IN THE SUPREME COURT OF BERMUDA

APPELLATE JURISDICTION

2011: No. 60

RUSS FORD II **Appellant**

and

LYNDON RAYNOR **Respondent**

AMENDED JUDGMENT

Date of Hearing: 29th March 2012

Date of Judgment: 9th May 2012 (in Court)

Mr. C. Craig Attridge, for the Appellant
Ms. A. Cassidy, Crown Counsel for the Respondent

INTRODUCTION

1. The appellant was found by a police officer in the bathroom of The Boat Club, North Shore Road, Devonshire, in possession of approximately an ounce of cannabis, with a street value of $600. He alleged he had recently purchased it for $650. The next day upon execution of a warrant at his residence in Smiths Parish, the police seized a smaller amount of 3.3gms.
2. The appellant was charged as follows:
   Count 1: Possession with intent to supply in an IPZ
   Count 2: Violently resisting arrest
   Count 3: Unlawful possession

He pleaded guilty to the latter two counts. In respect of Count 1 he pleaded guilty to unlawful possession which is the lesser and included offence. Trial proceeded upon Count 1 and the magistrate found him guilty of unlawful possession rather than possession with intent to supply. A probation report was ordered and considered.

He was sentenced as follows: Count 1, 4 months imprisonment plus 12 months consecutive for possession in the IPZ; Count 2, no sentence, Count 3, 30 days concurrent. In addition, he was sentenced to 18 months probation to follow. That Probation Order was not expressed to be attached to the sentence of any particular offence.

The appellant appeals on the grounds that; (1) The sentence is disproportionate and wrong in principle, and (2) the sentence is manifestly harsh and excessive.

The appellant submits that in respect of Counts 1 and 3, upon a conviction for simple possession of such a small quantity of cannabis in this jurisdiction it is unusual for a custodial sentence to follow.

He cited only one authority said to be found in this jurisdiction in which a person has been incarcerated for simple possession, *Hassell v R [1987]Bda. LR11* and he submits that is distinguishable.

Further, since the appellant maintained a guilty plea to the offences from the outset the sentences were not only wrong in principle but manifestly harsh and excessive.

The prosecution submitted written submissions but upon hearing the arguments did not seek to resist them.

3. Section 27(2) of the Misuse of Drugs Act 1972 provides sanctions of fines and imprisonment for unlawful possession of cannabis contrary to section 6(2). Therefore, regardless of what the practice maybe in the magistrate's court, this court cannot accept a submission and hold as a rule that a conviction for unlawful possession of a small amount of cannabis should not attract a custodial sentence. It will be for the sentencing magistrate to determine whether such a sentence should or should not be imposed after considering all the circumstances, including, the aggravating and mitigating circumstances.

4. It is accepted that the appellant was the subject of two unexpired conditional discharges for like offences at the time of these offences. Those are factors which the learned magistrate was not entitled to take consideration of as part of his sentence in the instant case. Where a person was previously convicted for an offence and was subject to an unexpired probation order or conditional discharge, such may not be taken into account when sentencing for a subsequent offence. The sentences for the previous offences and the current offence or offences must be separate even if concurrent or consecutive. *The Queen v Charles Webb 37 Cr. App. R 82.* In the final analysis the sentences must still be proportional.
5. Section 27A of the Misuse of Dugs Act 1972, provides for an additional term of imprisonment or fine depending upon whether the initial sentence was a fine or imprisonment and to the extent of the initial quantum, where the offence is committed within an increased penalty zone (IPZ).

   Sections 53 to 55 of the Criminal Code Act 1907 sets out those factors which a judge should consider when determining what a sentence should be. Section 56 establishes that imprisonment should be a last resort and section 57 establishes that unless otherwise expressly provided by that Act or another enactment where a provision provides for a penalty of imprisonment or fine a magistrate may impose a lesser degree.

   I think there appears to be nothing in the IPZ provisions of the Misuse of Drugs Act that overrides the discretion of a magistrate under sections 53 to 57 of the Criminal Code Act 1907.

   I think support for that opinion can be found in *Cox and Dillas v R [2008] Bda. LR. 6 and Mallory v DPP [2011]Bda. LR. 30*.

   Further since the IPZ provisions provide for fines and confinements, it seems that discretion and proportionality are inherent in its application.

   I think there is nothing in the provisions which prevents a magistrate from imposing an IPZ sentence of less than the amount stipulated in the section or at all.

   Since there is no evidence that the magistrate found the appellant to be in breach of the conditions of any of the two former orders nor proceeded to sentence him therefor, he was not entitled to treat the instant matter as a third offence. I think

the instant matter should have been treated as a first offence for sentencing purposes.

In the circumstances I would allow the appeal and vary the sentences.

6. In respect of the 18 months probation order, there appears to be two problems. Firstly, it is not attached to follow any particular sentence. There is a temptation to argue that it is obvious it should follow the greater sentence. In my view that is not satisfactory. These are punitive matters. They should be specific. To remove any risk of misunderstanding and misinterpretation, magistrates should make it clear which sentence a probation order is to follow.

Further, there is always a real risk in a combination sentence case that a convicted person may suffer a double and excessive punishment when his substantive sentence is followed by a community sentence such as a probation order. This is particularly so when the initial sentence is one of imprisonment.

I think a sentencing magistrate should first determine what the true sentence or range of sentence should be and state that in his reasons. If he considers that a community sentence such as probation should follow he should then reflect that in his final sentence. Such a community sentence may be reflected in the total sentence by way of a suspended or discounted portion of the substantial sentence, with the probation to follow. The convict should then be informed what his final sentence maybe should he breach his probation. Such should be stated in the reasons.

For example, a magistrate may consider that an appropriate sentence should be three years. He may further consider that the circumstances require that a period of probation should follow. In such circumstances he may consider discounting the three year sentence to two and one half years so that in the event of a breach of the probation order there is still sufficient room left for a sentence not exceeding the three years. Such further sentence or other sentence or part thereof may or may not in the magistrates discretion be later imposed. In any event he would have avoided the meting out to this defendant a greater sentence than another who had not been the subject of a consecutive probation order. This practice is particularly helpful when maximum sentences or close to maximum sentences or mandatory minimum sentences are imposed. Where this practice is not followed, there is a real risk in such cases that a magistrate upon a breach,

may find himself at risk of unjustly exceeding the maximum or at risk of being unable to impose any further penalty, for example under section 70CA(3)(b)(111), even when one maybe merited.

7. In the instant case the magistrate failed to attach the Probation Order to a specific sentence, further, there is no evidence that he considered the just stated principle. There appears to be a real risk that should the appellant breach his probation he could be doubly punished with further imprisonment which in totality maybe in excess of the appropriate sentence in this instance.

   The likelihood of such a result is clearly demonstrated firstly by the sentence imposed in the instant case and secondly by the appellants own words in the probation report, where he said he will not desist from the use of cannabis.

   Section 70B (d) of the Criminal Code anticipates the consent of a defendant to some probation programmes. Where it is clear to the sentencing judge that he will not, a persistence with such an order may only expose the convicted to double punishment that maybe wrong in principle, harsh and excessive or it may only result in a magistrate finding himself without any meaningful recourse under section 70CA.

8. In the instant case, I would allow the appeal and set aside the probation order on the basis that it is excessive and unreasonable in the circumstances.

   The sentences are varied as follows; Count 1, a fine of $800 for the unlawful possession plus $1000 for possession in the IPZ, payable in six weeks or 9 months imprisonment, Count 3, a fine of $500 for the unlawful possession, payable in 14 days or 3 months imprisonment. Count 2, the resisting order, is not interfered with.

Dated this **9th** day of **May** **2012.**

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Carlisle Greaves, Puisne Judge