23.6.2000

Drugs.

C15

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CRIMINAL CASE NOS. 2371/99, 2482/99, 2385/99 AND 2357/99

Devon Washington Hylton

vs.

Regina

Ms. Cheryl Richards for the Crown
Mr. Howard Hamilton Q.C. for Defendant.

RULING

In this appeal both prosecution and defendant have appealed against the length of the sentence handed down by the learned magistrate. Both matters were heard together. At the conclusion of the hearing I ruled that the method of sentencing was wrong, and accordingly increased the time to be served by the appellant. This written ruling is in response to a request by learned Crown Counsel.

On 8 October 1999 Devon Hylton, who had been convicted in the Summary Court on three drug related charges, and sentenced to a total of five and a half years, filed a Notice of Intention to Appeal. This contained two grounds that are as follows:-

(1) That the sentence is harsh and excessive.

(2) That this operation was orchestrated by others and due to financial hardship I was forced into doing what I did.

On September 24th. 1999 the Crown filed a Notice of Intention to Appeal against the sentence handed down by the Learned Magistrate in these charges. There were two grounds of appeal which are as follows:-

(1) That the sentence imposed by the Magistrate against the defendant was wrong in principle, and unduly lenient, and that she failed to give due regard to the sentencing principles in the U.K. and in Cayman for offences of this nature.

(2) That she failed to give due regard to the aggravating circumstances featured in the case, and to the deterrent aspect of sentencing necessary in cases of this nature which involved a major operation to import drugs into the Cayman Islands.

The charge numbers listed in the heading of this ruling all relate to the importation of drugs. There were three separate incidents for which he was sentenced, two for the actual importation, and the other for an attempt.

It is submitted by Learned Crown Counsel that seldom have we come across a case of such a magnitude. Indeed the facts reveal a large operation of importation of ganja into Cayman from where it was to be transported to the United States. In March 1999 the Appellant met with undercover agents and stated that he wanted to import 200lbs.of ganja to sell locally. The officers agreed to assist with the importation for a fee. The meeting

was tape-recorded and the Appellant was taken to the airport from which he departed to Jamaica.

On Wednesday 7th. April 1999 the Appellant informed the officer that he had come from Jamaica on a canoe with 280lbs.of ganja. Arrangements were again made for the Appellant to return to Jamaica. Negotiations continued with him by telephone during which the Appellant agreed to bring US$10,000 in front money. On 4th May 1999 the Appellant informed the officers that the vessel was on its way. The vessel did not arrive. However on Friday 7th. May 1999 the vessel appeared in Little Cayman, the amount of $9,700 cash was found on board. When the officers spoke to the Appellant he told them that he had dumped 1600lbs. of ganja overboard because they were chased by a police vessel on the south side of Grand Cayman. 1400lbs of ganja subsequently washed ashore in Cayman Brac.

On Saturday 29th. May further negotiations were carried out with a vessel regarding their arrival here, and the officers acting in an undercover capacity escorted the vessel to Frank Sound. Other officers met the vessel at the beach and the Appellant was removed from the area and taken to Sunset Hotel. He handed the officer $4000 as part payment for the transshipment of the ganja. The men on the vessel were arrested and remained in custody while a further undercover operation continued to unfold in the USA. Contact was made with the criminals in Florida through the Appellant and arrangements were made to deliver the ganja. The officers then travelled to Florida where a controlled delivery of the 1600lbs of ganja was made. Immediately upon the arrest of the US criminals Hylton was arrested at his hotel. He made no comments when interviewed.

At the trial of Hylton and the other men which took place in the Summary Court on 29th. August 1999, Hylton pleaded guilty to the three charges. In sentencing him the Learned Magistrate said, " I note that he was the mover and shaker of these transactions. I accept the Crown's contention that the maximum sentence on each offence is 7 years. However given the circumstances of these transactions I consider it appropriate to make some of these sentences consecutive."

In order to clearly see the Learned Magistrate's thought process I am recording hereunder the relevant extract of her Reason for Sentence.

> With respect to the Importation involving over 180lbs of ganja, I consider that given Mr. Hylton's role, had he been found guilty after a trial I would have imposed a sentence of 3 ½ years. In light of his guilty plea the sentence on charge 2371/99 is 2 years.
>
> With respect to the other importation charge (2385/990 (relating to the 1600lbs. of ganja) I have stated before that the starting point for this offence is 4 - 4 ½ years. In trying to balance the guilty plea entered but giving some emphasis to Hylton's role in the transaction, I consider that the appropriate sentence is 3 ½ years imprisonment with 1 year being concurrent to charge 2371/99. Finally, with respect to charge 2482/99-Attempted Importation, the sentence of the Court is 2 years imprisonment with 18 months of same being concurrent to charge 2385/99. Time spent in custody is to be deducted from the total sentence of 5 years and the defendant is recommended for deportation.

I will first deal with the issues contained in ground one of this appeal. The Learned Magistrate for some reason known to her determined the maximum sentences without much regard for the legal maximum or the quantity of the drug involved. Her judgement shows that she was fully aware of the seven years maximum. Ignoring both these guidelines she went ahead and fixed her own, then proceeded to give discounts on the basis of his guilty pleas. Not satisfied with this she went further and ran the sentences partially concurrent.

Importation of drug is in any jurisdiction a serious offence. Long before it became considered as serious an offence as we now do, the legislators set the maximum for a first offence at 7 years. Indeed many of the older cases demonstrate the somewhat lenient approach taken by the courts in those old days. This approach has changed with passing years and the necessity of the times. As far as Hylton's first offence, charge number 23 71/99 is concerned, the Learned Magistrate cannot be criticized for determining 3 ½ years to be the appropriate sentence. On this she gave him a discount in excess of a third of what she considered to be the appropriate sentence for pleading guilty, and similar discounts on the other charges. Learned Counsel for the Appellant argues that there is no principle that the strength of the prosecution's case can abrogate a guilty plea. I know of no such principle. Notwithstanding the fact that in a busy court, such a plea has the effect of saving that Court's time, a discount, if given on a guilty plea must be measured by the circumstances under which the plea is made. Certainly an accused that has been caught red handed, and who realises that he has no alternative to make such a plea does not

deserve much credit if any. In R.v. Morris (1988) 10 Cr. App.R.(S) 216, Gatehouse J. said:-

> In considering sentence we are bound to have regard to the absolute appalling record so far as the appellant's driving offences are concerned. We sympathise with the learned judge who said that he would have liked to impose a longer sentence, but in that regard the court's hands are tied by the legislature. We can perfectly understand why he imposed the maximum sentence on this occasion having regard to the record, the late plea and the fact that the appellant clearly **had no defence,** and knew perfectly well that he was disqualified. There was never a shadow of a defence in this case. We think that in the somewhat exceptional circumstances of this case the learned judge cannot be criticized for imposing the maximum sentence and giving **no discount** on this occasion.

I hold that the discount that Hylton ought to have received should have been a minimal one in respect to the fact that he had been caught red handed. However, in view of the length of the sentence imposed, and that of a minimal discount, any interference with the sentence on that account I would consider to be fiddling with the sentence.

I now come to the length of the sentences having regard to the gravity of the offence. As already stated, the maximum permitted by law is 7 years for a first offence. For a second offence it is 15 years. I consider that Hylton committed a separate offence each time he brought, or attempted to bring the drug into the country. It is obvious that the learned

magistrate has taken an extreme lenient view and treated all three offences as a first offence. I will not interfere with the sentence on this basis, as it seems to be a common practice where multiple charges are concerned. However the length of these sentences manifests the lack of a sense of the gravity with which these offences ought to be. In Hurlston v. R. a local case reported at 1986 CILR p.92, the appellant was charged in the Magistrate's Court on separate counts, *inter alia*, of possession of ganja more than one lb., possession of ganja, less than one lb., and exporting ganja. The information given by the courier led to the arrest of the appellant and the seizure of 324lbs, of ganja from the airport, 218 lb. of ganja stored in a suitcase in the appellant's mother's house, 20g of ganja in the appellant's house. The appellant pleaded guilty to all charges save that of exportation, (that found at the airport) and was sentenced on the first count, that of possession of more than one pound, to four years imprisonment and a fine of $10,000, and on the second charge, that for 20g. three months and a fine of $1,000. On appeal the sentences of imprisonment were confirmed. It was held that the main possession offences of which the appellant was found guilty was one clearly committed for profit, in which case the dominant sentencing consideration had to be that of deterrence.

In this matter the learned magistrate has not only given Hylton a minimal sentence of 3 ½ years from the Importation of 1600lbs of ganja, and 2 years for the attempt to import 1400lbs. However she has run the first charge of importation partially concurrent with the second, meaning that for both he will serve a total of 4 ½ years. This leaves me to wonder, if in a case where she considers the defendant to be the *mover and shaker* in such a large drug operation, what manner of man, or amount of ganja would attract a sentence

approaching the legal maximum or the maximum itself. In addition to this he received 2 years for the Attempt with 18 months to run concurrent with charge 2385/99, leaving him with 6 months to serve for this offence.

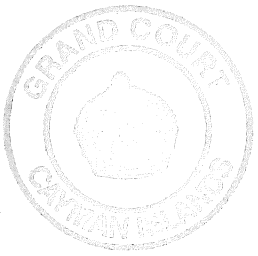
The evidence shows that the learned magistrate, although making no mention of it in her Reasons, may have been influenced by submissions that the police officers were acting as *agents provocateur.* Had this been the case the learned magistrate would have been justified in treating such as a mitigating factor. However in this matter it was Hylton himself who first told the officer that he wanted to import ganja to sell locally. Had it been the other way around there might have been some element of *agent provocateur,* that may have justified some discount in sentence. It is a recognised fact that in the fight against drugs it is very often necessary for the police to undertake an undercover operation that necessitates a certain degree of provocation. In the case of Dilbert and J.M. Ebanks v. R. another appeal from the Magistrate's court heard in the Grand court, and reported at 1985 CILR, 364, it was held at 366 that the sentences were not excessive. The trial magistrate had treated the activities of the *agent provocateur* as a mitigating factor but, in view of the gravity of the offences involving the distribution and supply of even a small quantity of controlled drugs, had properly rejected the lenient approach to sentencing which might have been appropriate had the drug been intended for the offender's personal use. The appeal was therefore dismissed.

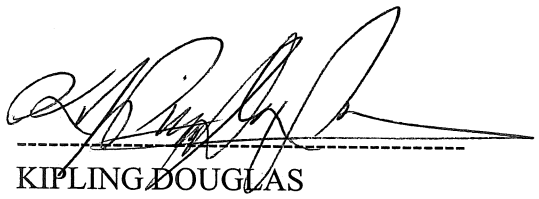
Apart from the extreme leniency of the sentences, it is my view that a partially concurrent sentence constitutes a bad sentencing practice. If the court wishes to give one year for an offence, then give the year, not two years with one to run concurrent. The time given in

each sentence of a multiple conviction ought either to be designated consecutive or concurrent. As can be seen from the above, by running eighteen months of the two years sentence concurrent to a two year sentence, the learned magistrate has in effect given Hylton 6 month for attempting to import 1,400 lbs. of ganja into the country.

In view of the 8 years given his co-accused, which unlike Hylton had previous convictions, I did not disturb the actual length of any of the sentences. Having found the practice of partially concurrent sentences an undesireable form of sentencing, and which in this case has made the total time to be served manifestly short, I have ordered that the sentences be run consecutively, giving Hylton a total of 7 ½ years. To this extent the appeal succeeded.

Dated this 23rd. Day of June 2000





KIPLING DOUGLAS
Judge of the Grand Court