[2014] JMCA Crim 28

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 2/2013

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

IVAN NOEL v R

Mrs Jacqueline Samuels-Brown QC and Miss Jacqueline Cummings instructed by Archer, Cummings and Co for the appellant

Miss Paula Llewellyn QC and Miss Melissa Simms for the Crown

5 November 2013 and 12 May 2014

LAWRENCE-BESWICK JA (Ag)

[1] On 28 June 2012, Mr Ivan Noel (the appellant) pleaded guilty and was sentenced in the Resident Magistrate's Court for the Corporate Area for offences in breach of the Dangerous Drugs Act ('the Act'). This is an appeal against those sentences as being unlawful and manifestly excessive. The appeal was heard on 5 November 2013 at which time the court reserved its judgment.

Background

[2] On 11 June 2012, the appellant was charged for possession of cocaine, dealing in cocaine, importing cocaine and conspiring to import cocaine. On 28 June 2012, he

pleaded guilty to possession of, dealing in and importing cocaine. The learned Senior Resident Magistrate, Her Honour Miss Judith Pusey, sentenced him to pay a fine of $500,000.00 or 5 years' imprisonment for each of the offences of possession of and dealing in cocaine. For the importing offence, the sentence was five years' imprisonment and a fine of $500,000.00 or five years' imprisonment. The sentences were to run concurrently, but consecutively if the fines were not paid. No evidence was offered on the conspiracy charge and a verdict of not guilty was entered. On 6 July 2012, the appellant filed notice and grounds of appeal challenging the correctness of the sentences.

[3] The transcript bears no record of the prosecution's account of the circumstances of the offence. The learned magistrate appears to have summarized what had been earlier said in court in these terms:

> "The drug was concealed in an x-box machine and in several parcels of biscuits in a suitcase, which he did not declare to Custom Officers, but which he returned to the Custom Hall to collect after he had left, saying he had forgotten it.
>
> During an interrogation session with the police, he admitted that he had smuggled drugs into the United States of America and had served time in Jamaica for smuggling ganja. He had travelled from his home in Guyana to Surinam, then to Curacao where he collected this cocaine to take via Jamaica to Panama. He is therefore a confessed, convicted drug smuggler." (page 11 of the transcript)

According to the learned magistrate's summary, the cocaine concealed weighed 21 lbs 15.82 ounces.

The grounds of appeal

[4] The grounds of appeal are:

> "1. The Learned Resident Magistrate erred when she sentenced the Defendant/Appellant to the maximum sentence of five (5) years imprisonment as she failed to take into consideration the fact that having pleaded guilty he should have received a concession for so doing.
>
> 2. The Learned Resident Magistrate erred when she imposed maximum fines of $500,000.00 for each breach of the Dangerous Drugs Act as they were manifestly excessive having regard to the circumstances of the case."

Submissions

[5] Counsel for the appellant submitted that the sentences were unlawful and/or manifestly excessive and ought to be reduced because of several factors. Firstly, the appellant had pleaded guilty to the offences at the first opportunity to do so, and therefore he should have benefitted from discounted sentences. Further, the sentences should reflect that the offences concerned the same facts. Counsel argued that although there were aggravating circumstances which justified the additional charges of dealing in and importing cocaine, the appellant ought not to have been sentenced on all the charges. She relied on **R v Ashan Spencer** (SCCA No 14/2007 delivered on 10 July 2009) to submit that even if the court viewed such a course as appropriate, the sentences for dealing and importing should be concurrent.

[6] In addition, counsel submitted, there had been no evidence given by the prosecution as to the allegations and therefore, the court should have accepted the

version of the circumstances stated by the appellant. Instead, the learned Resident Magistrate had disregarded and/or rejected the appellant's account of the circumstances of the offence and had relied on matters which were not the subject of sworn evidence and/or which were not stated in open court.

Reasons for sentencing

[7] Having concluded that the appellant was a confessed, convicted drug smuggler (page 11 of transcript),the learned Resident Magistrate gave reasons for imposing the sentences:-

> "- He has previous convictions for a very similar offence – smuggling ganja - and served time in Jamaica for those offences.
>
> - He is an admitted international drug smuggler.
>
> - The amount of the offending drug – almost 22 pounds – is in real and even esoteric terms a large amount for a courier in my experience.
>
> - He is unrepentant. The court did not accept the view that he wanted to resile from carrying this shipment but was of the view that leaving the bag was a ploy to avoid it being searched." (at page 12 of the transcript)

Analysis and discussion

Guilty Plea

[8] The learned Resident Magistrate in imposing the sentences considered that the appellant was unrepentant. However, the learned Resident Magistrate had no evidence on which to come to that conclusion. Indeed, the proceedings showed quite the

contrary. The appellant had exhibited his remorse by not only pleading guilty, but by doing so at the first opportunity.

[9] It has long been accepted that where a person pleads guilty, this is a factor to be considering in reducing the sentence. The earlier in the proceedings that the plea is entered, the greater is the consideration to be given to it. In **R v Barber** [2002] 1 Cr App R (S) 130, the Court of Appeal of England and Wales applied this accepted approach, indicating that where the plea came earlier in the proceedings, a discount greater than one-third would often be appropriate.

Previous convictions

[10] The learned magistrate is recorded in the transcript as having referred to the appellant having previous convictions in Jamaica for "smuggling" ganja and also to the appellant being an "international drug smuggler". Although the transcript of the proceedings does not record any evidence of this having been said in court, it is clear that the learned Resident Magistrate based her utterances in this regard on what had been reported to her as having been said by the appellant to the police. However there was no evidence before the court to allow the magistrate to rely on that information.

Differing accounts of incident

[11] The learned Resident Magistrate did not accept the submission that when the appellant left the bag in the customs hall, he had wanted to resile from importing the shipment of cocaine. Instead, she viewed that as a ploy. Counsel for the appellant argued that there is no dispute as to the amount of the drug found, nor as to the fact

that the appellant left the drugs and returned for them. The difference in accounts, she submitted, was as to the reason for his return to the customs hall. The appellant had maintained that he had not wanted to import the drug but he had been compelled to return to the customs hall for it. Counsel therefore argued that although this amounted to duress, this was not a defence to the charges, but ought to have been considered a mitigating factor in the sentencing process. The prosecution, on the other hand, reportedly said at the hearing that the appellant had forgotten it and therefore had returned to the hall for it. Counsel submitted that in the circumstances the magistrate was obliged to accept the account as given by the appellant's counsel that he had resiled from completing the offence.

[12] In **R v Pearlina Wright** (1988) 25 JLR 221, this court considered the correct approach to be adopted when the tribunal is faced with sentencing where the accounts of the prosecution and the defence are conflicting. There, the appellant pleaded guilty to unlawful wounding. The prosecution's account of the facts was that the appellant had injured the complainant with a knife because he used insulting words to her concerning her body odour. The appellant's account was that the complainant had persistently touched her private parts with his foot, eventually kicking her in that region after which she lost control and injured him.

[13] In varying the sentence which had been imposed on the appellant, Rowe P said:

> "The rule of law is that when a person pleads guilty, the learned trial judge, as the tribunal of fact, should sentence on the set of facts which are most favourable to the accused."

The court then sentenced in accordance with the appellant having been grossly provoked by the complainant.

[14] In the oft cited case of **R v Newton** (1983) 77 Cr App R 13, this issue was also discussed. There the court was confronted with a husband and wife who gave different versions as to the manner in which the wife had been injured, and had come to be a party to sexual intercourse and buggery.

[15] Lord Chief Justice Talbot described the situation thus:-

> "It was about as sharp a divergence, on questions of fact as could possibly have been imagined."

The appellant pleaded guilty to the offences. In response to his question, "In those circumstances what was the judge to do?" Lord Chief Justice Talbot said:-

> "There are three ways in which a judge in these circumstances can approach his difficult task of sentencing. It is in certain circumstances possible to obtain the answer to the problem from a jury... The second method ... is himself to hear the evidence on one side and another, and come to his own conclusion... The third possibility ... is for him to hear no evidence but to listen to the submissions of counsel and then come to a conclusion. But if he does that, where there is a substantial conflict between the two sides he must come down on the side of the defendant. In other words where there has been a substantial conflict, the version of the defendant must so far as possible be accepted." (pages 15 & 16)

[16] In this case, the prosecution's account was that the appellant deliberately imported the cocaine, whereas the appellant's account was that he had been loathe to take the suitcase from the customs hall and had in fact left it behind, resiling from

taking the cocaine further, when for reasons not recorded as having been stated, he retrieved it and was discovered. In these circumstances, the magistrate ought to have sentenced in accordance with the account of the appellant.

[17] What was the effect of the differing accounts? The transcript does not record the circumstances which compelled him to retrieve the cocaine from the customs hall. In this case therefore, the accounts may reasonably be regarded as not being substantially different, involving as they both do, what appears on the face of it, to be a voluntary act.

Offences

[18] The charges laid against the appellant were that he:

> 1. Did unlawfully have cocaine in his possession contrary to section 8B of the Dangerous Drugs Act.
>
> 2. Did unlawfully deal in cocaine contrary to section 8A of the Dangerous Drugs Act.
>
> 3. Did unlawfully import cocaine into the Island of Jamaica contrary to section 8 of the Dangerous Drugs Act.
>
> 4. Did unlawfully conspire with persons unknown to import cocaine into Jamaica contrary to common law.

[19] Section 8B of the Act provides for the offence of possession of cocaine:-

> "8B. A person shall not, save as authorized by a licence, or under any regulations made under this Act, be in possession of any drug to which this Part applies."

By section 10 cocaine is listed as being a drug to which the Part applies.

[20] The charge of dealing in cocaine for which Mr Noel was convicted and sentenced, was said to be contrary to section 8A of the Act. That section does not refer to dealing in cocaine but provides:-

> "8A Every person who, save as authorized by a licence or under regulations made under this Act -
>
> (a) Sells or distributes any drug to which this part applies; or
>
> (b) Being the owner or occupier or of any premises uses such premises for the manufacture, sale or distribution of any such drug or knowingly permits such premises to be so used; or
>
> (c) Uses any conveyance for carrying any such drug for the purpose of the sale or distribution of such drug or, being the owner or person in charge of any conveyance, knowingly permits it to be so used,
>
> shall be guilty of an offence."

[21] It is by possessing a prescribed amount of cocaine that an offender is deemed to be dealing in it. Section 22(7) of the Act provides:

> "A person, other than a person lawfully authorized, found in possession of more than –
>
> (a) …
>
> (b) One tenth of an ounce of cocaine
>
> (c) …
>
> (d) …
>
> (e) …

> is deemed to have such drug for the purpose of selling or otherwise dealing therein, unless the contrary is proved by him."

[22] An offender is therefore deemed to be dealing in cocaine if he is found, without being authorized, in possession of more than one tenth of an ounce of cocaine unless the contrary is proved by him. In **R v Outar and Senior** (1998) 35 JLR 473 Downer JA said:-

> "The point to note is that dealing... does not necessarily involve possession. A buyer ... may be a dealer without being in physical custody or control … A middleman need not be in physical control of the ganja to deal with it" (at page 480).

[23] The drug in that case was ganja and section 7B of the Act refers to selling or otherwise dealing in ganja. There is no equivalent provision for dealing in cocaine. Dealing in cocaine only arises in the Act where an offender in possession of more than one-tenth of an ounce of cocaine is deemed to be dealing in it.

[24] Importing of cocaine is provided for in Section 8 of the Act:

> "Every person who imports or brings into… the Island [cocaine] except under and in accordance with a licence, … shall be guilty of an offence against this Act."

[25] The appellant pleaded guilty to these three charges as laid, and the appeal is against the sentences. One of the issues to be resolved is whether the appellant should have been pleaded to both offences of possession of and dealing in cocaine since the offences involved the same cocaine and the same incident.

Separate sentences

[26] In **R v Brickligge** (1964) 8 JLR 496, this court considered the issue of whether separate sentences should be imposed for two separate offences when the offences were aspects of the same matter. In that case, the appellant had been seen smoking a ganja cigar and was charged, convicted and sentenced for possession of ganja and smoking ganja. Lewis JA in delivering the judgment of the court said:

> "The Court thinks that in the circumstances of this case the appellant ought not to have been convicted and sentenced in respect of both possession and smoking. The circumstances point to the offence of smoking, the possession being merely incident, a necessary incident to smoking and really another aspect, in this case an immaterial aspect of the offence of smoking.
>
> The court will therefore quash the conviction for possession and set aside the sentence. The conviction for smoking and the sentence imposed will stand."

[27] In **Brickligge**, this court referred to **R v Kenny** (1929) 21 Cr App R 78 where the appellant had been charged, convicted and sentenced for pavilion breaking and larceny as well as with malicious damage to property. The damage had consisted solely of damage which had been inflicted in the process of breaking into the pavilion. Lord Chief Justice Hewart said:

> "The malicious damage in this case was an incident of the breaking in, but nevertheless the appellant was sentenced in respect of each offence as though they were distinct offences... It is obvious that there should not be concurrent sentences for two aspects of the same matter, and accordingly this Court will quash the conviction for malicious damage...." (page 79)

In respect of the pavilion breaking and larceny, the court substituted a lesser sentence.

[28] In **Ashan Spencer**, (supra) this Court applied the principles used in **Director of Public Prosecutions v Stewart** (1982) 35 WIR 296. In **Stewart**, the Judicial Committee of the Privy Council said that where a defendant was convicted on two counts arising out of the same facts, as a matter of principle, substantial sentences should not be imposed on both counts.

[29] In **Ashan Spencer**, the appellant had held up the complainant with a firearm and had stolen from him his car and a cellular telephone. He had been convicted on three counts arising out of the same facts. The appellant had been sentenced to five years' imprisonment at hard labour for illegal possession of firearm, and seven years' imprisonment on each of two counts of robbery with aggravation. The sentences on the robbery counts were to run concurrently but consecutive to the sentence for illegal possession of firearm. This court determined that there was no basis for a consecutive sentence and varied the sentences to run concurrently.

[30] In **Outar and Senior** (supra) this court was concerned with the appropriateness of separate verdicts and sentences based on the same facts and discussed the question of whether taking steps preparatory to exporting ganja involves possession of ganja. There a police party observed the appellants alight from a car and open its trunk. An aircraft landed on the nearby embankment. As the appellants and others walked towards it, the police shouted "Police". The appellants surrendered. The others ran and were later caught. The aircraft was not captured. In the trunk of the car were 542 lbs.

4.9 oz of ganja and 48 lbs. 7.9 oz hash oil, having the equivalent weight of 21,822 lbs 3 oz. ganja. The appellants were found guilty and sentenced for possession of ganja, taking steps preparatory to exporting ganja and dealing in ganja. On appeal, the convictions were affirmed, as were the sentences for possession of ganja and for taking steps preparatory to export ganja. The sentences which had been imposed as alternatives if the fines were not paid, were to be consecutive to the additional sentence imposed. The sentence in relation to dealing in ganja was removed. This court said there that:

> "...if the charges are not in the alternative as in this case the practice is to return a verdict of guilty on one information and a nominal sentence, and the appropriate custodial sentence on the other since the amount of the fine is mandatory." (pg.486)

The precise amounts to be fined for each ounce of ganja concerned in those offences were mandated by law.

[31] More recently in **Patricia Henry v R** [2011] JMCA Crim 16 this court again considered the appropriateness of separate sentences arising from the same facts. There the appellant had been a customer services coordinator at the international airport in Montego Bay. She checked in luggage in the name of a passenger after the passenger had already checked luggage and had left the ticket counter. There was ganja in the newly checked on suitcase and the passenger denied knowledge of this additional luggage. The Resident Magistrate convicted the appellant of possession of ganja, dealing in ganja and attempting to export ganja. On appeal, counsel for the

Crown conceded that the appellant ought not to have been convicted for dealing in ganja on the same evidence upon which the conviction for taking steps preparatory to export ganja had been based (para. [24]). Morrison JA there said:

> "There was clear evidence establishing the offence of attempting to export ganja, the charge for dealing in ganja was therefore superfluous…" (para. [45])

[32] The Court allowed the appeal in part. The conviction for dealing in ganja was set aside and the sentence was quashed. The appeals against conviction for possession of ganja and for attempting to export ganja were dismissed, but the sentences of mandatory imprisonment were set aside, being substituted for by sentences of payment of fines, with the alterative of imprisonment in default of payment. (para. [2]).

[33] An examination of sections 8B and 22(7) of the Act shows that dealing in cocaine is inextricably intertwined with possession of cocaine. Possession is a necessary incident to dealing in cocaine. It would not be possible to deal in cocaine without possessing it, in the same way that it is not possible to smoke ganja without possessing it.

[34] In the instant case, the appellant had possession of cocaine in such quantities as to amount to the offence of dealing in it. The possession and dealing in cocaine are aspects of the same matter. However, by importing it into Jamaica, the appellant committed a separate offence. That becomes clear if one considers that if the appellant had been found in possession of that quantity of cocaine outside of the customs hall, with no evidence of having imported it, he would have been guilty only of possession of

cocaine and also of dealing in cocaine. It is only if there were evidence of an additional step of importing it into the island that the separate charge of importing could properly be laid. The importing is distinct from possession.

Maximum sentences

[35] The learned Resident Magistrate referred to the large amount of cocaine. However, the law provides the maximum sentences which can be imposed. The maximum sentence for possession of cocaine is prescribed in section 8B (2) of the Act which provides that a person in possession of cocaine shall be liable-

> "(a) ...
>
> (b) On summary conviction before a Resident Magistrate to a fine not exceeding $500,000 or to imprisonment for a term not exceeding 5 years or to both such fine and imprisonment."

[36] The sentence for dealing in cocaine is at section 22(5) of the Act which provides that:

> "Every person who is guilty of an offence against this Act for which no penalty is otherwise provided shall on summary conviction before a Resident Magistrate be liable to a fine not exceeding $15,000 or to imprisonment for a term not exceeding 2 years, or to both such fine and imprisonment."

[37] The maximum sentence for importing cocaine contrary to section 8 of the Act is found in section 22(2) of the Act which provides:

> "Every person who is guilty of the offence of importing or bringing into the Island … any drug contrary to section 8, ...
>
> shall be liable

(a) ...

(b) On summary conviction before a Resident Magistrate, to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding five years or to both such fine and imprisonment."

Appropriateness of sentences

[38] Possession of cocaine and dealing in cocaine are offences which are inextricably intertwined. Importing cocaine however, is a separate offence. In **Outar and Senior**, in sentencing for offences which were aspects of the same matter, this court held that:

> "[t]he practice is to return a verdict of guilty on one information and a nominal sentence, and the appropriate custodial sentence on the other since the amount of the fine is mandatory."

In **Outar and Senior**, the drug involved was ganja and the fine was mandatory. That is not the position here where the drug concerned is cocaine and there is no mandatory fine. Here, the appellant pleaded guilty to all three charges and the learned Resident Magistrate sentenced on all three.

[39] In **Outar and Senior**, the court remarked:

> "The important point to note is that the same ganja for which guilty verdicts for 'possession' and 'taking steps preparatory' were returned was now being used to give rise to an additional verdict for 'dealing'." (p.486)

[40] In our view where an offender is alleged to be in possession of more than one-tenth of an ounce of cocaine, an amount which would cause him to be deemed to be dealing in cocaine (section 22(7) of the Act), he need only be charged with either

possession of cocaine or with dealing in cocaine. We consider that in these circumstances possession and dealing in cocaine are aspects of the same matter. Charges and convictions for both offences arising out of one circumstance would generally be wrong. The appellant ought to have been convicted for either possession of cocaine or dealing in cocaine.

[41] The sentences imposed were the maximum monetary sentences for possession of cocaine and more than the maximum for dealing in cocaine. The sentence for importing was for the maximum fine allowed and also for the maximum imprisonment prescribed by law when convicted in the Resident Magistrate's Court. The sentences imposed by the learned Resident Magistrate were concurrent but were to be consecutive if the fines were not paid.

Conclusion

[42] The appeal was limited to the sentences imposed. We conclude that the learned Resident Magistrate fell into error in the sentencing process. The sentences did not take into account any discount which the early guilty plea should have afforded. Also, the learned magistrate considered information which was not a part of the proceedings, as recorded in the transcript. In addition, the sentences should have reflected that the offences concerned aspects of the same incident and that the same cocaine formed the core of all the charges. The sentences were unlawful and manifestly excessive.

[43] We therefore allow the appeal against the sentences. The sentences are set aside and sentences are substituted as follows:

For dealing in cocaine - a fine of $ 10,000.00 or one year imprisonment

For importing cocaine - three years' imprisonment and a fine of $300,000.00 or two years' imprisonment.

If the fines are not paid, the terms of imprisonment are to run consecutive to each other.

For possession of cocaine - Admonished and discharged

Sentences to commence on 28 June 2012.