Neutral Citation Number: [2025] CA (Bda) 16 Crim

Criminal Appeal No. 13, 14, and 15 of 2024

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS APPELLATE CRIMINAL JURISDICTION
BEFORE THE HON. ACTING JUSTICE MARK DIEL
CASE NUMBER 2021: Nos. 16 and 19

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 11/06/2025

Before:

JUSTICE OF APPEAL THE HON IAN KAWALEY
JUSTICE OF APPEAL THE HON NARINDER HARGUN
and
ACTING JUSTICE OF APPEAL THE HON ANDREW MARTIN

- -

BETWEEN:

CRIMINAL APPEAL No. 13 & 14 of 2024

AMIR MIZRACHY

Appellant

- and -

THE KING

Respondent

BETWEEN:

CRIMINAL APPEAL No. 15 of 2024

THE KING

Appellant

- and -

AMIR MIZRACHY

Respondent

Appearances:
Mr Amir Mizrachy the Appellant/Respondent in person
Ms. Cindy Clarke, Director of Public Prosecutions, for the Respondent/Appellant

Hearing date(s): 11 June 2025
Date of Judgment: 27 June 2025

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Appeal by defendant against the Supreme Court's dismissal of his appeals against his convictions for careless driving and criminal damage in the Magistrates Court-Crown appeal against the Supreme Court decision allowing defendant's appeal against his convictions for using offensive words in a public place and racial harassment-Road Traffic Act 1947, section 37-Criminal Code, sections 200A, 448 (I)- Summary Offences Act, sections 1, 11(e)

JUDGMENT

KAWALEY JA:

Introductory

1. This Judgment deals with three separate appeals which were heard consecutively on the same day:

    (a) Mr Mizrachy's appeal against the Supreme Court decision dated 6 December 2023 (Assistant Justice Mark Diel-the "Judge") dismissing the appeal his conviction in the Magistrates' Court (Worshipful Tyrone Chin-the "Magistrate") on 11 March 2021 of careless driving on 20 February 2020, contrary to section 37 of the Road Traffic Act 1947;

    (b) Mr Mizrachy's appeal against the Supreme Court decision on the same date by the same Judge dismissing the appeal against his conviction in the Magistrates' Court (Worshipful Khamisi Tokunbo-the "Magistrate") on 26 February 2021of wilful damage contrary to section 400 (I) of the Criminal Code on 19 March 2019; and

    (c) the Crown's appeal against the Supreme Court decision on the same date by the same Judge setting aside Mr Mizrachy's conviction in the Magistrates' Court

on 26 February 2021 before the same Magistrate for offences (1) using offensive words in a public place contrary to section 11 (e) of the Summary Offences Act 1926 and (2) racial harassment contrary to section 200A of the Criminal Code, both offences also occurring on 19 March 2019.

2. The Court is grateful for Ms Clarke's typically focussed submissions and for Mr Mizrachy's decision to present compact oral submissions, relying primarily on more lengthy written submissions. The appeals were listed for two days but were completed within just under one full day.

Criminal Appeal No. 13 of 2023

The Magistrates' Court proceedings

3. The Information alleged that Mr Mizrachy drove carelessly on "*Middle Road/South Road*" at 8.30 am on Thursday 20 February 2020. The Complainant Ms Crystal Saggar's evidence set out in salient part in the Magistrate's Judgment, may be summarised as follows. She was driving behind Mr Mizrachy's car which was driving in an unsafe manner. She decided to overtake when it was safe to do so. She stopped at the traffic light. Mr Mizrachy's car then attempted to overtake her, and when cutting back into the lane in front of her collided with her right front bumper. Under cross-examination she denied that her vehicle struck Mr Mizrachy's. An independent witness, Mr Rui Moniz, testified that he saw one vehicle overtaking another one slowly and the collision occurring after the overtaken vehicle overtook the Complainant's vehicle. A PC Mark confirmed his understanding that on a yellow line overtaking was only permitted if it was safe to do so. Photographs were taken by DC Clyke.

4. Mr Mizrachy gave evidence and described himself as a lawyer. His version of how the accident occurred was that his autistic son was with him in the car and became agitated when the Complainant's car overtook them. He decided to overtake to show his son the other car was "*no longer dangerous*". However, as he was overtaking "*she sped up …as if we were at war or something…*" He turned into the left lane at an angle because he was unable to complete the overtaking manoeuvre. "*In response the complainant drove forward hitting my car in the rear passenger side where my son was sitting. This agitated my son even more.*" The Complainant got out of her car in an excited state, accusing him of colliding with her. Mr Mizrachy asked her why she overtook on a yellow line. He then left the scene and took his son to preschool. Under cross-examination, he explained he was not a member of the Bermuda Bar but stated that he had: "*A thousand appearances in front of Magistrates in Israel and New York*" (he told this Court that he was mainly a personal injuries lawyer). It was then put to him by Crown Counsel (Ms King) that with this legal experience he ought to have put his case to the Prosecution witnesses.

5. It was common ground in the hearing before us that Mr Mizrachy's request to make closing submissions was declined, seemingly for the stated reason that he was not a member of the Bar. However the DPP indicated that her understanding of the general Magistrates' Court practice is that for traffic cases for the majority of offences where convictions are not entered in a defendant's criminal record, closing speeches are not given by either Prosecution or Defence.

6. The Magistrate recorded his findings of fact in bullet point form and then under the heading "*REASONING*" explained those findings. Most significantly he held:

> "*(2) Ms Saggar safely executed the overtaking maneuver [sic] in order to alleviate her than traffic fear with the car being driven by the defendant.*
>
> *(3)…but his maneuver [sic] was not done in manner deemed reasonable or safe regarding the circumstances*…"

7. The Magistrate expressly rejected Mr Mizrachy's explanation as to why he decided to overtake, and considered the following motive more plausible:

> "*(5) The Court viewed that Mr Mizrachy intended to overtake Ms Saggers' car as she had overtaken him as his form of retribution*…"

8. As Mr Mizrachy was charged with an offence of careless driving, the central question to be answered was whether the Prosecution had proved that he drove in a careless manner. The precise cause of the collision and the extent to which the Complainant contributed to it was immaterial-the position would different in a civil case where the focus would be on causation of loss and contributory negligence might fall to be assessed. The finding that Mr Mizrachy's admitted overtaking manoeuvre was in and of itself dangerous was the most pivotal factual finding that the Magistrate recorded. On the face of it, this conclusion and the resultant conviction were unassailable.

The Supreme Court appeal

9. Mr Mizrachi's Notice of Appeal ran to 13 pages, and rather than just setting out bare grounds of appeal it included supporting arguments as well. Although the Notice of Appeal implied an appeal was made against both conviction and sentence, no affirmative attack on the sentence (a fine of $1000 with 10 demerit points) was made. The grounds of appeal were the following:

(a) "*Lying witnesses*": every single Crown witness lied;

(b) "*A significant error of law*": the Court ought to have found that overtaking on a yellow line was unlawful, having regard to the Bermuda Traffic Code Handbook, and the Complainant accordingly should have been charged with careless driving; and

(c) "*Selective enforcement and selective prosecution and Abuse of Process*": the Magistrates' Court should have found that the Complainant by overtaking broke the law and that he had been prosecuted in a discriminatory way.

10. The Judge delivered a concise Judgment which recorded the following most significant findings:

> "*5. The Appellant did file a lengthy Notice of Appeal and a Statement of Defence. Part of the 'defence' is that the Complainant herself 'broke the law' by overtaking on a yellow line. To deal with the contention first, the Complainant is not on trial here and secondly, even assuming the Appellant is correct, this does not give him carte blanche to drive in the manner he did…*
>
> *7. The Appellant attempted to rely heavily on the Road Traffic Handbook believing erroneously that this was a binding legislation. Which it is not. It is merely a useful tool in proper driving techniques.*
>
> *8. The Appellant in his actions served only to make a bad situation worse and despite accusing every prosecution witness of 'lying' cannot overcome the hurdle of Mr Moniz' testimony which corroborates that of the Complainant. The facts speak for themselves in that the Appellant was clearly driving in a careless, indeed dangerous manner….*" [Emphasis added]

11. Each ground of appeal was clearly considered and dismissed, even though the Judge could at first blush be criticised for undue brevity in a case involving a litigant in person who was clearly unfamiliar with Bermuda law.

The appeal before this Court

12. The following grounds of appeal were relied upon:

(a) "*Lying witnesses*": the Judge failed to even refer to inconsistencies in the evidence of the Crown witnesses and ought to have found their evidence was unreliable;

(b) "*Serious error of law*": both the Magistrate and the Judge failed to explain why Mr Mizrachy found guilty of careless driving by reference to the elements of the offence. Both courts failed to explain why the Bermuda Traffic Code Handbook was not legally binding. Had they found that it was, this would mean that the Complainant ought to have been prosecuted;

(c) "*Selective enforcement and selective prosecution (and Abuse of Process)*": the similarly situated Complainant was not prosecuted despite clear evidence that she broke the law by overtaking on a yellow line;

(d) "*miscarriage of justice and unfair trial*": the refusal of an opportunity to make a closing speech deprived Mr Mizrachy of a fair trial. The Supreme Court investigated what had occurred in this regard but ignored the issue in its Judgment.

13. The "*lying witnesses*" ground can be dealt with shortly. The assessment of the credibility of witnesses is a matter for judges of fact. An appellate court can only set aside a trial court's factual findings if they are not supported by the evidence. As I put to Mr Mizrachy in the course of argument, there is a distinction between a witness who gives mistaken evidence and a witness who deliberately gives false evidence. It is unusual to find a witness has deliberately given false evidence to a court. The submissions which were advanced in support of this ground were inappropriate to be advanced to an appellate court. There was no basis for the Judge, sitting in an appellate capacity, to revisit the findings the Magistrate made based on his views as to the credibility of the Prosecution witnesses. There is no basis for this Court to revisit those findings either.

14. It is perhaps understandable that Mr Mizrachy was keen to advance these evidential complaints on appeal as he was not afforded an opportunity to do so in the Magistrates' Court. However, these complaints were all ultimately academic even if the allegedly "false" aspects of the Prosecution evidence was excluded from consideration. Mr Mizrachy admitted undertaking an overtaking manoeuvre on a yellow line in circumstances which were quite blatantly unsafe, even if his case that the Complainant caused the collision were to have been accepted.

15. Ms Clarke justifiably dealt with this ground briefly and rightly submitted that it was "*without merit*". This ground of appeal fails.

16. The serious error of law ground can also be dealt with shortly. Mr Mizrachy submitted most pertinently:

"*50. This ground of appeal centers on a significant error of law committed by both the Hon. Magistrates Court and the Hon. Supreme Court. The case was based on the Crown's accusation of careless driving under Section 37 of the Road Traffic Act 1947, which reads:*

> *"A person who drives a motor vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or public place, commits an offence."*

51. The Hon. Magistrates Court, in its judgment, failed to explain why it concluded that the Appellant was driving 'without due care and attention, or without reasonable consideration for other persons using the road or public place.' The Hon. Supreme Court based this conclusion on the testimonies of the complainant and the eye witness, Mr. Rui Muniz. However, as demonstrated in the First Ground of Appeal, these testimonies were unreliable and based on lies, and therefore cannot serve as a valid evidentiary basis for conviction.

52. Additionally, the Appellant argued throughout the proceedings that the law expressly forbids overtaking on a solid yellow line, and produced the legal source for this argument: the Bermuda Traffic Code Handbook, issued by the Transport Control Department in the Ministry of Transport. Despite this, the Crown, the investigating police officer (PS 2233 Cornelius Marc), and the Hon. Magistrates Court ignored the law.
53. Moreover, in the Supreme Court judgment, Assistant Justice Diel remarked that:

> *'The Appellant attempted to rely heavily on the Road Traffic Handbook believing erroneously that this was a binding legislation. Which it is not. It is merely a useful tool in proper driving techniques'.*

54. This statement by Assistant Justice Diel is in complete contrast to Chief Justice Mussenden's remarks in Stephanie Ann Soule v. Reuben Waldron et al. [2022] SC (Bda) 49 Civ (30 June 2022) where he unequivocally held that: 'Schedule 1 of the 1947 Act contains the Traffic Code which applies to all road users including drivers, motorcyclists and auxiliary cyclists .'

…

> *63. In this case, the complainant overtook on a solid yellow line without meeting any of the exceptions outlined in the Traffic Code Handbook, meaning her actions were in direct violation of traffic regulations. Even if the police chose not to prosecute, this does not change the fact that the complainant's maneuver was unlawful and contributed to the dangerous situation on the road. The handbook's provisions serve as an*

> *authoritative guideline for road safety, and non-compliance can be relied upon to demonstrate that the complainant's driving was improper and unsafe, reinforcing that her overtaking was a clear violation of established traffic rules.*"

17. This ground of appeal has two limbs to it:

    (a) the complaint that the Magistrate did not explain why he found a breach of section 37 had been proved and the Judge based his findings on evidence which was not credible; and

    (b) the complaint that the Traffic Code was legally binding and if taken into account should have resulted in a finding that because the Complainant overtook, she broke the law and (even if not charged) contributed to the accident.

18. Did the Magistrate err in law by not explaining why he found the charge proved? Section 37 of the Road Traffic Act 1947 creates the offence of driving "*without due care and attention, or without reasonable consideration for other persons using the road or public place*" [emphasis added]. The offence may be committed in in two different ways. The first version of the offence is commonly referred to as 'careless driving' and the second version of the offence is commonly referred to as 'inconsiderate driving'. The two versions of the offence are sometimes involved in a single incident and evidence of inconsiderate driving might well support a careless driving charge and *vice versa*. The Information in this case charged the offence of "*careless driving*", so the Magistrate only strictly had to consider whether he was satisfied that the Defendant drove "*without due care and attention*". The Magistrate however critically found:

    (a) the Complainant's evidence that before she overtook Mr Mizrachy's vehicle in a safe manner he was driving in an unsafe manner was supported by the independent witness Mr Moniz;

    (b) Mr Mizrachy's overtaking manoeuvre was not done in a "*reasonable or safe manner in the circumstances*"; and

    (c) "*The Court finds the Defendant…guilty beyond reasonable doubt under Section 37 above of careless driving without reasonable consideration for other…persons*[s] *using the road on 20 February 2021.*"

19. These findings, in the context of the Magistrate's Judgment as a whole, could not explain more clearly why the charge of careless driving was found to have been proved. Driving

in an unsafe manner is the very essence of driving without due care and attention. Driving with due care and attention is another way of saying driving safely. The evidence also supported a finding of inconsiderate driving, so although that form of the section 37 offence was not charged and technically ought not to have been mentioned, it could have been charged and found to have been proved. No material error of law occurred as the Judge's factual findings clearly focussed on the careless driving allegation and in any event are only reinforced by the passing reference to inconsiderate driving as well.

20. The criticism of the Judge for finding the charge proved on the basis of unreliable evidence is also unmeritorious for the reasons set out in relation to the "*lies*" complaint above. It was for the Magistrate to assess the witnesses' credibility, and neither the Supreme Court nor this Court can properly challenge those findings on appeal. That is not to suggest that exceptional cases may not exist where a trial judge is shown to have had no proper basis for believing a witness whose evidence was palpably unreliable (e.g. a witness shown to have been abroad when they claimed to have witnessed an offence in Bermuda). It is merely important to note that the present case comes nowhere near such an exceptional case.

21. I am bound to reject the second limb of this ground of appeal as well. This essentially contends that the Magistrate ought to have found (1) that the Traffic Code was legally binding and (2) that the fact that the Complainant overtook and broke the law was relevant to the causation of the accident. The main answer to this complaint is that the Complainant herself was not charged and the circumstances were that it could not credibly be asserted that both (a) Mr Mizrachy drove with due and attention at all material times, and (b) the Complainant's driving was the sole cause of the collision which admittedly occurred. As already noted above, the Complainant's contribution to the accident might well be relevant in a civil case where Mr Mizrachy would be entitled to advance a defence of contributory negligence. It was in all the circumstances of the present traffic prosecution wholly irrelevant to the evaluation of whether or not he was guilty of the offence with which he was charged.

22. As for the status of the Traffic Code, the following section in the 1947 Act is dispositive:

> "***Traffic Code***
>
> *48. (1) The Traffic Code containing directions for the guidance of persons using roads and set forth in the Schedule shall be printed, and sold to the public.*
>
> *(2) A failure on the part of any person to observe any provision of the Traffic Code shall not of itself render that person liable to criminal proceedings of any kind (unless such failure is specifically constituted an offence by any provision of this Act) but any failure to observe the provisions of the Traffic Code may in any proceedings, whether civil or criminal and including proceedings for an offence*

> *under this Act, be relied on by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings.*" [Emphasis added]

23. Mr Mizrachy correctly argued that the Code (paragraph 38) prohibits overtaking on a yellow line except when compelled to do so. His explanation for why he was compelled to overtake was rejected and so the Code if applied was only relevant in confirming his guilt. Paragraph (38) goes on to state that if you must cross over the yellow line, "*you must exercise the greatest care*". The Magistrate could only find he failed to "*exercise the greatest care*". So the Code was relevant to his guilt, because his "*liability*…[was] *in question*" in the proceedings. The Code was wholly irrelevant in relation to the Complainant's overtaking, because her liability was simply not in question in the trial of a careless driving charge against Mr Mizrachy. So how the Magistrate or Judge dealt with the Code (or failed to deal with the Code) cannot possibly provide any basis for setting aside the conviction which was entered in the Magistrates' Court and affirmed by the Supreme Court.

24. As for the legal status of the Code, section 48 of the Road Traffic Act clearly only provides that the Code, set out in the Schedule to the Act, can "*be relied on…as tending to establish or negative any liability".* That is entirely different from providing that the Code has binding legal effect either as part of the Act or as delegated legislation. As Ms Clarke rightly submitted:

> "*14…the Statute clearly states that The Traffic Code is for guidance purposes only.*"

25. The Judge held as follows:

> "*7. The Appellant attempted to rely heavily on the Road Traffic Handbook believing erroneously that this was a binding legislation. Which it is not. It is merely a useful tool in proper driving techniques.*"

26. This finding was fundamentally sound even though the last sentence could easily be construed as suggesting that the Code has no legal significance at all. It is more than a "*useful tool*" in driving "*techniques*". It is a useful tool for establishing criminal or civil liability in cases where the manner of driving is legally relevant. But the status of the Code as an issue in this case is completely overshadowed by the fact that the purpose for which Mr Mizrachy sought to rely upon the Code (the liability of the Complainant) was legally irrelevant.

27. The abuse of process ground can be dealt with more shortly. No relevant authority was cited in support of the proposition that it is an abuse of process to charge only one driver involved in an accident with careless driving in circumstances where, on one view of the facts, the other driver could also potentially have been charged. The Prosecution case was pivotally based on the evidence of an independent witness who testified that the Complainant overtook (on a yellow line) in a careful very slow manner while Mr Mizrachy overtook in a way which made it difficult for him to re-enter his own lane and which resulted in a collision. The decision to charge only Mr Mizrachy, who left the scene after the accident without leaving his contact details, is wholly unsurprising as is the decision not to charge the driver who made the initial complaint.

28. In most careless driving cases involving a collision between two vehicles, the Police presumably form a judgment as to which driver was primarily to blame. Their decision to prosecute one driver would only be an abuse of process, and grounds for applying to stay the prosecution before the trial commences, if there was when the charge was laid no evidence at all capable of supporting a conviction. This is because the courts processes are only to be used to advance potentially valid proceedings, not proceedings which can be shown from the outset are hopeless. If the Police get it wrong and no application to stay a hopeless prosecution is made prior to the trial, the remedy for the defendant is to demonstrate to the trial court at the end of the Prosecution case that there is no case to answer. In cases of this nature, what happens at the investigative and charging stage is irrelevant to the determination of whether an accused person is guilty as charged.

29. Here no arguable selective prosecution, selective enforcement or abuse of process occurred. The driver that leaves the scene of an accident implies their guilt by their conduct and cannot be surprised if they (and not the driver who stayed and made a complaint to the Police) are charged. There was in any event a clear evidential basis for Mr Mizrachy being charged and convicted, on the one hand, and the Complainant on the other hand not being charged at all. This ground also fails.

30. The miscarriage of justice complaint based on the failure of the Magistrate to accede to Mr Mizrachy's request to make a closing speech is even on superficial analysis a far more arguable ground of appeal. Depriving a defendant of the right to address the Court at the end of a contested trial, albeit of relatively low level traffic offence, simply seems unfair in an intuitive level. Mr Mizrachy relied on both local Supreme Court authority and persuasive US academic authority which supported the broad proposition that the right to make a closing speech cannot be refused, even if it may of course be waived.

31. In *Andrea Butterfield-v- Lyndon Raynor (Police Sergeant)* [2013] SC (Bda) 25 App, I held:

"*22…there was clearly substantive unfairness in the sense that Ms Pearman was denied the opportunity to make any closing speech at all thus losing the opportunity to seek to sway the Learned Magistrate altogether on at least two issues which it is not clear that he considered, not to mention the issue of credibility generally. This deprived the Appellant of an important element of her statutory and common law right to make "full defence and answer" to the charge against her with no apparent justification save perhaps administrative convenience or, alternatively, a misunderstanding between counsel and the Bench.*

23. The position might well have been different if the complaint was merely that closing submissions had been cut short. Moreover, it is clearly open to counsel to waive the right to make oral submissions to any court, either altogether or because it is felt that written submissions will suffice. Be that as it may, both the forensic importance of the right to make a closing speech and the Court's ability to regulate such speeches has been recognised beyond the British Commonwealth. As the New York State Supreme Court observed (in explaining why it found legislation purporting to give judges sitting without a jury the right to prevent closing speeches altogether to be unconstitutional) in the Herring case:

> *'14 The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.*
>
> *15 This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion…'*

24. Alternatively, however, there was also procedural unfairness to the extent that irrespective of the merits of the defence, justice was not seen to be done when the Appellant's counsel was (whether actually or constructively) refused the opportunity to make closing submissions. The loss of the right to address the Court at the end of the trial discloses circumstances, as this Court noted in Noel Edwin Broadley –v- John Eve (Police Sergeant), Supreme Court of Bermuda, Appellate Jurisdiction 1985: No. 40 (Collett J, unreported) 7, "such that the right minded

> *observer might very well conclude that the tribunal in question has abdicated fairness in the conduct of the proceedings before it".*
>
> *25. However, I did not consider that the level of apparent unfairness which occurred was so great (unlike the position in the Broadley case), as to make it inappropriate to order a retrial. The discretion to order a retrial where an irregularity which undermines the validity of a conviction occurs is very broad one under section 18 (5) of the Criminal Appeal Act 1952.*
>
> *26. Although the present Judgment has focused on the right of an accused to make a closing speech, it is hopefully self-evident that corresponding rights are enjoyed by the prosecution as well. In the absence of express legislative rules for the Magistrates' Court in this regard, the provisions of section 530 of the Criminal Code can probably be used as a useful guide for the practice which ought to be followed with respect to speeches in criminal cases tried in the Magistrates' Court in Bermuda.*"

32. Ms Clarke correctly submitted that there is no statutory right to make closing speeches in criminal cases in the Magistrates Court. However, more controversially, she submitted that whether or not closing submissions should be allowed was a discretionary matter for the Magistrate which this Court should only interfere with if the discretion was improperly exercised and a miscarriage of justice occurred. In oral argument she pointed out that even the right to make a defence formerly provided for in the Summary Jurisdiction Act had been repealed and not replaced in the Criminal Jurisdiction Procedure Act 2015.

33. The DPP argued the discretion had been properly exercised here because the practice in Traffic Court (dealing with cases where no criminal record would result from conviction, such as the present offence) was that neither Prosecution nor Defence had closing speeches, and all the relevant issues had been considered by the Magistrate in any event. In the course of argument, however, she did not strongly resist the proposition put to her from the Bench that a distinction should be drawn, even in Traffic cases, between a practice whereby counsel was not <u>invited</u> to address the Court and whether a request to address the Court could properly be refused.

34. It is inappropriate in this case where the issue was not argued to decide whether section 6 (1) of the Bermuda Constitution in guaranteeing fair hearing rights for persons "*charged with a criminal offence*" does or does not apply to traffic cases having regard to the fact that they are not criminal in the criminal record sense. A broad and purposive construction would suggest that section 6 (1) should apply. Applying the common law principles of natural justice and in particular the right to be heard (classically *audi alteram partem*), I find that:

(a) the apparently current Traffic Court practice of not inviting counsel and/or litigants in person to address the Court is appropriate, having regard to the fact that many traffic offence trials will involve generic issues where closing speeches are unlikely to assist the Court; however

(b) it will generally be contrary to the common law rules of natural justice to refuse a positive request by a party to address the Court at the end of a traffic trial (unless of course the Court does not need to hear from them because a decision will be made in their favour).

35. In *Butterfield*, I made reference to the role of closing speeches as part of the common law trial process:

> "*20. Professor Jeffrey Pinsler in 'Evidence, Advocacy and the Litigation Process', 2nd edition explains the role of advocacy and the closing speech in a common law system thus:*
>
> > '*In granting the parties considerable independence in the preparation and presentation of their cases, the adversarial process imposes considerable responsibility on the advocate. His role is fundamental to the process of adjudication for a party's chances of success very often depend on the quality of the legal representation which he receives…The objective of advocacy is to persuade the court to accept the position taken by the advocate on the facts and the law…The importance of the closing speech cannot be overestimated. Since most cases which go to trial are closely fought, the strength of the closing speech can often make the difference between winning and losing a case and may be very significant if the matter goes on appeal….The closing speech offers the advocate the opportunity of crystallising his theory of the case (that is, his view of what actually occurred), which should have been evident from his opening speech, the evidence-in-chief of his own witnesses and his cross examination of the opposing witnesses. This is achieved by scanning the whole case for the facts which support his theory and weaken the position of his opponent. These facts must be brought out of the background to make their significance clear.*"'

36. Admittedly those observations are made in relation to civil and criminal proceedings generally and are directed at advocates, but they apply with equal (if not greater) force to proceedings involving litigants in person. While the Magistrate properly considered all matters which were materially relevant to the careless driving charge, it is obvious that Mr Mizrachy wanted to advance points which the Magistrate could not possibly discern

without hearing from him. Most obviously, based on the grounds advanced to the Supreme Court and this Court, the ultimately unmeritorious lies, Traffic Code and abuse of process arguments. It is no answer to a fair hearing complaint to say that the points the denied party wished to raise were unmeritorious.

37. Accordingly, it is understandable that having regard to the practice of not inviting closing speeches in traffic cases and in the absence of any statutory mandate to afford the right to address the Court, the Magistrate refused Mr Mizrachy's request. However, in my judgment an error of law was made because there was no discernible valid justification for refusing him an opportunity to address the Court in closing. The justification given at the time, that Mr Mizrachy was not counsel, was not satisfactory and may well reflect the fact that the Magistrate was taken somewhat by surprise by an atypical closing speech request. The Judge also erred in failing to find that an error of law occurred. This ground of appeal (Ground 4) has merit and succeeds.

Disposition of appeal

38. It remains to consider how the appeal should be disposed of. The Court of Appeal Act provides:

> "*21. (1) Upon the hearing of an appeal under section 17(1)(a) or (b), the Court of Appeal shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Supreme Court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a mis-carriage of justice, and in any other case shall dismiss the appeal:*
>
> *Provided that the court may—*
>
> *(a) notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred; or*
>
> (b) *in an appropriate case and if the interests of justice so require, set aside the conviction and sentence of the appellant and remit the case to the Supreme Court to be re-tried; and in any such case, the Court may make such order as it thinks fit for the detention of the appellant in custody pending the re-trial or for his release on bail or otherwise*…." [Emphasis added]

39. In every criminal appeal where the appellant demonstrates that the decision or decisions complained of are potentially liable to be set aside on the grounds of legal error, this Court

must consider whether the error established is sufficiently serious to warrant allowing the appeal and setting aside the conviction. The only substantial prejudice Mr Mizrachy complained of in his oral reply was being prevented from advancing his version of the case on credibility. He also was denied the opportunity to contend that the Complainant's conduct caused the accident. It is also important to remember that being denied the right to be heard is in and of itself prejudicial to some extent, merits apart. A losing party may often accept the result if they "had their day in court" and feel they were fully and fairly heard.

40. Mr Mizrachy has been fully heard before the Supreme Court and this Court which mitigates the inherent prejudice of not be heard in closing. He put the key elements of his evidential case in cross-examination, because the Magistrate's careful Judgment ably grapples with the same evidential issues the trial Defendant has now raised by way of submission before two appellate courts. The Appellant has not advanced any legally viable defence to the charge of careless driving because the evidence against him was compelling. He admitted overtaking for a reason which had nothing to do with safety and created a situation in which an accident occurred. He left the scene of the accident before the Police arrived without leaving is personal details with the Complainant. His central and implausible thesis that she was solely or primarily to blame for the collision was considered and expressly rejected by the Magistrate. The conviction was unsurprisingly upheld by the Judge, albeit without adequately dealing with Ground 4 in explicit terms. In a short Ruling, he concluded: "*The facts speak for themselves in that the Appellant was clearly driving in a careless, indeed dangerous manner.*" I agree.

41. For these reasons I find that although Mr Mizrachy's complaint that the Magistrate erred in refusing his request to address the Court in closing is resolved in his favour, the appeal should nonetheless be dismissed under proviso (a) to section 21 of the Act, because "*no substantial miscarriage of justice has occurred*".

Criminal Appeal No 14 of 2023

The Magistrates' Court Proceedings

42. By an Information dated 19 September 2019, Mr Mizrachy was charged with committing the following offences on 19 March 2019:

(1) "*in a public place, namely St. Andrew's Church Car Park used offensive words towards Gremarie Armstrong*" (the "Complainant"), contrary to section 11 (e) of the Summary Offences Act 1926;

(2) orally communicated with the Complainant intending to cause her distress or alarm;

(3) wilfully and unlawfully damaged the Complainant's car causing loss in the amount of $1695, contrary to section 448 (I) of the Criminal Code Act 1907.

43. The Complainant's evidence may be summarised as follows. On the day in question, she drove her car to the Church car park and found a car which turned out to belong to Mr Mizrachy in her spot. She parked and had started walking to work when the driver of the car in her spot came out and asked if it was her car that was blocking his. She explained that the marked bays were paid parking spots and persons dropping off children could park on the side of the bays. Mr Mizrachy using abusive language asked her to move her car:

> "*The man replied 'I don't care about the f…ing sign. Move your f…ing car." I told man do not speak to me that way. He continued to curse at me and continued to say 'Just move your f…car.' The man's actions started to get increasingly hostile, at which point I started to get back in to my car. At that time I heard the man call me a 'f…ing black bitch.' I got back out of my car and told him do not speak to me that way, especially since I have been respectful in my approach and he was in the wrong. He got into his car and aggressively started beating his hands on the steering wheel. He continued to shout and curse. I told him his aggressive actions made me uncomfortable and that I was going across the road to Hamilton Police Station. I made a report at the front desk*."

44. The Complainant then told the Court that she returned to wait for the Police to arrive across the street from the car park in front of the Court Building. Mr Mizrachy was gesticulating and shouting in another language. Three Police officers arrived and, after speaking to Mr Mizrachy, escorted her across the street so she could move her car. At this point she noticed scratches on the right, left and rear of her car including a star on the rear. After reporting this to the Police, she moved her car and returned to Hamilton Police Station where she gave her statement. She also testified (before identifying Mr Mizrachy):

> "*There was a scratch on the driver's side panel previously that I knew was there. I was angry and didn't feel the situation called for the Defendant's actions. I was afraid at the level of aggression a stranger was showing to me, over a simple conversation. I was uncomfortable*."

45. Under cross-examination, the Complainant said she had told the truth in both her witness statement and in Court. She agreed she did not see the Defendant damage her car.

46. Dr Laura Robinson, a Forensic Psychologist with Court Services, was in her office at around 9.30 am on the day in question when she noticed a man by a silver grey car and a woman by a red SUV in the parking lot across the street apparently in a heated discussion. The woman left, walking in the direction of Victoria Street. The Magistrate then recorded the following evidence in his handwritten notes:

> "*After repeated attempts [to move his own car] I saw the male exit the car approach the SUV & with a closed hand. This time with a different motion at the back of the SUV. I got distracted by phone call and returned a few minutes later & on this occasion I was in the company of a colleague, Robert King, both looking out on car park. I saw male return back in silver grey car moving back & forth. I witnessed him exit vehicle again with a closed hand this time with a different motion at the back of the SUV - (illustrates scribble/writing). A short time later I looked out & the Police were speaking to the same man outside Apex Law Bldng.*"

47. Her colleague then went downstairs and spoke to the Police who contacted her later that day about giving a statement. Under cross-examination she testified that she saw a closed right hand which appeared to be holding something. She confirmed she heard nothing but could see clearly and was 37 years old with no eyesight problems. She confirmed in re-examination that the man she had been describing was Mr Mizrachy.

48. Mr Lawrence Michael Robert King, Senior Probation Officer, also gave evidence. He described standing next to the window with Dr Robinson on the day in question looking at the car park directly opposite his office. He saw the Defendant banging his hands on the steering wheel of his car and vainly trying to manoeuvre his car from its blocked position:

> "*He then exited vehicle with driver keys in his right hand. He walked to the rear of the burgundy vehicle and made stabbing motions and slashing motions towards the rear of the car. Illustrates. He then came around to the right rear quarter passenger side of vehicle and did slashing motions. Sometime after, I saw the driver of burgundy car speaking to the driver of silver car and some police officers who were present. I then exited this building and went across to the parking lot and informed the driver of burgundy car of what I had witnessed. I also identified the 3rd floor window from which I had witnessed it and Dr. Robinson who was still standing at the window.*"

49. Under cross-examination Mr King confirmed that he could not hear what was being said during the altercation, that he wears glasses and was wearing them at the time.

50. PC Clyke the Officer in Charge testified that he attended the scene on the day in question and spoke to both parties and saw scratches on the Complainant's car. Later that day he took statements from the Complainant and witnesses. On 20 April 2019 he asked Mr Mizrachy to attend Hamilton Police Station where he was arrested on suspicion of committing the offences of offensive words and wilful damage and interviewed under caution. He denied using any insulting words in English and damaging the Complainant's vehicle. He said his right hand was too weak to hold the car keys because of a chronic condition. He was officially charged with those offences by the Police on 17 July 2019. Under cross-examination PC Clyke stated that the Complainant did not tell him that her car was already scratched.

51. PC Kori Jackman, the first Prosecution witness, testified that he attended the scene on the day of the offence and took "*amateur pictures of the damage while PC Clyke was talking to the subject*".

52. Mr Mizrachy himself gave evidence. He testified that he had dropped off his son at the nursery at least 350 times and always parked in the bays. On the morning in question, he came out of the nursery and found his path was blocked by a red SUV. He asked her to move her car (which she was still sitting in) and she refused saying "*no way, I have had enough of you people*", screaming at him before leaving the car park. (This starkly different version of the verbal exchanges was seemingly neither put to the Complainant in cross-examination, contained in his closing written submissions or "Defense Statement" nor advanced when the Defendant was interviewed by the Police a few weeks after the relevant events). He denied insulting the Complainant or damaging her car and offered an apology to her if he their altercation had caused her any distress. Under cross-examination he:

(a) admitted using the words in the charge "*when God gave out brains*…";

(b) agreed that on the Complainant's version of what he was accused of saying, the words were offensive;

(c) admitted insulting the Complainant in Hebrew but denied saying "*move your f…ng car*", calling the Complainant a "*Black bitch*" or threatening to ram her car;

(d) agreed he was angry and banged his hands on his steering wheel but insisted he lacked the strength to use his right hand to cause the damage he was accused of causing.

53. Ms Emma Williams was called as a character witness. She testified that she knew Mr Mizrachy from working with his son at the Autism Centre. She described him as "*a loving caring father, upstanding citizen -just an all around good person*".

54. The Crown made no submissions. Mr Mizrachy was recorded by the Magistrate as advancing the following main points. He indicated the question was whether the Court had reasonable doubt. He noted that the offensive words charge was only supported by the Complainant's evidence. Because the Complainant had admitted there was a scratch on her car before the incident, any inconsistent statements should be carefully scrutinised. The eyewitnesses' evidence was said to be inconsistent. He had tendered an expert medical report which the Crown had not challenged-at which point the Magistrate indicated that it was not properly admitted into evidence.

55. The Magistrate convicted Mr Mizrachy of all three charges. He found the Prosecution witnesses to be credible, did not feel they had been really challenged and held (as regards the third charge that:

> "*Having reviewed all the evidence, I am satisfied so that I feel sure that the allegations against Mr. Mizrachy have been made out. I do not believe Mr. Mizrachy was a credible witness, that he was entirely honest about what took place…I do not accept that Mr. Mizrachy does not have the strength to cause that type of damage with his right hand. He was seen by the independent witnesses, one which said they could see he had keys in his hand, the other could see he was using his hand with something in it to cause a slashing or circular motion at different points around the car…*
>
> *I accept the independent witnesses who were at a distance across from the church…in this building…and looking down into the parking lot and watching him. I accept that evidence, they had no reason to falsely mislead the court or falsely implicate Mr Mizrachy…*"

56. As regards the first two charges, he confirmed that he accepted the Complainant's evidence about the insulting English language words she said he used. He summarised his findings overall in the following way:

> "*So as regards the evidence I'm satisfied so that I feel sure, notwithstanding his previous good character and his character witness-I'm satisfied that Mr Mizrachy did use offensive words; that is cursing towards Ms Armstrong- telling her to move her f…ing car, that when God gave out brains she must have been in the bathroom, move your f…ing car you black bitch. Also that he wilfully and unlawfully, using the keys of his car, caused damage to the right, left and rear of the car by using the slashing and circular motion - and as testified by a police officer who saw the damage and took photographs of it and repeated by Ms. Armstrong there was what appeared to be the scratching and scribbling of a star symbol on the car as well.*
>
> *So in all the circumstances I am so satisfied that I feel sure that the defendant is guilty of all 3 counts as charged.*"

57. The Prosecution asked for fines of $2000 to be imposed for each of the three offences. The Magistrate imposed fines of $200 for count 1, $2000 for count 2 and $1695 restitution order in respect of count 3.

The Supreme Court appeal

58. Mr Mizrachy's Notice of Appeal contained submissions as well as setting out the requite grounds of appeal. Those grounds may be summarised as follows:

    (a) "*abuse of process*": the arrest at the Hamilton Police Station was said to have been unlawful;

    (b) "*The weight of the evidence did not support the verdict*": the Crown's case was primarily based on (1) offensive and threatening words (two offences) and (2) wilful damage. The Magistrates' Court should not have found these charges were prove; and

    (c) in submissions supporting these grounds, various complaints were made about the insufficiency of the Magistrate's decision .

59. As regards the wilful damage conviction, the Judge found as follows:

> "*7. Whilst I agree that the Learned Magistrate's decision was lacking in reasons given the independent evidence of the two witnesses, I am not persuaded that there has been a miscarriage of justice. Accordingly on Count 3, I dismiss the appeal.*"

60. Mr Mizrachy appeals against the dismissal of the appeal against the wilful damage conviction although it must be noted at this juncture that the Judge's criticism of the Magistrate's judgment on inadequate reasons grounds is difficult to understand in light of the extracts from it set out in paragraph 55 above. The Magistrate could have been criticised for not dealing with other matters raised by Mr Mizrachy in his Defense Statement, such as abuse of process, but not of those matters properly analysed had any impact on the merits of the Crown case. The Judge quashed the conviction on count 2 (racial harassment) on the grounds that:

> "*8….I cannot be satisfied so that I am sure that this offence occurred.*"

61. The Crown unsurprisingly appeals against that decision, which will be considered further below. The Judge finally held:

> "*9…In my opinion a church car park is not a public place. Further and in any event, no evidence was led that the public have access to this area as of right nor was any led that these offensive words could be heard in contiguous public places. Accordingly I quash the conviction on this Count as well.*"

62. The Crown appeals against this aspect of the decision, which will be revisited below when considering that appeal.

The appeal before this Court

63. By a Notice of Appeal that itself contained fulsome submissions, Mr Mizrachy appealed against his conviction for wilful damage to this Court on the following grounds:

(a) "*The complainant's lie*": this ground complains that the significance of the Complainant's retracted assertion her Statement that no prior damage was on her car was not properly taken into account;

(b) "*Abuse of process-Police Misconduct*": this ground complains (as in the Supreme Court appeal) about an unlawful arrest. Building on the Supreme Court's quashing of the convictions on counts 1 and 2, an additional complaint that the Police failed to properly investigate is added;

(c) "*The weight of the evidence did not support the conviction*": this ground is essentially the same as that advanced before the Supreme Court;

(d) "*Physical impossibility*": the central complaint is the medical document he sought to rely upon was wrongly ignored in the Magistrates' Court at trial and in the Supreme Court appeal;

(e) "*an unreasoned judgment*": complaint is made that the Supreme Court Judgment is only 2 pages long.

64. The first ground can be dealt with shortly. Mr Mizrachy did not demonstrate through cross-examination that it was appropriate let alone necessary for the Magistrate to regard what the Complainant told the Police in her Statement about no prior damage as a "lie". A witness' sworn evidence in Court is the key evidence if a Statement is not read into evidence because it is unchallenged. A previous inconsistent statement may be used to undermine credibility, but whether credibility is actually undermined is a matter for the trial Court. It would take a previous inconsistent statement which was clearly inexplicable by reference to mistake and which undermined an important part of a witness' evidence to justify an appellate finding that the trier of fact wrongly ignored it. The inconsistency complained of here is on its face only realistically consistent with a mistake, because the Complainant herself in examination-in-chief volunteered the fact that one scratch existed. This was a mistake on an issue which was peripheral to the merits of the wilful damage charge (it would be different if the charge related to a single scratch in the same area as the previous scratch). On any sensible view, the Complainant's voluntary correction of what she said in her Statement fortified her credibility rather than undermined it. This ground of appeal can only properly be rejected.

65. The abuse of process complaint is also misconceived. Mr Mizrachy accepts in his Notice of Appeal that abuse of process can be used to stay criminal proceedings the pursuit of which would constitute an abuse of process. This doctrine cannot properly be invoked for the first time at the appeal stage. If a defendant is unlawfully arrested, that fact will not give rise to a defence unless the offence charged required proof of a lawful arrest. I made this point during the hearing by reference to the offence of violently resisting arrest. A civil remedy for the tort of wrongful arrest is the primary remedy, although in this case it appears that the ordinary 6 year limitation period has now expired. It is possible in the context of a trial to complain that an inadequate investigation raises a doubt about the defendant's guilt. However, it will depend on the legal and factual circumstances of each case whether:

(a) It is possible to credibly suggest that the Police failed to investigate properly a matter relevant to proving that the defendant committed an offence; and

(b) the deficiency complained of is so material to the defendant's guilt that a reasonable doubt is raised.

66. The wilful damage charge was substantially based on independent eyewitness testimony from credible witnesses. Viewed broadly, it is impossible to see what matter could or should have been investigated which might have undermined their testimony. Mr Mizrachy was unsurprisingly unable to advance any arguable inadequate investigation complaint. Two examples given in his Notice of Appeal (paragraphs 84-5) relate to (a) the Complainant's alleged history of confronting parents parking in the parking lot and (2) the need to confirm with the Church that she was indeed entitled to park there. Neither of those lines of inquiry would have any conceivable relevance the wilful damage charge which depended almost completely on the evidence of independent witnesses. However, in the Appellant's submissions prepared for this Court, the following additional complaint was made:

> "*79. The Appellant also informed PC 2476 Clyke that he suffers from Multiple Sclerosis, which causes severe weakness in his right hand, making him physically incapable of damaging the complainant's vehicle. However, PC 2476 Clyke failed to request medical documentation, did not contact the Appellant's doctor in Bermuda (whose name was provided on the day of the interview), and did not verify this crucial claim (page 8, lines 28-34). When questioned, he provided no reasonable explanation for this failure.*"

67. There are certain circumstances where it will be possible to plausibly contend that the Police ought to have investigated a matter which might have exculpated a defendant and that their failure to do so raises a reasonable doubt about the defendant's guilt. Generally, the matters will be the sort of matter that only the Police can pursue (e.g. interviewing other suspects who the accused says are the true culprits or undertaking scenes of crime tests). It is not for Police to conduct their investigations under the direction of the subjects of their investigations. In my judgment the existence of two credible independent eyewitnesses made it clearly reasonable for the Police to decide that they would not investigate at the expense of the public purse a medical defence Mr Mizrachy wished to rely upon. Medical defences are typically advanced through the defendant calling a medical expert witness as part of their own case. This ground of appeal fails.

68. The complaint that the conviction was against the weight of the evidence can be summarily rejected. This sort of complaint requires an appellant to show that the finding of guilt bordered on perverse or that there was simply no evidence at all to support an essential element of the relevant charge. The two eyewitnesses described actions which were only consistent with Mr Mizrachy deliberately scratching the Complainant's vehicle, having regard to the damage that was discovered when the Police arrived. It was clearly open to the Magistrate to accept their evidence-it is difficult to see how he could properly have rejected it. Minor inconsistencies in terms of who saw precisely what were,

in the circumstances, desperate points taken in answer to an overwhelmingly strong Prosecution case.

69. The complaint that the impossibility argument was wrongly rejected can also be summarily dismissed. Mr Mizrachy raised the medical incapacity issue when interviewed by the Police on 20 April 2019. He was charged on 17 July 2019. There is no suggestion that the Police or Prosecution indicated that they would accept his medical defence or indeed call a medical expert on his behalf. The trial started on or about 20 October 2020 more than a year later. The Prosecution closed its case on 11 January 2021. Mr Mizrachy had time to retain a medical expert witness had he seriously wanted to pursue an impossibility defence. The medical report that he sought to rely upon was, absent consent by the Prosecution, inadmissible as to the truth of its contents. It could perhaps have been admitted into evidence for the more limited purposes of confirming that Mr Mizrachy had before the incident been diagnosed with a medical condition that significantly weakened his right hand.

70. The excluded evidence was a Progress note dated 23 September 2020 apparently issued by the Beth Israel Deaconess Medical Center/Neurology in relation to Mr Mizrachy. It indicates that he had been receiving therapy for "*Relapsing-remitting multiple sclerosis*" since November 2018. It describes steroid treatment commencing in August 2020 following an exacerbation but contains no specific information about the patient's condition in 2019. Even if it had been admitted, the Note provides no basis for doubting the eyewitness evidence which formed the basis for the finding that he damaged the Complainant's car with an object as small and light as a car key.

71. The complaint that the Supreme Court's findings were inadequately expressed has merit; but this merely requires this Court to analyse the adequacy of the reasons given for the underlying Magistrate's decision. Mr Mizrachy noted the irony of his being required to attack the Judge's finding that the Magistrate's decision lacked adequate reasons deploying the complaint that the Judge had failed to give adequate reasons for his own decision to dismiss the appeal nonetheless. In brief, I find that:

    (a) the Judge was wrong to find that the Magistrate failed to provide adequate reasons for his decision to convict on count 3 (wilful damage); however

    (b) he was right in the final analysis to dismiss the appeal.

72. The Magistrate's reasons for finding the wilful damage charged proved may have been concisely expressed but they covered all the main bases (see paragraphs 55-56 above). He accepted the evidence of the independent witnesses and found they had no motive for giving false evidence against Mr Mizrachy, whom he did not believe and whose defence

of physical incapacity he rejected. It was in my judgment not necessary to explicitly deal with every point raised by Mr Mizrachy to undermine the reliability of their evidence as the points he raised were so obviously weak. It bordered on the absurd to suggest that he could only safely be convicted if the witnesses were able to describe precisely what he did when the actions they described were broadly consistent with the scraping and drawing which the Police found on the SUV in question when they arrived at the scene. The Magistrate did not need to mention that the star shape drawn on the back of the Complainant's car was almost like Mr Mizrachy's signature mark, intended to defiantly declare to the world that despite his temporary confinement in a car park in a strange land, he and his national identity mattered.

73. This ground of appeal accordingly has technical legal merit, but because the underlying Magistrate's reasons were adequate, the defects in the Supreme Court's Judgment on this issue provides no valid basis for setting aside the conviction.

Disposition of appeal

74. For the above reasons, I would dismiss Mr Mizrachy's appeal against his conviction in the Magistrates' Court on 26 February 2021 for the offence of wilful damage.

Appeal No. 15 of 2024

The Magistrates' Court Proceedings

75. The Information tried in the Magistrates Court and the Judgment delivered by the Magistrate so far as is relevant to the present appeal is described above (paragraphs 42-43, 52-57). Mr Mizrachy was convicted of all three charges and appealed to the Supreme Court.

The Supreme Court appeal

76. As set out above (paragraphs 58-62), Mr Mizrachy's appeal against his conviction on counts 1 and 2 was allowed and those convictions were both quashed by the Judge. It is important to understand how he arrived at those decisions.

77. The Notice of Appeal opened with an extensive submission on the importance of giving reasons arising from, *inter alia,* fair hearing rights under section 6 of the Bermuda Constitution. Complaint was made about the Magistrate's failure to mention points he had raised, such as relating to abuse of process. These arguments supported the formal ground of appeal advanced in relation to inadequate reasons. However a further

complaint, not formally advanced as a ground of appeal, was that the Magistrate failed to adequately assist Mr Mizrachy as a litigant in person. The Judge saw no need to deal with that sort of free floating point, and neither do I in relation to either Appeal No 14 or 15.

78. In oral submissions before the Judge, Mr Mizrachy pointed out that the offensive words and racial harassment charges depended solely on the Complainant's evidence, He also quoted section 200A of the Criminal Code, and in somewhat ironical terms, contended that the Magistrate had no basis for finding that the motive element had been proved:

> "*Response, first of all, regarding the wording of section 200A and the way the magistrates' court interpreted them, in the book of Jeremiah 11, Verse 2, it says God tests the thoughts and the mind. Apparently, magistrates in Bermuda acquired divine attributes.*"

79. When Crown Counsel replied, she firstly addressed the law in relation to offensive words and referred the Judge to the following part of the interpretation of "public place" in the Summary Offences Act:

> "*(a) every place (including any foreshore or any beach or open 1 space belonging to the Government) to which the public under ordinary circumstances have the right of legal access, whether with or without payment of any entrance fee or gate money*…"

80. When the Judge suggested the definition did not apply, the response was that the public could walk through the parking lot, although they could not park there. The Judge then asked whether there was any evidence that the words could be heard on the public road, and Crown Counsel accepted there was none. It was seemingly in these circumstances that only paragraph (a) of the definition of public place in section 1 of the Summary Offences Act was understandably relied upon.

81. No oral submissions were made by the Crown about section 200A of the Criminal Code and how the various elements of the offence of racial harassment had been proved. Whatever written submissions were placed before the Supreme Court by the parties do not appear to be in the Appeal Record. It seems unlikely that the Crown addressed section 200A of the Criminal Code in any such written submissions, because:

    (a) the hearing transcript does not record counsel mentioning the section; and

    (b) the Crown's written submissions to this Court does not engage with section 200A either.

82. The Judge dealt with racial harassment first in his Judgment and found:

> "*8. Turning to the second Count of the oral communication, namely 'move your f…ing car black bitch', contrary to Section 200A of the Criminal Code, here I am faced with a 'he said/she said' situation. Doubtless emotions were running high but I cannot be satisfied so that I am sure that this offence occurred. It is with some reluctance that I quash the conviction of the Count.*"

83. It is impossible, without engaging in major linguistic reconstructive surgery, to read that paragraph otherwise than in accordance with its express terms. That seems on superficial analysis to be a legally flawed finding because it is not for an appellate court to decide whether it is satisfied that a charge has been proved. That is the task for the trier of fact. However, it is ultimately easy to understand why the Judge would have been justified in concluding that it was unclear on the record that the Magistrate was satisfied beyond reasonable doubt that all the elements of this offence had been proved.

84. As regards the offensive words charge, the Judge found:

> "*9. Finally turning to the charge of offensive words in a public place, specifically St Andrews Church car park, is this a 'public place'? In evidence is a photograph warning people not to trespass and not to park their cars there without permission. This is clearly in my view private property. "Public Place" is defined in Section One of the Act as: Any highway, wharf, street, bridge and thoroughfare, and includes-*
>
> *(a) every place (including any foreshore or any beach or open space belonging to the Government) to which the public under ordinary circumstances have the right of legal access, whether with or without payment of any entrance fee or gate money; and*
>
> *(b) any steamer, boat or vehicle plying for hire in Bermuda;*
>
> *(c) and all land and land covered with water contiguous to a public place from which any act constituting an offence against this Act would ordinarily be viewable or audible to or by persons in such public place.*
>
> *In my opinion a church car park is not a public place. Further and in any event, no evidence was led that the public have access to this area as of right nor was any led that these offensive words could be heard in contiguous public places. Accordingly I quash the conviction on this Count as well.*"

85. Having regard to the evidence about the usage of the car park which appeared to be essentially common ground at trial, that finding appears at first blush to be legally sound.

The appeal before this Court

86. The Crown appealed against these acquittals on the following grounds:

> "*(i) THAT the Learned Assistant Justice erred in law by substituting his own view of the evidence for that of the Magistrate when he quashed the conviction on charge 2 on the basis that he could not be satisfied so that he was sure that the offence had occurred; and*
>
> *(ii) THAT the Learned Assistant Justice erred in law when he concluded that the conviction on Count 1 should be quashed on the basis that the location where the relevant conduct occurred was not a public place.*"

87. Ground (i) clearly succeeds although Mr Mizrachy invited the Court not to set aside the acquittal. The only question which falls for determination is whether, notwithstanding the error of law, the appeal should be dismissed on the grounds that no substantial miscarriage of justice occurred. In the process of preparing the present Judgment, I identified weaknesses in the evidence which the DPP was not afforded an opportunity to address in the course of the hearing and invited supplementary submissions. In response to comment on these weaknesses, Ms Clarke submitted as follows:

> "*(1) The evidence to support elements of the intent and motivation of the Appellant must necessarily be inferential evidence, as there is no confession evidence in this case. We submit that to ascertain intent, one must look at the behaviour of the Appellant before, during and after the actus reus. There was sufficient evidence in the case so that the Magistrate could be satisfied so that he felt sure that the Appellant was angry before and during the confrontation and that he continued his verbal abuse after he uttered the relevant words. It is our humble submission that the evidence was adequate for the inference to be drawn that the Appellant intended to cause distress fear or alarm.*
>
> *We submit that the Appellant's motivation can be inferred from the evidence of the words uttered in this case. "Black Bitch" in our humble submission is evidence that is adequate for the trier of fact to find that the Appellant was motivated by racial antipathy.*

> *(2) Whilst the Magistrate's Judgment makes no specific reference to the three essential elements of the racial harassment charge and records no explicit finding that he was satisfied that the elements of this specific charge was proved, the Judgment does commence with reference to the offences being considered, and does expressly include in that recitation the elements of the offence. It is accepted that in summarising his factual findings (pdf 187-188), he merely records being satisfied that the racially offensive words were used without any mention of the actual elements of the offence."*

88. I accept that the requisite intent and motivation could potentially have been inferred in the present case depending on the view the Magistrate took of how the evidence he accepted met the requirements of this far from straightforward case. However where it is not clear that the necessary legal and factual evaluation was carried out, it is impossible to conclude that no substantial miscarriage of justice would occur if a conviction is restored unless the case for the Crown is an overwhelming one. The case was not one where one can properly say that it is obvious that the Magistrate was satisfied of the legal requirements because he was familiar with the offence and the evidence was clear cut. In my judgment the appeal should be dismissed notwithstanding the error of law identified because the Judge ought to have found that the conviction entered by the Magistrate was flawed for the following principal reasons:

(a) the offence of racial harassment is a relatively modern[1] criminal offence with which the Bermudian courts are not intimately familiar. The elements are not straightforward and required careful consideration by the Magistrate;

(b) the Crown case at trial and on appeal appears to have proceeded on the legally flawed basis that the evidence which supported the offensive words charge was sufficient (in relation to the use of racially offensive words) to support the racial harassment charge;

(c) while the Magistrate explicitly recorded that he was satisfied of the essential elements in relation to Counts 1 and 3, it is striking that he omitted to do in relation to Count 2; and

(d) the evidence adduced at trial does not clearly support a valid finding that Mr Mizrachy was guilty of the racial harassment charge.

89. Section 200A of the Criminal Code provides as follows:

[1] Enacted in 1995.

"***Racial harassment***

200A (1) A person ("A") commits racial harassment of another person ("B") if—

(a) intending to cause B distress, fear or alarm; and

(b) being motivated by antipathy to B on account of B's race, colour or place of origin or A's perception of B's race, colour or place of origin A does, or attempts or threatens to do, in relation to B, an act specified in subsection (2).

(2) For the purpose of subsection (1), a person ("A") does in relation to another person ("B") an act referred to in that subsection if—

(a) A assaults B; or

(b) A makes a telephone call to B, whether or not a conversation with B ensues; or

(c) whether by mechanical or electronic means, or orally, or by any other means, A makes or causes to be made, a communication to B;

(d) A commits a trespass under section 329I involving a dwelling-house where B is or resides; or

(e) A damages, defaces or destroys any property of B.

(3)"To assault" in subsection (2) has the meaning assigned to it in section 233.

(4) Racial harassment of a person is a summary offence, and a person found guilty of it is liable to a fine of $5,000 or to imprisonment for one year or to both such fine and imprisonment."

90. The key elements of the offence are both mental ones because other elements will often constitute other offences such as assault, trespass or wilful damage. Where the offence under section 200A is charged in relation to oral communications, the distinction between the offence of offensive words and racial harassment will be that the defendant is alleged to have:

(a) intended to cause the complainant "distress, fear or alarm"; and

(b) was motivated by antipathy towards the complainant based on their race, colour or place of origin.

91. Use of the word "harassment" in defining the offence implies that the perpetrator is engaged in a course of conduct in circumstances in which the defendant is in some way taking advantage of the complainant's vulnerability. As noted above, Mr Mizrachy wryly wondered whether the Magistrate reached conclusions about his motivations through a process of divination. Courts routinely draw inferences about intention from the surrounding circumstances in which an alleged offence occurs. There are no limits to the variety of contexts in which this offence may be committed. The sort of circumstances in which one might expect the requisite mental elements of racial harassment to be easily inferentially proved would involve features such as the following:

(a) the conduct of the defendant involves actual, threatened or at least the implication of the infliction of physical or other harm to the complainant or (persons close to them);

(b) the social context is one in which recognised tensions exist between the groups to which the defendant and the complainant belong;

(c) the conduct occurs in a place or space in which, by reason of its demographics, the complainant is presumptively the vulnerable party and the defendant is presumptively the dominant party; and/or

(d) the conduct occurs in the context of an unequal relationship, such as employment, which makes the elements of the offence easier to infer.

92. In this case, a racially offensive phrase, not seemingly even directed at the Complainant and unaccompanied by any explicit or tacit risk of harm was unfertile forensic ground in terms of supporting an inference of an intention to cause "*distress, fear or alarm*". Wherever tensions between locals and "foreigners" exist, the foreigners are usually the vulnerable parties even though the roles may be switched within some bespoke employment contexts. If the Magistrate had considered the evidence in the light of the elements of this unfamiliar offence, it would have been open to him to take the following view of the evidence:

(a) the Complainant's evidence suggested that she was more empowered than a victim in her exchanges with Mr Mizrachy even though it is true she stated (without elaboration) that his "aggressive" behaviour made her feel "uncomfortable";

(b) she was not in 'hostile territory', but in a space next to the office of Bermuda's first modern Black female National Hero, across the street from an imposing office which bears her name;

(c) she was seemingly about to get into her car and move it when she heard the racially offensive words, unconnected to a demand that she move her car (contrary to what was implied by the phrase set out in the charge). Her response was not to cry for help or flee inside the pre-school for protection. She confronted Mr Mizrachy, "told him about himself", and walked to the Hamilton Police Station to file a report, leaving his car trapped in the parking lot;

(d) the independent witnesses watching her did not describe her as looking distressed or alarmed. The Complainant was apparently a Bermudian and a member of Bermuda's largest ethnic group. She was rightly offended by being verbally abused in such a manner by a foreigner;

(e) despite the abusive (in both racial and gender terms) phrase the Magistrate was sure the Defendant used, it was not straightforward to infer antipathy based on race in the context of (1) a 'man in a rage' and (2) with both parties belonging to ethnic groups who had historically been discriminated against in Bermuda and no notorious history of tension between the two groups. A valid finding that the racial antipathy element of this offence had been proved needed to be supported by explicit judicial reasoning, in all the circumstances of the present case.

93. In summary, the Magistrate never considered the essential elements of the offence and recorded no explicit evidential findings capable of supporting the conviction he recorded. Crown Counsel did not address the elements of the offence in opening or closing submissions, so this is not a case where it can be inferred from the fact the Crown's submissions were accepted that the appropriate findings were implicitly made. Nor is this a case where the evidence could only possibly be viewed as obviously supporting a conviction, because inferences can only be drawn against a criminal defendant when they are the only reasonable inference to draw from the proven facts. For these reasons in my judgment it is ultimately clear that although the Judge quashed the conviction on Count 3 in legally flawed terms, the Crown's appeal should be dismissed because in substantive legal and evidential terms, no substantial miscarriage of justice occurred.

94. As far as the much more familiar offensive words charge is concerned (it has been on Bermuda's statute books for almost 100 years), the point which arises for determination

is primarily a short point of statutory interpretation. Section 11 of the Summary Offences Act 1926 provides:

> "*Offences against public morality*
>
> *11. Any person who, in any public place—*
> *…*
> *(e) uses any threatening, abusive, insulting or offensive words, gestures or behaviour…*
>
> *commits an offence against this Act.*"

95. All seemingly assumed in the Magistrates' Court that the "*public place*" requirement was met by the parking lot. The Judge in the Supreme Court appeal thought otherwise. The Crown relied on the first limb of the definition in section 1 of the 1926 Act and accepted that no evidence was adduced to establish that, alternatively, the third limb applied:

> "*'public place' means any highway, wharf, street, bridge and thoroughfare, and includes—*
>
> *(a) every place (including any foreshore or any beach or open space belonging to the Government) to which the public under ordinary circumstances have the right of legal access, whether with or without payment of any entrance fee or gate money; and*
>
> *(b) any steamer, boat or vehicle plying for hire in Bermuda; and*
>
> *(c) all land and land covered with water contiguous to a public place from which an act constituting an offence against this Act would ordinarily be viewable or audible to or by persons in such public place*…" [Emphasis added]

96. The evidence in fact supported the clear view that the parking lot in question was not open to the public at large. The Complainant herself made this point and the Prosecution exhibited a picture of the sign which she said she pointed out to Mr Mizrachy. That sign proclaims: "*Private Parking: Use of this Private Car Park is restricted to: AUTHORIZED PERSONS.*" Ms Clarke was unable to advance any convincing alternative to a straightforward construction of the first limb of the "public place "definition upon which the Crown relied in the Supreme Court. That construction points to the clear conclusion that the first limb of the definition could not be relied upon in this case. Ms

Clarke expressed concerns about a finding that car parks generally were not public places. However, the analysis set out above should not apply to any car parks which are open to members of the public, whether accessible for free by patrons of business and social premises or dedicated car parks accessible for a fee.

97. The difficulty with the third limb is that, as regards offensive words, being contiguous (or adjacent) to a public place such as Court Street only matters if the words would "*ordinarily be…audible to…persons in such public place.*" A finding that the car park in question was indeed a public place because words would "ordinarily" be audible from the adjacent street requires at least some minimal evidential foundation. It seems obvious that shouting could be heard, taking judicial notice of the geography of the property opposite the Court. But it is not necessarily obvious that even speaking in raised voices would "ordinarily" be audible, having regard to varying levels of ambient noise from passing traffic. Crown Counsel appears to have rightly accepted in the Supreme Court that evidence was required to support reliance on this limb of the definition of "public place". In contrast if the offence was based on conduct which could be *seen* from the adjacent parts of Court and Church Streets, judicial notice could easily be taken of what would ordinarily have been visible.

98. For these reasons I find that, regrettable as it may be that Mr Mizrachy should "get off on a technicality", the Crown's appeal against the Supreme Court decision to quash his conviction for offensive words must be dismissed. In any event there is no floodgates concern. Patrons of a private church parking lot are unlikely to be a burgeoning threat to Bermuda's public order; the present incident appears to me to be something of an aberration. And offences under the Summary Offences Act 1926 are all, by definition, lower-level ones.

Disposition of appeal

99. Accordingly, the Crown's appeal against the Supreme Court's decision to quash the convictions entered in the Magistrates Court against Mr Mizrachy for contravening section 200A of the Criminal Code and section 11 (e) of the Summary Offences is dismissed.

Summary

100. For the above reasons, I would dispose of the three appeals heard together as follows:

(a) Mr Mizrachy's appeal against his conviction in the Magistrates' Court on 11 March 2021 for careless driving contrary to section 37 of the Road Traffic Act 1947 on 20 February 2020 is dismissed;

(b) Mr Mizrachy's appeal against his conviction in the Magistrates' Court on 26 February 2021 for wilful damage contrary to section 448 (I) of the Criminal Code on 19 March 2019 is dismissed;

(c) The Crown's appeal against the decision of the Supreme Court on 6 December 2023 to quash the convictions entered against Mr Mizrachy in the Magistrates' Court on 26 February 2021 for using offensive words contrary to section 11(e) of the Summary Offences Act 1926 and racial harassment contrary to section 200A of the Criminal Code, also on 19 March 2019, is dismissed.

HARGUN JA

101. I agree.

MARTIN AJA

102. I also, agree.