In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: 32/2017: 39

VALISA HOLDER

Appellant

-v-

THE QUEEN

Respondent

FIONA MILLER
(Police Sergeant)

Appellant

-v-

AMANDA HENRY-HUGGINS

Respondent

JUDGMENT

(in Court)[1]

Appeal against sentence following trial-importation of cannabis-disparity of sentences-adequacy of reasons for sentencing decision-consequences of Crown failure to make sentencing submissions on Crown right of appeal-Criminal Appeal Act 1952, sections 4A, 18(3)

[1] The present judgment was circulated without a hearing to save public expense.

Date of hearing: August 30, 2017

Date of Judgment: September 14, 2017

Ms Auralee Cassidy, Kairos Philanthropy, for the Appellant Holder
Mr Vaughan Caines, Marc Geoffrey Ltd, for the Respondent Henry-Huggins
Mr Alan Richards, Office of the Director of Public Prosecutions, for the Crown (who did not appear at either sentencing hearing in the Court below)

Introductory

1. The two unrelated appeals were heard together because they engaged broadly similar offences and similar sentencing principles. However, despite apparently significant differences in gravity, they reflected markedly different results:

    - the Appellant Holder, a person of previous good character, having been convicted following a trial of importing and possessing with intent to supply 1101.85g of cannabis worth between $19,000 and $55,000, was sentenced in the Magistrates' Court (Wor. Tyrone Chin) on April 18, 2017 to 2.5 years imprisonment. She appealed on the grounds that her sentence was harsh and excessive;

    - the Crown contended that the sentence imposed on the Respondent Henry-Huggins was manifestly inadequate. Henry-Huggins, a person of previous good character, having been convicted following a trial of importing and possessing with intent to supply 10,896.8g of cannabis worth a maximum of $542,825, was sentenced in the Magistrates' Court (Wor. Archibald Warner) on March 21, 2017 to 2.5 years imprisonment.

2. It was essentially common ground that the amount of illicit drug of the same type involved in individual cases is the main indicator of the relevant offence's gravity. Accordingly, from the outset it was difficult to see how both sentences could be said to reflect the appropriate level of sentence. It was quite obvious having heard argument that the Appellant Holder's sentence was on the high side of the appropriate range and that the Respondent Henry-Huggins' sentence was far below the appropriate range. However:

    - on an appeal by an offender, the appellate Court may exercise the sentencing discretion afresh even if the original sentence is not shown to be wrong in principle;

- in Holder's case sentencing submissions were made by both the Prosecution and Defence in the Magistrates' Court. It was not immediately clear from the sentencing remarks what formed the basis for the decision to impose a sentence at the top of the appropriate range. Holder, being sentenced less than a month after a fellow female prisoner Henry-Huggins, could not have reasonably expected to receive the same sentence for a similar offence involving 10% in quantity of the same drug;

- on a Crown appeal against sentence, in part because of the rule against double jeopardy, the appellate Court can only interfere with the first instance sentence if has been shown to be wrong in principle;

- in Henry-Huggins' case sentencing submissions were only made by Defence counsel. Crown Counsel (possibly due to staffing shortages) was deputizing for Prosecution counsel who conducted the trial and did not challenge the range suggested as appropriate by Defence counsel. In those circumstances, putting to one side the typically clear and cogent submissions advanced by Mr Richards on appeal, it was easy to understand why the sentence imposed fell within the range it did. That said, it was somewhat surprising that the sentence imposed was six months' shorter than the 3 year sentence suggested by the Respondent's own counsel.

3. Despite the importance of sentencing judges exercising their statutory discretion in each case, drug importation cases usually have quite similar features. The courier frequently has no previous convictions, is a victim of unfortunate circumstances and appears to be deserving of sympathy from the Court. Absent unusual features, such as significant cooperation with the authorities, a consistent approach to sentencing ranges will usually be required.

The Holder Appeal

Submissions in the Magistrates' Court

4. Both Prosecuting and Defence counsel tendered written and made oral submissions. In the Crown's written submissions, the fact that the Appellant had been convicted following a trial was characterised as an aggravating factor (alongside the quantity of drugs). Ms Cassidy in her oral submissions countered this by correctly pointing out that her client had a constitutional right to a trial. It is clear from the Learned Magistrate's admirably detailed and legible notes that in her reply Crown Counsel withdrew all of this submission on aggravating factors in oral argument. She agreed that the Appellant had a constitutional right to a trial and that the quantity of the drugs was merely a factor to be taken into account in sentencing. Crown Counsel further

submitted that the appropriate sentencing range was 18 months to 3 years and contended that three years was the appropriate sentence for this offender. She rightly pointed out that previous good character was of limited weight for this type of offence as drug couriers were frequently selected on the basis that they were not known to the Police (*Cousins-v- Earl Kirby (PS)* [1990] Bda LR 4 (Court of Appeal)), and also highlighted the absence of any cooperation or remorse.

5. The Appellant's counsel submitted, without compelling support from the authorities cited, that 12 months was the appropriate sentence based on the sentencing practice of the Magistrates' Court. The Appellant herself, seemingly for the first time, expressed remorse when given the *allocutus*. In terms of authorities, Crown Counsel cited, *inter alia*, *Philip Taylor (PS)-v-Williams* [2000] Bda LR 56, where LA Ward CJ held that a sentence of 3 years would have been appropriate after a discount for a guilty plea and substantial cooperation for importing 80 grams of cannabis (the respondent received and served 14 months imprisonment having been given a 50% discount in the Magistrates' Court). However, in orally conceding that three years was the top of the appropriate range for a similar offence to that of the present appeal, the Crown implicitly accepted that the tariff in *Williams* did not reflect the modern position.

6. More relevant was the more recent decision of this Court in *Fiona Miller (PS)-v-Lauren Davies* [2014] Bda LR 15, aptly cited by Ms Cassidy, where the basic pre-discount sentencing range was held to be in the middle of the 1-3 year range for importing 608.81g of cannabis resin worth $60,850. The amount of drug involved in the present case was broadly similar in terms of the estimated retail value ($55,000 in the present case) to that in *Davies*. I held in *Davies*:

> "*15. In summary, Davis-v-Angela Cox (PC) [2000] Bda LR 48 fixes a tariff for cannabis importation sentencing which is inconsistent with modern sentencing trends. The Crown conceded just over a year ago that 5 years imprisonment is the basic sentence for a cruise ship employee importing an amount of cocaine comparable in street value to the cannabis resin involved in the present case. <u>The basic Magistrates' Court sentence for importing a comparable amount of cannabis resin without aggravating factors today must be in the 1 to 3 year range, with the present case probably falling in the middle of the range</u>.*"

<u>The basis for the sentence imposed in the Magistrates' Court</u>

7. The sentencing remarks are set out in full below:

"*The Court read the Social Inquiry Report dated 27th March 2017 by Jibri Lewis for Valisa Holder also known as Valisa Holman who is 42 years of age with previous good character.*

The Court read the legal sentencing submissions by the Crown and by Ms. Cassidy on behalf of the Defendant. The Court also heard from Ms. Cassidy who spoke about her case of Hewey and Davies which she submitted to the Court.

The Court had heard a long and protracted trial from 2nd September 2015 stretching to several months with very many trial session. It was a very contentious case.

The Court having considered the above mentioned S.I.R., with sentencing submissions, oral submissions and legal authority sentences the Defendant to 2 ½ years of imprisonment with time in custody taken into consideration."

8. Ms Cassidy forcefully argued before this Court that the reference to the fact and length of the trial in his sentencing remarks only made sense if the Learned Magistrate had wrongly accepted the Crown's written argument that the fact that the trial had occurred was an aggravating factor. Mr Richards could only counter this point with the argument that, in effect, the Learned Magistrate ought to have realised that Crown Counsel's reliance on the trial as an aggravating factor was wrong. This Court does need to resolve this controversy. The crucial point is that the most recent relevant sentencing authority placed before the sentencing judge supported a basic sentence in the region of two years imprisonment, against a background of opposing pleas by counsel for a sentence at the top and bottom of the nearly agreed scale (18 months-3 years said the Crown, 1-3 years said the Defence). The result was that:

- the Magistrates' Court imposed a sentence nearer the top of the scale than the bottom;

- the Magistrates' Court either wrongly relied on the fact of a long contentious trial (which was mentioned) or wrongly imposed a sentence above the 2 year level prescribed by this Court in *Davies* without identifying in its sentencing decision any legally valid aggravating factors to justify doing so;

- the Magistrates' Court failed to any meaningful extent at all to explain, having considered written and oral submissions on sentence, the basis for the precise length of sentence it ultimately saw fit to impose.

The merits of the Holder appeal

9. Mr Richards essentially argued that 2.5 years was within the 1-3 range prescribed by *Davies*, and could not be said to be harsh and excessive because of the absence of mitigating factors which applied in that case. This submission conveniently ignored the important point that the mid-range suggested as appropriate in *Davies* was a basic pre-discount sentence, before credit was applied to that basic sentence for a guilty plea and cooperation. When those mitigating factors are removed from consideration, some reasoned basis for moving above the mid-range nearer to the top of the range must be found. These need not be aggravating features of the offence; a more severe sentence could be justified because, for instance, the amount of drugs involved in the importation was materially greater than those in *Davies*. In Holder's case, the amount (measured by reference to street value) was in fact roughly 10% less. Her counsel was unable to find any cogent support for the proposition that 12 months' imprisonment was the appropriate basic sentence.

10. Mr Richards also assisted the Court by making reference to two other recent Magistrates' Court sentencing decisions which supported the Appellant Holder's complaint of disparity. The most directly relevant case was Kyla Smith, who I assume is also currently a fellow female prisoner of the Appellant Holder. Smith was sentenced to 18 months imprisonment for importation and possession with intent to supply in relation to 890g of cannabis with a street value of $44,500. She was convicted following a trial in the Magistrates' Court, had no previous convictions and was sentenced either shortly before (or perhaps) after the present Appellant, receiving a sentence 50% as long as the Appellant for an amount of the same drug that was only some 20% less.

11. Although it is conventional for convicted appellants to appeal against their sentences on the grounds that the impugned sentence was "harsh and excessive", this Court can exercise the sentencing discretion afresh under section 18(3) of the Criminal Appeal Act 1952. This Court will only generally do so where either (a) a sentence is shown to be harsh and excessive, or (b) some fault is found with the sentencing process. In the present case, I find that I should exercise this Court's jurisdiction to reconsider the sentence afresh because:

    - the Appellant Holder's sentence was harsh and excessive by reference to the sentence imposed on her fellow female prisoner Henry-Huggins less than a month earlier for a markedly more serious offence;

    - the Appellant Holder's sentence was harsh and excessive by reference to the sentence imposed on her fellow female prisoner

Smith within the same broad time-frame; and, further and in any event

- the Magistrates' Court failed to provide sufficient reasons for imposing a sentence nearer the top of the applicable sentencing range and the sentence contended for by the Crown, as opposed to nearer the bottom of that scale, as contended for by the Appellant.

12. Following this Court's decision in *Fiona Miller (PS)-v-Lauren Davies* [2014] Bda LR 15, and in the exercise of the broad discretion conferred by section 18(3) of the Criminal Appeal Act 1952, I quash the sentence of 2.5 years (30 months). The gravity of the offence by reference to the type and quantity and/or value of the drug imported is broadly similar to that in *Davies* where 2 years (24 months) was found to have been what this Court would have determined to be the basic pre-discount sentence. However, in determining what alternative sentence it is just to impose in place of the original sentence, I am also bound to take into account the disparity between the Appellant's sentence and those imposed on her fellow prisoners Henry-Huggins and Smith. I take judicial notice of the fact that female prisoners represent a comparatively small group detained in the same correctional facility. It is self-evident that the Appellant's sense of injustice will be greater as a result because her contact with the beneficiaries of more lenient sentences is likely to be greater than would be the case with the ordinary male prisoner at Westgate.

Disposition

13. I accordingly substitute a sentence of 22 months' imprisonment (or 1 year and 10 months) for the sentence of 30 months' imprisonment originally imposed in the Magistrates' Court.

The Henry-Huggins appeal

The sentencing submissions in the Magistrates' Court

14. Crown Counsel assisted the Learned Magistrate by reminding him that the maximum sentence for the offences in question was 10 years imprisonment and that the quantity and value of cannabis involved were both substantial (10, 896.8 g worth $544,825). In terms of sentencing range, however, the Court was merely told: "*This carries a lengthy term of imprisonment but I do not have any authorities for sentence.*" This Court was advised that the same counsel who prosecuted at trial was unable to attend the sentencing hearing due to other professional commitments so that the usual sentencing submissions were not prepared.

15. Mr Caines asked for "*mercy and leniency*" and suggested a sentence of three years imprisonment was appropriate. He supported this submission by reference to the following cases:

    - *Flood and Madeiros* [2006] Bda LR 45 (Court of Appeal): 10 years imprisonment imposed following a trial in the Supreme Court for importing 126lbs of cannabis (six times the amount involved in Henry-Huggins' case) upheld by the Court of Appeal;

    - *Hewey-v-Raynor (PS)* [2012] Bda LR 66: 18 months' imprisonment imposed in the Magistrates' Court following a guilty plea for importing (and abandoning at the Airport) 4.1lbs of cannabis (25% of the amount in the present case) was reduced to 12 months on appeal;

    - *Virgil-v-R* [2016] Bda LR 30: a sentence of 10 years imposed in the Supreme Court following a trial for conspiracy to import 262lbs of cannabis (13 times the amount involved in the present appeal) with a street value of nearly $6 million was not challenged on an appeal against conviction to the Court of Appeal.

16. These cases were of limited guidance because they involved quantities which were either too great or too small; *Hewey* was, in any event, highly unusual in terms of its facts. But these cases did, in a very general sense, paint a picture which assisted the Appellant: sentences as low as 12 months were imposed in the Magistrates' Court, while the Magistrates' Court maximum was only deployed in the Supreme Court for far more serious cases. However, (according to the record) the Crown neither (a) submitted to the Court that the three year sentence proposed was obviously far too low, nor (b) sought an adjournment to prepare sentencing submissions in reply.

17. Against the background of Defence counsel's submission that three years was an appropriate sentence being unopposed, the Learned Magistrate imposed a sentence of 2.5 years or 30 months. At first blush this seems surprising. The absence of even a brief explanation for the sentence seems inexplicable. However, on reflection, the typical sentencing hearing reviewed by this Court proceeds in the following manner:

    - the Crown requests a sentence at the top of an appropriate range;

    - the Defence suggests a sentence at the bottom of an appropriate range; and

    - the Court imposes a sentence somewhere in between.

18. The Learned Magistrate was entitled to assume when the Prosecution did not positively challenge Defence counsel's proposed three year sentence that this sentence was likely unwittingly proposed because it was probably nearer the top of the appropriate range than the bottom (or, perhaps, even the middle). On the basis that the sentencing hearing was in substance not a contested one, it is on reflection not surprising that (a) a sentence slightly below that proposed by Mr Caines was imposed, and that (b) it was not considered necessary to articulate reasons for this decision.

The merits of the Henry-Huggins appeal

19. Mr Richards had little difficulty in persuading me that, based on a review of guideline cases not placed before the Learned Magistrate (including the *Davies* case), the gravity of the offence in present appeal made the appropriate range higher than the 1-3 years set out in that case. Crown Counsel suggested 5-6 years was appropriate. The range 4-6 years would seem appropriate in the Magistrates' Court for persons of previous good character convicted of importing quantities of cannabis five to ten times larger than the amounts involved in cases such as *Davies* and the current Holder appeal. Any higher range (e.g. 6-10 years) would have to be reserved for cases involving drugs such as cocaine or heroin.

20. Mr Caines advanced for the first time before this Court an elaborate argument in defence of the sentence imposed based on United Kingdom Sentencing Guidelines, uplifted by 25% to take account of higher sentences typically imposed here. In my judgment the guidance provided by local cases is far too well settled to justify this Court establishing an entirely new set of sentencing principles. The fact that the impugned sentence may well have fallen into an acceptable UK range is of assistance in that it suggests that it is not so inconsistent with international legal standards as to give rise to a clear public interest in quashing the sentence to restore confidence in the administration of justice in Bermuda's courts.

21. The Respondent's counsel advanced two other points of general principle which are pivotal to the disposition of the present appeal:

    (1) an appellate court should be even more reluctant to interfere with the sentencing discretion at first instance in a Crown appeal than in an appeal by the convicted person;

    (2) the Crown cannot fairly criticise the Learned Magistrate for failing to apply the correct sentencing principles when it failed to provide him with a sufficient basis for applying those principles.

22. Mr Richards was unable to muster a response with any conviction when I put to him that it was a misuse of the Informant's right to appeal a sentence on the grounds that it

is manifestly inadequate to seek to increase on appeal a sentence which the Prosecution did not in substance oppose at the sentencing hearing. Prosecution counsel were for the first time given the right to address the Court on sentence after the enactment of section 4A of the Criminal Appeal Act 1952 in or about 1983. This was part of the *quid pro quo* of the Crown being conferred the right to challenge a sentence as being manifestly inadequate. The practical purpose of the Crown appeal against sentence, therefore, is for the appellate court to review the adequacy of a sentence in circumstances where the sentencing court has rejected the principles or approach urged upon it by Prosecution counsel.

23. There will be cases, as Mr Richards rightly pointed out, where the public interest in justice being seen to be done is so great that this Court might allow a Crown appeal against sentence despite the fact that the appropriate sentencing principles were advanced for the first time on appeal. Sexual offences or offences of violence where victims' rights and public safety concerns are engaged are potential cases in point. But unless this Court applies the general rule that appeals under section 4A of the Criminal Appeal Act 1952 are not ordinarily properly brought to allow the Crown to make sentencing submissions which could with reasonable diligence have been made at first instance, there will be no incentive for the Crown to assist the Court at sentencing hearings at all. The efficiency of sentencing hearings will be reduced, the number of Crown appeals will rise and justice for all parties involved will be delayed and to some extent as a result be denied. Section 19A of the 1952 Act 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.*"

24. In my judgment relevant factors to this Court's determination of whether or not a sentence is manifestly inadequate and should be quashed includes an assessment of how inadequate the sentence is based on the material available to the sentencing court. It is not necessarily enough for the Appellant to establish that based on submissions advanced for the first time on appeal, the sentence imposed is manifestly inadequate. In *Miller-v-Davies*[2014] Bda LR 15, upon which Mr Richards relied for other purposes, I stated:

> "*18. Crown appeals against sentence under section 4A of the Criminal Appeal Act 1952 ought not in principle ordinarily to be allowed based on matters arising after the initial sentencing hearing. <u>The purpose of the right of appeal is to correct errors of principle or unduly lenient sentences, having</u>*

regard to the law as existing at the date of the sentence and the material placed before the sentencing court. The right of appeal is not designed to allow the Prosecution to have a second bite of the cherry, in contrast to an offender's right to appeal his or her sentence. It is designed to afford an opportunity to review a sentence imposed in the Magistrates' Court in circumstances where either:

i. the sentencing judge has imposed a sentence which is obviously lenient, having regard to recent comparable cases; or

ii. wrong in principle, having regard to the submissions made to the Court."

Disposition of Henry-Huggins appeal

25. In the present case the Appellant has demonstrated based on arguments advanced for the first time on appeal that the sentence imposed on the Appellant was manifestly inadequate in the sense that it was both unduly lenient and wrong in principle. However, because the sentence imposed was within a range which was proposed by Defence counsel and tacitly conceded as appropriate by Prosecution counsel at the sentencing hearing, a case for allowing the appeal and quashing the sentence imposed has not been made out. The appeal is accordingly dismissed.

Dated this 14th day of September, 2017 _____

IAN RC KAWALEY CJ