CAYMAN ISLANDS
CRIMINAL FORM 18
RULE 50(1) & 51(1)

# IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. CACR012/2011
**(Indictment No. 26/10)**

**Between:**

**HER MAJESTY THE QUEEN**

**Respondent**

**- and -**

**Vincent Lloyd McDonald**

Appellant

## NOTIFICATION TO AUTHORITIES OF RESULT OF APPEAL

**To: The Attorney General**

**This is to give you notice** that **Vincent Lloyd McDonald** having sought leave to appeal against *his* SENTENCE passed upon *him* by the Grand Court on the 30 day of March 2011, as set out below:

IND0026/2010 Indecent assault – Count 1
**2 years imprisonment.**

Doing an act intending to pervert the course of public justice – Count 2
**1 year imprisonment.**
**Sentence on Count 2 is to run consecutive to sentence on Count 1.**

The Court of Appeal has this **5th day of August, 2011** given judgment therein to the effect following:

1. **Application for an extension of time in which to appeal sentence granted.**
2. **Appeal allowed. Sentences of 2 years and 1 year (consecutive) set aside.**
3. **A sentence of 17 months substituted in respect of count 1 and a sentence of 10 months substituted in respect of count 2 . Sentences to run consecutively.**
4. **Total sentence 27 months. Time spent in custody to be taken into account.**
5. **Transcript of Reasons for Judgment to be released.**
6. **Legal aid granted to Nicholas Dixey effective 4th August 2011.**

Dated this 19th day of September, 2011

Registrar

CAYMAN ISLANDS COURT OF APPEAL

# IN THE CAYMAN ISLANDS COURT OF APPEAL

**CICA (Crim) 12/ 2011**
**(CAVR012/2011)**

**BEFORE**

**The Rt Hon Sir John Chadwick, President**
**The Hon Ian Forte, Justice of Appeal**
**The Hon Dr Abdulai Conteh, Justice of Appeal**

**ON APPEAL FROM THE GRAND COURT**
**Ind 26/ 2010**

**BETWEEN**

**HER MAJESTY THE QUEEN**

**Respondent**

**- and –**

**VINCENT MCDONALD**

**Appellant**

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**Mr Nicholas Dixey** for the Appellant
**Ms Manson** for the Respondent

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Hearing: 5 August 2011

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**JUDGMENT**
**Revised from transcript and Approved**

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**Sir John Chadwick, President:**

1. On 21 February 2011, the applicant/appellant, Vincent McDonald, pleaded guilty to two charges on which he had been arraigned: a charge of indecent assault and a charge of acting to pervert the course of justice. He was sentenced for those offences on 30 March 2011. The sentence imposed was two years on the first charge of indecent assault and one year on the second charge of perverting the course of justice. The judge directed that the charges should run consecutively: so that the totality of the sentence passed was three years.

2. Notice of appeal against sentence was given on 12 May 2011. That is some six weeks after Mr McDonald was sentenced. Accordingly, the notice of appeal was out of time by a month or so. Accordingly, he needs to seek permission to appeal out of time. In deciding whether or not to grant permission, it is pertinent to consider the merits of the proposed appeal.

3. The application for permission to appeal out of time is based on a notice of appeal which seeks to challenge the sentence on three grounds: first, that no credit was given for a guilty plea; second, that the case relied upon by the judge, *R v Goodman,* was a case where there had been a trial after a not guilty plea; and, third, that the judge's sentencing remarks left doubt as to whether any credit was given for guilty plea, and if so, what credit. No complaint is made as to the decision that the two sentences should run consecutively.

4. In the appeal in *R. v O'Neil Alrick Robinson* (CICA (Crim) 37/ 2010, heard and determined on 12 April 2011) this Court, after referring to observations of Lord Justice Waller in the case of *R v Daryl Robert Kluk* [2005] EWCA Crim 1331, pointed out that the proper course for a judge to take in a case where there has been a plea of guilty is to ask himself what sentence would have been appropriate had the matter proceeded to a verdict of guilt following a trial. In the course of that exercise, the judge should take into account matters of aggravation and of mitigation. Having arrived at a conclusion as to what the

appropriate sentence would be after a not guilty plea, the judge should then ask himself what discount should be given for the fact that the plea in the case before him was one of guilty. We emphasised, at paragraph 19 of our judgment, that:

> ". . . it is important that, in passing sentence, judges of the Grand Court should state clearly what discount is being given for a guilty plea so as to encourage others to plead guilty in appropriate cases; and thereby to avoid unnecessary waste of time and resources."

In *R v Robinson* the Court of Appeal found that that process had not taken place. It quashed the sentence that had been passed and substituted what it considered was the minimum sentence that could have been imposed by a judge applying proper sentencing principles.

5. In the present case, the judge indicated his view that the decision in *R v Goodman* [2005] EWCA Crim 736 was, "quite indistinguishable on its facts from the facts in the matter before me". There were two factors which led him to that view. The first was that *R v Goodman* was a case in which the appellant had engaged in acts of indecent assault falling short of attempted rape; the second that that was a case in which the appellant had sought to pervert the course of justice by entering into arrangements with others to suggest that the offence had not happened. In *R v Goodman* the offender was sentenced, after a trial, to two years on a count of indecent assault and twelve months on the count for perverting the course of justice, those terms to run consecutively, and his appeal against sentence was dismissed.

6. As we have said, in *R v Goodman* there had been a not-guilty plea. In those circumstances, having determined that case was "quite indistinguishable" on its facts from the facts which were before him, it might have been expected – and the accused was entitled to expect - that the judge would have started from sentences of two years and one year respectively, and then gone on to consider

whether there should be a discount to reflect the accused's guilty plea; and if so, what that discount should be.

7. The judge referred to two aggravating factors in the case before him: first that, as he thought, the offence had been committed while the offender was on bail; and second that he was impressed by a victim impact report showing that the offence had affected the complainant in a major way so that she was completely traumatised. But he did not suggest that either of those factors detracted from his earlier conclusion that the case before him was quite indistinguishable from the case of *R v Goodman* on its facts; or that those aggravating factors, of themselves, required a higher starting point than the two years and one year which had been adopted in *R v Goodman*.

8. The judge went on to say this:

> "Mr. Furniss, your attorney, has submitted on your behalf that I should give you credit for your guilty plea, and I bear this in mind. He also submitted that the *Goodman* case is distinguishable as in that case a trial had been gone through. For my part, I do believe that the act of indecent assault must be regarded as disgusting and must have been highly offensive to the complainant."

And so, he said, in all the circumstances, the sentence of two years' imprisonment should be imposed in respect of the indecent assault, and a sentence of one year in respect of perverting the course of justice. He ended with the observation that the sentence should be a lesson to the accused and others that women should always be respected.

9. The difficulty with the passage just cited is that, if the judge recognised the distinction between the case before him and the *Goodman* case – in that, in *R v Goodman* there had been a trial, whereas in this case a trial had been avoided by the guilty plea - then either (i) that distinction ought to have been reflected by a discount from the sentence that was passed in *R v Goodman* or (ii), if there were to be no discount, reasons needed to be given. Otherwise, the

accused does not know whether or not he is getting credit for his guilty plea; or why – in circumstances where the logic of the judgment points strongly to the conclusion that he is not - he is being denied the credit that he would ordinarily be entitled to expect. That, in our view, was a serious flaw in the approach to sentencing in this case. The judge's approach was inconsistent with the guidance which this Court sought to give in *R* v *Robinson*; although, in fairness to the judge, it must be mentioned that he was carrying out the sentencing exercise in this case a few weeks before this Court heard and gave judgment in *R v Robinson.*

10. We are satisfied that, having indicated the proper approach in *R vRobinson*, it cannot be right to allow a sentence which appears to have been passed as the result of an exercise inconsistent with that approach to stand. For those reasons, we extend time for an appeal; and we allow the appeal, setting aside the sentences of two years and one year that were passed.

11. The question then arises: what sentences should be imposed in their place? What discount should be given from the *R v Goodman* starting point to reflect the fact that, in this case, there had been a guilty plea?

12. Mr. Dixey, appearing for the applicant/appellant, has urged that the appropriate discount should be one third off each sentence. That would have the effect of reducing the sentence in respect of the indecent assault to sixteen months, and reducing the sentence in respect of the act of perverting justice to eight months; so reducing the overall sentence to twenty-four months (or two years, that is to say one third less than three years. In our view, that is an over generous discount in the circumstances of this case.

13. In particular, it seems to us that a one third discount in respect of the offence of perverting the course of justice in recognition of a late plea to that count is excessive. This was a case in which it was obvious that there was never a defence to that count. It was explained to us by Mr Dixey that the late plea was

attributable to the fact that the accused was not willing to plead guilty to the count of attempted rape with which he was originally charged. He delayed his plea in relation to the offence of indecent assault for the obvious reason that that offence was not being charged against him until a late stage; that is to say, until after it had been indicated that, but for that guilty plea, there would be a Newton hearing on the question whether the acts alleged amounted to attempted rape. He pleaded guilty to that charge only when the Crown indicated that it would accept a plea on the lesser offence of indecent assault; and having pleaded guilty to indecent assault, he then took that opportunity to plead guilty to the offence of perverting the course of justice. Be that as it may, it seems to us that the fact that there was no defence to the distinct charge of perverting the course of justice should have been appreciated and reflected in a guilty plea at an earlier stage that it was.

14. In those circumstances, it seems to us that the appropriate overall discount is not twelve months but nine months; representing a twenty five per cent discount off the overall sentence that would have been appropriate had there been a trial. Given the fact that these sentences are to be served consecutively, it is necessary to translate that view as to the overall discount into specific reductions in the case of each of the two sentences. These matters are not to be addressed by precise mathematical calculation. It seems to us that an appropriate discount would be seven months off the sentence for indecent assault (that is a reduction of a little less than one third) and two months off the sentence for perverting the course of justice (that is a reduction of about one sixth).

15. Accordingly, we substitute a sentence in respect of the indecent assault of seventeen months; and we substitute a sentence of ten months in respect of the act of perverting the course of justice. The result is an overall sentence of twenty seven months; or nine months less than the sentence which was passed by the judge.

16. At the request of Mr. Dixey we make it clear that those sentences run from the date of first imprisonment.