In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2018: 22

NATASHA YORK

Appellant

-v-

FIONA MILLER
(POLICE SERGEANT)

Respondent

JUDGMENT

Appeal against sentence in the Magistrates' Court
Whether sentence was harsh and manifestly excessive
Importation of Cannabis contrary to section 4(3) of the Misuse of Drugs Act 1972

Date of Hearing:	01 October 2020
Date of Judgment:	02 October 2020
Appellant	Mr. Mark Pettingill, Chancery Legal Limited
Respondent	Ms. Karen King for the Director of Public Prosecutions

JUDGMENT delivered by Shade Subair Williams J

Introduction

1. This is an appeal against sentence imposed in the Magistrates' Court upon the Appellant's guilty plea to Count 1 of Information 17CR00548 in respect of the offence of importation of the controlled drug cannabis, contrary to section 4(3) of the Misuse of Drugs Act 1972 ("the MDA"). The Crown offered no evidence on Count 2 which

alleged possession of cannabis with intent to supply, contrary to section 6(3) of the MDA.

2. On 28 May 2018 Magistrate Khamisi Tokunbo sentenced the Appellant to 12 months imprisonment, 9 months of which he suspended. Crown Counsel confirmed, as it appears from the Record of Appeal ("the Record"), that no reasons for the sentence passed were given by the magistrate.

3. By Notice of Appeal filed on 30 May 2018 by her previous attorney, the Appellant commenced appeal proceedings against her sentence on the grounds that the sentence imposed in the Magistrates' Court was manifestly harsh and excessive.

4. As the Appellant's new Counsel, Mr. Pettingill initially sought to withdraw the complaint on the harshness and excessiveness of the sentence. He accepted that he was motivated to do by the Crown's agreement for the Appellant's continued release from serving the immediate custodial portion of her sentence on the basis of procedural delay in the prosecution of this appeal. However, this Court was unwilling to direct the Appellant's release from serving her sentence on such a basis.

5. I advised Counsel of my provisional openness to the question as to whether there was established good reason before the magistrate at the sentence proceedings to have suspended the whole of the custodial sentence imposed. Mr. Pettingill accordingly pursued the complaint upon which the Notice of Appeal was pleaded i.e. that the sentence was manifestly harsh and excessive in that the magistrate wrongly exercised his discretion in failing to suspend the entire of the term of imprisonment.

6. While the Crown was given the opportunity to express any concerns or to make an application for a short adjournment occasioned by the abandonment of the procedural point and the pursuit of the Notice of Appeal as pleaded, Ms. King confirmed that the Crown was unopposed to the appeal proceeding on the grounds that the sentence was manifestly harsh and excessive.

The Sentence Hearing and Factual Background

7. The Appellant, now 44 years of age (DOB 20 August 1976), appeared before Magistrate Tokunbo for sentence on 28 May 2018 as a first-time offender and mother of two daughters who were also present at the sentence hearing. (The Appellant's daughters were 16 and 11 years old at the time of the sentence hearing.)

8. The summary of facts underlying her guilty plea before the magistrate was as follows:

"*On Sunday the 28th of May 2017, the defendant and her two female children returned to Bermuda via a commercial aircraft from Toronto, Canada.*

The defendant cleared immigration then entered the Baggage Hall before proceeding to the Inspection area where she was directed to a secondary inspection counter.

The defendant was asked a series of questions including if she was aware of the contents of her luggage and whether she packed her bags herself to which she responded, "Yes". The Customs officer commenced an inspection of the defendant's purse and noted that the contents smelled of cannabis. The defendant was asked if she used cannabis and stated that she cannot smoke but she stayed with a lady whose daughter smoked it for medical reasons. The customs officer continued a search of the defendant's luggage and observed that one of the suitcases contained various hemp oils and hemp butter. At that time, the defendant was asked if she had any illegal drugs to which she replied, "no".

As a result of the officer's suspicions, the defendant was escorted to a secondary search room where officers commenced a search of the defendant. The officer conducted a pat down of the defendant's right side and then proceeded to her left side when the defendant suddenly bent over to prevent the officer from continuing. At this time the officer felt a hard lump at the defendant's waist. The defendant was cautioned and she replied, "I don't know what to do. I should have someone present?"

The defendant was informed of the search procedures and right to appeal and subsequently agreed to a more in-depth personal search. Before the officers commenced the search, the defendant put her hand down her pants and pulled out a brick shaped package wrapped in black tape. When asked if she had anything else, the defendant pulled another black package from the same area. When asked what was in the packages she replied, "I have no idea."

Shortly thereafter, a police officer attended the search room and arrested the defendant on suspicion of Importation of a Controlled Drug and cautioned her. The defendant replied, "Yes, it was a stupid thing to do."
… Whilst under caution, the defendant admitted to bringing the packages into Bermuda hidden on her person but did not know what the items contained…

…She was later interviewed under caution and responded "No comment" to all questions pertaining to her arrest.

A search of the defendant's residence was conducted and a phone and documentation concerning the defendant's finances was seized. An examination later made of the documents revealed that the defendant had fallen into financial hardship.

The police evidence bag containing the two black packages seized from the defendant was forwarded to the Government Lab for analysis and later confirmed to be the controlled drug Cannabis with a total weight of 1430.7 grams.

…The Drug Expert stated that the 1430.7 grams of Cannabis in this matter would have produced 2861 twists. If sold at the price of $25, it would have an estimated street value of seventy one thousand five-hundred and twenty-five dollars ($71,525) dollars…"

9. In addition to the agreed summary of facts, the magistrate received a report from Bermuda Assessment and Referal Centre ("BARC") and a Social Inquiry Report authored by Mr. Jibri C. Lewis, M.Sc, dated 28 May 2018 ("the SIR").

10. The SIR disclosed, *inter alia*, the Appellant's medical history and explained the Appellant's proneness to regular seizures and her narrative that this was her only reason for smoking cannabis and committing the offence of importing the cannabis seized from her person. In reporting on the Appellant's personal profile, Mr. Lewis stated:

"*…She identified her main challenge in life as dealing with her seizures, as it also affects her relationship with her children, who are often the ones tasked with reviving her after she has an episode. She further added, "I am an organized person, so having seizures is hard because you can't control them when they happen. I can have them three to four times per day. I am also raising my children on top of dealing with the seizures. My children help revive me when I am having seizures, so I know it's hard for them as well." Ms. York reported that she has several acquaintances, but stated that she only has two friends. She reported that to her knowledge, none of her peers are involved in any form of criminal activity*."

11. The Appellant also divulged to Mr. Lewis that she travelled to Canada to attend the Lift & Co. Cannabis Business Conference ("the Cannabis Conference") where she engaged several vendors. It is reported in the SIR that the Appellant told Mr. Lewis that she spoke with the vendor of "Sisters of the Valley" who recommended her consumption of a specific strain of cannabis known as "sativa" to treat her seizures. She accordingly purchased a large quantity of cannabis sativa from a vendor at the Cannabis Conference who packaged the substance for her without being made aware that she intended to return to Bermuda with it.

12. For the preparation of the SIR, the Appellant was queried on what she thought she should have done differently in relation to this matter. Her reported response was:

"*I would not have done anything differently. I wish I did not bring back the cannabis, but there was no other way. I was trying to help myself, because I was tired of having seizures and I knew that my prescription medication did not work for me. They would give me a reaction and I would still have the seizures. I never smoke in front of my children, but I did let them know that I smoke cannabis to deal with my seizures. I would*

not even smoke cannabis if I did not have the seizures. I do not have a drug problem. It is just I just smoke to deal with my seizures. I tried to get a licence through my doctor, but I was told 'no' at first. Then I was given a licence to use CBD, but not the THC."

13. Mr. Lewis independently contacted three other people who were personally acquainted with the Appellant so to report on their collateral impressions. He stated that they each confirmed their understanding from the Appellant that her suffering of seizures was her single reason for engaging in her cannabis use. This was confirmed by the Appellant herself when addressing the magistrate during her plea of allocutus.

14. Prior to the commission of this offence the Appellant applied for a government issued licence to possess a Cannabinoid substance but this was refused. The magistrate was presented with a copy of the Appellant's six month licence to possess "*300 x 25 mg Real Scientific Hemp Oil capsules Cannabinoid Hemp Oil containing 7.5 g of CBD equivalent to pure base content*" issued on 2 August 2017 and expiring on 2 February 2018. During the sentence hearing the Appellant also relied on a medical report from her physician, Dr. Kyjuan Brown, dated 22 May 2018 ("the medical report"). The medical report read as follows:

"*I am writing in regards to the above named patient a 40 year-old mother of 2, who has been diagnosed with intractable seizures and has failed multiple medications. The patient has been seen by a local neurologist Dr. Keith Chiappa, as well as visiting Lahey specialist Dr. Camac.*

In Dr. Camac['s] letter dated December 9th 2011, she invited the patient to consider increasing her dose of ant-seizure medication Kappra, which would possible [sic] [possibly] lead to more adverse side effects, as well as adding anti-seizure medications Lamictal or Dilantin. The possible side effects of these medications include but not limited too [sic] [to] *depression, suicidal thoughts, rashes, allergic reactions, itching and swelling, trouble breathing, hostility, aggressive behaviors, psychosis, neutropenia, leukopenia, pancytopenia, thrombocytopenia, anaphylaxis, angioedema, eosinophilia, Stevens-Johnson's reaction, toxic epidermal neck or lysis, erythema multiforme as, hyponatremia, acute renal failure… … … …*

While increasing the dose and as well as adding the additional medication her seizures continued. In Dr. Chiappa['s] *letter dated January 15, 2016 he outlines his concern of the patient who is presently taking maximum doses of medications, and yet her clinical events are essentially the same. He further writes that he is unable to take the case any further.*

I have seen the patient on numerous occasions after having several seizure episodes sometimes 3-4 per day. As a result of the seizures the patient often develops tongue lacerations, abrasions to her face and body, conjunctival hemorrhages [bleeding on

the outside of the eye], swelling and bruising. The patient also has short term memory loss, where she has forgotten large chunks of time 2nd to the frequency of seizures.

In addition due to the uncontrolled nature of the patient's seizures she has lost her job, unable to drive and is presently before the court in regards to the care of her 2 children.

When this patient consumes medical marijuana either via oral drops or inhalation her symptoms abate completely. She no longer suffers seizures, nausea and visual auras. Her life essentially returned to normal within minutes.

Medical cannabis has a calming effect of the central nervous system as it has been shown to target the CB1 receptor which leads to a significant antiseizure activity in animal models with chronic seizures.

As license medical practitioner here in Bermuda with qualifications in medical marijuana prescribing I endorsed the treatment of intractable seizures with the use of medical marijuana. We are currently in the process of applying before the Minister of Social Development & Sports with responsibility for National Drug Control, to grant this patient an additional license for her to obtain more the 1% THC. The recommendation for this condition is to take CBD rich extract with a ration in between CBD 8-39% and THC 1 to 10%. According to my latest discussion with the Minister, we are expected [sic] [expecting] *this application to be granted.*

It is important to note that medical marijuana is approved in Candida [sic] [Canada]*, Australia, 29 states in the United States, Netherlands, Columbia, Czech Republic, Chile, Uruguay, Spain, Norway, Peru, Philippines, Poland, Puerto Rico, Romania, San Marino, Switzerland, turkey* [sic] [Turkey]*, Zambia, and Austria.*

If you have any questions about the direction of treatment, please do not hesitate to contact me.

Sincerely,
Dr. Kyjuan H. Brown, MD
Medical Director"

15. At the close of the sentence hearing, Magistrate Tokunbo imposed the 12 month term of imprisonment, out of which he suspended 9 months. The Appellant, having served 4-5 days of her term of immediate imprisonment, fell gravely ill and was permitted on the order of the then Minister of National Security, the Hon. Mr. Wayne Caines, to be released from prison custody and admitted to King Edward Memorial Hospital. There, she remained for approximately one week before returning to her home for further care and treatment whilst on bail pending her appeal.

Analysis and Decision:

16. Mr. Pettingill clarified that no complaint arose out of the 12 month term of imprisonment imposed. He argued that the magistrate's failure to suspend the whole of the sentence resulted in a manifestly harsh and excessive penalty in the circumstances of this case.

17. Indeed the magistrate was made aware of the Appellant's desperation to treat her condition of chronic seizures. While this did not afford her a defence to the charge of importation, the magistrate clearly accepted that the medical evidence before him. The magistrate obviously accepted that the Appellant suffered from regular seizures and that she had adverse side effects from alternative medications previously administered. Magistrate Tokunbo would have also accepted the unchallenged factual position before him that only two months after the commission of the offence she obtained a licence from the Minister of Social Development and Sports to use Cannabinoid Hemp oil capsules as part of her primary medical care. Thus, I may reasonably conclude in the absence of written or oral reasons from Magistrate Tokunbo that he suspended 9 months of the Appellant's sentence having determined that these medical realities amounted to a good reason for a suspension of the majority of her custodial sentence.

18. The law on suspended sentences was most recently rehearsed in my previous judgment in *Mandaya Thomas v R* [2020] SC (Bda) 1 App (7 January 2020) [paras 17-20]:

"*In R v Tafari Wilson, I agreed with the above reasoning. Kawaley CJ drew a crucial distinction between two classes of offences. The first category applies to offences where the only appropriate offence is an immediate custodial sentence. In this first class, exceptional circumstances were required for suspending the expected sentence. The reasoning was that the Court had to be satisfied under section 70K that the suspension of a prison term was appropriate in the circumstances. Applying this analysis, in circumstances where the genre of offence calls only for an immediate custodial offence, the Court could not properly be satisfied that a suspended sentence would be appropriate without exceptional circumstances justifying the suspension. The second category pertained to offences where it would be appropriate but not essential to impose an immediate custodial sentence. In this second class of offences, the R v Carneiro 'good reason' test applied. This, I say, was the thrust of Kawaley CJ's analysis in Miller v Crockwell.*

However, it was common ground between Counsel that Miller v Crockwell was overturned by the Bermuda Court of Appeal in The Queen v Garth Bell [2016] Bda LR 104 where the test is correctly stated. In the unanimously agreed judgment of the upper Court, Baker P rejected Kawaley CJ's analysis in Miller v Crockwell as follows:

The requirement for exceptional circumstances to suspend the sentence was never a statutory one in Bermuda, although it was applied in practice by the Bermuda courts for a number of years. Having considered the authorities, we are satisfied that such a gloss should not be put on the interpretation of section 70K. The section says the Court can impose a suspended sentence if it is satisfied it is appropriate to do so in the circumstances. We adopt the words of Toulson LJ in Carneiro which seem to us to be equally applicable in this jurisdiction.

It is regrettable that Counsel appearing in R v Tafari Wilson did not refer me to the Garth Bell decision which is binding on this Court. Notwithstanding, the Court of Appeal in Garth Bell disapproved of the Miller v Crockwell analysis as an approach to the interpretation of section 70K and imposed the Carneiro 'good reason' test in its place. This is therefore to be regarded as the correct interpretation of section 70K.

Respectfully and humbly, I would say, both the Carneiro 'good reason' test and the overturned 'exceptional circumstances/good reason' Miller v Crockwell test bring about the same result. What constitutes a good reason is likely to be of a more exceptional nature for offences where the only appropriate offence is an immediate custodial sentence. Kawaley CJ unequivocally embraced the approved Carneiro 'good reason' test for offences where a custodial sentence is appropriate but not essential."

19. In my judgment, the magistrate did not err in finding that the facts of this case supported the granting of a suspended sentence as there was clearly good reason to do so. The question is whether he was so unreasonable in the exercise of discretion to suspend only a portion of the 12 month sentence that an appellate court should interfere. The prosecutor conceded to Mr. Pettingll's submission that the magistrate ought to have suspended the entire of the term of imprisonment. (Notably, it appears from the Record of the sentence passed that no specification was given to the term of suspension.)

20. The Appellant appeared before the magistrate as 41 year old mother of two daughters of minor age, with no criminal history or suggested criminal affiliation and on an early guilty plea. It was clearly accepted by the Crown and by the magistrate that the Appellant had no intention of sharing the imported cannabis with any other person and that her sole purpose for bringing the substance to Bermuda was to privately smoke it as a means of relieving herself of regular and injurious seizures. Given the facts of this case, I find that it was particularly harsh and unreasonable for the magistrate to compel the Appellant to serve a 3 month portion of her 12 month custodial sentence. While this was a case of importation involving 1430.7 grams of Cannabis, the factual reality is that this case bears more of a resemblance to an offence of simple possession by a first-time offender driven by desperation to obtain medical treatment and healing from a serious and chronic ailment. But for such unique circumstances, I would agree that an offence

of importation of 1430.7 grams of any illicit substance would otherwise result in an immediate term of imprisonment.

21. In my judgment, the whole of the 12 month term of imprisonment imposed ought to be suspended, pursuant to section 70K of the Criminal Code, for a term of 3 years following the date of conviction.

Delay in the Prosecution of this Appeal

22. The prosecution of this appeal was exceedingly delayed beyond the point of satisfaction from any perspective. It appears from the Record that this matter proceeded at an efficient pace up until it was delisted by the Court on 21 August 2018 from its 22 August 2018 fixture. This was stated by a Court administrator (as opposed to the Registrar) to be "due to Court contingencies".

23. It was proven unfortunate that the Registry did not assign a fixed date for the relisting of this appeal. Instead, the parties were invited (by email communication from the Registry to an administrator for the DPP and to Counsel Mr. Paul Wilson and Kamal Worrell) to submit mutually agreed dates for a hearing fixture in September/October 2018. It appears that a response to the Court was never received by either side and that it was not until 2 March 2020 that the next step of progression was achieved by a Notice of Appointment of Attorney for representation by Mr. Charles Richardson of the Legal Aid Office.

24. This is a clear illustration of the importance of criminal appeals being managed through the open Court process. For this reason, I find it necessary to reiterate that criminal appeal fixtures ought not to be delisted administratively. Only in extreme circumstances should a delisting of a criminal appeal hearing be permitted and in any such case it should only be delisted on the written and express approval of the Registrar or a judge of the Supreme Court. Otherwise, an adjournment must be sought openly in Court.

25. I am, thus, reminded of my previous remarks in ***DS (young offender) v R (Sentence)*** [2018] Bda LR 11 [paras 43-44]:

> ***Case Management of Appeals***
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> *The Court did not have the benefit of skeleton arguments or written submissions from Counsel in this matter. The case management hearing fixed was delisted by a Court administrator at Counsel's request but without the express approval of the Registrar. Unfortunately, this resulted in the appeal being heard without directions for the exchange of written arguments and authorities.*

Case management hearings in criminal appeals ought not to be delisted merely by agreement between Counsel. The express written approval of the Registrar, Acting Registrar or Assistant Registrar is required for the delisting of fixtures in criminal appeals.

Conclusion

26. For all of the reasons stated herein, I allow the appeal to the extent that the entire of the 12 month term of imprisonment shall be suspended for a term of 3 years.

Dated this 2nd day of October 2020

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THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE