



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2015: 10

EVERETT JAHNI BEAN

V

TRAVIS POWELL (Police Sgt)

EX TEMPORE JUDGMENT

(in Court)

Date of hearing: December 4, 2015

The Appellant in Person

Ms. Takiyah Burgess, Department of Public Prosecutions, for the Respondent

Introductory

1. The Appellant, appearing in person, appeals against his conviction and sentence imposed in the Magistrates Court on the 8th of October 2014 (Wor. Khamisi Tokunbo).
2. He complained that he did not have sufficient time to prepare his case properly and to instruct counsel and was therefore denied his right to a fair hearing. He complained further that his sentence of imprisonment, which comprised a basic sentence of 30 days' imprisonment together with the one year's imprisonment imposed as an additional penalty for being in an increased penalty zone, was harsh and excessive.

Appeal against conviction

3. As for as the conviction appeal is concerned it appears that Mr Horseman only received Legal Aid late. But he was supplied the Prosecution papers in late June. He appeared before the Magistrates Court at trial¹ and cross-examined the Prosecution witnesses in a way that was broadly consistent with the Appellant's case as explained on this appeal. The Appellant elected not to give evidence and the Learned Magistrate found that he was satisfied, based on the evidence of two Prison Officers, that the Defendant was in possession of a small amount of cannabis found in his cell during a search.
4. The Appeal against conviction is accordingly dismissed.

Appeal against sentence

5. As far a sentence is concerned I was troubled when looking at the file by what appeared to me to be a disproportionate sentence overall. A basic sentence of 30 days' imprisonment was increased over 10 times by the application of the strict terms of section 27A of the Misuse of Drugs Act. Section 27A provides as follows:

“27A (1) Where a person is being sentenced for an offence under any of sections 5 to 11 of this Act which was committed (whether wholly or partly) in an increased penalty zone, the court shall—

- (a) first determine the sentence (“the basic sentence”) in accordance with established principles but without regard to this section; then*
- (b) where the basic sentence includes a term of imprisonment or a fine, increase that sentence by adding an additional element determined in accordance with subsection (2).*

(2)The additional element shall be—

- (a) a term of imprisonment of at least one year but not more than three years, where the basic sentence includes a term of imprisonment of less than seven years;*
- (b) a term of imprisonment of at least three years but not more than five years, where the basic sentence includes a term of imprisonment of seven years or more;*
- (c) a fine of at least \$1000 but not more than \$10,000, where the basic sentence includes a fine.*

¹ The trial took place on October 8, 2014.

6. In this case it is accepted that section 27A(2)(a) applies and that the minimum increased penalty required, according to the strict terms of section 27A, was duly imposed. Ms Burgess for the Crown submitted that the Learned Magistrate had little choice but to follow the strict terms of the statute, although she conceded that the practical effect in the present case was certainly a harsh one.
7. The Court was initially under the impression that section 27B of the Act was relevant. But, as Ms Burgess rightly pointed out, section 27B of the Act deals with an increased penalty for hard drugs. It is nevertheless interesting to note, although it is dealing with a different scenario than the increased penalty under section 27B, that for possession of drugs including heroin and cocaine, the increased sentence is 50% of the basic sentence. While it might be said that Parliament intended to treat increased penalty zones more severely, it is difficult to imagine that Parliament consciously had in mind a circumstance where a basic sentence of as low as 30 days would be imposed and the increased penalty (by virtue of the offence being committed in an increased penalty zone) would be over ten times that basic penalty in duration. Interestingly, the Appellant himself asserted that he was aware of another inmate who had been convicted of possession of more cannabis in Prison who was sentenced to an additional 3 months only.
8. Although Ms Burgess did not have an opportunity to research this issue, it does seem to me to be improbable that this section in the Act is being applied according to its terms in every case; because if it were, it would be producing manifest injustice.
9. Fortunately the Court is able to have regard to the Court of Appeal decision in *Cox and Dillas-v-The Queen* [2008] Bda LR 65. The nub of the decision is that the scheme of the Bermuda Constitution gives the courts the ultimate role to play in imposing sentences and Parliament cannot take away the right of the courts to impose a sentence that is proportionate to the facts before the Court. At paragraph 24 of President Zacca's Judgment in the *Cox* appeal, he said this:

“24. For these reasons, we hold that the minimum term provisions of section 315C(6) are subject to the proportionality requirement of section 54, and to that extent the Appeals against sentence are allowed. It is incumbent on the sentencing judge, in every case, to determine whether the prescribed minimum sentence would infringe the defendant's rights under section 54, taking account both the statutory guidelines set out in section 55 and of the minimum term requirement which, subject to section 54, itself has the force of law...”
10. In this case I reach a similar conclusion. The provisions of section 27A are not unconstitutional but the Learned Magistrate ought to have regard to Section 54 of

the Criminal Code and in failing to do so he imposed a sentence which was disproportionate and which is liable to be set aside.

11. It is somewhat difficult to assess what is a proportionate sentence globally in circumstances where Parliament has specified a minimum way in excess of what in some cases would be the basic sentence. But trying to achieve a rough and ready justice, I would find that an appropriate result would be to quash the 12 months' additional sentence and to substitute a further 30days.

12. So the sentence of 30 days plus 12 months' imprisonment is quashed and substituted with a total sentence of 60 days imprisonment.

Dated this 4th day of December, 2015 _____

IAN RC KAWALEY CJ