

39 In the light of the combination of circumstances to which I have referred in the previous paragraph I do not think that it was justifiable for the judge to have dismissed the two appeals. I would, therefore, allow the appeals and direct that they be referred back to the Supreme Court in order for it to give directions as to:

(a) the filing of responsive submissions by the Crown;

(b) any further interlocutory matters that need to be determined;

(c) the date for hearing of the two appeals.

I would, also, regard it as appropriate for the Court to order that if, without good and sufficient reason, counsel for the appellants is not in a position to advance the appeals at the date fixed for the hearing thereof, if the appellants fail to comply with any orders made under head (b) above, the Court will be likely to impose the sanction of dismissing the appeals.

40 Lastly, I must observe that Ms Christopher needs to alter her pattern of behaviour. I am well aware that in the latter half of 2024 she was very busy with other matters and that for a while she had influenza. But her practice of not complying with orders of the court, not communicating with the Crown or the Court about her difficulties, and making repeated applications for an adjournment at the last minute is simply unacceptable, particularly when it is one of the duties of counsel to assist the court, not to hinder it.

GLOSTER JA

41 I agree.

HICKINBOTTOM JA

42 I too agree both as to the analysis and the result of this appeal.

43 In particular, I agree that section 15(1) of the Criminal Appeal Act 1952, read with Rule 3.4(2)(i) and (5), enables the Supreme Court, in the exercise of its appellate function, (i) to give a case management direction with dismissal of the appeal being the specified consequence of non-compliance, and (ii) in any event, to dismiss an appeal if there is non-compliance with a rule or direction of the Court.

44 However, when exercising this jurisdiction, the Court must both take into account all relevant considerations notably, as the President has identified, that the effect of dismissal in these circumstances will mean that the appellant will lose the opportunity of having the merits of his appeal considered by the Court, and that non-compliance may not have been the personal fault of the appellant (as opposed to his or her Counsel); and ensure that the appellant is treated with procedural fairness. For the reasons given by the President, I do not consider that the Judge, in dismissing the appeal as he did in this case, satisfied those requirements.

45 Whilst there will clearly be cases in which it is appropriate to dismiss an appeal under these provisions, as an alternative to dismissing an appeal under these provisions, it is always of course open to a Judge, in an appropriate case, to refuse an adjournment and proceed to hear an appeal on the submissions and evidence before him; and, if that is insufficient to persuade him that the appeal should be allowed, to dismiss the appeal on its merits. In some cases, the Judge may consider that that is the preferable course.