[2017] JMCA Crim 21

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 13/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA

DEAN ELVEY v R

Cecil Mitchell for the applicant

Mrs Sahai Whittingham-Maxwell for the Crown

5 April 2017

MORRISON P

[1] On Sunday 21 August 2016, the appellant arrived at the Norman Manley International Airport and checked in for a flight destined for Saint Lucia. The police officers on duty noticed a bulge in the appellant's groin area and questioned him. When he was searched, a quantity of 3 pounds 7.55 ounces of ganja was found strapped to his groin area. As a result, the appellant was charged with possession of ganja, dealing in ganja and taking steps to export ganja, contrary to the provisions of the Dangerous Drugs Act ('the Act').

[2] On the appellant's first appearance before the Parish Court for the Corporate Area (Criminal), he pleaded guilty to all three offences and was sentenced to a fine of

$14,000.00 or 6 months' imprisonment in default of payment for possession of ganja; $28,000.00 or 6 months' imprisonment in default of payment for dealing in ganja, and $56,000.00 or 6 months' imprisonment for taking steps to export ganja. In addition, the appellant was sentenced to two years' imprisonment to run concurrently to the sentences imposed above, but consecutively if the fines were not paid.

[3] The court was informed by the police that the appellant had a previous conviction. It also appears from the learned Parish Court Judge's sentencing remarks, that the appellant admitted having previously served a period of incarceration as a result of that conviction. In passing sentences on the appellant, the learned Parish Judge said this:

> "The court took into consideration the fact of the early plea of guilty and the suggestion that it automatically earned a discount. The court also contemplated the suggestion that he was in financial difficulties and was sorry for what he did.
>
> The existence of a previous conviction in this very court for the same offences influenced the nature and quality of the sentence and the consideration of the one-third rule. The court felt that a pattern of behavior was developing in the accused and that while his plea of guilt could influence his sentence, it could not carry the same weight as for a first offender. The court also considered that this was an offence committed for financial gain and the accused, because of his antecedent [sic] had a propensity to committing this offence."

[4] As a result, the court imposed the fines indicated above, calculated on the basis of the formula set out for these offences in the Act.

[5] On 9 September 2016, the appellant filed a notice of appeal in which he indicated a single ground of appeal, which was that the sentences imposed by the Parish Court Judge were manifestly excessive.

[6] Supplemental grounds of appeal were filed by Mr Cecil Mitchell on behalf of the appellant on 29 March 2017. These were as follows:

> "1. That in view of the intention of the Learned Parish [sic] Judge to impose a custodial sentence a Social Enquiry Report ought to have been ordered so that the Learned Parish Judge would have an informed view and appreciation upon which the sentence was being imposed.
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> 2. That the entire Court appearance lasted about 10 minutes and hence no opportunity was allowed to call character witness.
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> 3. That the Appellant was unrepresented at the hearing and that this was the first and only appearance by the Appellant before the Court. That the Appellant pleaded guilty at the first available opportunity and that having pleaded guilty the sentence was pronounced and imposed immediately.
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> 4. That no opportunity was given for the Appellant to set out his medical condition before the Court. That a copy of the medical report of the Appellant is attached hereto which is explanatory of the medical condition of the Appellant.
>
> 5. Save and except that the Appellant was convicted for possession of 20lbs of ganja in the United States of America in 1995 the Appellant was otherwise of previous good character.
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> 6. That the Appellant who is forty-eight (48) years of age is the father of three children. That two of those children are age nine (9) and six (6) years and that

> both of those children are dependent upon him for support."

[7] Attached to the supplemental grounds of appeal was a medical report on the appellant, which certified that he had been seen by a doctor on 27 March 2016, that is, some months before these offences were committed. At that time, he gave a history of sudden onset of crushing chest pain associated with sweating and shortness of breath of a few hours' duration. The doctor's conclusion was that the appellant had suffered from uncontrolled hypertension and significant ischaemic heart disease, but no proof of myocardial injury was seen at that time.

[8] Before us this morning, Mr Mitchell was given leave to rely on these supplemental grounds of appeal. Mr Mitchell has quite candidly told us that his main concern was with the period of imprisonment for two years. But he also raised a supplementary point as to whether the conviction for dealing can stand, in the light of the consideration that the charge for dealing in the circumstances of this case was an alternative to the charge for taking steps preparatory to export ganja, and that no plea ought to have been taken on the latter charge in the light of the appellant's plea of guilty to the former.

[9] In relation to the sentence of two years' imprisonment, Mr Mitchell makes a number of points for our consideration. He points out that the appellant was unrepresented; that he pleaded guilty at the first opportunity, which was the very first date on which the matter came before the court; that there was a very brief sentencing

hearing, which, it appears, may not have consumed more than ten minutes; that no social enquiry report was obtained and, if such a social enquiry report had been obtained, the appellant's medical history might have been revealed; and that the appellant admitted a previous conviction for possession of 20 pounds of ganja in the United States of America, for which he served a period of imprisonment all the way back in 1995, but that the appellant did not know anything about the charges before the Parish Court for the Corporate Area (Criminal) to which the learned Parish Court judge referred.

[10] Mr Mitchell referred us to the decision of this court in **Patricia Henry v R** [2011] JMCA Crim 16: firstly, to make the point that, as with the appellant in that case, the appellant has not demonstrated a deep-seated criminal tendency and therefore ought to be entitled to some consideration in respect of sentence; and, secondly, in support of the submission that the conviction for dealing should not be allowed to stand in the circumstances of this case.

[11] Dealing firstly with the question of a social enquiry report, this court has in recent times considered the circumstances in which a social enquiry report should be ordered. In the case of **Michael Evans v R** [2015] JMCA Crim 33, McDonald-Bishop JA, speaking for the court, said this (at paragraph [9]):

> "We do recognize the utility of social enquiry reports in sentencing and cannot downplay their importance to the process. Indeed, obtaining a social enquiry report before sentencing an offender is accepted as being a good sentencing practice. …"

[12] Notwithstanding that, the court has also said, more than once, that the question of whether in the absence of any mandatory requirement that a social enquiry report should be obtained, is very much a matter for the discretion of the sentencing judge. In the more recent case of **Sylburn Lewis v R**, [2016] JMCA Crim 30, the court confirmed this position and indicated that in the light of the fact that "the sentencing judge would have heard the evidence and be fully seised of all the facts of a particular case", it would not wish to be too prescriptive about the circumstances in which a social enquiry report should be obtained.

[13] In this case, we bear in mind the situation in which the learned Parish Court Judge found herself. The appellant, it is clear, having been brought before the court, was himself anxious that the matter be dealt with at the earliest possible date and it seems to us that we cannot fault the learned Parish Court Judge for not ordering that a social enquiry report should be obtained in this matter.

[14] So we come now to the question of whether, in the first place, a custodial sentence ought to have been imposed in this case; and, secondly, whether the length of that sentence was appropriate in all the circumstances. We would say at once that we have no doubt that a custodial sentence was appropriate on the facts of this case. This appellant can in no wise be compared to the appellant in **Patricia Henry v R**, who was a person who had been employed at the Donald Sangster International Airport for several years and held a senior position. In those circumstances, the court considered that her conduct was wholly aberrant. On Mr Mitchell's own case before us today, this appellant is someone who has had brushes with the law in the past, in

particular, in connection with the possession of dangerous drugs. In those circumstances, we have no doubt that a custodial sentence was appropriate. Nor do we doubt that two years was an appropriate term of imprisonment in this case. In our view, it cannot on the face of it be said to be manifestly excessive.

[15] However, we do have a concern as to whether the learned Parish Court Judge sufficiently took into account the fact of the appellant's guilty plea. As this court has again confirmed recently in more than one case, a sentencing judge ought generally to (i) arrive at the appropriate sentence before considering what value to give to the guilty plea, and (ii) demonstrate for the record how the sentence ultimately arrived at was calculated taking into account the guilty plea. However, in this case, the Parish Court Judge's remarks which we have quoted, while not fully explicit on the precise value given to the guilty plea, show that she was alive to the principle that some discount should be given for the guilty plea. We bear in mind also that the maximum sentence for the offence of taking steps to export ganja would have been five years and as a repeat offender, with a substantial amount of ganja found in his possession, the appellant could well have expected a sentence more in the top half of the range established by the legislation. In all the circumstances therefore, it appears to us that, the Parish Court Judge having made mention of the fact of the guilty plea as a factor to be taken into account, must in the result have given it some weight in arriving at the sentence of two years' imprisonment. We will not therefore disturb that sentence in this case.

[16] This leaves Mr Mitchell's other point relating to the conviction for dealing in ganja. This is a point that was dealt with by the court in the **Patricia Henry** case, in which the appellant was charged with the offences of possession of ganja, dealing in ganja and attempting to export ganja. She was found guilty on all three offences on the identical evidence and subsequently appealed against the conviction and sentence. The appeal was allowed in part; the conviction for dealing in ganja was set aside and the sentence quashed; the appeal against conviction for possession of ganja and attempting to export ganja was dismissed; the sentences of mandatory imprisonment were set aside; and the sentences of the fines imposed with the alternative of imprisonment in default of payment were affirmed. At paragraph [45] of the judgment, the court said:

> "… In **R v Outar & Senior**, it was held that these two offences were in fact alternatives and that where, as here, convictions on both were based on possession of the same ganja, convictions of both offences were irreconcilable and could not stand. …"

[17] In this case, in which there was clear evidence establishing the offence of attempting to export ganja, the charge for dealing in ganja was therefore superfluous and the Crown quite properly conceded that the conviction for that offence cannot be sustained. In our view, therefore, Mr Mitchell on that basis makes good his contention that the conviction for dealing in this case ought not to stand and we will therefore quash the conviction for dealing and set aside the fine of $28,000.00 or six months' imprisonment.

[18] The appeal is therefore allowed in part, the conviction for dealing is quashed and the sentence for that offence is set aside. The other convictions and sentences are confirmed. The sentences are to take effect from 30 August 2016.