



In The Supreme Court of Bermuda
APPELLATE JURISDICTION
Case No. 15 of 2023

BETWEEN: Dwight Hatherley

v

The King

JUDGMENT

*Appeal against conviction in the Magistrates Court
– Implementation of Covid regulations – pre-trial issues*

Before: The Hon. Justice Kenlyn Swan, Acting Puisne Judge

Appearances: Mr. Dwight Hatherley in Person
Mr. Alan Richards for the Respondent

Date of Hearing: 29th April 2024

Date of Judgment: 14th June 2024

Introduction

1. This is an appeal against Magistrate Khamisi Tokunbo’s finding of guilt of the Appellant on Information 22CR00204 relating to six (6) charges which can be classified as Covid offences namely:
 - i. On the 1st day of February 2022, failed to comply with paragraph 5(2)(a) of the Quarantine (COVID-19) (No.3) Order 2020, in that you, a person ordinarily resident in Bermuda, returned to Bermuda without having

- ii. completed the Travel Authorization Form set out on the Ministry of Health website.

Contrary to paragraph 27(1)(a) of the Quarantine (COVID-19)(No.3) Order 2020 and section 11 of the Quarantine Act 2017.

- iii. On the 1st day of February 2022, failed to comply with the requirement to pay the Travel Authorization fee required under paragraph 7(2)(b) of the Quarantine (COVID-19)(No.3) Order 2020.

Contrary to paragraph 7(3) and 27(1)(aa) of the Quarantine (COVID-19)(No.3) Order 2020 and section 11 of the Quarantine Act 2017.

- iv. On the 1st February 2022, without reasonable excuse, contravened paragraph 9(1) of the Quarantine (COVID-19)(No.3) Order 2020, in that you refused to be tested for COVID-19 as required by that provision.

Contrary to paragraph 27(1)(b) of the Quarantine (COVID-19)(No.3) Order 2020 and section 11 of the Quarantine Act 2017.

- v. Between the 1st day of February 2022 and the 25th day of February 2022, refused or without reasonable excuse omitted to comply with a requirement to quarantine under the Quarantine (COVID-19)(No.3) Order 2020.

Contrary to paragraph 27(1)(ab) of the Quarantine (COVID-19)(No.3) Order 2020 and section 11 of the Quarantine Act 2017.

- vi. On the 11th day of February 2022, without reasonable excuse, contravened paragraph 16(2)(a) of the Quarantine (COVID-19)(No.3) Order 2020, in that you did not comply with public health supervision requirements, namely a requirement to be tested for COVID-19

Contrary to paragraph 27(1)(b) of the Quarantine (COVID-19)(No.3) Order 2020 and section 11 of the Quarantine Act 2017.

vii. On the 25th day of February 2022, without reasonable excuse, contravened paragraph 16(2)(a) of the Quarantine (COVID-19)(No.3) Order 2020, in that you did not comply with public health supervision requirements, namely a requirement to be tested for COVID-19.

Contrary to paragraph 27(1)(b) of the Quarantine (COVID-19)(No.3) Order 2020 and section 11 of the Quarantine Act 2017

2. Having heard from the Appellant in person and Counsel for the Respondent on oral submissions and having reviewed the written submissions of the Respondent, I dismissed the appeal, reserved judgment which I now provide with my reasons.

The Evidence

3. A significant portion of the evidence in this case was not disputed by the Appellant.
4. On the 1st day of February 2022, the Appellant arrived back in Bermuda at L.F Wade International airport via airline. The Crown called oral evidence from Sharifa Crockwell who was working for the Department Health doing Covid relief at the Travel Authorization (“TA”) desk which was located at the airport. Her responsibilities were to update TA information of persons arriving and/or to create TA forms for persons who did not have one and/or deal with persons who did not want to complete a TA form.
5. At around 2:30 p.m., on that day, a passenger arrived who did not consent to a TA form, this was the Appellant.
6. She says that she was the second point of contact and asked to see his TA form; his response was that he did not have one. He was informed that she could assist him in completing one and that the cost would be \$75.00. He indicated that he does not consent to the process. She further informed him that he could be summoned or arrested, she then called for police assistance and contacted a Mr. Thomas informing him of what had transpired.

7. She then escorted the Appellant out of the area, made a report of the incident and informed the Appellant of the potential consequences. When asked if he was vaccinated and whether he was consenting to be tested, the Appellant's response was no to both. She said that she informed him that he had to quarantine for fourteen (14) days, the Appellant indicated that he doesn't consent to that either. They then moved onto the testing station, however, the Appellant refused to take the test.
8. The Crown's next witness was PC Paul Watson who was on duty on the said day and stationed at the arrival hall. His duties were to assist in the screening of passengers for TA purposes. He says that he received information about a passenger refusing directions and was told the name of that person. He says that the person was the Appellant; who he informed could be liable to arrest. He says that due to uncertainty and on instruction he (the Appellant) was told that he would be dealt with by way of summons. The Appellant walked from the testing desk and out of the airport refusing to be tested.
9. This evidence was followed by that of Kendia Gill, who was employed by the Department of Health at the relevant time; and whose duties were to monitor the testing of travelers inbound and outbound. Those who did not test would be called to reschedule at either their home or an office. On 3rd February 2022, she called the Appellant obtaining his contact information from the quest system data base. This call was two-fold (i) because there was no record of him testing and (ii) to follow up on his fourteen (14) day test.
10. During that telephone call, the Appellant questioned why he was being called and indicated that he did not consent to testing or to being called. He labelled the interaction as harassment. When Ms. Gill informed the Appellant that she would be calling again to follow up, the Appellant responded by saying 'I don't consent, I already told you that, you can get the Premier or whoever' he then ended the call.
11. On 17th February 2022, she again called as there were no results of a test on his 'close out' file. Mr. Troy Brimmer who was a compliance officer was also on this call. The Appellant verified himself as the person on the call. She explained the reason for the call; the

Appellant interrupted her by stating that you are calling again, that he did not consent, he had said what he had to say, she could take it as high as she wanted to the Minister and then ended the call.

12. The Court then heard from Troy Brimmer who indicated that he was a compliance officer with the Department of Health who on 17th February 2022 was present for telephone call with Ms. Gill to the Appellant who cut her off saying that he does not recognize the Minister and that the Premier can F (expletive) off. He then ended the call. As a result of this interaction, he then contacted the Bermuda Regiment who was assisting in enforcement of Covid laws, the purpose of this assistance was to check the Appellant's residence for compliance with quarantine. The regiment officer was Sergeant David Dumont.
13. Sergeant David Dumont then gave evidence that he was a member of the Bermuda Regiment in the capacity of Covid Marshall in February 2022. His responsibilities were to do wellness, quarantine and breach checks at the request of the Ministry of Health officials. He received a request from Mr. Brimmer to check an address at #1 Dudley Lane in Paget; the address of the Appellant.
14. That he went to the address with Lance Corporal Smith and Nelson around 14:00 hours. He called the telephone number that he had for the Appellant; however, there was no answer. He and the other officers went to the unit, occupied by the Appellant, which was pointed out by a neighbor. They knocked for approximately 5 – 10 minutes with no answer; assuming that the Appellant was either not at home, not answering and wilfully obstructing by refusing to answer, they left at approximately 14:15 hours. Following this, multiple checks were subsequently made at the Appellant's address.
15. Corporal Nelson who was also a member of the Regiment gave evidence that the along with Corporal Dill on a separate occasion went to the Appellant's address for a wellness check. On this occasion, Corporal Dill went to the door; whereas he remained in the vehicle. A person came to the door of the residence and that he video recorded what subsequently occurred.

16. Corporal Smith also gave evidence which supported that of Officers Smith and Dumont.
17. The next witness for the Crown was Kevin Christopher who was employed with the Market Place, who stated that following a meeting with officers from the Department of Health, he accessed and viewed the company's CCTV system in relation to the Appellant. He said that he has known the Appellant for at least thirty (30) years.
18. That upon reviewing the footage on 1st February 2022 at approximately 6:00 p.m., he saw a person he knew to be the Appellant enter one of the Market Place stores. He downloaded video and still images which showed the Appellant entering the store, walking down the aisles, ultimately making purchase of items and then leaving the store.
19. Additional information was tendered by way of statements being read into evidence which was specific to the authenticity and continuity of the CCTV footage.
20. A further statement was read in of the person responsible for the administration of travelers in relation to the travel authorization documentation through the computer. A search in relation to the Appellant revealed that during the relevant period, a travel authorization was not applied for or issued to him. That was the Case for the Crown.
21. It is to be noted that the Appellant, who was unrepresented during trial, opted to cross-examine three of the Crown's witnesses. The cross-examination of these witnesses did not give rise to a variance of the facts.
22. The Defendant elected to give evidence and indicated that he did arrive in Bermuda on 1st February 2022 and that he had taken a PCR test prior to arrival which was negative.
23. On arrival, he was asked whether he had a TA and his response was no. He says that his first contact person was Ms. Crockwell; and that she along with her colleagues informed him that he was required to complete a TA form. He responded to them that this is not the civil law, it was not mandated and that it was not an indictable offence.

24. Following this, Ms. Crockwell informed him that he may be arrested if he failed to complete the form; resulting in him extending his arms; saying if he committed a criminal offence then he should be arrested now.
25. He was not arrested, and six (6) months went by before police officers arrived at his home in July 2022. When these officers offered a summons, he did not accept it. It (the summons) was left on the ground and that he never saw it. Two weeks later officers came back to his home and arrested him. He says that he was remanded and ultimately charged. The remand was due to the fact that he refused to wear a mask in court.
26. The remand warrant document contained a charge of senior citizen elder abuse which was incorrect. He was remanded for ten (10) days before again appearing in court where he quoted Magna Carter.
27. Under cross-examination, the Appellant accepted that he arrived on Island on 1st February 2022 and that he did not complete a TA form as he had no intention to do so because he does not consent. He indicated that he did not quarantine upon his arrival and that it is obvious that he did not remain home for fourteen (14) days.
28. He says that no one was made to quarantine as a result of his being in contact with them. Further, he accepted that he did not go to any testing appointments; again, because he did not consent. He is of the view that this did not apply to him. He informed that he could fine up to a million dollars for infringing upon his rights.

The Grounds of Appeal

29. Counts 1 & 2 Nowhere in the Quarantine Act 2017 and or the Quarantine (Covid 10) Order 2020 is there any mention of persons arriving back into Bermuda. In reference to persons being liable to pay a fee of \$75.00 or \$40.00 to enter their place of residence via a travel authorization portal. This is a violation of one rights, inherent and inalienable right to life, travel, privacy and private property above all written documentation.

30. Counts 1 & 2 The Auditor General, who released a report about the travel authorization portal. The findings included multiple violations of the law and he [sic] code of practice. Heather Thomas, Auditor General; police to engage with AG on Covid report. Commissioner confirms officers will contact Heather Thomas to see if further action should be taken. Ms. Thomas conducted a review of how the contract for a Travel Authorization portal was granted during the Covid-19 pandemic. Procurement in the awarding development, implication and operation of the electronic travel authorization portal and the processing and collection of revenues generated by them of this facility.
31. Counts 3, 5 & 6 PCR Test – abuse of process, cohesion against one consent. Nowhere in the act is the word crime or criminal offence ouster [sic] at an early stage that will be requested by the defense for clarification as to items on the schedule which may be vaguely or incorrectly described. It is not unusual for description such as “box of documents” on a schedule are of [sic] no assistance to anyone either the prosecution in satisfying their duties to examine the material in their possession or the defense in trying to identify material that may be of assistance to them. Material which may be relevant to an investigation which officers believe will not for [sic] any part of the prosecution case, must be listed. Whether the failure to disclose was due to inadvertence or inefficiency re deliberate conduct. Whether the non-disclosure could damage the prosecution care or advance that of the defense. The extent of any prejudice to the accused in the conduct of the defense case as a result of the non-disclosure.
32. Count 4 Quarantine – inalienable rights, rights which are not capable of being surrendered or transferred without the consent of the one possessing such rights.
33. Wrongful incarceration – judge remanded me in maximum security for refusing to wear a mask in court between July and August 2022. Nowhere in the quarantine Act 2017 or the Quarantine (Covid 19) Order 2020 is there any such act or order. Further to that Judge also uses false charge to remove me, abuse of senior, ignorance, malfeasance, misconduct, fraud, misrepresentation of the law. Prosecutors mentioned old conviction during the

trial. Prosecutors, ethics, reasonable probability that the outcome of the trial would have been different. Disciplinary sanction against prosecutor miscarriage of justice, tainted or fraudulent, wrongly convicted or wrongful convictions. The prosecutions misconduct misuse of evidence by prosecutor, prejudicial impact, inaccurate and misleading criminal procedure.

34. Judge gives his own personal opinion of me out of court with the law. That the learned trial judge erred in law by concluding that the defendant had no knowledge of he [sic] law, conduct of the trial judge, improper comment on facts or defense case. Comment on the accused character commonly occurring errors in the course of a trial. Approach of court of appeal to commonly occurring errors in summing up. Malfeasance – evil doing, ill conduct, the commission of some act which is positively unlawful.
35. The issues to be determined on this appeal are whether or not the Appellant breached Covid regulations and whether there was any impropriety in the trial process. At this point, it is helpful to look at the spirit and intent of the legislation. The starting place would be the preamble of the Quarantine Act and the rationale of the Order. The preamble of the 2017 Act reads:

WHEREAS it is expedient for the Government of Bermuda to protect public health by taking comprehensive measures to prevent the introduction and spread of communicable diseases; and it is essential for the Government to work in cooperation with the international community to prevent the spread of communicable diseases.

The reasons for the Order indicate:

The Minister responsible for health, in exercise of the power conferred by section 9 of the Quarantine Act 2017, being of the opinion that a public health emergency exists and after having consulted with the Chief Medical Officer, makes the following Order.

The Relevant Law

Quarantine (Covid-19)(No.3) Order 2020.

36. Section 11 of the Quarantine Act 2017 being the relevant section which creates offences provides:

11. Any traveler or conveyance operator who, contrary to this Act, or the regulations or orders made under this Act—

(a) refuses to answer or knowingly gives an untrue answer to any inquiry, or who intentionally withholds any information reasonably required of him by a Health officer or other person acting under such authority, or who knowingly furnishes to any such officer or other person any information which is false;

(b) refuses or wilfully omits to do any act which he is required to do, or who refuses or wilfully omits to carry out any lawful order, instruction or condition made, given or imposed by a Health officer or other person acting under such authority;

37. A 'traveler' is defined by section 2 under the Interpretation section of the QA as follows:

Interpretation

2 In this Act—

“traveler” means any person who— has arrived in Bermuda on a conveyance but has not landed for the purposes of section 24 of the Bermuda Immigration and Protection Act 1956 (passengers in transit); or is about to board or has boarded a conveyance for his departure from Bermuda;

38. The Quarantine (Covid-19)(No. 3) Order 2020 defines the 'Covid-19 test' as well as 'quarantine' as:

Interpretation

2 *In this Order— “COVID-19 PCR test” means a polymerase chain reaction test for the qualitative detection of nucleic acid from SARS-CoV-2;*

“quarantine” means— staying in a place of quarantine as a Health Officer may determine, which may be— the house or accommodation in Bermuda at which the person to be quarantined resides; or a place designated by a Health Officer as a place of quarantine; complying during the period of quarantine with such health measures as a Health Officer may specify as necessary to limit or prevent the spread of COVID-19; and complying with the requirements of paragraph 11

Grounds of Appeal

Implementation of Covid Legislation

39. The crux of the Appellant’s argument is that he relies on Magna Carta which he considers to be a higher form of guidance in law to protect lay people from those who have more knowledge of the law.
40. The fact that the production and implementation of Covid related legislation came into force in 2017, three (3) years in advance of the actual pandemic, the Appellant’s position is that there must have been knowledge by the government officials, politicians and/or the ‘powers-that-be’ of the existence of this virus prior to the pandemic which causes him to question the ‘realness’ of Covid.
41. Due to the lack of his consent to these laws, primarily because he did not know anything about the Covid legislation being implemented on him as a free and living man coupled with the forcefulness of this law upon him, he considers a trespass.
42. He did not enter into a contract of any form to be subjected to this treatment and as a result, has been treated unfairly from the outset; essentially, due to this lack of consent.

Mistakes and typographical errors

43. A further complaint from the Appellant is that prior to the trial, having not complied with an order of the court to wear a mask during the proceedings, he was remanded as a result. He learned that the remand warrant which committed him to prison contained a charge of abuse of a senior, and that in his view, this mistake or typographical error was intentional and amounts to a defamation of his character.

Wrongful incarceration

44. That he was wrongfully incarcerated during this period, when he was remanded prior to trial for refusing to wear a mask as required by the Court and this amounted to an infringement or breach of his rights.

Trial Magistrate's Comments

45. One of the Appellant's grounds of appeal criticizes the magistrate for accusing him (the Appellant) of not knowing the law, which is the Learned Magistrate's opinion and should not form part of the process, it should not be allowed by the judge; and the use of the word(s) making a precedent or setting a precedent by the Learned Magistrate was an abuse of power.

46. The function of this court is to hear appeals by way of argument on the record; to carry out a review of the decision of the Magistrate and on doing so it is required to allow the appeal if it appears to the Court (a) that upon a weighing up of all the evidence, the conviction ought not to be supported; (b) that it should be set aside on the ground of a wrong decision in law; or (c) that on any ground there was a miscarriage of justice. Otherwise the Court is obliged to dismiss the appeal.

47. In performing the function of the Court, it must act in exercising its supervisory jurisdiction over the summary court and its starting point will be the reasons given by the Magistrate.

48. Magistrate Tokunbo in his judgment clearly had under his consideration the strength of the Crown's case at paragraphs 6 - 8 the learned magistrate's judgment indicates that he found the prosecution witnesses to be credible witnesses; and that the few prosecution witnesses that the defendant chose to question in cross-examination none of their evidence in chief was materially challenged or discredited at all.
49. He continued, that the defendant's testimony in his defence did not challenge or contradict any of the prosecution's evidence at all or in any material respect of the alleged offences. His evidence provided no reasonable excuse, explanation or defence against any of the offences charged. Indeed the defendant admitted returning as a traveler without completing a Travel Authorization Form, that he did not complete a travel authorization form and that he had no intention to do so, he did not quarantine and that he was not at home quarantining for fourteen (14) days and that he did not attend any Covid 19 test appointments as they did not apply to him.

Analysis

50. The focal point of the Covid-19 and Quarantine legislation is settled on its efforts to prevent and avert the spread of a pandemic which caused deaths worldwide. This was attempted through the implementation of measures and restrictions on all individuals.
51. At the time of the implementation of these Orders, special measures and restrictions, it was to reduce the spread of the effect of a deadly virus. At times there being requirements to self-isolate (stay at home) to assist in the reduction of spread of this highly contagious and deadly virus.
52. Judicial notice is taken of the effect that the global spread of the Covid virus had; wherein deaths were recorded worldwide. People were falling gravely ill, who were well aware of the prospect of death. Internationally there were lockdowns, emergency curfews and consequently un-employment. The threat of this virus was real which culminated in legislative amendments.

53. There is one ground of appeal alone which touches and concerns the trial process proper and that is the allegation that the learned judge gave his own personal opinion of the Appellant concluding that he had no knowledge of the law. Although this ground was not advanced at the appeal hearing, there is nothing that would indicate that the Learned Magistrate misdirected himself.
54. It is noted that during both the evidence and cross-examination of the Defendant (as he was at the time) that he admitted many, if not all elements of the offences for which he was charged.
55. Much of the Appellant's complaints are connected to the absence of his consent to the testing regime and implementation of fee which were properly enacted laws, violations of his rights as an individual to have implemented these laws without his consent or knowledge and wrongful incarceration having been remanded into custody prior to trial.
56. There are various pieces of legislation containing multiple provisions which expressly apply to persons arriving back in Bermuda. It is not accepted that due to his lack of consent, that the requirement to pay a fee is a violation of ones right, right to life, travel, privacy and private property.
57. The reliance of any report of the Auditor General would require a demonstration of its relevance and admissibility which is not accepted, not produced and therefore should be of no consideration.
58. It is accepted by the Respondent that there were typographical errors contained on the remand warrant; however, I find that these errors did not affect the trial. I find there was

no error in law and that the verdict is not unsupported by the evidence which was presented at trial.

59. It is not and cannot be that the law is only applicable if and when an individual grants his consent to that legislation or the implementation of it.
60. In relation to the submission that had the Appellant been arrested upon his arrival, the charges which flowed subsequently would not have been committed. I find that there is no merit in this argument. The police have the power to effect an arrest; however, this is not an absolute requirement. An officer would along with that power of arrest, possess a discretion in these circumstances. The fact that he chose to exercise this discretion does not confirm that the remaining offences could not and would not have been committed. I find that that was to be determined by the Appellant's actions alone.
61. The Appellant's failure to give rise to any issue which would attack or challenge the quality of the evidence against him and his grounds of appeal which does not raise any procedural impropriety prevents the finding of any reason to disturb the Learned Magistrate's determination.
62. In my assessment of the evidence, having regard to all the circumstances of this case and having examined the various provisions, I am of the view that this is an example of the need and desire for the protection of the public; which Parliament intended to deter and penalize in passing the relevant legislation and that the evidence supported the charges.
63. For these reasons, I find there was no irregularity or impropriety in Magistrate Tokunbo's determination following the trial process and that the remaining grounds of appeal are lacking in merit.

Conclusion

64. The convictions are safe and the appeal shall be dismissed.

Dated the 14th day of June, 2024



The Hon. Mrs. Kenlyn Swan
Acting Puisne Judge of the Supreme Court of Bermuda

