The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 2 of 2018

B E T W E E N:

THE QUEEN

Applicant

- v -

DWAYNE WATSON

Respondent

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

Appearances: Takiyah Burgess Simpson, Office of the Director for Public Prosecutions, for the Appellant.
Elizabeth Christopher, Christopher's, Barristers and Attorneys, for the Respondent.

Date of Hearing: **15 June 2018**
Date of Judgment: **27 July 2018**

JUDGMENT

Conviction and sentence for importation of cocaine - Crown's appeal against sentence for being manifestly inadequate- meaning of "manifestly inadequate"- whether respondent's belief that drug was cannabis instead of cocaine to be taken into account – evidential burden upon respondent to establish that belief.

SMELLIE, JA:

Introduction

1. On 15 December 2017, the Respondent was convicted on his plea of guilty to possession with intent to supply 1090.96 grams of cocaine

hydrochloride, a controlled drug[1]. On the 24 January 2018 he was sentenced to six years' imprisonment for the offence. The Crown now seeks leave, pursuant to section 17A of the Court of Appeal Act 1964, to appeal against the sentence on the ground that it is manifestly inadequate. The circumstances of the offence must therefore be examined.

2. On Friday, 1 September, 2017, the Respondent arrived at L. F. Wade International Airport, Bermuda ("LFWIA") from Jamaica via New York, on a commercial airline. Upon arrival the Respondent was cleared by Immigration and proceeded to the baggage claim area. There he collected his single piece of checked luggage – a large maroon coloured suitcase. Affixed to the suitcase was the airline computer generated check-in label with the Respondent's name and other details printed on it.

3. The Respondent then proceeded to exit down the Green "Nothing to Declare" Channel where he was selected for an H.M. Customs examination. He was directed to the secondary inspection area. There he was asked by Customs Officer Robinson a series of questions pertaining to his trip and luggage to which he gave answers which were noted. The Respondent appeared visibly nervous and shaking.

4. Among the questions asked included whether the suitcase was his, to which he replied "yes", and whether anyone had given him anything to bring to Bermuda, to which he replied "no". Upon inspection of the suitcase, it was found to have been bound by a zip-tie and when asked by Officer Robinson whether he had tied it, the Respondent answered "no", while appearing to look at the suitcase with a confused expression.

[1] Another count for conspiracy to import the same quantity of cocaine was ordered, at the instance of the Crown, to remain on file and not to be proceeded with without the leave of the Court.

5. Upon further inspection Officer Robinson observed that the screws that should hold it together were removed and laying inside the suitcase. Officer Robinson then x-rayed the suitcase and irregularities were seen in the area of the handles.

6. Holes were drilled in that area and white powdery substance resembling cocaine was revealed. A presumptive field test proved positive for the presence of cocaine and the suitcase was seized. The Respondent consented to a search of his person but nothing of relevance was found.

7. The Bermuda Police Service ("BPS") at LFWIA were notified and attended the Customs Hall where they arrested and charged the Respondent for importation of a controlled drug and cautioned him when he replied "Ok, I understand."

8. The next day, 2 September 2017, the suitcase was handed over to the Organized and Economic Crime Department who conveyed it to the Forensic Laboratory where it was further examined. During the process, eleven (11) packages of various sizes were removed from inside the handle frame, the base board and the four corners of the suitcase. When weighed and analysed the contents of the 11 packages amounted to the aforementioned 1090.96 grams.

9. Later, for the purposes of the court proceedings, an experienced drugs investigation officer of the BPS estimated a maximum street value of BMD$200,634 for the 1090.96 grams of cocaine and this value was presented to and accepted by the court without demur from the defence.

10. The Respondent had been interviewed under caution by the BPS and as his responses came to be accepted by the Crown for the purposes of his

sentencing, it is necessary to set out the summary of the interview here (as presented to the Court by the Crown):

> "[In the interview] *the Respondent acknowledged that he had visited Bermuda before in January 2017 when he stayed with a cousin. He had then stayed for three (3) months and departed Bermuda on 18 April 2017. He stated that during that visit he had met a female friend (whom he named) and other people. He stated that when he returned to Jamaica in April, around May or June 2017 he received a call to "bring up something"; hash and gum for $3000.00. He initially said "no", as he was thinking of the consequences. But he was trying to get work in Jamaica and things were hard. He agreed even though he had second thoughts. A Bermuda male contacted with him via WhatsApp and asked him to bring the stuff to Bermuda. He didn't really known the Bermuda male. But he agreed to carry the drugs. During the planning to bring the drugs into Bermuda the Bermuda male sent him cash via Money Gram. The Respondent stated that he received anywhere from $80 to $100 every couple of weeks, about ten different times. This was pocket money.*
>
> *The Respondent further stated that he was in Portmore, Jamaica when he received the suitcase from a local Jamaican male. That he thought the suitcase looked tampered with as there was a cut in it and the wheel stuck but he still decided to go through with it and travel with it to Bermuda. That when he arrived at Bermuda and the suitcase was tested he was surprised that it [the drugs] was white [implying that he expected the drugs to be "hash or gum", extracts of cannabis]. He thought that from the money he was to receive he would buy a taxi and be a taxi driver in Jamaica".*

The sentencing

11. It appears from the transcript of the sentencing proceedings that the Crown accepted that the Respondent, who is 22 years old, had pled guilty at the earliest opportunity and had been cooperating with the BPS in "an

ongoing investigation". The extent of this investigation related only to his identification of his recruiters. Of direct relevance to the issue of the inadequacy of the sentence, the following appears from the transcript of the learned sentencing Judge's remarks:

> "*Ms Christopher (representing the Respondent) submits that the sentence should take into consideration that the (Respondent) had a belief that the controlled drug was cannabis and not cocaine. The Crown does not challenge this belief, and it would appear from the (Respondent's) police statement, that he maintained this belief throughout.*
>
> *The question therefore is whether any sentence should be reduced because of this belief. Let me say from the outset, that I do not agree that he should be sentenced as if he had cannabis. This in my view was not - – within the contemplation of the authorities cited.*
>
> *The fact is that he brought in cocaine, and therefore he should be sentenced on the basis of the cocaine tariffs. Therefore, the only thing to decide upon is whether or not – or whether—to what extent, that tariff should be reduced based on the (Respondent's) belief.*
>
> *Such reduction in my view should not be considerable, as to [do] such would give leave to would-be offenders simply saying that they believed the drug was something else.*
>
> *Linsky*[2] *(sic) in my view is the proper guide to follow, i.e.; "that the mitigating facts of the appellant's belief, if held, was small as the exercise of only a – – small degree of curiosity inquiry- –or care , would reveal the true nature of the drug."*

[2] The transcript should read "**Bilinski**", a shorthand reference to **R v Edward Bilinski** (1987) 9 Cr App R (S) 360.

12. I break in the narrative from the transcript of sentencing here to note that the foregoing citation by the learned Judge is indeed a synopsis of dictum from *Bilinksi***,** a case in which it was decided, among other things, that the mitigating effect of the defendant's belief that the drug was something else was small because the exercise of only a small degree of curiosity, inquiry or care would have revealed the true nature of the drug. I will return to consider *Bilinski* further below.

13. Having so set the parameters for sentencing, the learned Judge then proceeded as follows (also as appears from the transcript):

> "*In the absence of evidence to the contrary, and given no challenge from the Crown, I accept that the (Respondent) had the belief that he was bringing into Bermuda cannabis for three thousand dollars [ie: his payment for doing so]. The (Respondent) does not seem to have played a sophisticated or major part in this enterprise, and given the secretion of the drugs in the suitcase, I do not think that any inquiry of the suitcase would have revealed the presence of cocaine.*
> *As the proper tariff, I place reliance on Mirza***,** *the case of Mirza*[3]*. The distinguishing features in this case, is that the value of the drugs and the purity is less, but the quantity is more—than in Mirza.*
>
> *In my view, the level of sophistication was the same in both cases, and that the defendants did it for money.*
>
> *In the circumstances, it is my view that a basic sentence in this case should be four and a half years' imprisonment however, in consideration of*

[3] **R v Raza Mirza** , Crim. Case No. 29 of 2017 (Supreme Court of Bermuda), sentence delivered on 6 December 2017, in which imprisonment for 7 ½ years was imposed for "importation of a controlled drug" as appears from the Warrant of Commitment.
In her written submissions on behalf of the Crown, Ms Burgess Simpson reports that in **Mirza,** the defendant was convicted on his own confession to importing 963.3 grams of cocaine with a street value of $233,125 and received a custodial sentence of seven (7) years imprisonment. (which I assume should read 71/2 years in light of the Warrant of Commitment).

> *the defendant's belief that is – that it was his belief, --I will apply a further reduction of six months.*
>
> *Therefore the basic sentence should be four years imprisonment.*
>
> *Therefore, applying the uplift of fifty percent[4], I hereby sentence the Defendant to a period of six years imprisonment."*

14. Crown Counsel submits that the learned Judge first fell into error by adopting a basic sentence which was far too low – that of 4 years imprisonment mentioned by the Judge - and that this ultimately resulted after the fifty percent uplift mandated by section 27B of the Act, in a sentence of 6 years' imprisonment that was manifestly inadequate.

15. The measure of the inadequacy she submits is readily apparent from terms of imprisonment imposed in respect of other recent cases involving comparable amounts of cocaine with comparable street values, and in respect of which terms of imprisonment of between 11 -15 years were imposed[5], the case of **Mirza** appearing, by those comparables, to be an extreme outlier rather than the norm.

16. It further appears submits Crown Counsel that the learned Judge fell into error by ascribing too great a mitigating effect to the Respondent's "*wrong belief in the type of drug*". That the discount of 6 months said by the learned Judge to have been allowed in that regard in the first place (and thereby reducing the basic sentence from 4 1/2 to 4 years' imprisonment) was too large.

---

[4] Mandated by section 27B of the Misuse of Drugs Act 1972 where the drug is one coming within Schedule 5 of the Act such as cocaine.

[5] **R v Cox** [2005] Bda L.R. 47; **R v Chamari Burns** Crim.Case No. 30 of 2017; **R v Rudolph Clarke** Crim. Case No. 31 of 2017; R **v Tyrone Brown** Crim App No. 9 of 2016.

17. In response to the Crown's submissions, Ms Christopher argued two salient points. First that the sentences of 11-15 years' imprisonment cited were not true comparables because none involved the full combination of factors present here, viz: an early guilty plea, the relative youth of the accused without any previous conviction, the wrong belief in the type of drug, as well as co-operation with the police in an investigation. With those factors in mind, the sentence of 6 years' imprisonment should be regarded as correct and certainly not as being inconsistent with other cases identified by the Crown itself including *Mirza* - cases in which sentences of 6-7 years' imprisonment were imposed[6].

18. Secondly, that the Crown is wrong in its understanding of *Bilinski* as laying down any principle to the effect that only a small mitigating effect can be ascribed to an accused's wrong belief in the type of drug. That the true understanding of the case allows for all the circumstances to be taken into account and that if as here, the circumstances show that the accused's wrong belief was genuinely held (as the Crown has here expressly acknowledged) and following *Bilinski* "*only a small degree of curiosity, inquiry or care would (not) have revealed the true nature of the drug"* (as Ms Christopher also contends here), then the sentence should reflect that belief and the Respondent should have been sentenced as if he had imported cannabis instead of cocaine. Viewed in that way, the sentence she submitted, could not be criticized for being manifestly inadequate.

19. While there is some cogency to Ms Christopher's submissions, they do not, in my view, justify or explain the disparity of sentencing in this case. This sentence, when assessed against the established principles and

[6] **Rv Wayne Gilbert** Crim. Case No. 39 of 2015 and **R v Shomari Virgil** Crim. Case No. 30 of 2015

precedents of sentencing must be regarded, in my view, as manifestly inadequate.

20. In the line of recent cases, an important starting point is the judgment of this Court in *Cox* (supra) where it was declared (per Mantell JA) to have been already "*well recognized that in cases of commercial importation of crack cocaine the starting point following a trial is unlikely to be less than twelve years"* and that "*Zambari v The Queen Criminal Appeal 5 of 1995 is a case in point*".

21. This dictum was more recently reaffirmed by this Court in *Brown* (supra) and applied such that the sentence in that case of fifteen years' imprisonment for importation of 894.6 grams of cocaine, was upheld (with the Court noting that a sentence of eighteen years' imprisonment would not have been criticized).

22. In *Brown*[7] the proper procedure for arriving at the appropriate sentence in cases of this kind (first set out in *R v Tucker and Simmons*[8]*),* was also reaffirmed:

> "*The proper procedure would be for the trial judge to fix the basic sentence. We understand this to mean the appropriate sentence for the offence charged after considering all the circumstances of the case including discounts if any. Having fixed that sentence the section provides that fifty percent of that figure should be added to the basic sentence.*"

[7] At para 30.
[8] [2010] Bda L.R. 39, per Zacca P., at para 16

23. Here it is apparent from the transcript of sentencing as set out above, that the learned Judge fell into error first by not accepting and applying the starting point (basic sentence) settled in *Cox* (and reaffirmed in *Brown*). He then further erred by failing to follow the proper procedure reaffirmed above.

24. Had he applied the principle from *Cox*, the starting point would have led him to a basic sentence of twelve years' imprisonment, given that this was clearly a case involving the commercial importation of cocaine**.** Without discounts to the basic sentence, the result would have been a sentence of eighteen years after the application of the mandatory section 27B uplift.

25. But following *Brown* and *Tucker & Simmons***,** the learned Judge would have identified and applied the appropriate discounts to the basic sentence; viz: for the early plea of guilty (ordinarily up to a one-third discount); for such credit as should be given for assistance to the police (in this case so far as the record shows, involving no more than naming his recruiters) and the appropriate discount for the professed (and accepted) belief that the drug was of a different kind (cannabis).

26. These together, in my view, ought properly not to have reduced the basic sentence of twelve years to less than six years in this case. Application of the mandatory uplift to that minimum basic sentence would have resulted in a sentence of 9 years' imprisonment- that which is to be regard as minimally appropriate in this case.

27. In conclusion, this Court should comment on the applicability of the dictum from *Bilinski* in this jurisdiction, in light of section 32 (1) (a) of the Act which provides:

> "(1) *Without prejudice to any other provision of this Act-*
>
> > *(a) where it is proved that a person imported anything containing a controlled drug it shall be presumed, until the contrary is proved, that such person knew that such drug was contained in such thing."*

28. The subsection is specific in imputing knowledge not only of the presence of the drug but also of the specific type (i.e. "such" drug, as may be contained in the thing imported).

29. The subsection therefore operates as a reversal of the evidential burden so that a defendant who (like the respondent here) asserts such belief , will be required to show, on a balance of probabilities, that he or she believed the drug in the thing imported to have been of a different kind than that actually imported.

30. Accordingly, a mere assertion by a defendant that he believed the drug to be different from that actually imported must be approached with great circumspection. In response to an indictment for importation of an illegal drug, it can hardly be sufficient for him merely to point to the condition of the container itself as reason for his failure to ascertain the true nature of the drugs. There should ordinarily be something more – some objective point of reference - against which his professed belief might be assessed for credibility. Otherwise, the presumption created by the subsection would be shorn of its meaning and purpose.

31. With such considerations in mind, the kind of discount of which *Bilinski* speaks will appropriately arise only in the rare situation where the presumptive evidential burden is satisfied by reference to objective circumstances.

32. Having regard in particular to the Crown's expressed acceptance in this case, the learned Judge cannot however, be criticized for allowing the Respondent the six- month discount on account of his professed belief. But given that in any event all the circumstances should have been examined[9], I feel compelled to note that the Respondent was fortunate to have been allowed any discount at all for his professed belief.

33. Finally on this point, I emphasize the importance of ascribing to would-be traffickers the common sense to have ascertained the real nature of the risk they assumed (and so the real nature of the drug) when agreeing with others to engage in the dangerous and destructive business of drug trafficking.

34. On the basis of all the foregoing, in particular as the setting of the wrong basic sentence gave an erroneous starting point, the sentence of six years' imprisonment is "*manifestly inadequate*" within the meaning of the Act and as that expression has long been explained in the case law.

35. The long standing explanation is in these terms:

> "*The expressions "manifestly excessive" and "manifestly inadequate" are opposite sides of the same coin, so to speak. "Manifestly" means obviously; and a sentence is manifestly inadequate if, after making all due allowance for the fact that the trial judge's discretion should not be lightly interfered with, it is obvious to the appellate tribunal that the sentence is much too low and fails to reflect the feelings of civilized society to the crime in question".. (*and from earlier in the judgment) "… *obviously insufficient because the Judge [or Magistrate] has acted on a*

[9] As advised in **Bilinski**: "The extent to which the punishment should be mitigated by this factor (the belief that the drug was of a different kind) would depend on all the circumstances, amongst them the degree of care exercised by the defendant."

> *wrong principle or has clearly overlooked or undervalued, or overestimated, or misunderstood some salient features of the evidence…a failure to apply right principles*[10]"

36. On the basis of all the foregoing, the sentence of six years' imprisonment is set aside and substituted by a sentence of nine years' imprisonment.

BAKER, P

37. I agree.

BELL, JA

38. I also agree.

Smellie JA

Baker P

Bell JA

[10] **Plant (R) v Robinson** Crim. App. No 1 of 1983, Bda. Court of Appeal. (at pp17 and 19)