



IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 6 of 2022

IND.42 of 2021

SC#0684 of 2021

BETWEEN:

Andrae Cain

Appellant

- and -

His Majesty the King

Respondent

BEFORE:

**The Rt Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Hon Sir Michael Birt, Justice of Appeal**

Date of Hearing:

Friday 11th May 2023

Appearances:

Mr. Myers of Kelly Myers Attorneys for the Appellant
Mr. Scott Wainwright of the DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 11th May 2023 and Approved for Release 31st May 2023

BIRT, JA

1. This is an application for leave to appeal against a sentence of 11 years' imprisonment imposed on the applicant, Mr Cain, by Richards J on 13 May 2022 for one offence of being concerned in the importation of .63 kilos, which is just over 22 ounces, of cocaine, contrary to section 3(1) of the Misuse of Drugs Act (2017 Revision).
2. The facts giving rise to the offence can be summarised as follows.



3. On the 30 April 2021, a man called Odain Davis took a flight from Kingston, Jamaica to Grand Cayman. His luggage included a suitcase which had been handed to him by a female at the airport shortly before his departure. Davis was stopped by Customs & Border Control on arrival in Cayman, and .63 kilos of cocaine were found concealed in a tin of cheese in the suitcase which he had been given at Kingston airport. Davis denied any knowledge of the cocaine and said that he had been told to give the suitcase to the applicant on arrival.
4. When interviewed subsequently, the applicant accepted that he had asked Davis to collect the suitcase from the female at Kingston airport and bring it to him in Cayman, but he denied any knowledge of the cocaine in the suitcase.
5. Davis, the applicant, and the applicant's cousin Joseph Cain were all subsequently charged in relation to the importation and tried before a jury. Davis and Joseph Cain were acquitted, having said that they had no knowledge of the cocaine, but the applicant was convicted.
6. As the Judge said in her sentencing judgment, the evidence of Davis was that the applicant had called him the day before the importation and was swearing and cursing at him in persuading him to carry the suitcase. She was satisfied that there was overwhelming evidence from the various phone messages produced at trial that the applicant had involved others in the operation, whether by persuasion, influence, intimidation or reward.
7. She further stated that the exchanges between the applicant and a man called Alex Kesto showed that the applicant had some awareness and understanding of the scale of and arrangements for the operation.
8. The judge reminded herself of the Statement of Tariffs and Guidelines for certain offences issued by the Chief Justice in 2002, the relevant part of which addressed trafficking offences concerning cocaine in the following terms, which Mr. Myers has reminded us of:

"The tariff for a first such offence, involving less than 2 ounces of cocaine or less than 4 grams of cocaine base without mitigating circumstances, will be 8 years. For offences involving 2 ounces or more or 4 grams or more of cocaine base without mitigating circumstances the tariff will be 10 to 12 years. 15 years or more will be imposed where such an offence involves substantial importation or

dealing in any way either in powder or crack cocaine. We would define 'substantial importation or dealing' as any transaction involving several ounces or kilo quantities."

9. This morning Mr Myers suggested there was some ambiguity in that last expression about several ounces or kilo consequences. We would not agree. It seems to us clear that it is talking about several ounces or, if it is more than several ounces, kilo quantities; in other words the two expressions are alternative.
10. The judge also referred to the Sentencing Guidelines for England and Wales, not in respect of the length of sentence but for assistance in relation to assessing an offender's culpability. She noted that involving others in the operation was a factor stated in those guidelines as likely to lead to an offender's role being categorised as a 'significant role' rather than a 'lesser role'.
11. She summarised her view of the applicant's role in the following terms at paragraph 58 of her sentencing judgment:

"Given all the circumstances, the conclusion is that this defendant played a significant role. He recruited persons for the operation which was critical to the success of it. Without his involvement, the drugs would have remained in Jamaica. He was aware of important details. The messages and the information upon arrival of Davis showed that it was the defendant who was waiting to collect the suitcase with the drugs, from him."

12. Having referred to and considered a number of other cases in her judgment, the judge concluded that the starting point of 15 years was appropriate having regard to the quantity of cocaine and the role played by the applicant. She said she would not increase the starting point to reflect the aggravating factors suggested by the prosecution as this would be to double count, and she considered that such matters had essentially been taken into account in fixing the starting point of 15 years.
13. She then took into account the mitigation. The applicant was aged 36. He had no previous convictions and was of good character. He had good personal qualities and had been gainfully employed, and he was the father of young children. Incarceration in the Cayman Islands would mean that he would be separated from his family in his home country and would be unable to



provide for and support his children. She therefore reduced the starting point by 4 years and imposed a sentence of 11 years' imprisonment.

14. On this application, Mr Myers submitted that the judge should have taken the lower starting point mentioned in the Chief Justice's guideline of 10 to 12 years rather than of 15 years. He referred to the case of *Millwood v R* [2016] 2 C.I.L.R. Note 5, where the Court of Appeal had taken a starting point of 15 years for an importation of 2.86 kilos of cocaine, a significantly greater amount than in the present case. After allowance and mitigation, a sentence of 10 years was imposed in that case. Mr Myers pointed to the larger amount of cocaine in that case as compared with this case. However, the offender in that case was a simple courier, and the Court of Appeal specifically placed weight on this and described it as a lesser role when reducing the starting point from the 17 years taken by the judge to one of 15 years.
15. The applicant's role in the present case was significantly greater than the role in *Millwood*.
16. Mr Myers also referred to the case of *Palmer v R*, 13 November 2020, where a starting point of 15 years was upheld by the Court of Appeal for a courier who imported 1.93 kilos of cocaine. He argued that this suggested that a lesser starting point should be taken in the present case where the amount of cocaine involved is less. However, that submission ignores the fact that *Palmer* was a courier, whose role was less significant than that of the applicant in the present case.
17. Whilst it can sometimes be of assistance to be referred to other cases where they have sought to establish guidelines and principles, it is not usually helpful to look at the detailed facts of other cases in order to point to particular factual aspects which could be said to be more or less serious than in the instant case and therefore to suggest a particular sentence in the instant case. It is usually impossible from a note of another case or of a sentencing judgment to capture all the factors which may have influenced the court on that other occasion.
18. In relation to drug trafficking offences, key aspects for consideration by a sentencing court are the nature and the scale of the offender's involvement and the amount of the drug.
19. In the present case, the nature and scale of the applicant's involvement was significant, for the reasons summarised by the judge at paragraph 58 of her judgment, which has already been

quoted. Furthermore, the amount of the cocaine was several ounces, and therefore fell within the expression "*substantial importation*" as used in the 2002 Guidelines, which this Court held in *Palmer*, at paragraph 23, '*are still the definitive source of sentencing guidance in cases such as the present*'. It was therefore open to the judge to take a starting point of 15 years.

20. In the circumstances, it cannot possibly be said that the sentence of 11 years imposed by the judge was manifestly excessive, and, accordingly, we dismiss this application.