In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
2017: No. 12

THE QUEEN

-V -

RYAN WILLINGHAM-WALKER
ROBERTO C MARQUES

Date of Hearing: 27th October 2017

Date of Judgment: 31st October 2017

Mr. Charles Richardson for the Defendants

Ms. Nicole Smith and Ms. Larissa Burgess for the Crown

Before: Hon. C. Greaves PJ.

SENTENCE

Criminal law- Misuse of Drugs Act 1972- Sentencing - Possession with intent to supply 118 grams of cocaine-135 grams cannabis- Drug equipment.

1. On 17th October 2017 the defendant Mr Walker pleaded guilty to counts 2, 3, 4, 5 and 8. On the 23rd October 2017, the defendant Mr Marques pleaded guilty to counts 9, 10, 11 and 12.

2. Mr Walkers' friend, Ms Griffith, was discharged from the indictment and her counts together with others pertaining to the two defendants remain on file not to be proceeded with without the courts' leave.

3. Both defendants indicated they desired no presentencing reports. Sentencing was fixed for 27th October 2017. On 27th October submissions were heard in respect of Mr Marques and due to some issues raised by Mr Walker in his submissions, the remaining hearing was adjourned to the 31st October.

4. In respect of Mr Marques, the prosecutor advocated for various sentences relating to those counts excluding count 10. There is no dispute between the prosecution and the defence in respect thereof.

5. In respect of count 10 (possession of 118.41 grams of cocaine with intent to supply), the prosecution advocated a sentence of 12 years, taking into account as a mitigating factor, his guilty plea, and as an aggravating factor his breach of the public trusts as a customs officer. Counsel for Mr Marques submitted that to be excessive and advocated a sentence of no more than 8 years, starting from a basic of 5 years and taking into account the same aggravating factor.

6. The prosecution relied upon the following cases in support:

   R v Richards, Davis and Hall 1991 Bda LR 15 CA. in which the defendants were sentenced to 12, 11,and 8 years respectively, after a guilty plea, for conspiracy to supply and importation of 135grams of cocaine.

7. The Court of Appeal established that a sentence of between 8-12 years would be appropriate for a conspiracy to import a quantity of cocaine even if the quantity was small. It found that 130 grams was substantial. It found that given the importance of the cruise ship business to Bermuda, importation by crew members was an aggravating factor. It is not in dispute in this case that Mr Marques' position as a customs officer is a substantial aggravating factor.

8. In *R v Michel Brown 1993 Bda LR 20,* the defendant was sentenced to 14 years imprisonment, after trial by judge and jury, for possession of 148 grams of cocaine with intent to supply. That sentence was reduced to 10 years by the Court of Appeal.

9. There, relying on *R v Richards and R v Ward et al, and R v Wilson 9 Crim. App. 18/88*, the Court said, the possession of cocaine for supply should normally carry a sentence of 8

years upon a guilty plea; that a sentence of 10 years would be proper and could be more severe if the quantity of cocaine is larger.

10. In *R v Daymon Simmons [2016] Bda LR 105*, the trial judge affixed a sentence of 6 years imprisonment upon the defendant who pleaded guilty to possession of 385 grams of cocaine in an increased penalty zone, taking into account a discount for the guilty pleas and adding back an increase for the IPZ.

11. The Court of Appeal reasoned, applying the guilty plea factor and the IPZ factor, that the appropriate sentence might have been *11 1/2* years. It also acknowledged the difficulty and anomalies such a mathematical sentencing structure could lead to.

    Without engaging in mathematical tangle, the court increased the sentence to 9 years.

12. It is instructive that in that case the Court of Appeal referred with approval to *R v Gibbons and Beach [2009]Bda LR 41* in which the cocaine was substantially smaller but in which there was evidence of trading. That was a case in which the defendants had elected to be tried on indictment and defence counsel argued that the quantity was such that at the Magistrates Court level the sentence would have been quantified in months. The Court rejected that argument and upheld the 8 year sentence.

13. It is evident from these cases that the appropriate sentence for possession with intent to supply in the range of 130 grams is between 8 and 12 years regardless of the mathematical formula.

14. Defence counsel relied on *R v Victoria Zambardi* (Crim App) *1995:5,* there upon a guilty plea for possession with intent to supply 340.35 grams of cocaine, the defendant was sentenced to 10 years, upheld by the Court of Appeal.

15. In *R v Albert Peyton No.11 of 1997 CA,* the Court of Appeal upheld a sentence of 14 years for possession with intent to supply 980.3 grams of cocaine, after trial.

    There the CA referred to the leading cases *of Richards, Davis and Hall* and re-emphasized the 8-12 year tariff.

Counsel rightly submitted that the drugs in that case were more substantial by a great degree than they are in the present case-and the defendant had the benefit of a full trial.

16. In *R v Jamie Cox, [2005]Bda LR 47*, a sentence of 4 years imprisonment upon a guilty plea for importation with intent to supply 361 grams of cocaine was held manifestly inadequate and a sentence of 6 years was substituted.

17. That sentence was apparently influenced by the particular facts of that case which tended to suggest that the jury might have felt that the importation was accidental, in the sense that the drugs were not intended for Bermuda. In any event the CA still emphasised the rulings in *Zambardi.*

18. Defence counsel also referred to *R v Willston Davis [2006]Bda LR 49*, in which a sentence of 12 years imprisonment after trial appeared not have been disturbed by the CA. The quantity of cocaine is not stated in the judgment. Consequently I do not find that authority particularly helpful.

19. Also cited is a sentencing certificate of 3-6 years imprisonment in R v Antoine Kent No. 1 of 2016, per Simmons J. It does not state the quantity of drugs. I am unable to rely upon it.

20. Upon writing this judgment I did not find the issue of sentencing as it relates to the level of sentence to be as difficult as it at first seem during the arguments.

21. I do think however, that perhaps the time has come when a table of proper sentencing guidelines for drug cases in Bermuda should be established. As it presently stands the darting about mathematically between different quantities measured by grams is too tedious an exercise for a criminal disposition and is likely to bring about some uncertainty to defendants when it comes to the course they may wish to take.

22. Despite the many helpful Court of Appeal Judgments, there appear to be too many cases, some of which have not been appealed, which tend to lead to a little too much confusion in this jurisdiction and tend to raise spectres of some inconsistency. It should not be difficult for an appropriate committee to conduct the relevant research, given the

quantities of drugs and the sentences for arrival at a consensus fit for a good set of guidelines.

23. The quantum of cocaine in the instant case is 118.41 grams. On that alone I do not think I would be falling outside the principles in all the above authorities if I impose a sentence of between 8-10 years after taking into account in mitigation the defendants' guilty plea and in aggravation that he was a customs officer of 8 years who breached and eroded the publics' trust.

24. Furthermore, I do not think I would be wrong in principle if I did not ignore the fact that he was in fact in possession of an additional 12.83 grams and therefore possessed a total of 131.24 grams, though I must avoid double punishing him. Nor would I be wrong in principle if I take into account the strong evidence suggestive of his trading, including the equipment, large amount of money and its make- up, his telephone record inclusive of the messages inter alia.

25. His guilty plea came on the day fixed for trial, though it is acknowledged that one week prior on the day Mr Walker pleaded, there was some indication he might do likewise on the trial date.

26. A plea that late might only attract a discount of about 10 % however I will allow 15%, taking into account the earlier possible indication.

27. In the circumstances, I consider the appropriate starting point to be 8 years with a discount of 15% for his guilty plea.

28. I consider his breach of trust as a customs officer to be of a more severe and substantial aggravating factor than that of the cruise ship seaman in *R v Richards, Davis and Hall*.

29. In the circumstances, I consider a reasonably appropriate sentence on count 10 should be 10 years.

30. The other sentences, will as undisputed, run concurrently.

Now I turn to Mr Walker. For count 9, (possession with intent to supply 135.95 grams of cannabis, the prosecution advocated a sentence of 2 to 4 years.

31. She relied upon, *R v Gershyn Smith [2002]Bda LR 45*, in which the defendant was fined $10,000.00 and $20,000.00 respectively, upon guilty pleas for possession with intent to supply 2173.07 grams of cannabis and cultivating 545 cannabis plants. The Court of Appeal, re- emphasising that a period of imprisonment can be expected in such cases, held the sentence to be manifestly inadequate and a departure from the norm without good reason. A sentence of 2 and 4 years were respectively substituted.

32. In the instant case there appears to be evidence tending to support the prosecutions submission that the defendant was in the business of trading. This evidence includes the quantity of drugs found at his residence, the several scales, his meeting with the co-defendant in the Supermarket car park, the presence of the uncontrolled drug Cathinone in the possession of both.

33. Since the adjournment last Friday, Mr Walker has now retained Mr Richardson to mitigate on his behalf. Mr Richardson submits that Mr Walker accepts that the cannabis in count 2 was intended for supply though not commercially.

34. He submits that the sentences sought by the prosecution in respect of all counts are excessive. Given, the defendants guilty plea, and his previous clean record and the small quantity of 135.95 grams of cannabis when compared with the large quantities in *Gershyn Smith*, the sentence should not exceed one year imprisonment. This is a matter that might have been heard in the magistrates' court but was perhaps joined with the Marques case for apparent reasons. So too would the other counts have been dealt with below and would have likely attracted fines.

35. Both counsels concede there to be a dearth of authorities at the Supreme Court level for quantities of cannabis at the 135 grams level. It is accepted however that upon conviction for possession of cannabis with intent to supply the defendant can expect a custodial sentence.

36. I think there is merit in the defence argument. I have not found the *Gershwyn Smith* case to be sufficiently on point.

37. I take into account Mr Walkers guilty pleas one week before the trial date and the absence of previous convictions. On the other hand I take into account the evidence of

his trading activity as above referred to. I consider a fair sentence to be one of up to 18 months imprisonment.

38. In all the circumstances I sentence as follows:

Marques, Count 9 (Possession of 12.83 grams cocaine with intent to supply in IPZ) 2 years, 3 months' imprisonment.

Count 10. (Possession of 118.41 grams cocaine with intent to supply) 10 years imprisonment.

Count 11. (Possession of drug equipment digital scale with cocaine trace) 1 year imprisonment.

Count 12. (Money Laundering), 2 years, 6 months' imprisonment.

39. Despite the offer of the defence to allow forfeiture of the recovered $1600.00, the Crown has not pursued an application for forfeiture at this time and has indicated it will be undertaking another procedure. Consequently I make no forfeiture order in respect of Mr Marques.

All sentences shall run concurrently and time in custody in respect of this matter shall be counted as part of the sentence for count 10.

Mr Walker is sentenced as follows:

Count 2. (Possession of 135.95 grams of cannabis) 18 months imprisonment.

Count 3. (Possession of 6.40 grams of cannabis) 4 months imprisonment.

Count 4. (Possession of drug equipment-Digital Scale) 1 year imprisonment.

Count 5. (Possession of drug equipment-two metal grinders) 1 year imprisonment.

Count 8. (Possession of 2.66 grams of cannabis) 3 months imprisonment.

The sums recovered by the Crown are forfeited to the Crown.

40. All sentences shall run concurrently and time in custody in respect of these matters shall be counted as part of the sentence for count 2.

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C. Greaves J.

31st October 2017