The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 4 of 2011

Between:

RICARDO VALENTINE STEWART

Appellant

-v-

THE QUEEN

Respondent

Before: Zacca, E. President
Evans, Anthony, JA
Baker, Scott, JA

Date of Hearing: **16 March 2012**
Date of Order: **16 March 2012**

Appearances: Mr L Mills for the Appellant
Mr C Mahoney and Ms T Tannock for the Respondent

REASONS FOR DECISION

ZACCA, P

1. The appellant was convicted by the verdict of a jury on 17 January 2011, for the offence of attempting to import controlled drugs, contrary to section 4(3) of the Misuse of Drugs Act 1972 as used with section 230(1) of the Criminal code.

2. The appellant was sentenced to fifteen years imprisonment on February 9, 2011. He has appealed against the conviction and sentence. Leave to appeal against sentence was granted. However, Mr Mills, Counsel for the appellant having taken instructions for the appellant informed the court t hat the appellant abandons the appeal against sentence.

3. The Crown sought leave to appeal against the sentence which was refused. An Application for Leave to Appeal against the sentence is now before this Court. The ground on which the application is made is that the sentence imposed by the learned trial judge is manifestly inadequate.

4. The facts presented by the Crown were to the effect that the appellant, a Jamaican natural, was an employee on the cruise ship, The Explorer of the Seas. The ship was to dock in Bermuda after travelling to other ports of call.

5. Mr Adrian Morris who was also an employee on the cruise ship was approached by the appellant, who informed him that he could earn some extra money. He told the appellant that he was not interested as he did not wish to get caught. The appellant told Mr Morris that all he needed to do was to put the bag in a spot where someone else would pick it up. The appellant offered to pay Mr Morris $1,500.

6. Mr Morris subsequently decided that he would assist the appellant. On 6 June 2010, he received a phone call from the appellant. He recognised his voice and the reference to his pet name “tall man”. The appellant told him to pick up the bag which would be left outside the appellant’s cabin and leave it inside the pub. Mr Morris saw an orange colour bag.

7. A CCTV footage revealed Mr Morris lifting a seat in the cruise ship pub and placing the bag under it. The bag was found by the cruise ship upholsterer. A report was made to the head of security.

8. The bag contained cocaine weighing 3963.3 grams. The street value was estimated at between US $424,500 and $735,000.

9. On realizing that the bag was discovered, Mr Morris went to the appellant's cabin where he saw the appellant's girlfriend. A call was made to the appellant by the girlfriend and within ten minutes the appellant came to the cabin.

10. Mr Morris on informing the appellant what had happened was asked by the appellant not to mention his name to the authorities. The appellant then gave Mr Morris $1,500.

11. Evidence disclosed that a call was made from the corridor phone to the appellant's cabin and a subsequent call from the appellant's cabin to a restaurant where the appellant was working.

12. Mr Mills for the appellant submitted that the evidence of Adrian Morris in light of his guilty plea was tainted, self serving, flawed and unreliable and ought to have been totally disregarded. Further, Mr Morris lied to the ship's security personnel when he was first questioned by them and only admitted his involvement after the CCTV footage was viewed.

13. It was also submitted that Mr Morris had his own interest to serve and that he implicated the appellant because having pleaded guilty and co-operated by giving evidence he would receive a more lenient sentence.

14. Mr Mills did not advance any submissions to the effect that the judge misdirected the jury as to how they should treat the evidence of Mr Morris who was an accomplice. He found no fault with the directions at page 32-35 of the summing up.

15. It was not suggested that, if the jury believed and found Adrian Morris to be a credible witness, that a conviction could not follow. What is being submitted was that he was an unreliable witness who had his own interest to serve.

16. There was evidence to be left to the jury at the close of the Crown's case and it was a matter for the jury to reach a decision as to the credibility of the witness. The jury by its verdict of guilty must have accepted Adrian Morris as a truthful witness. The jury is entitled to convict on the evidence of an accomplice if they find that the witness is speaking the truth and his evidence is such that it could result in a conviction.

17. For the above reasons the appeal against conviction is dismissed and the conviction and sentence affirmed.

18. The Crown's application for Leave to Appeal was presented on the basis that they were not asking the Court to interfere with the sentence of fifteen years.

19. However, they submitted that the trial judge was in error in discounting the proposed seventeen of eighteen to one of fifteen years.

20. Mr Mahoney furthermore submitted that the judge was in error in taking into account the personal family problems that might exist as a result of the appellant's incarceration.

21. In sentencing the appellant the learned trial judge stated:

> "*I do believe that the Court would not be out of its jurisdiction in considering the harshness of a sentence to consider matters such as, for instance, the dependency, the distance that the defendant will be away from his family, the length of time that the distance and length of time, the effect that its likely to have in the relationship, on those relationships, and the fact that there is no opportunity for early release, so that, in fact, in light of that it makes the sentence harsh, and I am simply saying that the Court has residual jurisdiction, a discretion to ameliorate a harsh sentence, and for that reason it's the Court's intention today to give effect to that."*

22. In the case of *R v Randal Richards et al,* Bermuda Court of Appeal 1/1991, the Court observed that the importation of drugs by a crew member or passenger of a cruise ship should be considered by the Courts as an aggravating circumstance. The Court stated:

> *"The trial Judge in sentencing one of the co-defendants made allowance "for your plea of guilty, your age, your previous good record."*
>
> *"We think that, where drug offences are concerned, Courts should give very little weight to the age of the offender or to an absence of any previous record save in the most exceptional circumstances. The reward for taking part in the distribution of drugs is high, so must the risk of severe punishment on detection."*

23. In the case of *The Queen v Geisha Ann Alomar*, Bermuda Court of Appeal 4/2003, the appellant was an American with four children including one who had some form of mental illness. The sentencing judge took this into account saying, "I am concerned for your children in particular the eldest who has a mental illness." She was sentenced to 4 ½ years imprisonment. However, the Court of Appeal stated:

> *Her tragic circumstances obviously attract considerable sympathy. But the Courts have long recognized that persons in vulnerable circumstances similar to those of the respondent would very quickly be targeted by drug dealers if they were given significant discounts, and that it is necessary for the Courts to steel themselves against a sentimental view."*

The sentence was increased to one of eight years.

24. The case of *Janice E Dayle Smith,* Bermuda Court of Appeal 8/1997 involved the appellant pleading guilty to the importation of cocaine and sentenced to imprisonment for seven years. The Court referred to cases in *Thomas, Current Sentencing Practice* where the Courts of England and Wales may as an act of compassion and mercy, discount what would otherwise be appropriate sentences of imprisonment by reason of an offender's particular medical condition. However the Court went on to say:

> *"We do not quarrel with the principle in general, but at the same time have to point out, as we feel must have been pointed out before, that in this and other jurisdictions it is a principle which is much reduced in its application to offences which arise from the unlawful trade in drugs. In that context only the most exceptional personal circumstances such as perhaps in R v Green, can expect to be given consideration. Mrs Dayle Smith is not in the same league; indeed in R V Bernard it is expressly noted:*
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> > *"The fact that an offender is HIV positive, or has a reduced life expectancy, is not generally a reason which should offset sentence."*
>
> *Were the Courts not to make an exception in this kind of offence it would inevitably make it more easy for those whose personal or family circumstances are most likely to arouse sympathy if apprehended. That must not be encouraged."*

25. We conclude that there may be special circumstances, such as a medical condition, which require the Court to discount a long sentence. It is for the Court to

decide whether such exceptional circumstances arise. There may be other special conditions other than a medical one which might earn a discount.

26. However the remarks made by the learned trial judge in the present case for personal and family difficulties does not fall into the special circumstances discretion. The courts are too often in mitigation of sentences, referred to the age of the appellant, a wife and children to support, the absence of the appellant from the home.

27. We are therefore of the view that had the Crown founded its appeal on the basis that the sentence was inadequate by reason of the discount given to the appellant, the Court may well have increased the sentence to 18 years, which the judge considered as the appropriate sentence apart from the family circumstances she took into account.

28. For the above reasons the application for leave to appeal against sentence was refused.

Signed

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Zacca, P

Signed

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Evans, J

Signed

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Baker, JA