In The Supreme Court of Bermuda

APPELLATE JURISDICTION
Consolidated Appeals

2021: 29

FIONA MILLER
(Police Sergeant)

Appellant

-v-

MARLEY WATKINS
ADANESSA INFANTE

Respondents

2021: 30

MARLEY WATKINS

Cross-Appellant

-v-

FIONA MILLER
(Police Sergeant)

Cross-Respondent

JUDGMENT

Appeal against Sentence passed in the Magistrates' Court – Section 4A of the Criminal Appeal Act 1952 – Approach to comparing possession of Cannabis with possession of Cannabis Resin for the purpose of Sentencing - Misuse of Drugs Act 1972

Date of Hearing: 29 October 2021

Date of Judgment: 21 December 2021

Mr. Alan Richards, (On behalf of the DPP) for the Appellant/Cross-Respondent

Mr. Charles Richardson, (Compass Law Chambers) for the Respondent/Cross-Appellant

JUDGMENT delivered by Shade Subair Williams J

Introduction

1. In this case I am concerned with the Crown's appeal against the custodial sentences passed by the Senior Magistrate, Mr. Juan Wolffe, on two US citizens, namely Mr. Marley Watkins and Ms. Adanessa Infante (collectively, "the Respondents") following their guilty pleas entered on 23 June 2021. I am not required to determine the merits of Mr. Watkins' cross-appeal as it was abandoned and accordingly dismissed.

2. The convictions underlying Mr. Watkins' and Ms. Infante's impugned sentences are for conspiracy to import cannabis resin between an unknown date and 30 April 2021 (inclusive), contrary to section 230 of the Criminal Code as read with section 4(3) of the Misuse of Drugs Act 1972 (MDA). Ms. Infante, alone, was also convicted and sentenced for attempting to remove criminal property, namely a quantity of cash from Bermuda on 2 May 2021, contrary to section 32 of the Criminal Code, as read with section 43(1)(e) of the Proceeds of Crime Act 1997 (POCA).

3. By the time of delivery of this judgment, the Respondents had both been deported from Bermuda having served the requisite portions of their custodial sentences. The First Respondent was deported in December 2021 following the hearing of this appeal and the Second Respondent was deported on 2 October 2021, prior to the appeal hearing.

4. At the outset of the hearing, Mr. Richards informed this Court that the Crown's primary focus in pursuing its appeal against the Respondents' sentences was without particular regard to the prospect of further detaining the Respondents personally but more so to seize the opportunity to invite this Court to confirm the proper sentencing tariffs and approach in cases of the like, for the sake of good precedence. Mr. Richards explained that it is the Crown's position that there is no real prospect of successfully extraditing either of the Respondents to Bermuda to serve out the balance of any increased sentences.

5. On 29 October 2021, the appeal was argued by the Crown and defended by Mr. Richardson on behalf of Mr. Watkins who was present at the video hearing before me. At the conclusion of that hearing I reserved judgment and informed Counsel that I would in due course deliver this, my decision, together with these written reasons.

The Evidence

6. The factual evidence accepted by this Court was in the form of a narrative provided in a Summary of the Evidence filed by the prosecutor together with the findings of the Senior Magistrate pursuant to a Newton Hearing.

The Facts Asserted in the Crown's Summary of Evidence

Personal Mitigation

7. In April 2021 when these offences were committed, Ms. Infante was 31 years of age with an infant son and she had a clean antecedent history. She was ordinarily resident in New York where she was employed in the day care industry.

8. Mr. Watkins, then a 39 year old with no previous criminal record involving offences committed in Bermuda, was living in Bermuda with his wife and infant daughter.

Commission of the Offences

9. On 30 April Ms. Infante boarded a commercial flight from New York and arrived in Bermuda around 11:30am that same day. Having cleared Immigration and the Customs Baggage Hall area, Ms. Infante travelled by taxi to the Reefs Resort and Club in Southampton Parish ("the Reefs").

10. Pursuant to the COVID-19 quarantine protocols, Ms. Infante was escorted by hotel staff to her assigned room where she was required to remain for a determinate period. She was observed at this stage be in possession of a small pink suitcase. However, on the same day Mr. Watkins attempted to visit Ms. Infante at the Reefs. Having been refused permission to enter her room, he attempted to contact her by telephone. This proved unsuccessful so a hotel employee attended her room on Mr. Watkins' behalf. In doing so, Ms. Infante handed the pink suitcase to the employee who then handed it over to Mr. Watkins on Ms. Infante's instructions.

11. The following day, Ms. Infante attempted to leave Bermuda on a flight back into the US. She was found to be in possession of the pink suitcase which contained four hardback books in plastic coverings. US Customs Officers observed that a significant portion of the pages of those books was missing leaving behind a noticeable cavity and a detectable odour

of cannabis and coffee. Ms. Infante's handbag was also searched at US Customs and BDA $3,500.00 in cash was discovered. That sum of money was found to be contained in three separate bundles secured by black elastic bands.

Police Searches, Seizures, Questioning and Arrests

12. Ms. Infante told the officers that she brought the money into Bermuda from the US and that she had obtained the currency exchange during what she described to be a 2-day stay in Bermuda. When questioned about the books and the smell of cannabis, Ms. Infante informed the officers that she had brought in "*a small amount of weed for personal use*". When questioned further about the quantity, she said; "*about an eighth* (1/8)". Ms. Infante also told the officers that she knew a 'Marl' in Bermuda and described him as a friend who she had met in Brooklyn who was now living in Bermuda.

13. As a result of these findings, US Customs Officers contacted the Bermuda Police Service. Thereafter, Ms. Infante was arrested on suspicion of conspiracy to import controlled drugs into Bermuda and her belongings were seized, namely the cash, the suitcase with the book shells and an IPhone.

14. Following the onset of a police investigation into Ms. Infante's stay in Bermuda and Mr. Watkins involvement with her, police attended Mr. Watkins' Southampton residence on 2 May 2021. At that time, he escorted officers to a nearby location to retrieve plastic bags containing plant material later analysed to be cannabis. According to Mr. Watkins, he had recently imported the cannabis which was intended to be for his personal consumption to assist with the management of his chronic pain. This, said Mr. Watkins to the police, occurred as he was returning to Bermuda on Thursday 29 April 2021 from New York.

15. Police also discovered and seized a number of small vials containing liquid believed to be vape cartridges with cannabinoid content and remnants (roaches) of plant material. Additionally, police seized BDA$1005.00 which, notably, was secured in black elastic bands similar to the way in which the cash seized from Ms. Infante had been contained.

16. The total weight of cannabis seized was 7.19 grams in addition to 0.11 grams of cannabis resin. The vape canisters were found to contain less than 1 millilitre of delta-9-tetrahydrocannabinol with THC content greater than 1%.

17. When questioned about his knowledge of Ms. Infante, Mr. Watkins denied being personally acquainted with her. He claimed that a client of his requested for him look after Ms. Infante who had been described to him as an online blogger. Mr. Watkins admitted to attending the Reefs Hotel and collecting the pink suitcase for the purpose of providing her with some 'spliffs' (marijuana cigarettes) for her holiday enjoyment. On Mr. Watkins'

account, however, he had a change of heart and returned the pink suitcase to the Front Desk station of the Reefs without having placed any controlled substances into it. He added that he, however, returned the following morning to leave a rolled spliff/joint on her stoop prior to her departure. Mr. Watkins, however, maintained, that he never met Ms. Infante directly.

18. Mr. Watkins was subsequently arrested for conspiracy to import controlled drugs into Bermuda and transported to Hamilton Police Station. As the police investigation progressed, officers obtained evidence of various text messages and voice notes evidencing direct contact between Mr. Watkins and Ms. Infante. Eventually, after this evidence was put to the Mr. Watkins by police during a further formal interview under caution, he admitted that he paid Ms. Infante $3,500 to import the cannabis into Bermuda for his personal consumption.

The Facts Found by the Senior Magistrate after a Newton Hearing

19. By and large, the Newton Hearing was ordered to resolve the factual dispute between the prosecution and the defence in relation to the quantity of cannabis which was the subject of the conspiracy and the level of involvement the Respondents played in the conspiracy.

20. The pertinent findings from the Newton Hearing were:

    (i) the total weight of cannabis conspired by Mr. Watkins and Ms. Infante and others to be imported into Bermuda was approximately two (2) pounds at an estimated street value of $102,400.00;

    (ii) that cannabis was not solely for Mr. Watkins' personal medicinal use but was also intended for recreational supply to others;

    (iii) the cannabis was not intended for commercial supply and

    (iv) Mr. Watkins was an organiser in the conspiracy and his role was more significant than that of Ms. Infante.

The Sentence Passed by the Senior Magistrate

The Sentence passed on Mr. Watkins

21. Mr. Watkins was sentenced to a custodial sentence of 9 months, 3 months of which was ordered to be served as a suspended sentence for 2 years.

The Sentence passed on Ms. Infante

22. Ms. Infante was sentenced to 6 months imprisonment on each of the two counts to which she pleaded guilty. On both counts, 3 months of Ms. Infante's sentence was suspended. Although it is not apparent from the written judgment, I understand those sentences to have been made to run concurrently.

Analysis and Decision

23. In this case the Crown is appealing against the Respondents' sentences pursuant to section 4A, as read with section 19A of the Criminal Appeal Act 1952. So, this Court will not quash any sentence imposed by the lower Court unless that original sentence is shown to be manifestly inadequate.

24. The Crown's complaint on its Notice of Appeal and submissions to this Court is that the sentences for the Respondents were manifestly inadequate for a case involving 2 pounds of cannabis at an estimated street value of $102,400.00. While Mr. Richards, on behalf of the Crown, conceded that he was bound by Mr. Wolffe's finding that the cannabis subject to the conspiracy was not intended for commercial supply, he contended that such an amount is significant in any event, thereby increasing the gravity of the offence. Crown Counsel further argued that no portion of the sentences passed ought to have been suspended but accepted that Ms. Infante's sentence properly reflected that her role in the conspiracy was less significant than that of Mr. Watkins.

25. As a means of identifying the correct sentence range for the basic sentence in a case involving cannabis, Mr. Richards invited this Court to confirm its approval of the reasoning outlined in the judgment of Kawaley CJ (as he then was) in *Fiona Miller v Lauren Davies* [2014] Bda LR 15 where a Court of this jurisdiction expressed a view that a basic sentence for a quantity of cannabis resin worth under 60% of the value of cannabis in the present case would fall somewhere around 2 years imprisonment.

26. Kawaley CJ reinforced this estimation of the basic sentence in his later judgment in the consolidated appeals of *Valisa Holder v R; R v Amanda Henry-Huggins* [2017] SC (Bda) 70 App (14 September 2017). The Crown's case is that the Senior Magistrate misapplied the general guidance offered by those authorities and in doing so he imposed manifestly inadequate sentences on the Respondents. Mr. Richards further added that the Senior Magistrate failed to properly distinguish the Respondents' cases from my former decisions in *Natasha York v Fiona Miller* [2020] SC (Bda) 44 App (2 October 2020) and *Fiona Miller v Tafari Wilson* [2018] Bda LR 112, which Mr. Richards contends were cases peculiar on their own facts.

27. In *Miller v Davies* the Respondent, a British national, was a 24 year old female with no known previous convictions who pleaded guilty in the Magistrates' Court to a charge of importation of 608.81 grams of cannabis resin at a street value of $60,850. In that case Ms. Davies provided assistance to the police. The then Senior Magistrate, Mr. Archibald Warner, settled on a basic sentence of 12 months imprisonment against which a 50% discount was granted as a reward for the assistance Ms Davies gave towards the investigation. Under those circumstances, the Crown railed against the sentence passed on the premise that the basic sentence ought to have been set higher than the 12 month period and that the 50% discount was wrong in principle.

28. In his final analysis, Kawaley CJ did not interfere with the basic sentence of 12 months but reduced the 50% discount to 35%, thereby marking a distinction between an offender who merely assists with an investigation and an offender who provides assistance in furtherance of the prosecution of another offender. This resulted in a quashing of the sentence of 6 months imprisonment which was substituted for a period of 8 months.

29. In the course of his reasoning, Kawaley CJ considered that the appropriate range for a basic sentence in a case involving 608.81 grams of cannabis resin was 1 to 3 years. So, although he left the 12 month basic sentence undisturbed on the footing that it was not manifestly inadequate, Kawaley CJ opined that the appropriate basic sentence in that case would probably fall in the middle of that 1 to 3 year range i.e. around 2 years.

30. Subsequent to *Miller v Davies*, Kawaley CJ handed down his judgment in the *Valisa Holder v R* and *R v Amanda Henry-Huggins* appeals which were heard together.

31. In the case of *Valisa Holder v R*, the Appellant was tried and convicted in the Magistrates' Court for the offence of importation and possession with intent to supply 1,101.85 grams of cannabis worth between $19,000 and $55,000[1]. On appeal before Kawaley CJ Ms. Holder successfully argued that her sentence of 2 ½ years (30 months) imprisonment was manifestly excessive. This led to a substituted sentence of 1 year and 10 months (22 months) imprisonment.

32. The Crown was the Appellant in the case of *R v Amanda Henry-Huggins* where the Respondent was tried and convicted in the Magistrates' Court for the offence of importation and possession with intent to supply 10,896.80 grams of cannabis valued at $542,825 at maximum. In that appeal, the Crown complained that the 2 ½ year prison sentence imposed was manifestly inadequate. Kawaley CJ accepted that the original

[1] Subsection 4 of the Interpretation section of the MDA provides "*For the purposes of this Act the street value of a controlled drug shall be the value for which evidence is accepted by the court as the maximum value the controlled drug can be sold for in Bermuda*."

sentence passed was both unduly lenient and wrong in principle; however, the appeal was refused only because the Crown had conceded the sentence range proposed by the Defence in the lower Court without mounting any opposing arguments. So not to offend the double jeopardy rule by allowing the Crown a second bite at the cherry to make arguments which ought to have been made at first instance, the Crown's appeal was not allowed.

33. As observed by Kawaley CJ in the *Valisa Holder v R* and *R v Amanda Henry-Huggins* appeals, the primary aggravating factors in drug cases will generally concern the quantity of drugs involved and the plea entered. Kawaley CJ also spoke about the commonness of offenders who have a clean antecedent history, distinguishing the fact of a clean record from unusual circumstances warranting a special discount in sentence [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*."

34. Weighing down on his grounds as to why a suspended sentence was inappropriate, Mr. Richards highlighted that Mr. Watkins never assisted police in recovering the balance of the cannabis which was not discovered by police after the search of his residence.

35. On behalf of Mr. Watkins, Mr. Richardson urged this Court to uphold the sentences imposed by the Senior Magistrate. He argued that Kawaley CJ erred in his reasoning in *Valisa Holder v R* because the range for the basic sentence in that case of cannabis importation was originally formulated from *Miller v Davies* which was a case about cannabis resin.

36. In *Valisa Holder v R* Kawaley CJ relied on the 1 to 3 year range he deemed appropriate in the determining a basic sentence in the case of *Miller v Davies* where he was concerned with cannabis resin in the amount of 608.81 grams at a street value of $60,850. Clearly Kawaley CJ recognised that in *Valisa Holder*, the Court was concerned with cannabis while in the case of *Miller v Davies* the Court was concerned with cannabis resin. He, therefore, compared the gravity of the two cases by reference to the street value of the substances. This is evident from his citing of *Miller v Davies* in the *Valisa Holder* appeal as follows [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 608.81 g 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…"

37. Notwithstanding, Mr. Richardson has asked this Court to consider whether and how cannabis and cannabis resin may be compared when looking at the gravity of an offence of possession by reference to the drug quantities. Notably, the MDA provides a statutory recognition of the physiological difference between cannabis and cannabis resin. The following definitions appear in the Interpretation portion of the MDA:

"…
"cannabis" (except in the expression "cannabis resin") means any part of the genus Cannabis or any part of any such plant except that it does not include hemp, cannabis resin or any of the following products after separation from the rest of the plant, namely—

a) the mature stalk of the plant;
b) fibre produced from the mature stalk of any such plant; or
c) the seed of any such plant;

"cannabis resin" means the separated resin, whether crude or purified, obtained from any plant of the genus Cannabis"

38. Notwithstanding the botanic sub-divisions between of cannabis and cannabis resin, it is uncontroversial that cannabis resin is a derivative of cannabis. Further, section 3 of the MDA defines a controlled drug by reference to the specification in Part 1 of Schedule 2. There, cannabis is listed jointly with cannabis resin, illustrating parity for the purposes of its inclusion within the meaning of a controlled substance. More so, in Part II of Schedule 2 the expression and definition of "cannabinoids" has the implicit effect of classifying any substances which "*act on the cannabinoid receptors in the brain and body*".

39. So, given the sibling relationship between cannabis and cannabis resin, I see no reason why a comparison of their street values ought not to be the substratum path for determining which substance is the larger or more significant quantity in order to measure the gravity of the offence. After all, the relevance of the street value of controlled substances is underpinned by section 27 of the MDA where the level of criminal penalty may be made contingent on the street value of the controlled substance concerned. For these reasons, I align my approach to that which was employed by Kawaley CJ in In *Valisa Holder v R* where he relied on the basic sentence range in *Miller v Davies*.

40. Neither party to these proceedings criticised Kawaley CJ's opinion in *Miller v Davies* that the appropriate range for a basic sentence involving $60,850 worth of cannabis resin is 1 to 3 years imprisonment. More so, it was never suggested that Kawaley CJ was misguided in his view that Ms. Davies' case gave rise to a basic sentence of approximately 2 years. It seems that the Senior Magistrate himself accepted that the 1 to 3 year range should be applied as a starting point to determining the proper sentence. However, in doing so it seems that Mr. Wolffe may have overlooked the fact that Kawaley CJ opined in *Miller v Davies* that appropriate basic sentence fell somewhere in the middle of the 1 to 3 year range, despite his final decision not to interfere with the basic sentence of 12 months.

41. In this case the value of the cannabis is $102,400.00. That is nearly 40% more than the maximum street value of the cannabis resin in *Miller v Davies*. So, it is difficult to see how anything less than a basic sentence of 18 months would have been applicable to either Respondent since in both the present case and in the case of *Miller v Davies* guilty pleas had been entered and the offenders had no record of previous criminal convictions. More so, in the case of Mr. Watkins, the proper range for the basic sentence would be somewhere in the region of 2 years in order to mark his more significant role in the conspiracy. This broadly reflects the level of increase over Ms. Infante's sentence which the Senior Magistrate settled on without controversy.

42. This Court has also been invited by Crown Counsel, Mr. Richards, to address the Senior Magistrate's application of my earlier decision in *Natasha York v Miller* in suspending a portion of Mr. Watkins' and Ms. Infante's custodial sentences. In *Natasha York v Miller* I allowed an appeal against a sentence of 12 months imprisonment, 9 months of which was suspended. In that case I substituted the original sentence only to the extent of suspending the entire 12 month period.

43. In *Natasha York v Miller* I found that the Appellant's circumstances constituted a good reason to suspend her sentence. In that case the Appellant pleaded guilty to a single count of importation of 1,430.7 grams of cannabis at an estimated street value of $71,525.00. At the sentence hearing in the Magistrates' Court, she produced compelling medical evidence of her diagnosis and ongoing struggle with intractable seizures which was being ineffectually treated by maximum doses of medications producing serious side effects. Outlining the traumatic effects of her condition, Ms. York's medical physician advised the Court, *inter alia*, in a written report filed for the sentence hearing:

"*… 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."

44. In allowing the appeal against sentence in *Natasha York v Miller*, I said [20-21]:

"*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. <u>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</u>.* [Underlined for my emphasis]

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."

45. On my assessment of the facts of this case, one cannot sincerely collate the seriousness of Mr. Watkin's actual or intended medicinal use of an unquantified portion of the imported cannabis with the desperation which plagued Ms. York. In Ms. York's case, the Court accepted that the cannabis in question was solely intended for her personal use as a last attempt means of combating her severe seizures. The Court further accepted that the effect of those seizures were life-changing and acutely debilitating. Notably, the Senior Magistrate recognised how much more serious Ms. York's medical circumstances were to that of Mr. Watkins. In his written judgment on sentence, Mr. Wolffe said [p.12-13]:

"… …

v. *It has to be highlighted though that there are a couple of distinguishing features between this case and that of York as to the extent of medical ailments of Defendant Watkins and the appellant York. Firstly, Subair Williams J in York was satisfied that the appellant imported cannabis into Bermuda solely for medicinal purposes and for her personal use without any intention of giving it to another (Subair Williams J likened the facts of York with that of "an offence of simple possession by a first-time offender…" [footnote: "York, p.8"]). On the other hand, as I found at the Newton Hearing, Defendant Watkins did have the intention of sharing some of the cannabis with others.*

Secondly, it is patently clear to me that the medical issues suffered by the appellant in York were far more serious than those suffered by Defendant Watkins. While I accept that Defendant Watkins experienced chronic pain due to sports injuries and that he uses cannabis to alleviate this pain, I find that the pain he had to endure pales in comparison to the seizures suffered by the appellant in York (which was supported by medical evidence).

Therefore, any weight that I give to the Defendant Watkins' medical issues will be far short of that given to the appellant by Subair Williams J in York.

It should be noted that at the Newton Hearing that Defendant Infante gave evidence that she uses cannabis to deal with various issues such as migraines and post-traumatic stress ("PTSD") which have arisen out of road traffic accidents, but she did not advance these as a reason for committing the offences charged."

46. So, in the case of Mr. Watkins, the Senior Magistrate made a finding of fact that the First Respondent suffered from chronic pain due to sports injuries and that his personal use of cannabis was for the purpose of alleviating that pain. This Court has not been invited nor has any reason to go behind those findings of facts. That leads me to the next stage of analysis which is whether Mr. Watkin's motive to use a portion of that cannabis to manage his chronic pain sufficed as a good reason to suspend a portion of his custodial sentence.

47. In my judgment, the exercise of the Senior Magistrate's discretion to suspend a third of Mr. Watkins' 9 month sentence based on his findings of medicinal use was not so unreasonable that it warrants interference by the Court. It is plainly the case that the Senior Magistrate found that part of Mr. Watkins motivation for the offence was directly related to his efforts to treat his chronic pain. Implicitly, the lower Court attributed one third of his intentions to that motivation and I see no fault in that approach.

48. However, where Ms. Infante is concerned, I see no good reason as to why half of her sentence was suspended, particularly in light of the Senior Magistrate's finding that her medicinal use of marijuana was not advanced as a motive for her commission of the offences. In explaining the basis for the suspension the Senior Magistrate wrote in his judgment [para 33]:

"*In relation to Defendant Infante, by her criminal conduct: (a) she leaves behind a ten (10) year old son whose care has been entrusted to another in an overseas jurisdiction since her day of arrest on 1st May 2021, and (b) whilst she has been in Bermuda awaiting resolution of this matter she, according to Mr. Daniels, has been unable to pay her mortgage and therefore her overseas premises is likely to be the subject of foreclosure proceedings. I find that these circumstances amount [to] good reasons to suspend part of any term of imprisonment imposed on Defendant Infante, but only marginally so. Any person committing criminal offences, particularly those as serious as conspiracy to import cannabis, should expect that their conduct will have a deleterious effect on others who may be close to them*."

49. Mr. Richards urged this Court to reject these factors as a proper basis for suspending any portion of a custodial sentence. To that end, he directed my attention to the binding decision of the Court of Appeal in *R v Chavdar Bachev and Georgi Todorov* [2016] Bda LR 69 where Baker P in handing down the judgment of the Court said [11]:

11. The fact that someone chooses to commit crimes whilst visiting Bermuda and is thereby unable to maintain family life whilst serving a prison sentence because their family is abroad is not mitigation. In Stewart v R [2012] Bda LR 18 Zacca P said:

> *"25 We conclude that there may be special circumstances, such as a medical condition, which require the Court to discount a long sentence. It is for the Court to decide whether such exceptional circumstances arise. There may be other special conditions other than a medical one which might earn a discount.*
>
> *26. However, the remarks made by the learned trial judge in the present case for personal and family difficulties does not fall into the special circumstances discretion. The courts are too often in mitigation of sentences, referred to the age of the appellant, a wife and children to support, the absence of the appellant from the home."*

12 .Nor are administrative considerations relating to release mitigation however regrettable it may be that foreign prisoners may in practice spend longer in custody.

50. So, in my judgment the Senior Magistrate erred in suspending Ms. Infante's sentence.

Conclusion

51. For these reasons I allow the Crown's appeal to the following extent:

    (i) Mr. Watkins was sentenced by the Senior Magistrate to a sentence of 9 months imprisonment, 3 months of which was suspended for 2 years. I quash that sentence and substitute a sentence of 2 years imprisonment, 8 months of which is to be in the form of a suspended sentence.

    (ii) Ms. Infante was sentenced to 6 months imprisonment, 3 months of which was suspended on each of the two counts to which she pleaded guilty. On only the count relating to the conspiracy to import the cannabis, I quash that sentence and substitute a sentence of 18 months imprisonment, without suspending any portion thereof.

52. In the particular circumstances of this case, neither Respondent shall be made to serve the extended custodial periods of their sentences.

Dated this 21st day of December 2021

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SHADE SUBAIR WILLIAMS
PUISNE JUDGE