



# In The Supreme Court of Bermuda

## CRIMINAL JURISDICTION

2020 No: 26

### BETWEEN:

THE QUEEN

And

MAKHAIL SALTUS & GIOVANNI SALTUS

## RULING ON SENTENCE

*Section 128 of the Criminal Code (Conspiring to Defeat Justice) - Section 37A of the Road Traffic Act 1947 (Causing GBH by Careless Driving) - Section 320 of the Criminal Code (Causing GBH by Wanton Driving)*

Sentencing Hearing Date: Monday 27 March 2023

Date of Ruling on Sentence: Wednesday 5 April 2023

Counsel for the Crown: Ms. Cindy Clarke, the Director of Public Prosecutions

Counsel for the First Defendant: Ms. Elizabeth Christopher, Christopher's

Counsel for the Second Defendant: Mr. Charles Richardson, Compass Law Chambers

RULING of Shade Subair Williams J

## **Introduction**

1. The Accused men appeared before this Court for sentence, upon their guilty pleas to various counts on Indictment No. 26 of 2020.
2. The First Defendant, Mr. Makhail Saltus, pleaded guilty to Counts 4, 5 and 6 for charges of conspiracy to defeat justice, contrary to section 128(1) of the Criminal Code, causing GBH by careless driving, contrary to section 37A of the Road Traffic Act 1947 (“RTA”) and causing bodily harm by wanton driving, contrary to section 320 of the Criminal Code.
3. The Second Defendant, Mr. Giovanni Saltus pleaded guilty to Count 4 only which is the charge concerning the offence of conspiracy to defeat justice.
4. The Crown did not proceed with Count 1 (causing GBH when driving under the influence of alcohol), Count 2 (causing GBH by dangerous driving) or Count 3 (refusal to comply with a demand for a sample of breath) which were all left on the file.

## **Summary of the Facts**

5. This offence occurred at approximately 11:15pm on Monday 29 June 2020 when the COVID-19 Emergency Power Regulations imposing a curfew on the general public were in force, the pandemic having first broken out some 3-4 months prior.
6. At that time, officers of the Royal Bermuda Regiment were manning a vehicle check-point in the same vicinity where the Defendant, Mr. Makhail Saltus (“M Saltus”), was driving easterly in a motor car on South Road, Paget. Mr. Giovanni Saltus (“G Saltus”) M Saltus overtook a motorcycle traveling in the same direction. In doing so he failed to stop at the check point and collided into Regimental Officer Mr. Ndayyah Williams.
7. As is stated in the Summary of Evidence:

*“The impact caused Williams to land on top of the hood of the car and come in contact with the front windshield. Williams was sent flying through the air and landed in the road on his stomach face down several feet away from the point of impact.”*

8. That was the collision which concerns Officer Williams.

9. M Saltus struck a second regiment officer, Officer Kirk Wilks Jr. who was also thrown several feet by the impact of M Saltus' car. A witness observed M Saltus reverse and drive around Officer Williams who laid on his stomach, motionless on the roadway.
10. Thereafter, as the Accused men were leaving the scene, the car hood popped open on three consecutive occasions. On each of those occasions M Saltus stopped the car and both Accused men exited the vehicle to close the hood. Eventually the motor cyclist who had been overtaken by the Accused caught up to their vehicle and shouted for them to stop as they had knocked down a soldier. The hood flung open a fourth time causing the vehicle to stop and the rider of the cycle parked his vehicle in front of the assailants to prevent them from moving. Thereafter the Accused men were apprehended when the Defendant G Saltus falsely stated; "I'm the driver. It's my fault. I take full responsibility."
11. The regiment soldiers escorted the Defendants back to the scene of the collision where they, the soldiers, engaged in discussion amongst themselves together with other soldiers. Shortly thereafter, the Accused men were seen to have walked off from the scene and into the trees causing the regiment officers to chase them for a second time to escort them back onto the scene.

## **Analysis:**

### *Maximum Penalties*

12. The offence of conspiracy to defeat justice, contrary to section 128 of the Criminal Code, carries a maximum penalty of 10 years imprisonment.
13. The penalty for the offence of causing GBH by careless driving, contrary to section 37A of the Road Traffic Act 1947 ("RTA") is prescribed by the Traffic Offences (Penalties) Act 1976 ("the 1976 Act"). For a first offender, that offence carries a maximum penalty of 4 years imprisonment and an obligatory disqualification period of 3 years and a discretionary disqualification period of 4 years. Section 4 sets out the approach the Court is required to employ in so far as it concerns obligatory and statutory disqualification periods:

### ***"Disqualification; obligatory and discretionary***

4 (1) *Where a person is convicted of a traffic offence in relation to which there appears in head 6 of Schedule 1—*

- (a) *the word "obligatory", the court shall order him to be disqualified for such period as is specified in that head as the period of obligatory disqualification in relation to that offence unless the court for special reasons thinks fit to order*

*him to be disqualified for a shorter period or not to order him to be disqualified;*

*(b) the word “discretionary”, the court may order him to be disqualified for such period as the court thinks fit, not exceeding the period specified in that head as the period of discretionary disqualification in relation to that offence;*

*(c) both the word “obligatory” and the word “discretionary”, the court shall, subject to paragraph (a), order him to be disqualified for the period of obligatory disqualification and may, subject to paragraph (b), order him to be disqualified for a further period, the aggregate of such periods not exceeding the period of discretionary disqualification.*

*(2) Where a person is convicted of a traffic offence, other than an impaired driving traffic offence and the court orders him to be disqualified, the court may order him to be disqualified for driving the class of motor vehicle in respect of the use of which the offence is committed or may order him to be disqualified for driving all motor vehicles, including auxiliary bicycles, and may, in addition to any other order under this section, order him to be disqualified until he has, since the date of the order, passed the test of competence to drive prescribed under the Motor Car Act 1951.*

*(2A) Where a person is convicted of an impaired driving traffic offence and the court orders him to be disqualified, the court shall order him to be disqualified for driving all motor vehicles, including auxiliary bicycles and may, in addition to any other order under this section, order him to be disqualified until he has, since the date of the order, passed the test of competence to drive prescribed under the Motor Car Act 1951.*

*(3) A disqualification ordered by the court under this section may be in addition to, or in lieu of, any other punishment imposed by the court in respect of the offence.*

*[Section 4 amended by 1993:30 effective 29 June 1993; amended by 1997:28 effective 16 January 1998]”*

14. So, pursuant to section 4(1)(a), it is open to the Court to impose a disqualification period which falls short of the obligatory 3 year period only if there are “*special reasons*” for which the Court thinks fit to do so. It is also the case that this Court is empowered under section 4(1)(c) with a discretion to impose a period longer than the obligatory 3 year period in this case, so long as that longer period does not exceed the maximum discretionary period of 4 years disqualification.

15. The offences to which the Accused, M Saltus, pleaded guilty do not involve impaired driving traffic offences. Accordingly, the effect of section 4(2) is such that this Court may, in imposing a disqualification period, order that the disqualification applies only to the use of motor cars since that was the class of motor vehicle used for the offences committed. That would be an exercise of discretion since it is also within this Court's power to disqualify M Saltus from driving all motor vehicles.
16. For the final offence with which this Court is concerned, namely causing bodily harm by wanton driving, contrary to section 320 of the Criminal Code, the maximum penalty is four years on indictment.

*Part IV (Sections 53-55) of the Criminal Code and Victim Impact*

17. I have had careful regard to Part IV of the Criminal Code where the purpose and principles of sentencing is outlined. I accept the DPP's submission that the primary objectives of sentencing in a case of this nature is to publicly denounce the criminal acts and to impose a sentence that will deter others who may be inclined to commit similar type offences. That is, of course, to be weighed and properly balanced with the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
18. In assessing the seriousness of the offence, this Court is duty bound to heed all of the circumstances of the offence, including any physical or emotional harm done to a victim.
19. In this case, the impact on the two regiment officers was considerable, particularly in respect of Officer Williams who described the 29 June 2020 as "*the day his life changed*". His injuries have been severe. Fair to say, as he put it, he continues to suffer from head to toe, having sustained, a fractured skull and a fracture to the left medial orbital wall of his eye, a diaphragmatic hernia and a broken coccyx (the triangular bone located at the base of the spinal column). That is not an exhaustive list of his injuries. Officer Williams' bilateral knee injuries have caused him to endure a double knee replacement and a subsequent surgery to remove some of the artificial components inserted in his knee cavity. He has since which had to reluctantly accept the reality of a life-long and painful presence of the remaining implants, on the more recent advice of his orthopaedic surgeon. This has significantly prolonged his recovery period and need for physiotherapy.
20. The effect of all of these injuries has clearly been nothing short of devastating to Officer Williams who is no longer able to visit his young daughter who resides overseas given the level of family support he requires for travel. I also take note of the fact that Mr. Williams may likely face further surgeries in the future to correct the ongoing damage to other parts of his body. It is also noted that Mr. Williams' employment, regiment career and participation in sport abruptly ended when M Saltus recklessly struck him on 29 June 2020.

## Sentence for M Saltus

### *Whether to Impose a Custodial Sentence and the Appropriate Range of a Custodial Sentence*

21. As a matter of statutory obligation, I considered all lawful sanctions other than imprisonment as the Court is required to do under section 55 of the Criminal Code. However, no other sanction can properly replace the need for a custodial sentence in this case.
22. I was invited by Counsel to consider various previous cases in Bermuda where sentences were imposed by Courts of concurrent jurisdiction. Two of the previous cases were of particular assistance to this Court.
23. The Court of Appeal's decision in *R v Selwyn Berkeley* Criminal Appeal No. 8 of 1999 was a case of causing the death of one person by dangerous driving and ABH to two others resulting from the same act of dangerous driving. These charges, to which the Respondent pleaded guilty, were brought under provisions which have since which been repealed. For the two lesser offences of causing ABH, Mr. Berkeley's sentenced was increased from 6 months imprisonment to one year of imprisonment on each of the two counts, running concurrently.
24. In the case of *R v Ricardo Olivera* [2005] Bda L.R. 17, per Kawaley J (as he then was), the Defendant pleaded guilty in the Supreme Court to an offence of causing injury by dangerous driving contrary to section 35(2) of the RTA. In that case the Accused was found to have been twice over the legal alcohol limit and the dangerous driving was regarded to have constituted a "*temporary a lack of judgment as opposed to a deliberate course of unlawful conduct*" [5]. Kawaley J imposed a sentence of 3 months imprisonment which he suspended for 3 years combined with a 12 month probation sentence and disqualification period of 18 months in respect of all classes of vehicles.
25. So, before I consider any mitigation available to M Saltus, I find that the range of sentence which is appropriate on the facts of this case, having regard to the degree of responsibility of M Saltus and the gravity of the criminal conduct as a whole is 18 months imprisonment. This range takes account of the fact that the injury caused to the victims occurred during a time prior to the COVID 19 vaccination being made available to the general public. So, the effect of being severely injured and hospitalized was particularly serious during that period.

### *The Social Inquiry Report*

26. A Social Inquiry Report for M Saltus only was ordered. In that report of 10 October 2022, Ms. Mia Bean of the Department of Court Services reported that M Saltus' score for the risk assessment of re-offending and the need for rehabilitation was "very low". She added that while he was a suitable candidate for a community-based sentence, he does not present as being in need of the services of the Department.



### *Mitigation*

27. I now turn to consider the available mitigating factors. In sentencing M Saltus, I am bound by law to consider the fact of his guilty plea and his expressions of remorse for which I credit him the full portion of the ordinary 30% discount. Counsel for both sides also agree that M Saltus is also eligible for an additional discount under the temporary sentencing discount policy I issued on Monday 25 April 2022 under Court Circular No.6 of 2022. That temporary discount entitles offenders to a discount which may go up to an additional 30%. In this case, I will credit M Saltus for the full additional 30%.
28. The Accused also had a previous clean record for which he was entitled to a further credit.
29. Those discounts bring M Saltus sentence of imprisonment down from a starting point of 18 months to 6 months imprisonment.

### *Whether to Suspend a Sentence of Imprisonment*

30. Ms Christopher, on behalf of M Saltus, robustly argued that any period of imprisonment should be given in the form of a suspended sentence. I do not consider it necessary to restate the principles of law as it concerns suspended sentences, This Court undertook that exercise in *Mandaya Thomas v R* Appeal No. 21 of 2019 (January 2020). Suffice to say, this Court recognized that the reasoning in *Miller v Crockwell* [2012] Bda LR 56, per Kawaley CJ was not approved by the Court of Appeal in *R v Garth Bell* [2016] Bda LR 104 where Baker P stated:

*“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. M Saltus entered his guilty pleas before this Court on 1 August 2022. His original sentence date was fixed for 3 November 2022. That hearing date was relisted under the direction of this Court and the subsequent hearing dates were relisted at the mutually agreed requests of Counsel. One of those grounds was motivated by the need for further discussions between Counsel to avoid the need for a Newton Hearing to be held. So by the time these sentence proceedings took place, some eight months transpired between the pleas and the hearing.
32. This also means that the Defendant is now being sentenced for an offence which he committed nearly three years ago. During that interim period, during which the Accused transitioned from a 26 year old to a nearly 30 year old man, he also became a first-time father of a young baby

born less than one month prior on 21 March 2023. Also during that interim period, he has not committed any further offences or engaged in any offensive breaches of bail which would have been brought to this Court's attention. Instead he has steadily maintained gainful employment under the supervision of Mr. Michael Desilva of Island Construction Services who described him in the SIR as "great guy" and "model employee". M Saltus also secured the express support and endorsement of character from the Vice President of Hamilton Parish Workmen's Club ("HPWC"), Ms. Nandi Outerbridge, JP who described him in a written letter as a valued member of the HPWC and the wider Hamilton Parish community.

33. These factors constituted a good reason for suspending the entire custodial portion of the sentence in my judgment for a period of 2 years.

*Combining the Custodial Sentence with other Non-Custodial Penalties*

34. I also think it fit to combine the custodial sentence with other non-custodial penalties. I align myself with the reasoning of Kawaley J as he put it in *R v Ricardo Olivera* "*It seems to me that it is also important to mark the gravity of the offence and the impact on the victim to ensure that Mr. Olivera does not walk away from Court today and simply put this matter behind him and sense that he has been, in any way, "let off" ...*"

35. The catastrophic effect on the victims in this case call for M Saltus to properly atone for his shockingly temerarious conduct. This offence let to inevitable outrage from the Bermuda community, so I think it fitting that M Saltus be made to engage in a strong dose of community service.

36. I therefore direct that M Saltus shall also be sentenced to 1 year of probation under section 70A and 70B of the Criminal Code. Pursuant to section 70A he shall:

- (a) not commit another offence during the period of the order;
- (b) appear before the court when required to do so by the court; notify the probation officer in writing in advance of any intended change of address and promptly
- (c) notify the probation officer of any change of employment or occupation;
- (d) report to a probation officer at the place and within the times stated in the order and thereafter when required by the probation officer and in the manner directed by the probation officer; and
- (e) not leave Bermuda without the written permission of a probation officer.



37. During that 1 year period M Saltus shall perform no less than 100 hours of community service pursuant to section 70B of the Criminal Code.
38. I considered the imposition of a fine in this case but concluded that such a penalty would not be as effective or appropriate as the community service order that I now impose.
39. Further, M Saltus shall undergo a disqualification period of 3 years from motor cars only, given the nature of his employment and his need to operate heavy machinery in order to maintain his employment at Island Construction Services Limited.

### **Sentence for G Saltus**

40. No sentencing submissions were made on behalf of G Saltus and no issue was taken against the Crown's recommendation for a conditional discharge for an 18 month period.
41. I accept that the offensive act by G Saltus was likely a momentary lapse of judgment in so far as the conspiracy to defeat justice is concerned. However, on the facts before this Court G Saltus partook in the act of walking away from the regiment officers after he was apprehended. That is part of the circumstances of his offence.
42. For that reason, I find that G Saltus should also serve a period of community service as a condition of a discharge pursuant to section 69 of the Criminal Code. Under that section, a conditional discharge shall be prescribed in a probation order under section 70.
43. Accordingly I direction G Saltus to serve 15 hours of community service under section 70B as a condition of his conditional discharge of 6 months. As a matter of law he too shall be bound by the requirements of section 70A.

### **Conclusion**

44. Having had regard to all of the circumstances of the commission of the offence and the character and circumstances of the Accused, I direct that the Accused M Saltus be sentenced to a term of 6 months imprisonment to be suspended for a 2 year period on Count 5. This is to be served in combination with 100 hours of community service pursuant to section 70A and 70B of the Criminal Code in respect of Counts 5 and 6. M Saltus shall also serve a disqualification period of 3 years from motor cars only on Count 5.

45. On Count 4, G Saltus is sentenced to serve 15 hours of community service under section 70B as a condition of his conditional discharge of 6 months pursuant to section 69 of the Criminal Code.

Dated this 5<sup>th</sup> day of April 2023



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**THE HON. MRS JUSTICE SHABE SUBAIR WILLIAMS**  
**PUISNE JUDGE**