In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2014: CRIMINAL APPEAL N0: 3

FIONA M. MILLER
(Police Sergeant)

Appellant

-v-

LAUREN DAVIES

Respondent

JUDGMENT
(In Court)

Date of Hearing: February11, 2014
Date of Judgment: February 28, 2014

Ms. Takiyah Burgess, Office of the Director of Public Prosecutions, for the Appellant
Mr. Marc G. Daniels, Charter Chambers Bermuda Ltd.

Introductory

1. On December 18, 2013, the Respondent was charged in the Magistrates' Court with importing and possessing with intent to supply cannabis resin, offences alleged to have occurred on November 14, 2013. She pleaded not guilty, was remanded in custody and appeared in Court again, with counsel, on January 8, 2014. She pleaded guilty to the importation charge (Count 1) and the Crown offered no evidence on Count 2.

2. Although the Summary of Facts was read at the second hearing, sentencing was adjourned until January 16, 2014. On the latter date the Respondent, who was again remanded in custody, again appeared and was represented by counsel. The

Prosecution case was that the weight of drug imported was 608.81 grams of cannabis resin, which could have been sold in 1217 5 gram blocks or cakes for $50 each. The street value of the drugs was $60,850. The Respondent was a 24 year old British national with no known previous convictions. The Prosecution admitted that the Respondent had assisted the Police and submitted that the basic sentence was in the range of 4 to 5 years. Mr. Daniels for the Respondent submitted the appropriate basic sentence was one of 12 months and that the Respondent deserved a discount of 50% for her cooperation.

3. The Respondent was sentenced to six months' imprisonment by the Magistrates' Court (Wor. Archibald Warner, Senior Magistrate). The Court found that 12 months imprisonment was the basic sentence and that the Respondent was entitled to a discount of 50% for her cooperation with the Police. The Appellant appeals against that sentence on the grounds that it is manifestly inadequate because:

    (a) the basic sentence for the offence is clearly higher than 12 months; and

    (b) a discount of 50% was wrong in principle.

The sentencing hearing in the Magistrates' Court

4. Ms. Burgess for the Prosecution submitted to the sentencing Court that, having regard to the assistance she had given the Police following her arrest, the Respondent deserved a total discount of 35% on the basic sentence for the offence. She referred the Court to section 27E of the Misuse of Drugs Act 1972. It seems convenient to describe the sentence which a court determines to be appropriate, before any statutory or other discounts are applied, as the 'basic sentence' and I adopt Counsel's terminology accordingly[1].

5. Crown Counsel supported her submission that a basic sentence for the offence was between 4 to 5 years imprisonment with reference to a 2009 Supreme Court case, for which there was no published judgment, and which she did not rely upon in support of the Crown's sentence appeal.

6. Mr. Daniels submitted, without apparent reference to any specific previous cases, and in the absence of any digest of sentences imposed in the Magistrates' Court, that his experience was that 3 years imprisonment was the most severe sentence imposed in that Court for less than 2 pounds of cannabis. He referred to *The Queen-v-Bascombe* [2004] Bda LR 28, where the Court of Appeal set aside a Probation Order imposed in the Supreme Court (Warner, AJ) and substituted a sentence of 12 months imprisonment. The amount of cannabis involved was only 227.61 grams and there was only inferential evidence of any commercial motive for the importation by the Respondent, a Bermudian, who pleaded guilty in the Supreme Court and asserted it was for his personal use.

[1] In a general sense, this mimics the statutory concept of 'basic sentence' as formulated for increased penalty purposes by section 27A(1)(a) of the Misuse of Drugs Act 1972.

7. As for the discount for cooperation, the Respondent's counsel is recorded as submitting that the Court could award a discount of "up to" 50%.

8. The Learned Senior Magistrate effectively accepted the obviously eloquent submissions of Mr. Daniels to the fullest extent possible. He accepted that 12 months was an appropriate basic sentence, counsel having argued that 3 years would have been the top of the range. He then awarded the maximum discount contended for by the Respondent's counsel, namely 50%.

Findings: merits of appeal (the basic sentence)

9. Ms. Burgess adopted something of a scatter-gun approach in terms of authorities cited with a view to demonstrating that the basic sentence for the level of importation offence for which the Respondent was sentenced is higher than the 12 months adopted by the Learned Senior Magistrate. Reference was made to some cases which I found to be of little if any relevance, including:

   (a) cases involving hard drugs (*James and Duncan-v-Raynor* [2013] Bda LR 7-cocaine); and

   (b) cases where the importers were in a position of trust, such as cruise ship employees (*James and Duncan* and *Cousins-v-Kirby* [1990] Bda LR 4).

10. The only directly similar guideline case cited by Crown Counsel was, at first blush, highly pertinent. In *Davis-v-Angela Cox (PC)* [2000] Bda LR 48, the 21 year old appellant pleaded guilty to importing 447 grams of cannabis in what was clearly a commercial smuggling operation. She did not assist the authorities. L. Austin Ward CJ reduced a sentence of 4 years imprisonment to 3 years on the grounds that it was disproportionate with similar cases, holding:

    "*I agree that this Appellant can have a justifiable sense of grievance that she has been treated more harshly than other accused persons in a similar position.*"

11. Assuming that the 3 year term included the standard one-third discount for a guilty plea, the basic sentence in *Davis-v-Cox* can be calculated as 4 ½ years (3/2= 1.5 x 3= 4.5). Assuming there is no dramatic difference in the commercial value of comparable weights of cannabis and cannabis resin, this authority strongly supports the submission made by Crown Counsel that the basic sentence for the offence involved in the present appeal as regards sentences imposed at the Magistrates' Court level is in the 4 to 5 year range.

12. The Respondent's counsel also cited authorities which were distinguishable, but in one instance, with the valid aim of undermining the contention that a 4 to 5 year tariff could possibly be applicable to his client's case. In this regard, he aptly pointed out in *James and Duncan-v- Lyndon Raynor (PS)* [2013] Bda LR 7, this Court recently

found that 5 years was the basic sentence for importation of $52,000 worth of cocaine by a cruise ship employee. In fact it is clear from paragraph 42 of my judgment in that case (delivered just over a year ago[2]), the relevant tariff was expressly conceded by the Crown.

13. The latter case suggests the need to treat with caution guideline cases from 10 or more years ago. Mr. Daniels also referred to *Philip Taylor (PS)-v- Williams* [2000] Bda LR 56. Here, L. Austin Ward CJ increased the sentence of a cruise ship worker who admitted importing 808 grams of cannabis worth $40,400 from 14 months to three years. Since the 50% discount given for "substantial cooperation" by the Senior Magistrate was not disturbed, this represents a basic sentence in 2000 for an admittedly aggravated cannabis importation offence of six years. This is one year more than the basic sentence conceded by the Crown as appropriate in 2013 for a similarly aggravated cocaine importation offence, which also involved drugs of a comparable street value.

14. On the other hand, reliance on *Bascombe* [2004] Bda LR 28 as an indicator for the appropriate basic sentence in the present case was, in my judgment, misplaced. The amount of cannabis involved in that case was a third of that involved in the present appeal. It was also not a standard commercial importation case, as noted already above. The 12 months imprisonment Collett JA (delivering the judgment of the Court of Appeal) considered appropriate there is of little assistance to determining what the basic sentence should be in the case of an admitted cannabis courier, who has imported three times as much drugs.

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. 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.

16. The appropriate basic sentence is higher than that adopted by the Learned Senior Magistrate, but falls within the range contended for at the sentencing hearing by the Defendant's counsel and well below the unsubstantiated higher range contended for by Crown Counsel.

17. Based on the material placed before the Magistrates' Court, the basic sentence adopted by the Learned Senior Magistrate cannot be said to be wrong in principle or manifestly inadequate. It was not obvious without authority that a more severe sentence was required. Prosecuting counsel, quite understandably, was not able find and/or to rely upon any clear recent guideline case as to what the appropriate basic sentence should be. No such recent guideline cases appear to exist and the older case relied upon in support of the present appeal, *Davis-v-Angela Cox (PC)* [2000] Bda LR 48, is clearly itself out of step with modern sentencing practice.

[2] [2013] SC (Bda) 9 App (25 January 2013).

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. The purpose of the right of appeal is to correct errors of principle or unduly lenient sentences, having 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:

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

    (b) wrong principle, having regard to the submissions made to the Court.

19. The Appellant has demonstrated for the first time before this Court that the basic sentence for similar offences of importation in the future ought to be in the range of 1 to 3 years immediate imprisonment. Having regard to the quantity and value of drugs involved in this case and taking into as a mitigating factor the assistance given by the Respondent[3], an appropriate term of imprisonment would in my judgment have been two years. Or, looked at from another perspective, had a sentence of two years' imprisonment been imposed on the Respondent, she could not have complained that such a sentence was harsh and excessive.

20. However, this position was not advanced or substantiated at the initial sentencing hearing. The Learned Senior Magistrate's chosen tariff fell within the range of possible sentences he could properly impose, both (a) based on the very limited precedents he was invited to consider, and (b) based on the further precedents placed before this Court. There was no error in principle; nor was the basic sentence of 12 months shown to be obviously lenient having regard to other comparable cases. This limb of the appeal accordingly fails.

Findings: merits of appeal (discount for cooperation)

21. Section 27E of the Misuse of Drugs Act 1972 provides as follows:

    "**Sentencing discounts for assistance**
    27E. Where a person charged with an offence under this Act gives assistance to the investigation and prosecution of any offender—

    (a) in the same case in which he is charged, such person may be rewarded with a discount not exceeding fifty per cent of the basic sentence; and

[3] The issue of credit for assistance is considered more fully below.

(b) in a case other than that for which he has been charged, the person may be rewarded with a discount not exceeding seventy-five per cent of the basic sentence.

[Section 27E inserted by 2005:26 s.8 effective 4 August 2005]"

22. Prior to the enactment of section 27E in 2005, sentencing judges had a common law discretion to award a discount for assistance given to the authorities, with the leading authority seemingly being the Court of Appeal for Bermuda judgment in *Amon Brown-v-The Queen*[1994] Bda LR 10. In that case (at page 3), Sir Denys Roberts (P) stated as follows:

"*In Carrie Spencer v. The Queen (1988 Bermuda Cr. App. 13/88) it was said that where an accused person can be properly described as a "supergrass", a discount of 50% to 75% may be properly given.*

Such a discount ought only, it was said, to be allowed where the accused has given help or has adduced evidence in relation to a number of offences other than those with which he is himself charged.

Where an accused person has been of assistance to the police and has given evidence in relation to the same offences as those with which he has been charged, a discount of something like 30% to 50% may be given.

It is important to note, however, that in all the reported cases in which a discount has been granted, the person who benefits from the discount has either given evidence, himself, or has provided information as a result of which others have been prosecuted. That was not the case here.

There may be instances in which for various reasons (for example the death of a suspect) the information given by a defendant is not followed by the prosecution, but these will be rare…

The Chief Justice, when passing sentence, took into account the degree of co-operation given to the police in identifying a co-conspirator. He does not say what discount he allowed for this…If, in fact, he allowed a 25% discount for assistance to the police, we could not say that he was necessarily wrong, though we think that a court should be slow to do so when a prosecution has not followed from information given, or action taken, by the defendant. "

23. These observations, made 20 years ago, in general terms still have considerable force today. In particular, it must always be the case that where credit is given for cooperation, significant credit must only be given where the value of the assistance is itself recognised as significant, in the eyes of the investigating and/or prosecuting authorities themselves. While the Court will always retain the right to evaluate the weight to be given to assistance as a mitigating factor, the starting point will always be the weight the Prosecution submits should be given to the assistance given because those facts will be within the peculiar knowledge of investigators and/or prosecutors.

24. I would also adopt the view of the English Court of Criminal Appeal in *R-v- Sehitoglu and Ozakan*(1998) Cr.App.R (S.) 89 to the effect that the correct approach is to determine a global discount taking into account both the guilty plea and any relevant assistance given to the authorities. This rule of sentencing practice was summarised by the learned editors of Archbold 2010 at paragraph 5-95 as follows:

> "*…the sentencer should determine the final sentence by calculating a single discount taking into account all the relevant factors, including the plea of guilty and the assistance given to the authorities.*"

25. It is necessary to read English case law on discounts for assistance with considerable care, however. In England and Wales, there is now a very different statutory scheme enabling credit to be given when assistance is rendered pursuant to an agreement with a prosecutor under sections 73-75A of the Serious Organised Crime and Police Act 2005. The procedural framework is quite elaborate and includes (a) the power to avoid publicity of the fact that a discount has been given, and (b) the power for the Court of Appeal to review a sentence when an offender receives a discount on the premise that he will provide future assistance which he fails to provide. However, the type of assistance which can be rewarded and the amount of the discount appear not to be restricted in any way. It seems that the old cases on the amount of discount which is appropriate (rarely more than 75%) are still applied: *Archbold 2010*, paragraph 5-94e. This legislative scheme is, overall, quite different from the Bermudian common law <u>and</u> statutory position.

26. Nevertheless, the restrictive approach commended by the Court of Appeal for Bermuda in *Amon Brown,* in 1994, which suggested that assistance should rarely be rewarded where no prosecution of another offender results, appears to me to be of diminished force today. In late 2001, a new statutory sentencing code was inserted into the Criminal Code. Section 55(2) (g) of the Criminal Code lists the following example of "*mitigating circumstances relating to the offence or the offender*":

> "*(v) any assistance the offender gave to the police in the investigation of the offence or other offences*".

27. While case law will continue to define the precise extent to which credit is given for assistance to the authorities, section 55(2)(g) of the Criminal Code imposes a general statutory obligation on the sentencing judge to consider assistance given by the offender to the investigation of his own offence or other offences. There is no statutory requirement for the assistance to have also related to a prosecution. So the scope of assistance which can be taken into account is broader under section 55(2)(g) than it was under the pre-existing common law position, which common law regime was under consideration in *Amon Brown-v-The Queen*[1994] Bda LR 10. But, that case, it seems to me, is still good law in suggesting that significant discounts of 30-50-% or even more will rarely be appropriate when the benefits flowing from the assistance are themselves obviously significant.

28. It also seems logical that when assistance is being taken into account as a general mitigating factor, credit would be given for that in reaching the appropriate basic sentence. Thereafter, any further discount for a guilty plea would be applied.

29. It flows from this analysis that where an offender wishes to obtain a significant discount on the basis that his assistance has resulted in the arrest, prosecution and/or conviction of another person, or some other equivalent substantial public benefit, the route to achieving the appropriate discount may well often be by way of adducing fresh evidence on appeal. The proof of the assistance pudding will always be in the eating, and the evidential pudding will rarely be ready for consumption until after the assisting defendant has himself been convicted and initially sentenced.

30. Our former common law 'discount for assistance' rules appear to have, to some extent, inspired section 27E of the Misuse of Drugs Act 1972. But, because sentencing courts are no longer exercising a somewhat fluid common law discretionary power, the statutory words must be carefully construed. Ms. Burgess in her oral submissions on appeal correctly submitted that that the power to award a statutory discount is only engaged when two cooperation pre-conditions are met:

    (a) the offender has given assistance in relation to an investigation; <u>and</u>

    (b) the offender has given assistance in relation to a prosecution.

31. This follows upon a straightforward reading of the introductory and dominant portion of the relevant statutory provision: "*Where a person charged with an offence under this Act gives assistance to the investigation and prosecution of any offender*". The "and" linking the investigation as assistance and prosecution assistance requirements is clearly conjunctive and not disjunctive. If Parliament intended a contrary result, section 27E would surely have been drafted to read "*Where a person charged with an offence under this Act gives assistance to the investigation* **<u>[or]</u>** *prosecution of any offender*", instead of "*investigation <u>and</u> prosecution*" as the legislation actually says.

32. Two levels of sentencing discount are then provided for in the two sub-paragraphs of section 27E:

    (a) a discount of up to 50% where the assistance provided relates to the investigation and charging of another offender in relation to the same proceeding in which the defendant is charged; or

    (b) a discount of up to 75% where the assistance provided relates to the investigation and charging of another offender in relation to a different proceeding to that in which the defendant is charged.

33. The task of construing these provisions was squarely placed before the Learned Senior Magistrate. It is somewhat unclear from the record that Crown Counsel conceded that a section 27E discount was available. On balance, I am satisfied that she led the Court to believe that at most, a maximum discount of 50% under section 27E (a) was potentially available. Ms. Burgess undoubtedly made it plain that limited assistance had been provided which had not resulted in any other offender being prosecuted. She submitted that a small uplift of the standard one-third discount to 35% was justified to acknowledge the assistance given.

34. Mr. Daniels clearly submitted that section 27E applied and that a discount of "up to 50%" was possible. He does not appear to have had the temerity to submit that a

discount of 50% was actually warranted, although he did state his client was willing to give evidence if required.

35. Although the Learned Senior Magistrate appears to have been misled by both counsel into thinking that section 27E of the Misuse of Drugs Act 1972 applied to the Respondent's case, he erred to the extent that he found that a discount was available under those statutory provisions. The correct legal position is that the Respondent was not entitled to a discount under section 27E at all because while she had assisted the Police to investigate another offender in relation to the matter with which she was herself charged, she had neither assisted the Police to prosecute such other person nor given evidence against them at the date of her own sentence.

36. The correct legal position is that any credit for cooperation should have been taken into account as a general mitigating factor under section 55(2)(g) of the Criminal Code. This factor ought properly to have been taken into account in determining the basis sentence before applying a discount for the guilty plea. When the Crown appeal against a sentence on the grounds that it is manifestly inadequate, however, in my view it ought not ordinarily to be open to the Prosecution to penalize a defendant by raising fresh arguments or other matters for the first time on appeal.

37. Accordingly, I will assume for the purposes of the present appeal that, based on the concession made by the Prosecution in the Court below, the Respondent was entitled to receive a modest discount over and above the one-third she was entitled to expect for her early guilty plea: a global discount of 35% of the 'basic' sentence for the offence.

38. I find that the discount of 50% of the basic sentence of 12 months which was applied by the Magistrates' Court was wrong in principle because it was or ought to have been obvious to the Court based on the terms of section 27E and the facts before the Court that:

    (a) assuming that the Respondent had given qualifying assistance for the purposes of section 27E (a), there was no material before the Court capable of supporting the finding that the Respondent's assistance merited a discount at the top of the section 27(a) range; and

    (b) the only potentially lawful discount would have been a modest discount along the lines of that proposed by the Prosecution, namely 35%.

39. Save in cases where it is clear that the Prosecution's position on the value of the assistance given by an offender borders on the perverse, it is difficult to imagine when a sentencing judge will be properly entitled to override the Crown's assessment as to what level of discount ought to be given.

Disposition of appeal

40. For the above reasons, I find that the appeal should be allowed and the sentence of six months' imprisonment should be set aside on the grounds that it is manifestly inadequate in the sense that it was wrong in principle for the reasons explained above.

41. The Court below did not err in principle in selecting 12 months imprisonment as the appropriate level of 'basic' sentence. However, this sentence was at the very bottom of the applicable sentencing range and, indeed, below the sentence I would have considered to be appropriate if I were exercising the sentencing discretion afresh. Based on the material placed before the sentencing Court, it cannot be said that the sentence imposed was manifestly inadequate.

42. As a matter of construction of section 27E of the Misuse of Drugs Act 1972, the Respondent was not entitled to a statutory discount at all. The Magistrates' Court erred in law in concluding that this provision applied to the Respondent even though her assistance did not relate to both an investigation <u>and</u> a prosecution as the statute explicitly requires.

43. Since the Prosecution conceded that the Respondent was entitled to a very small additional discount under section 27E at the sentencing hearing, it is not fairly open to the Appellant to seek to deprive the Respondent of the benefit of that discount at this stage. The appeal should be dealt with as if the relevant statutory provisions did apply. Even if the statutory provisions did apply, the Court below erred in principle in giving a more generous discount than that assessed by the Prosecution as being appropriate, in circumstances where no material before the Court supported such approach.

44. Accordingly, the sentence of six months' imprisonment is quashed, and substituted with a term of eight months' imprisonment. This assumes a basic sentence of 12 months, with a discount of very nearly 35%[4].

45. For the avoidance of doubt, the disposition of the present appeal in no way precludes the right of the Respondent to seek appropriate relief in the event that she can in the future demonstrate that in fact she provided assistance to the <u>prosecution</u> of another offender, as well as merely assisting an investigation.

Dated this 28th day of February, 2014 ______________________

IAN R.C. KAWALEY CJ

[4] By my calculations 35% of 12 months is 4.2 months, or four months and less than one week. I have rounded this down to 4 months.