



IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEALS 003/2021 & 004/2021

IND 0042/2019 & IND 0026/2020

SC 01042/2019 & 01941/2019

BETWEEN:

Kemar Anthony Boothe

Appellant

- and -

Her Majesty the Queen

Respondent

BEFORE: **The Rt Hon Sir John Goldring, President**
The Hon Sir Richard Field, Justice of Appeal
The Hon C. Dennis Morrison, Justice of Appeal

Date of Hearing: 16 November 2021

Appearances: Mr. Jonathan Hughes of Samson Law for Appellant
Mr. Garcia Kelly of DPP for the Respondent

JUDGMENT

Revised from transcript of oral judgment 16 November 2021 and Approved

Released 14 December 2021

MORRISON, J.A.

1. On the 11 December 2020, having pleaded guilty on all three counts for which he was charged, the Applicant was sentenced by Richards J ('the judge'), as follows:

(i) Being concerned in the importation of cocaine, contrary to section

3(1) of the Misuse of Drugs Act (2017) - imprisonment for 4 years and 8 months.

(ii) Possession of an unlicensed firearm, contrary to section 15(1) of the Firearms Act – imprisonment for 3 years and 5 months.

(iii) Possession of an unlicensed firearm (ammunition), contrary to section 15(5) of the Firearms Act – imprisonment for 6 months.

2. The judge also ordered that the sentence for possession of the unlicensed firearm should run consecutively to the sentence for being concerned in the importation of cocaine, but that the sentence for possession of the ammunition should run concurrently with the sentences for the two other offences.
3. Under section 7(c) of the Court of Appeal Act, this court has jurisdiction to hear an appeal against sentence with the leave of the court, save where the sentence is one fixed by law. However, under section 13(1), a person wishing leave to appeal is required to give notice of his application within 14 days of the date of the conviction.
4. In this case, the Applicant filed notice of his application for leave to appeal against sentence on 10 March 2020. The notice was, therefore, out of time by approximately two and a half months. Accordingly, by notice, also filed on 10 March 2020, the Applicant now seeks an extension of time (pursuant to section 13(3)) within which to file leave to appeal. The single ground of the application is that the Applicant, who is a lay person, had only just discovered that his sentence was manifestly excessive.
5. Before us this morning, Mr Kelly has quite properly indicated that the Crown does not oppose the application. We therefore grant leave to the Applicant to apply for leave to

appeal out of time.

6. The Applicant's original grounds for seeking leave to appeal against sentence were that (i) the judge failed to give effect to his early pleas of guilty and his assistance to the police; and (ii), the judge erred in imposing consecutive, rather than concurrent, sentences in relation to the firearm and the drug offences.
7. However, before us this morning, Mr Hughes, for whose assistance we are very grateful, has advanced two shorter complaints: firstly, as to the starting point chosen by the judge in relation to the drug offence; and, secondly, as to the level of the discount which the judge afforded the Applicant for the assistance which he gave to the police.
8. But, before we come to the submissions, we must first give a brief outline of the facts of the case. On 9 November 2018, one Mr Michael Palmer, a Jamaican national, arrived at the Owen Roberts International Airport on a flight from Jamaica. He was arrested and charged for importation of 1.93 kilograms of cocaine, an offence to which he subsequently pleaded guilty and was sentenced to 8 years and 9 months' imprisonment. This court dismissed his subsequent appeal against this sentence on 13 November 2020 (*Michael Palmer v Her Majesty the Queen* [CICA (Crim) 023 of 2019]).
9. Investigations into Mr Palmer's case, including analysis of cellular telephone data, led the police to the Applicant and a Mr Adams, both also Jamaican nationals. The telephone evidence revealed exchanges between Mr Palmer and the Applicant for about two months prior to Mr Palmer's arrest, and the messages all had to do with the arrangements being made for the importation of cocaine into the Cayman Islands from Jamaica.

10. On 8 May 2019, a team of customs officers went to the Applicant's workplace, where they arrested him on suspicion of conspiracy to import cocaine. Later that same day, a search warrant was executed at the Applicant's home in George Town. While searching the kitchen, the officers found a firearm at the bottom of the oven of the stove. When examined by the firearms officer, the firearm was found to be a 9mm Smith & Wesson semi-automatic pistol, with a loaded magazine containing 15 rounds of ammunition. The firearm was test-fired and found to be a firearm within the meaning of the Firearms Act.
11. The Applicant was not the holder of a Firearm User's Licence issued under section 19 of the Firearms Act.
12. In subsequent interviews with the police, the Applicant, having at first denied any involvement in the importation of cocaine, gave full details of the conspiracy to the police. Among other things, he told the police that he had invested \$2,000.00 in the importation venture, with the expectation of a return of \$5,000.00 upon its successful completion. He also gave the police the details of the involvement of his co-defendant, Mr Adams, and provided them with the link to the name "Nick", which the police had discovered from the telephone evidence. Other information was also given as regards the names of other persons involved in the conspiracy.
13. In sentencing the Applicant, the judge had regard to (i) the Statement on Tariffs and Guidelines for Sentencing for Certain Offences issued by the Chief Justice in 2002; (ii) the provisions of the Misuse of Drugs Act (under which the maximum sentence for Being Concerned in the Importation of drugs of more than 2 ounces of a hard drug like cocaine is 20 years); and (iii) the provisions of the Firearms Act (section 39(2) of which provides

for the imposition of a mandatory minimum sentence of 7 years' imprisonment on a plea of guilty, unless the sentencing court is of the opinion that there are exceptional circumstances relating to the offence or the offender which justify not doing so).

14. In relation to the charge for being involved in the importation of cocaine, the judge considered the Applicant's role to have been significant. She pointed to his high level of participation and the fact that he was "motivated by financial gain" (sentencing judgment, para 57). This was, the judge said, a carefully planned scheme rather than one by impulse.
15. In the result, given the nature of the role played in the venture by the Applicant and his co-defendant, the judge adopted a starting point of 17 years' imprisonment for the drug offence. The judge then, firstly, reduced the sentence to 14 years' imprisonment to take into account the Applicant's personal mitigation as revealed by the social inquiry report which was provided to the court; secondly, increased it by 6 months, to reflect the aggravating factor of the Applicant having destroyed his phone upon being told of his imminent arrest; thirdly, further reduced it by one-half to 7 years and 3 months' imprisonment to reflect the Applicant's assistance to the police; and fourthly, further reduced it by one-third on account of his guilty plea to 4 years and 8 months' imprisonment.
16. In respect of the firearms offences, the judge also reduced the mandatory minimum sentence of 7 years' imprisonment on a plea of guilty by one-half, again to reflect his assistance to the police. The judge also carried out the same exercise in relation to the offence of the possession of ammunition, reducing the sentence of 1 year's imprisonment to 6 months on account of his assistance to the police.

17. And, finally, on the question of the sequence in which these sentences were to be served, the judge said (at paragraph 75 of her sentencing judgment) that the sentence for being involved in the importation of cocaine should run consecutively to the sentence for possession of an unlicensed firearm, considering that these were unconnected offences.

18. This is how the judge put it (at paragraph 75 of the sentencing judgment):

*“The Cayman Islands Sentencing Guidelines set out the general principles as to totality and concurrent/consecutive sentences. In this case the offences of Possession of Unlicensed Firearm and Being Concerned in the Importation of Drugs arise out of unrelated facts or incidents. Considering the seriousness of the offences and the overall criminality, save for the sentence in respect of the ammunition, the sentences in respect of Mr Boothe are to run **consecutively**.”*

19. Mr Hughes advanced two points on the Applicant's behalf. First, he submitted that the judge's choice of a starting point of 17 years for the drug offence was inappropriate, given the quantity of drugs involved and her determination that the Applicant had played a significant rather than a leading role. In this regard, he referred us to the United Kingdom Sentencing Guidelines to make the point that, under those guidelines, a starting point for a leading role in a case of drugs falling within category 1 would be 14 years, within a range of 12 to 16 years. So, on that basis, Mr Hughes submitted that the judge's starting point of 17 years should be reduced to 15 years to reflect the circumstances of this case.

20. Mr Hughes' second point was that, with regard to the discount allowed for assistance to the police, the judge erred in not awarding a higher level of discount to the Applicant in the circumstances of the case. He referred us to paragraph 11 of the Cayman Islands Sentencing Guidelines in which reference is made to the decision of the Court of Appeal of England and Wales in *R v Blackburn* [2007] EWCA 2290, in which it was held that

only in the most exceptional case would the appropriate level of reduction exceed three-quarters of the total sentence which would otherwise be passed, and that the normal level would be a reduction of somewhere between one-half and two-thirds of that sentence.

21. As we have indicated, the judge gave a discount of 50 percent in this case, and Mr Hughes' contention was that she ought to have given a discount somewhat higher in the range of what was described as "the normal level" in *Blackburn*. Mr Hughes submitted that, in this case in which the information supplied by the Applicant, even before he was charged, led to the conviction of Mr Adams and a plea of guilty; and also where there was some indication that the Applicant's role in providing assistance to the police might have put him at personal risk both in the prison here in the Cayman Islands and on his inevitable return to Jamaica at the end of his sentence, the judge ought to have awarded a level of discount closer to two-thirds.
22. For the Crown, Mr Kelly submitted that, as regards the starting point, the starting point of 17 years chosen by the judge was entirely in keeping with this court's approval in the case against Mr Michael Palmer, who, as we have indicated, was the courier of the drugs involved in this case, of a starting point of 15 years' imprisonment. Accordingly, a starting point of 17 years' imprisonment for the Applicant's significant role as one of the persons who had organised the importation of the drugs was entirely appropriate.
23. Mr Kelly's second submission was that, in relation to the reduction for assistance to the police, while the Applicant did assist the authorities by alerting them to a couple other names in Cayman and making the link with Mr Adams, there were, obviously, others

involved in Jamaica in respect of which he was not able to supply any useful information. In this regard, he referred to a person known as "Zeeks", to whom reference was made in the telephone evidence, but who, at the end of the day, was not identified by the authorities.

24. Further, Mr Kelly pointed out that the judge applied the 50 percent discount for assistance to the police across the board in relation to both the drug and the firearms offences, which she need not have done. Taken as a whole, therefore, the choice of 50 per cent was one which was entirely open to the judge and ought not to be disturbed by this court.
25. We approach the matter on the basis of the long-established principle that an appellate court will not normally vary a sentence imposed by the court of first instance unless it is found to be unjustified in law, founded upon a wrong factual basis, based upon matters which should not have been taken into account, or is manifestly excessive or wrong in principle (*Edwards, McBean, Barnes and Dixon v R* [2001 CILR 334]).
26. In this case, essentially for the reasons advanced by Mr Kelly, we are of the view that it cannot be said that there was any error in principle in the judge's approach to both of the issues raised by Mr Hughes. Both the starting point of 17 years, given the circumstances of this case and given the clear distinction between this case and that of Mr Michael Palmer, the courier; and the 50 per cent discount for assistance to the police, were comfortably within the range of possible choices available to the judge. In our view, therefore, despite Mr Hughes' very careful submissions, no reason has been shown to disturb the judge's exercise of her sentencing discretion.
27. In these circumstances, the application for leave to appeal is dismissed.