In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CRIMINAL APPEAL 2012: NO. 31

VINCENT HEWEY

Appellant

-v-

LYNDON RAYNOR
(Police Sergeant)

Respondent

JUDGMENT
(In Court)

Date of Hearing: October 3, 2012
Date of Judgment: October 9, 2012

Ms. Elizabeth Christopher, Christopher's, for the Appellant
Mrs. Tawana Tannock, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. By an Information dated April 8, 2011 a warrant was issued as he failed to appear, the Appellant was indictably charged with importation of cannabis and possession with intent to supply of cannabis on December 18, 2008. The amount involved was 4.7 pounds with a potential street value of approximately $100,000. A warrant was issued on that date as he failed to appear. He first appeared in Court on February 10, 2012 and has been in custody since then.

2. The Crown at some point decided to proceed summarily and the Appellant pleaded guilty at the first opportunity to the importation charge. On May 17, 2012, he was sentenced to 18 months imprisonment. Against that sentence he appealed.

3. The appeal against the decision of the Magistrates' Court (Worshipful Khamisi Tokunbo) can be distilled into two principal complaints. Firstly, the Learned Magistrate erred in refusing to suspend the sentence of imprisonment because he gave insufficient weight to the impact the abandonment of the drugs had on the responsibility of the offender. Secondly, and alternatively, having regard to the unique circumstances of the Appellant's case, the term of imprisonment imposed was excessive.

Findings: circumstances of the offence

4. On the date of the offence, the Appellant arrived at LF Wade International Airport and cleared Customs leaving a large black duffel bag on the baggage conveyor belt with a label bearing his name. The bag was retrieved by a Jet Blue staff member, examined by Customs and was found to contain 2165.9 grams of cannabis with a street value of $108,300 (or $46,200 if sold by the ounce).

5. At the sentencing hearing, the Prosecution did not challenge the Defence assertion by way of mitigation that the Appellant had simply abandoned the bag in the Airport Arrival hall and aborted his mission to import the drugs for ultimate commercial distribution in Bermuda. The Magistrate accepted this central mitigating fact noting:

> "*Had a second thought about committing the offence while on airplane-but that was rather late-even though he abandoned drugs at airport….The offence of importation was already completed.*"

Circumstances of the offender

6. The Appellant was (according to the Information) born on April 9, 1989 and only 19 years old at the time of the offence in December 2008. At the date of sentence he was 22 years of age and seeking to return to Canada where he claimed to have fathered a child. This was his first known criminal conviction. When interviewed a Probation Officer for the purposes of the Social Inquiry Report placed before the Magistrates' Court, the Appellant admitted bringing the drugs into Bermuda for commercial gain. He was assessed as representing a low risk because, inter alia, he had family support and future goals and aspirations. The Report recommended that he take advantage of Corrections programmes while in custody and suggested that a period of Probation after his release might assist his reintegration into society.

The sentencing hearing

7. Prosecution counsel (Mrs. Tannock did not appear below) suggested that the appropriate range of sentence was between 18 months and three years. Ms. Christopher invited the Court to consider a partially suspended sentence, taking into account the fact that the Appellant abandoned the drugs, was young at the time of the offence, grew up in a difficult neighbourhood and the passage of time since the offence was committed. He had become a father in Canada and wished to return there. The Learned Magistrate took note of all the mitigating factors advanced but crucially concluded:

"*This is a serious offence…Substantial amount of drugs…Offence must attract an immediate custodial sentence in the circumstances…A partially suspended sentence would not be appropriate since you are not likely to remain in Bermuda…*"

Findings: Supreme Court's powers in relation to appeals by convicted persons against sentences imposed by the Magistrates' Court

8. Mrs. Tannock in paragraph 8 of the '*Skeleton Argument of the Respondent*' submitted that "*the Appellate Court must be satisfied that the sentence passed was wrong in principle, to find that the sentence passed is manifestly excessive: R-v-Ball, 35 Cr. App. R*…." This initially appeared to me to represent the approach this Court should take when asked to interfere with a sentence imposed by the Magistrates' Court. However, Ms. Christopher rightly submitted that the correct approach must be informed by the relevant provisions of the Criminal Appeal Act 1952.

9. The statutory jurisdiction of this Court when considering appeals against sentence by convicted persons was recently (and authoritatively) analysed by the Court of Appeal for Bermuda in *R-v-Jason Damian Brown* [2012] CA (Bda) 4 Crim. Evans JA (delivering the Judgment of the Court) stated (at pages 2-3):

"*4. The procedure is set out in section 18(3) of the Criminal Appeals Act 1952 which reads –*

'(3) Subject as hereinafter provided, the Supreme court, in determining an appeal under section 3 by an appellant against his sentence, if it appears to the Court that a different sentence should have been imposed, or that the appellant should have been dealt with in some other way,--

(a) may quash the sentence imposed by the court of summary jurisdiction and may impose such other sentence allowed by law (whether more or less severe) in substitution for the original sentence as the Court thinks just; or

(b) may quash the sentence imposed by the court of summary jurisdiction and may deal with the appellant in such a way as may be allowed by law in respect of the conviction of the offence in question;

And in any other case shall dismiss the appeal:

Provided that no sentence imposed by a court of summary jurisdiction shall be increased upon appeal by reason of or in consideration of any evidence which was not given during the criminal proceedings before the court of summary jurisdiction.'

5. The meaning in our judgment is clear. The Supreme Court Judge is required to consider, first, what sentence the Magistrate imposed; secondly, whether in his or her view a different sentence should have been imposed,

taking account of the evidence that was before the Magistrate and any fresh evidence introduced on the hearing of the Appeal; and thirdly, whether in all the circumstances of the case, the sentence passed by the Magistrate should be quashed and a different sentence imposed.

6. This may mean, for example, that the Supreme Court Judge would decide not to quash the original sentence in a case where, in his or her independent view, the sentence might have been marginally different from the one the Magistrate imposed."

10. The freedom the Court has in appeal against sentence by a convicted person under section 18(3) of the Criminal Appeal Act 1952 is accordingly far greater than it is in relation to an appeal by the Crown under section 4A of the Criminal Appeal Act 1952. The Courts powers in such a case are delineated by section 19A of the Criminal Appeal Act 1952, which provides as follows:

> "*19A On an appeal under section 4A against sentence, the Supreme Court shall, if it thinks that the sentence imposed is manifestly inadequate or excessive, quash the sentence imposed by the court of summary jurisdiction, and impose such other sentence as may be warranted in law in substitution therefor, and in any other case shall dismiss the appeal.*"

11. This Court has previously held that "*manifestly inadequate means obviously inadequate – obvious to the appellate tribunal that the sentence is much too low …It is a failure to apply right principles*": LA Ward CJ in *Taylor-v-Smith* [1999] Bda LR 63 (applying the unreported decision of the Court of Appeal for Bermuda in *Plant (R)-v-Robinson*, Criminal Appeal 1983: 1). The statutory scheme is explicitly designed to restrict the ability of the Crown to seek a more severe sentence on appeal but to facilitate the ability of a convicted person to secure a more lenient sentence on appeal. Under section 18(3), material not before the Magistrates' Court cannot be used to increase a convicted person's sentence where he appeals; it can be used as a basis for reducing his sentence.

12. In summary, when a convicted person such as an Appellant appeals against sentence, this Court can substitute what it considers to be a more appropriate (and more lenient) sentence even where the Learned Magistrate has made no error of principle. In this regard, material not before the Magistrates' Court can be taken into account. The converse applies with respect to appeals against sentence brought by the Crown: *F Miller-v-J Crockwell* [2012] SC (Bda) 47 App (7 September, 2012)[1].

Findings: was the sentence imposed wrong in principle?

13. Mrs. Tannock placed an array of local cases before the Court in support of her submission that the sentence imposed fell at the lower end of the range of sentences imposed for similar cases and adequately took into account the mitigating

[1] In this case the Crown appeal against sentence was dismissed on the grounds that sentence imposed in the Magistrates' Court was not wrong in principle based upon the sentencing principles relied upon by the Crown before that Court. New guidelines were formulated for future cases based on material considered for the first time on appeal.

circumstances upon which the Appellant relied. She relied, most significantly, on the following principles these authorities supported:

(a) "*The Appellant's plea of guilty and his clean record are mitigating factors, but not of high value. It is only common sense to choose as couriers, persons with no previous convictions...*: *Cousins-v- Earl Kirby (Police Sgt)* [1990] Bda LR 4 (Court of Appeal for Bermuda-413g cannabis, 3 years imposed in Magistrates' Court upheld by Wade J (Acting) and Court of Appeal);

(b) In *R-v-Bascombe* [2004] Bda LR 28 (Court of Appeal for Bermuda, 227.61 g of cannabis), a sentence of 3 years probation imposed in the Supreme Court was quashed and replaced with 12 months imprisonment. In rejecting the argument that the new statutory sentencing principles radically altered the approach to sentencing in drug importation cases, Collett JA (at page 4) opined as follows:

> "*We have carefully considered these provisions and have concluded that, in essence, they are guidelines to which sentencers should have regard, but that in relation to drug trafficking offences under the 1972 Act they have in no way deprived the existing principles of sentencing established by decisions of this Court of their force or authority. In declaring that an immediate custodial sentence is appropriate in such cases absent exceptional circumstances and in establishing a range of tariff sentences for the guidance of judges and magistrates, this Court has always been mindful of the principles which the Legislature has now enjoined sentencers to apply.*
>
> *The reasons given by the learned judge for imposing probation rather than a custodial sentence in this case assert that there was no evidence of a financial/commercial aspect to it. However, the amount of Cannabis imported would seem to suggest such a motive on the Respondent's part rather than a mere intention to import a supply for his own use. Too little weight was given to the previously decided cases and the learned Judge proceeded upon the mistaken basis that they were no longer relevant to the decision. No case was cited to us in which an offender who imported a similar quantity of Cannabis, or was found in possession of it with intent to supply, escaped an immediate custodial sentence.*"[2]

[2] This decision is, of course, binding on this Court. I respectfully disagree with the *obiter* suggestion, earlier in this Judgment, that the 2001 amendments to the Criminal Code as part of the Government's Alternative to Incarceration initiative was "*largely a codification of existing practice*", for the reasons set out in paragraphs 71-72 of my Judgment in *F Miller-v-J Crockwell* [2012] SC (Bda) 47 App (7 September, 2012).

14. In my judgment it was open to the Learned Magistrate to conclude that an immediate custodial sentence with no suspended element was required, taking into account the fact that:

    (a) the Appellant evinced an intention to leave the island upon his release;

    (b) the Appellant did not cooperate to any exceptional extent with the authorities; and

    (c) by accident or design, the Appellant had enjoyed the benefit of some years at liberty having seemingly left Bermuda before charges were laid.

15. The mere fact that the Appellant abandoned the drugs in the airport was not, standing by itself, such a compelling exceptional circumstance as to positively require the partial suspension of any term of imprisonment which was imposed. The Learned Magistrate did not err in principle in declining to partially suspend the immediate custodial sentence which he imposed.

Findings: does it appear that a different penalty ought to have been imposed?

16. None of the cases cited by Mrs. Tannock on before of the Respondent to the present appeal involved the unusual feature of the imported drugs being abandoned before the offender had passed through the port of entry. Because of the range of sentences involved in previous cases, it is difficult to say how much weight the Learned Magistrate gave to the abandonment factor. What is clear is that the range of sentences suggested by the Crown was 18 months to 3 years and he opted for a sentence at the lower end of that scale.

17. For instance, Crown counsel referred to the Royal Gazette report of the Magistrates' Court case of *Scraders* who imported over 100g of cannabis concealed in soda bottles and swallowed in pellet form. Although the quantity of drugs involved was less than that involved in the present case, the Learned Acting Magistrate imposed a 3 year prison term for "*a very calculated*" offence. On the hand, counsel also referred the Court to a Royal Gazette report of the case of *Dyer*, a breach of trust case where the offender was a security officer responsible for searching planes, who received an 18 months sentence of imprisonment from the Learned Senior Magistrate for handling 948.7g of cannabis which he removed from a plane concealed on his body. The quantity was half that involved in the present case and the offence was not importation, but the responsibility of the offender would seem to be clearly far greater than the culpability of the Appellant in the present case.

18. Ms. Christopher relied essentially on what section 54 of the Criminal Code itself describes as the "*fundamental principle of sentencing*", namely: "*A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender*". She submitted that the fact that the Learned Magistrate had accepted that the Appellant, despite completing the offence of importation, had genuinely abandoned the drugs at the airport was a factor which greatly diminished both the gravity of the offence and the responsibility of the offender. Even if a partially

suspended sentence was inappropriate, then a shorter custodial term ought to have been imposed. I find this submission compelling.

19. The offence of importation of controlled drugs falls into a category of offence where the gravity of the offence and the responsibility of the offender may vary markedly even though the full offence is completed depending upon whether either: (a) but for the intervention of the authorities or some other intervening agency beyond the control of the offender, the purpose of the criminal enterprise would have been fulfilled; or (b) the offender himself, of his own volition, abandons the enterprise. With offences of violence, the completion of the offence necessarily means inflicting the full extent of the harm that the penalties for the relevant offence are intended to sanction. With other offences, the gravity of the offence in term of harm caused may vary markedly depending on events occurring after the completion of the offence. By way of example, the gravity of an offence of stealing would be far less if the thief had a crisis of conscience after committing the offence and abandoned the stolen property in a place where it was likely to be found by the owner.

20. In the present case, the Appellant failed to collect his bag from the baggage conveyor belt, leaving it in a highly visible high security area where it was likely to come to the attention of the authorities. The Prosecution did not suggest that this was part of the criminal enterprise upon which he had embarked and the Magistrates' Court accepted that he genuinely abandoned the drugs[3]. In all of the importation cases referred to in argument, but for the intervention of the authorities, the offenders in question would have completed the main object of their criminal enterprise, namely supplying the drugs for commercial reward in Bermuda causing the social harm that the offence is actually designed to prevent.

21. While the offence of importation is serious in and of itself, a significant discount on the ordinary custodial term is in my judgment appropriate where an offender voluntarily abandons the drugs in circumstances where they are likely to be and are in fact found by the authorities. Had the Appellant handed in the bag containing the drugs and made a clean breast of it on arrival at the Airport, a custodial term might not even have been required.

22. Having regard to the original sentence imposed and taking an independent view of the matter, I find that the seriousness of the offence and the responsibility of the offender in all of the circumstances of the present case justified a sentence more than marginally below the range relied upon by the Crown below of 18 months to 3 years. That range was appropriate for the ordinary importation case where not only was the offence completed by the offender but, absent the intervention of events beyond his control, he would have completed his role in the wider criminal enterprise of which the offence of importation merely formed a part. In my judgment a sentence of 12 months imprisonment is more appropriate to give due credit for the Appellant's belated change of heart about completing the sharp end of the criminal enterprise upon which he rashly embarked.

[3] There may be many cases where the offender completes his role in the broader criminal enterprise of which the importation offence is but a part by leaving the drugs e.g. on board a plane or at a place in the airport where the contraband will be collected by an accomplice. The Appellant was not sentenced on the basis that his was such a case.

Summary

23. The appeal is allowed, the sentence of 18 months imprisonment imposed in the Magistrates' Court is quashed and substituted with a sentence of 12 months imprisonment (with time spent in custody since his remand in custody by the Magistrates' Court taken into account).

Dated this 9th day of October, 2012 _____

IAN R.C. KAWALEY CJ