



# The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 5 of 2016

Between:

**THE QUEEN**

Appellant

-v-

**DAYMON SIMMONS**

Respondent

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**Before: Baker, President  
Bell, JA  
Bernard, JA**

**Appearances:** Ms. Victoria Greening, Department of Public Prosecutions, for the Appellant  
Mr. Marc Daniels, Marc Geoffrey Ltd, for the Respondent

**Date of Hearing & Decision:**

**14 November 2016**

## REASONS

*Sentence for drug offences – increased penalty zone – method of calculation*

**Bell. JA**

1. This an application for leave to appeal against the sentence imposed by the trial judge, Simmons J, on the grounds that it is manifestly inadequate. The application for leave to appeal was unsuccessful and this Court ordered on 17 June 2016 that the matter should be listed for a half a day of the session, and that if the application for leave to appeal were to be successful, the hearing of the appeal would follow. We have today heard both the application for leave to appeal and the substantive appeal.

2. On 5 April 2016, the Respondent was convicted on his own guilty plea on the following charges:
  - Count 1: Possession of a Controlled Drug with Intent to Supply in an Increased Penalty Zone, contrary to section 63, as read with section 27A of the Misuse of Drugs Act 1972. The drug in that case was cocaine.
  - Count 2: Possession of a Controlled Drug with Intent to Supply in an Increased Penalty Zone, contrary to section 62, as read with section 27A of the Misuse of Drugs Act 1972. The drug in question was cannabis.
  - Count 3: Possession of a Controlled Drug in an Increase Penalty Zone, contrary to section 63, as read with section 27A of the Misuse of Drugs Act 1972. The drug was cannabis resin.
  - Count 4: Possession of Drug Equipment in an Increased Penalty Zone, contrary to section 92, as read with section 27A of the Misuse of Drugs Act 1972. The equipment in question was a silver grinder.
  - Count 5: Occupier Permitting Activity to Take Place, contrary to section 13(1)(d) of the Misuse of Drug Act 1972.
3. On 17 May 2016, the Supreme Court sentenced the Respondent to a term of 6 years' imprisonment in respect of count one, 18 months' imprisonment for count two, 18 months' imprisonment for count three, 15 months' imprisonment for count four, and four years' imprisonment for count five. The sentences were to run concurrently.
4. It is important to note that the quantities of drugs constituted approximately 30 grams of cannabis, 385 grams of cocaine, and just less than 1 gram of cannabis resin.

5. It is not disputed that the offences took place within an increased penalty zone, so that section 27A of the Misuse of Drugs Act applied. The range of additional penalty provided for in section 27 of the Misuse of Drugs Act 1972 is an increase of one to three years where the sentence was one of fewer than seven years, and three to five years where the sentence was one of seven years or more, The judge accepted that it was appropriate to apply the lower end of the increased range of sentence. The Crown has today sought to apply an additional element of four years on the basis that the appropriate sentence was over seven years, and that would represent the mid-way point in the range of three to five years.
6. Given the facts as they have been identified in relation to the Respondent's residence and its proximity to the school, I would accept the judge's view that the low end of the increased penalty zone range was appropriate. I should mention that the cocaine alone in terms of the drugs had a street value in excess of \$100,000. There was an amount of \$12,900 in cash seized, as well as the drug equipment referred to, all of which makes it abundantly clear that the Respondent was in the business of supplying a variety of controlled drugs. The judge took as her starting point on sentence that the appropriate range which she should start from when determining the basic sentence was one of four to seven years. From that the judge took the figure of six years as the appropriate sentence and then applied the additional factor identified by the increased penalty zone provision and the add-on, before applying a discount of fifteen percent for the respondent's guilty plea.
7. This led the judge to impose a sentence on count one of some six years. Since this was the most serious of the counts and the sentences were all concurrent, in practical terms one can therefore focus on the charge relating to the intent to supply cocaine. The section governing the increased penalty zone provisions makes it clear that the exercise of applying the additional penalty is to be carried out at the end of the sentencing process, after the "basic" sentence has been determined. So the judge erred in considering the increase attributable to the increased penalty zone before considering the appropriate discount.
8. In this case the error made little difference to the final result because the judge had taken a starting point of some six years, but in other cases the difference

could be significant, and it is important to follow the provisions of section 27A accurately.

9. In my view, the judge's starting point of four to seven years was manifestly inadequate.
10. The cases cited by the Crown start with *Richards et al v The Queen* [1991] LR1. In that case, although it was cited by the Crown for different reasons in terms of the matters in which the Court should have regard, it is noteworthy that it concerned possession with intent to supply, albeit on the basis of a conspiracy, and a quantity of cocaine of approximately one-third of the amount seized in this case. The Court of Appeal set a bracket of eight to twelve years as being the appropriate starting point and refused to interfere in a sentence of twelve years.
11. In the second case to which the Crown referred us, the case of *The Queen v Willston Ezekiel Davis* [2006] Bda LR 49, the sentence following trial on a charge of possession with intent to supply a lesser amount of controlled drugs than was the case in this case was a sentence of twelve years.
12. And lastly in terms with these cases which give guidance to the Court was the case of *Gibbons and Beach v The Queen* [2009] Bda LR 41. The Court was concerned with a much smaller quantity of cocaine, but said notably that where there was evidence of trading in hard drugs a sentence of eight years was not manifestly inadequate.
13. The Crown has suggested in this case that there should be a starting point of nine years and accepted a fifteen percent discount for the respondent's guilty plea, to give seven and a half years before the additional element applicable by reason of the increased penalty zone factor. The minimum such of additional element would be three years, to give a total figure of ten and a half years.
14. It is the case that one can take a variety of examples of sentence and, with the addition of the increased penalty zone factor, arrive at quite remarkable different results. For instance, a basic sentence of eight years and a discount of fifteen percent would give six point eight years, and if one then took the lower part of the range for the increased penalty zone, that would leave a total of seven point eight years. I have gone through the position if one started with a basic sentence of nine years and one gets a fifteen percent deduction to seven and a half years, and adds

three to give a total of ten and a half years, ten years with a fifteen percent discount would give eight and a half years and the minimum add-on for the increased penalty zone would bring you to eleven and a half years.

15. Those different numbers demonstrate the possibility for anomalies within the sentencing system in such circumstances. I would prefer not to deal with matters by means of arithmetical calculations, but there is no doubt in my mind that the judge's conclusion of six years is manifestly inadequate, given the quantity of drugs involved in this case.
16. I would substitute a period of nine years, without breaking that down further in terms of the discount factor or the additional add-on penalty for the increased penalty zone. So the appeal is allowed and the sentence of six years imposed by the judge is set aside and this Court would substitute a sentence of nine years' imprisonment.

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Baker, P

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Bell, JA

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Bernard, JA