

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 11/2018

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE FRASER JA (AG)**

MERVIN HENRY v R

Dr Garth Lyttle instructed by Garth E Lyttle & Co for the appellant

Adley Duncan and Ms Channa Ormsby for the Crown

1 and 3 May 2019

FRASER JA (AG)

Introduction

[1] On 17 August 2018, Mr Mervin Henry, the appellant, pleaded guilty in the Corporate Area Traffic Court to the offence of obstructing traffic committed on 16 July 2018. He was sentenced to an immediate term of imprisonment of three months at hard labour. He has appealed seeking to have that sentence rescinded, or in the alternative, to have both the conviction and sentence set aside.

Evidence

[2] The evidence in this appeal is contained in complimentary affidavits of the presiding Judge of the Corporate Area Traffic Court and the clerk of the courts who marshalled the case for the prosecution before her. Together, these affidavits provide what appear to be a full picture of what transpired at the hearing. Though Dr Garth Lyttle, counsel for the appellant, indicated that the appellant had intended to respond to the affidavits, he had not done so up to the time of hearing. Given the clear legal position upon which this matter turns, counsel was content to proceed without adducing evidence.

[3] Therefore, the evidence before this court is that on 17 August 2018 the appellant appeared before the Corporate Area Traffic Court on an application to relist a traffic ticket. The ticket had been issued by Corporal Whyte of the Traffic Division Headquarters. The appellant had missed his initial court date, which was the previous day, 16 August 2018. He was arraigned by the clerk of the courts who outlined the charge, that, on 16 July 2018 whilst the appellant was operating a public passenger vehicle, he obstructed the flow of traffic at the intersection of Trafalgar Road and Holborn Road in the parish of Saint Andrew. The appellant pleaded "guilty".

[4] In response to a query from the court about the nature of the obstruction, the clerk of the courts read the summary from the ticket, which indicated that the appellant drove his motor vehicle into the middle lane prescribed to go straight, and impeded the movement of other motor vehicles on the green light. When the clerk further enquired from the appellant if he agreed with the allegations and accepted that he did obstruct

the flow of traffic, he responded yes he agreed, as he had stopped in the middle lane to let off a passenger thereby obstructing the flow of traffic. According to the appellant, this was what drew the officer's attention to him.

[5] The court then queried whether it was the first time the appellant had received a ticket for obstructing traffic. He indicated "no", but that he had paid the others and that it was an oversight why this one came before the court. The court further enquired when the appellant received the last ticket. The appellant did not answer that question.

[6] It was brought to the attention of the court by the clerk of the courts, that the appellant had previously come before the Traffic Court in other names. When the court enquired of the appellant whether this was so he did not deny it, but behaved boisterously and said among other things, "mi waan know weh yuh a ask mi dem bag a question yah fah? Weh dat a fi duh wid now? Mi always pay fi mi ticket dem an mi jus come fi pay mi [\$5000.00] and guh bout mi business". The matter was stood down so his antecedents could be checked.

[7] The checks on the Traffic Ticket Management System (TTMS) revealed that the appellant had received a number of tickets in the alternate names of Marvin Henry and Carlington Henry, in addition to the name Mervin Henry. Alarming, the appellant was recorded as having received 414 tickets; 17 of which, issued between January 2018 and 26 June 2018, were for obstructing traffic. The appellant's antecedents were read to him by the clerk of the courts and he was asked by the court if he wished to say anything. He declined. He was then sentenced as previously indicated.

[8] Counsel Dr Lyttle, appeared for the appellant after sentence and made an application for bail, which was refused by the learned Judge of the Traffic Court. On 13 September 2018, the appellant was granted bail pending appeal, by a single judge of the Court of Appeal.

Reasons for conviction and sentence

[9] The learned Judge of the Traffic Court, in her reasons for conviction and sentence, noted that the appellant having failed to pay the fine of \$800.00 at the revenue department, within the 21 days period stipulated on the ticket, he was now subject to the jurisdiction of the court and the \$800.00 fine would no longer apply. She stated that the court fine would be \$5,000.00 if he were to be fined by the court.

[10] She further indicated that the ticket was clear and unambiguous as to the nature of the charge and laid out a reasonable explanation as to the charge sufficient for the appellant to understand. She stated that, the appellant having entered a guilty plea, there was no need for the prosecuting police to submit a written statement or for the court to hear from him to test his truthfulness concerning how the offence was committed.

[11] The learned Judge of the Traffic Court further outlined that, after the appellant's antecedents were brought to his attention, the appellant was asked if he wanted to say anything on his own behalf before sentence and he responded, "no".

[12] In explaining her sentence, the learned Judge of the Traffic Court adverted to:

- a) the fact that the appellant had 18 convictions under the Road Traffic Act (RTA) for “Obstructing” or “parking in a manner likely to obstruct”; and
- b) the appellant being part of a culture of “pay and reoffend” which was confirmed by his boisterous behaviour in court when the court asked for his antecedents.

[13] Accordingly, on the basis that no special penalty was provided for the offence to which the appellant pleaded guilty, the learned Judge of the Traffic Court relied on section 108 of the RTA as providing authority for her to impose the immediate custodial sentence of three months imprisonment.

Grounds of appeal

[14] On 27 August 2018, a notice of application for permission to appeal against sentence and grounds of appeal were filed on behalf of the appellant. The grounds of appeal are as follows:

- "a) The offence of obstructing traffic for which the Appellant pled guilty, falls under Part VIII Special Powers of Enforcement and Administration of Traffic Ticket, which allows for the prosecuting police to name the offence and state the fine and option to attend court S.116.
- b) There is no statutory provision under S.116 for a mandatory sentence of imprisonment for three months for the simple offence of obstructing traffic, rather than the imposition of a fine or the alternative would be a term of imprisonment.

- c) The Learned Judge of the Traffic Court erred in sentencing the Appellant to a term of imprisonment of three months without the option of paying the fine as shown in Appendix P129 RTA, where the fine is \$800.00.
- d) The learned Judge erred in law in sentencing the Appellant without the benefit of a written statement on file from the prosecuting police, or hearing from the police, to test his truthfulness as to how the offence was committed, or at all."

Discussion and analysis

[15] In respect of the conviction recorded against the appellant, the oblique challenge mounted by him has absolutely no merit. Dr Lyttle, in his submissions, highlighted the concern raised in ground d that the learned Judge of the Traffic Court had acted without the benefit of a statement on file. Though we are not to be taken as endorsing the non-provision of statements by police personnel who issue traffic tickets, in this case there was ultimately no need for Corporal Whyte who issued the ticket to provide a written statement, as the appellant did not seek to contest it. In fact, it was the appellant who volunteered the precise circumstances under which he received the ticket. Those circumstances clearly make out the offence charged and he was under no mistake concerning the conduct in respect of which he entered his plea. The challenge against his conviction, such as there is, therefore fails.

[16] The central consideration for this court is whether the learned Judge of the Traffic Court had the authority under the RTA to impose a custodial sentence on the appellant. The answer is contained in the relevant sections of the RTA. These are

sections 51, 53, 108 and 116. As necessary, these sections or pertinent part(s) of them are set out below.

[17] Section 51 comes under the heading "Driving Rules" and, among other things, proscribes a number of driving modes in which a vehicle in motion could cause an obstruction to the flow of traffic. Based on the facts of this case, the appellant accepted that the obstruction occurred when he stopped the motor vehicle to let off a passenger. From the outline of the facts by the prosecution, it is not clear that was what led to the obstruction.

[18] However, it is settled law that when a defendant enters a guilty plea, where there is any conflict or ambiguity in the accounts, the defence version should be accepted, unless the conflict is so significant that the basis of the plea needs to be clarified or the judge needs to make findings of fact to be able to sentence appropriately (see for example **R v Newton** (1982) 4 Cr App R (S) 388; **R v Pearlina Wright** (1988) 25 JLR 221; **Daniel Robinson v R** [2010] JMCA Crim 75; and the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts issued January 2018 guidelines 10.1 – 10.4). There is no such significant conflict in this matter; hence it is clear section 51 would not apply, as on the facts at the time of the offence the vehicle was not in motion.

[19] Section 53 addresses situations where a motor vehicle is not in motion. It provides in part that:

"(1) A motor vehicle when not in motion—

- (a) ...
 - (b) shall not be placed or allowed to remain in such a position as to obstruct or be likely to obstruct traffic.
- (2) ...
- (4) Any person who—
- (a) ...
 - (b) acts in contravention of paragraph (b) of subsection (1) or subsection (3), shall be guilty of an offence and shall be liable on conviction thereof to a penalty not exceeding five thousand dollars;
..."

[20] Section 108 contains general provisions that apply to offences where no special penalty is provided. It states:

"Any person who contravenes any of the provisions of this Act, and any person guilty of an offence under this Act, **for which no special penalty is provided**, shall be liable in respect of each such contravention or offence to a penalty not exceeding five thousand dollars and in default of payment thereof to imprisonment, with or without hard labour, for any period not exceeding two months or in the case of a second or subsequent conviction to a penalty not exceeding ten thousand dollars and in default of payment thereof, to imprisonment with or without hard labour, for a period not exceeding three months **or in the discretion of the court to imprisonment, with or without hard labour, for a period not exceeding three months.**"
(Emphasis supplied)

[21] Section 116, which falls under the rubric "Special Powers of Enforcement and Administration Traffic Tickets", provides:

"116.-(1) This section shall apply to any offence created by or under an enactment and punishable on summary conviction—

- (a) being an offence committed in respect of a vehicle—

- (i) ...
- (ii) by its obstructing a road or waiting, or being left or parked or being loaded or unloaded, in a road; or
- (iii) ...
- (b) ...

(2) Where a constable finds a person on any occasion and has reason to believe that on that occasion he is committing or has committed an offence to which this section applies, he may give him the prescribed notice in writing offering the opportunity of the discharge of any liability to conviction of that offence by payment of a fixed penalty under this section; and no person shall then be liable to be convicted of that offence if the fixed penalty is paid in accordance with this section before the expiration of the twenty-one days following the date of the notice or such longer period (if any) as may be specified therein or before the date on which proceedings are begun, whichever event last occurs.

(3) Where a person is given a notice under this section in respect of an offence proceedings shall not be taken against any person for that offence by any constable or local authority, as the case may require, until the end of the twenty-one days following the date of the notice or such longer period (if any) as may have been specified therein.

...

(6) A notice under subsection (2) shall—

...

(d) require the person, in the event that the fixed penalty is not paid within the period specified in the notice pursuant to subsection (3), to attend before the Traffic Court or, as the case may be, the Resident Magistrate's Court in the parish in which the offence is alleged to have been committed, to answer the charge on such date as may be specified. being a date not earlier than ten days after the expiration of the period specified pursuant to subsection (3)

...

(10) In any proceedings for an offence to which subsection (1) applies no reference shall be made after the conviction of the accused to the giving or affixing of any notice under this section or to the payment or non-payment of a fixed penalty thereunder unless in the course of the proceedings or in some document which is before the court in connection with the proceedings reference has been made by or on behalf of the accused to the giving or affixing of such a notice or, as the case may be, to such a payment or non-payment.

..."

[22] Starting with section 116, the last section, aspects of which were just outlined, stipulates the procedures to be employed when a person is alleged to have committed an offence such as obstructing traffic (section 116(1)(a)(ii)). In accordance with section 116(2) the appellant was issued with a ticket. He thereafter had the opportunity to pay the fixed penalty of \$800.00 within 21 days. Failure to pay within the specified time required the appellant to attend court (section 116(3) and (6)(d)). The ticket not having been paid, the appellant was required to appear before the Corporate Area Traffic Court.

[23] The lynchpin of the reasons provided by the learned Judge of the Traffic Court for the sentence she imposed was that section 108 was applicable. It is, however, not immediately clear how she arrived at that position. She, firstly, correctly noted that if the court were going to fine the appellant, the relevant amount would have been \$5,000.00. She further adverted to the 18 convictions recorded against the appellant for

obstructing traffic and parking in a manner likely to obstruct traffic and then stated that:

“The court applied section 108 of the Road Traffic Act which states...`any person who contradicts [sic] any of the provisions of this act [sic], for which no special penalty is provided...or in the discretion of the court to imprisonment with or without hard labour for a period not exceeding three (3) months’.”

[24] Based on the foregoing the learned Judge of the Traffic Court formed the view that she was empowered to exercise her discretion to sentence the appellant to up to three months imprisonment. Was that the true position?

[25] On the facts of this case, the appellant having been brought under the jurisdiction of the Traffic Court by his failure to pay the ticket within the specified time, section 53(1)(b) of the RTA, which creates the offence of obstructing traffic by a vehicle that is not in motion, would apply. This is the case because, based on the explanation of the appellant, that is the nature of the obstruction to which he pleaded guilty. For such cases of obstruction, section 53(4)(b) specifies that a maximum penalty of \$5,000.00 may be imposed upon conviction of such an offence. We therefore agree with the written submissions made by counsel for the Crown, gratefully adopted by Dr Lyttle, who frankly conceded that section 108 does not apply, as in this case a special penalty has been provided. Therefore, a condition precedent for the application of section 108 has not been met.

[26] In his submissions, Dr Lyttle also focussed the court’s attention on section 116(10) of the RTA. The effect of that subsection is that, after conviction of a summary

offence which falls under section 116(1), such as obstructing traffic, no reference should be made in the proceedings of any payment or non-payment of a fixed penalty for a previous offence falling under that sub-section, unless the defendant raises the issue. It therefore appears that, in any event, the fact of the previous convictions, which undoubtedly influenced the learned Judge of the Traffic Court in the sentence she imposed, was an irrelevant consideration under the scheme of the RTA.

[27] In **Matthew Hull v R** [2013] JMCA Crim 21, Panton P, at paragraph [9], addressed the power of the Court of Appeal to alter a sentence where the sentencing judge erred in principle. Given the foregoing, it is manifest that the sentence of three months imprisonment at hard labour, imposed by the learned Judge of the Traffic Court, cannot stand. The sentence imposed should therefore be set aside and the statutory maximum fine of \$5,000.00 or seven days imprisonment in default of payment substituted therefor.

[28] The alternative of imprisonment in default of payment is to compel compliance. By virtue of section 4(4) of the Traffic Court Act, a Judge of the Traffic Court is empowered, pursuant to section 195(1) of the Judicature (Parish Courts) Act, to enforce the payment of a fine, in the absence of an express provision to do so, by ordering imprisonment in default of payment. Thus, in keeping with those provisions and the power of this court under section 305(2) of the Judicature (Parish Courts) Act, we consider that the alternative of imprisonment in default of payment is a necessary component of the sentence that should be imposed on the appellant.

[29] Before parting with this appeal, we are constrained to make the following comment. A ticketing system in which:

- 1) a defendant can blithely rack up 414 tickets;
- 2) no previous payment by the defendant of a ticket can properly be considered at his sentencing, even where it is for a previous similar offence, unless section 108 applies; and
- 3) that defendant, in the words of the learned Judge of the Traffic Court, can simply "pay and reoffend",

strains the credibility of traffic enforcement efforts, the concept of law and order, and respect for the courts.

[30] We note that under the new Road Traffic Act passed on 31 December 2018, but which is yet to be brought into force, the maximum penalty for obstruction of traffic is \$20,000.00 with a maximum of seven days imprisonment in default of payment. Time will tell if the increased penalties will address the troubling culture in the Traffic Court adverted to by the learned Judge of the Traffic Court, though we must confess of that likelihood we are not entirely sanguine. Perhaps in appropriate circumstances, there may be need for a "sting in the tail", reflected by the possibility of an immediate custodial sentence, or other measures such as disqualification from driving for a period, that would be determined by the Legislature.

Conclusion

[31] We therefore order that the appeal is allowed. The sentence of three months imprisonment at hard labour imposed by the learned Judge of the Traffic Court is set aside. The statutory maximum fine of \$5,000.00 or seven days imprisonment in default of payment is substituted therefor. The appellant is given until 10 May 2019 to make the payment at the Traffic Court, failing which the sentence of imprisonment in default of payment will take immediate effect.