CAYMAN ISLANDS

IN THE COURT OF APPEAL

CAYMAN ISLANDS CRIMINAL APPEAL NO. 34/85

5-06-86
Reported

BEFORE: THE HON. MR. JUSTICE ZACCA, PRESIDENT
THE HON. MR. JUSTICE TELFORD GEORGES, J.A.
THE HON. MR. JUSTICE KERR, J.A.

KENNETH A. HURLSTON

VS.

REGINA

Mr. Norman Hill, Q.C. and Mr. M.Parkinson of C.S. Gill & Co. for the Appellant.
Mr. A. Smellie for the Crown.

DECEMBER 2, 1985 & JUNE 5th 1986

GEORGES, J.A.

The appellant appeared before the magistrate to answer four charges (1) possession of an unlicensed firearm (2) possession of ganja less than one pound (3) possession of ganja over 1 pound and (4) exportation of ganja. Also appearing was Reuel Pixley who was charged with possession of ganja more than a pound and exportation of ganja. The appellant pleaded guilty to all the charges except that of exportation of ganja and that charge was withdrawn. Pixley pleaded guilty to the possession charge and the charge of exportation against him was also withdrawn.

The prosecution stated that Pixley had been arrested in the environs of the airport. He had been seen to arrive in a van from which six suitcases had been unloaded and taken to the Cayman Airways checking centre. Pixley had accompanied the suitcases to the checking centre and was returning to the area where the van had gone to park when he

was arrested. He was taken back to the airport and the suitcases identified. When opened they were found to be stuffed with ganja - 324 lbs. He said that he had been promised $1000.00 and expenses to fly from Miami to Grand Cayman where he was to pick up some luggage for delivery to Miami. When he saw the suitcases he had suspected their contents but had to do as he had been instructed because he feared that the person who had given him the instructions could harm him or his family.

Pixley gave the police information which led them to the appellant's house. He was out fishing. The house was searched and the firearm found - a .45 caliber sub machine gun. It was fitted with a silencer and loaded with 24 bullets. In a kitchen drawer was a plastic bag with 20 grams of marijuana. The appellant's mother's house was also searched and there the police found suitcases containing 218 lbs of ganja. The appellant's excuse was that he had been trying to help a friend. As regards the gun he explained that he had had no intention of using it and was simply holding it for a friend. There is no indication that these friends were identified.

The sentences imposed on the appellant were as follows -

(a) on the charge of possession ganja over one pound - 4 years imprisonment plus a fine of $10,000 or in default 12 months;

(b) on the charge possession of ganja under one pound - 3 months imprisonment plus a fine of $1000 or in default 3 months imprisonment;

(c) on the charge of possession of a firearm - 1 year imprisonment plus a fine of $1000 or in default 6 months imprisonment.

The sentence on (b) was to run concurrently with that on (a) except as regards the alternative sentence of imprisonment for non-payment of fine. The sentence on (c) was consecutive to that on (a).

Pixley was sentenced to 4 years imprisonment plus a fine of $8000.00 or in default 12 months on the charge of possession.

The appellant appealed to the Grand Court. The sentences were varied.

On (a) the sentence of imprisonment was confirmed but the fine was varied to one of $5000.00 or 6 months imprisonment. On (c) the sentence of imprisonment was confirmed but the sentence to be served in default of payment of the fine was reduced to 3 months. Effectively, therefore, the appellant was to serve a sentence of 5 years with a possible further term of 9 months if he failed to pay the fines.

Pixley's sentence was also varied. The term of imprisonment was confirmed but the fine reduced to one of $8000.00 with a term of imprisonment of 6 months in default of payment of the fine.

The appellant and Pixley both appealed to this Court. For some reason Pixley's appeal came up for hearing more expeditiously. His appeal was partially successful. His term of imprisonment was reduced to one of three years.

Mr. Hill contends that the sentence imposed on the appellant is manifestly excessive and fails to take into account well established principles of sentencing.

He urged that the sentence was out of line with sentences imposed in roughly comparable cases over the last 11 months. Little point could be served by setting out the examples cited. Suffice it to say that it is difficult to detect any pattern. In Samuel Coleby Myles v Regina S.C. App. No.17/85 the Chief Justice after examining a list of precedents also concluded that he could detect no pattern and stated -

> " Perhaps it might be useful to observe that there should be an underlying uniformity in sentences in cases which frequently come before the courts, the variations from one to another merely reflecting the circumstances peculiar to each case".

Where possession of drugs is concerned the quantity of the drug found provides an obvious but reasonably valid ground for differentiation. It is already enshrined in the legislation in that a charge in the case of ganja may be laid for amounts under one pound and amounts over one pound. There appears to be a fairly clear policy that for amounts over one pound a peremptory term of imprisonment is appropriate. The length

of the term can be assessed according to the increase in the quantity. With such a measuring rod an individual sentence can then be fixed taking into account the special circumstances of aggravation or mitigation which can then be clearly set out.

In this case, in as far as a pattern could be said to exist the sentence on (a) could be said to be on the high side. In the case of Ducanty for example where the accused was charged with importation of 227 lbs of marijuana the sentence was one of 2 years plus a fine of $5000 or in default 6 months imprisonment.

Mr. Hill contended that sufficient weight had not been given to mitigating factors. The appellant was 42 years old and had no previous convictions. A consequence of his imprisonment would be that he would lose his job. His family, which comprised a divorced wife with two children whom he supported generously and a mistress with whom he lived and by whom he had a child, would endure great hardships during his incarceration. He had pleaded guilty, expressed sorrow and shouldered his responsibility.

While all of these are true it does not appear true that they are factors which should weigh significantly in any variation of the measuring rod for sentences which I have already mentioned. The appellant was clearly helping in the movement of drugs for money. One cannot seriously accept the suggestion that he was helping a friend. In determining sentencing policy in such a situation the dominant factor must be deterrence. The appellant is a fisherman. He was also the Manager of 3 Marine Stores. There was no element of need. The motivation was money and the scale of penalties must be geared to make the risk seem clearly unacceptable. So often the persons who assist the trade in that manner are persons who are otherwise eminently respectable. The very fact that they so appear makes detection more difficult.

In this regard the passage cited from Ball 36 C App. R. 164 at p.166 which emphasises the need to consider the rehabitative effect of a sentence is inappropriate. The appellant must have been taking a calculated risk and the sentence should make clear that the game is not worth the candle.

There may be cases of extreme poverty which may have made a passing temptation irresistible or coercion not amounting to duress which compels cooperation. These are the sort of factors in my view which may lead to some significant variation of the pattern of punishment.

In this case the reduction of the sentence imposed on Pixley is a factor of some importance to be considered. Both Pixley and the appellant were playing indispensable roles in the movement of the prohibited drug: Pixley was promised $1000.00 and a trip here. One has no idea what the appellant's payment was to have been. If it could be established that he would profit far more, that would be a sound reason for differentiating between the two. In the absence of any evidence the two should in my view be treated in the same way.

Accordingly on the charge of possession of marijuana over one pound the sentence was varied by reducing the term of imprisonment from 4 years to 3 years but was otherwise confirmed.

No arguments have been advanced in relation to the sentence on the charge of possession of marijuana under one pound and the sentence on that charge is confirmed.

The sentence on the charge of possession of the firearm is challenged on two grounds. The maximum term of imprisonment has been imposed on a first offender and the sentence is out of line with other sentences imposed in comparable cases. It is also urged that the sentence on that charge should run concurrently with the sentences on the marijuana charges and not be made consecutive.

This last mentioned argument appears to me unacceptable. The possession of a firearm is in no way part of the same transaction as the possession of marijuana thus consecutive sentences proper. In so far as those who deal in or handle marijuana may conceive that they should keep illegal arms as part of their stock in trade, and it should be made abundantly clear that this will be at the price of an added penalty should they be caught.

On the other hand the policy of not imposing the maximum penalty

on a first offender for an offence is one which seems well grounded in authority in good sense and merits application.

In Reg. v. Markus (1974) 3 W.L.R. 645 at p. 656 Lord Widgery CJ states -

> "The Court takes account of the fact that the sentence imposed in this case was seven years, which was the maximum sentence permissible under the statute. It is difficult to say that the sentence was excessive having regard to the vast fraud with which the defendant was concerned but we are impressed by the fact that it is unusual to give a man of previous good character the maximum statutory sentence; and furthermore we think that the man is entitled to some credit for having stayed behind and faced the music when everybody else left."

The weapon here can properly be described as vicious. A sentence of peremptory imprisonment was therefore proper. The term was, however, manifestly excessive. In the case of Martinez the accused pleaded guilty to six counts of offences against the Firearms Act. He had three weapons and had been discovered because he displayed one in a threatening manner. He was a government employee in a responsible position and the convictions and sentence of imprisonment would mean not only disgrace but the loss of his job and the end of his career. A sentence of 3 months imprisonment plus a fine of $500 or in default 30 days imprisonment was imposed.

Having regard to the nature of the weapon and the appellant's connection with the drug trade a term of 6 months imprisonment without an additional fine seemed appropriate and accordingly the sentence on that count was quashed and a sentence of 6 months imprisonment substituted to run consecutively to the 3 year sentence on the charge of possession of marijuana over a pound.