IN THE SUPREME COURT
OF TURKS AND CAICOS ISLANDS

Case no: CR APM 11/08

DARREN PINDER

V

REGINAM

O Smith for appellant
L Franklyn for respondent

Hearing: 23 July 2008
Judgment: 29 July 2008

Judgment

On 14 May 2008, police officers executed a warrant on a house in the Five Cays area. On arrival they saw the appellant bending over something in the grounds of the house and, on searching that area, found bags of cannabis concealed under a piece of wood. Those bags contained 6 lbs or 2.7 kg of the drug. In the house was a smaller amount, 68 gm, and the appellant admitted that he had cut that from the larger amount outside. When he was interviewed under caution, he admitted possession of both amounts.

He appeared in the Magistrate's Court on 20 May 2008 and was dealt with on a charge of possession. The magistrate's Reasons for Sentence state that the "appellant was charged both with possession and possession with intent to supply. He pleaded not guilty to possession with intent to supply but guilty of simple possession". There is no charge of possession with intent on the papers before this Court and it is not clear what order was made in respect of that charge. However, the facts were outlined and he was sentenced to 2 years imprisonment. He now appeals against that sentence.

The appellant was not represented in the Magistrate's Court and he initially drafted his own grounds of appeal but they have been supplanted by further, and partially overlapping, grounds drafted by his attorney:

1. The learned magistrate failed to give any or sufficient consideration to the appellant's guilty plea.
2. The learned magistrate erred in not allowing the appellant to give evidence of his personal circumstances by way of mitigation
3. The sentence imposed was in all manner and form excessive.

A further ground was subsequently added:

4. The learned magistrate erred in inferring and concluding that the possession of cannabis was with the intent to supply and improperly relied on this factor in assessing sentence.

The main thrust of the appeal is the last issue and I shall deal with it first.

1. <u>The assessment of sentence</u>

In his Reasons for Sentence, the learned magistrate dealt with the fact that he was sentencing for a plea of guilty to simple possession but then clearly considered that the quantity of the drug led to an unavoidable inference that it had been, in fact and despite the plea, possessed with intent to supply.

His first reference could be considered as relating to a sentence for simple possession:

> "In passing sentence the court considered, among other things, the seriousness of the offence based on the quantity of cannabis found in the possession of the appellant ... the street value was estimated to be about $30,000.00."

And later:

> "In my opinion, the appellant before me who had in his possession 2.7 kg of cannabis had committed a very serious offence and the sentence reflected the gravity of his breach. It must be remembered that imprisonment rather than a fine is the usual punishment in such a situation – previous conviction or not. The appellant has one previous conviction for possession in 1996 which was over ten years ago. It did not play a major part in my decision."

Both those passages would be unobjectionable in sentencing for simple possession of a substantial quantity but other passages suggest that he was not treating the case as one of simple possession:

> "The court did note that although the appellant pleaded guilty to simple possession the irresistible inference to be drawn from possession of such a large quantity of drugs is distribution rather than personal use. It is hardly likely that any court would omit to consider such an inference in passing sentence for a serious offence as possession of cannabis."

> "In the case before me, my sentence in the absence of a guilty plea would have been 30 months imprisonment. Even by the relatively low sentences in England, 30 months would have been appropriate. I note the sentencing case of *R v Chatfield* [1983[5 CrAppR(S) 289 ...
> While the Chatfield case is about intent to supply, the large quantity in the case before me demanded such an inference and, in my view, 30 months would certainly have been appropriate in the case of a guilty plea without previous convictions."

> "In the Turks and Caicos Islands however, sentences are relatively similar for both possession and possession with intent to supply at the summary level and the Crown therefore often accepts a plea of guilty to possession simpliciter rather than go through a trial for possession with intent to supply. On many occasions then, possession with intent to supply is masked behind a plea of possession simpliciter. This, in my view, is what happened in the case before me. I therefore considered the sentence to be quite appropriate bearing in mind the large quantum."

Those passages clearly show that the sentence was for an offence of possession with intent to supply, not for simple possession, and it cannot remain. If the prosecution is willing to adopt the pragmatic position described by the magistrate and the trial proceeds on that basis, the court may only sentence for the offence admitted. To pass a heavier sentence because the court has formed the view that the defendant is guilty of a more serious offence means that he is being sentenced for an offence he has not admitted and one for which he should not, therefore, have been convicted on his plea.

The offence of possession with intent to supply is a much more serious offence that simple possession. It is an offence which encourages drug habits to be formed in others. It perpetuates drug taking and, by

enabling it to continue, contributes to the frequently dreadful consequences. It is an offence of cruelty and selfishness. If the magistrate is correct that the prosecution is accepting pleas of guilty to simple possession solely to avoid the inconvenience of a trial of the more serious charge, it is time that policy was changed. Whilst it is part of every prosecutor's duty not to pursue every charge regardless of the cost in terms of expense and court time, the difference in gravity between these two offences is so great that no procedure should be adopted which may allow a supplier of drugs to escape the proper charge. If, when such a course is adopted, it places the court in the position of sentencing for the wrong offence, it shakes the very foundation of fair trial.

The decision whether or not to accept a plea of guilty to the lesser of alternative offences lies with the prosecution but, if during the outline of the facts, the judge considers that they reveal the more serious offence, he should stop the case and, unless the prosecution or defendant can satisfy him it is appropriate to continue, order a trial on the more serious charge.

In the present case, the appellant was unrepresented in the lower court. It was, therefore, essential that, once the magistrate considered he was unable to avoid the inference that this was an offence of possession with intent to supply, he should have told the accused. Any court trying an unrepresented person must, before accepting a plea of guilty, be satisfied that the defendant understands the nature of his plea. In this case, the plea was not equivocal. It was a clear plea to possession only but the magistrate's approach had the effect of making it equivocal because he was treating it as a plea to the more serious offence.

The sentence must be quashed. I shall return to the appropriate order when I have briefly considered the remaining grounds.

2. The discount for the guilty plea

As has appeared from the passages already set out, the magistrate had formed the view that the appropriate sentence was one of 30 months imprisonment. Clearly the facts showed that he had admitted the possession from the outset and maintained it at the trial. The court should always give some credit for such a position and it is apparent that the learned magistrate did so:

> "Because he pleaded guilty I shaved six months off the sentence I would otherwise have imposed.
> It has been suggested in the case of *John Spencer Missick* CR APM 6/03, 9 May 2003, that, where offenders are caught in the act, as the appellant was, their discount should be small i.e. 10%. Six months is ... 20% - twice as much. As it turned out the appellant got more than a sufficient discount on the intended sentence."

I agree. The amount of discount for a plea of guilty is matter for the discretion of the sentencing judge. Where the evidence shows that he was caught in circumstances which left him little alternative but to admit the offence and then does so, some discount should still be considered but, if there are no other factors, should be small and even 10% may be too high in some cases. However, the fact is that he was given a generous discount and there is clearly no substance in this ground.

Although not a ground of appeal, it appeared in the appeal hearing that, on the day the appellant pleaded guilty in the Magistrate's Court, he was charged together with two other defendants, one of whom was his wife. Counsel for the Crown stated to this Court that they were charged on the sole basis that they were also present in the house at the time the cannabis was discovered outside. On the plea being entered and accepted by the prosecution, the charges against the other two were withdrawn.

I know no more about it than that but it is not clear, on the facts as outlined to this Court, why, in a case where the defendant was caught in the act, the drug was principally outside the house and he immediately admitted it, the charges were brought against the wife and another person in the house. In such circumstances, the magistrate should inquire of the prosecution why the charges were being withdrawn and make sure there is no possibility that the defendant is pleading guilty solely to "let his wife out".

3. Evidence to support mitigation.

It appears that the defendant applied to call evidence in support of his mitigation. In his Reasons, the magistrate states:

> "Finally, the appellant complained in his second ground of appeal that he was not allowed to give evidence in support of his plea in mitigation. I could find nowhere in the Laws of the Turks and Caicos Islands any such procedure when passing sentence.
>
> The appellant was allowed to make his plea in mitigation orally and it was recorded. His plea was essentially that he had such a quantity for personal use. After his plea he was sentenced. It maybe that the appellant, in citing ground 2 of his appeal, had in mind some procedure existing in another jurisdiction whose laws are not incorporated in those of the Turks and Caicos Islands and hence are not applicable here."

Every court when sentencing should ensure it has all relevant factors before it in order to assess the proper penalty. That will inevitably mean listening to the mitigating circumstances put forward by the defendant as clearly occurred in the present case. It appears from facts outlined by the prosecution that, from an early stage, the appellant stated that he had the drug for his wife who was sick and had been recommended to use it by a "doctor". It may be that the defendant was seeking to call evidence in support of that, I know not, but the magistrate should have ascertained the nature of the evidence and whether, if credible, it might have affected the sentence. If it might have done so, he should have allowed the appellant to call it.

There is no provision specifically dealing with it in the Magistrate's Court Ordinance but is a principle which applies in all courts as part of the general duty of a court to seek a just result. In the Criminal Procedure Ordinance, section 44 provides in respect of trial in the Supreme Court:

> "44. The Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed and may hear counsel, or the accused if he is not represented, on any mitigating or other circumstances which may be relevant."

Similar principles must apply to all courts. It is a discretion given to the court but it is one which must be exercised with the clear aim of striving to achieve justice.

4. Conclusion

As I have stated it is hard to understand how a court, hearing of the quantity of cannabis is this case could have sentenced only in terms of personal possession and I have already pointed out that the magistrate, coming, as he did, to the conclusion that it was a clear case of possession with intent to supply, should have directed the trial of that offence.

However, the maximum sentence in the Magistrate's Court for simple possession of cannabis is three year's imprisonment. There are not many factors beyond the fact of possession which would appear to justify sentences in the upper part of that range but one must be the sheer quantity. If this was accepted as

being for personal use, as the prosecution's acceptance of the plea also accepts, 6 lbs would put it near the top of the range. In such a case, a sentence of two years would not be manifestly excessive.

In his reasons, the magistrate cited a passage from the case of *Isaac Jay Freitas* CR APM 20/05, 5 December 2005, in which Gardner CJ stated that an appellate court will only interfere with a sentence imposed by the lower court if it was manifestly excessive. That does not, with great respect to my learned predecessor, adequately state the position on appeal against sentence. The overall principal is that the court will interfere if the sentence is wrong in principle or manifestly excessive but it is also the duty of an appellate court to interfere where the sentence has been shown to have been passed on an incorrect factual basis or where some matter has been improperly taken into account or where the sentence cannot be justified as a matter of law.

The present case had proceeded on the prosecution's acceptance of the plea to simple possession and not on the more serious charge. The consideration by the learned magistrate of the un-admitted intent to supply means that the sentence cannot stand.

Where such a large quantity of drug is found, the proper charge should normally be possession with intent to supply. However, the appellant was told his plea was accepted and he should have been sentenced on that basis. As a result, I consider the proper order in the special circumstances of this case is to adjust the sentence but base my assessment of the appropriate penalty on the magistrate's reasoning.

He considered 30 months the appropriate sentence for possession with intent to supply and then gave a 20% reduction for the plea of guilty. On that basis, a sentence for simple possession would be in the order of 18 months. With a 20% reduction as ordered by the magistrate, that gives a sentence of 14 months imprisonment and I so order.

I make it clear that this sentence is passed solely because of the events in the Magistrate's Court. It is not an authority for such a sentence in future even when only simple possession of such a quantity is the appropriate charge.

Order

The appeal is allowed, the sentence quashed and a sentence of 14 months imprisonment substituted.

Before leaving this, I feel it is appropriate to mention one other aspect which became the subject of comment in the appeal hearing.

By section 161 and 163 of the Magistrate's Courts Ordinance, anyone dissatisfied with a judgment sentence or order of a Magistrate Court may appeal and must serve notice of his intention to appeal with the general grounds within five days. It is a provision which encourages inadequately assessed appeals to be entered and means that any appeal will inevitably be entered before the record is available of the proceedings from which the appeal is made.

Section 167 provides that every appellant or respondent shall, if he so requests, be entitled to be furnished by the magistrate with a copy of the depositions or minutes of evidence and of the judgment, order or conviction.

The practice appears to have grown up that where there has been plea of guilty, the notes of evidence are supplemented by the magistrate's Reasons for Sentence, as happened in this case. The problem with this practice is that, as has been stated, the grounds have to be submitted before the Reasons are written and

the appellant may well be left with a sense of injustice from a belief that they may have been crafted to meet the appeal. Similarly, as happened in the present case, the magistrate, may refer to the specific grounds of appeal and state his reasons in relation to them. That is wrong. The appeal is based on what was stated and considered at the time of the trial. If there are any submissions to be made in response to the appeal, they will be made by counsel for the Crown not by the magistrate arguing, as it were, in support of his own decision.

The reasons for sentence should only be those noted by the magistrate in the minutes at the time of passing sentence and should be submitted as part of the record. I appreciate the pressure under which magistrates work and that the note of the reasons for sentence may well be a very brief summary or list but that is what should be submitted without further amplification.

29 July 2008

Gordon Ward
Chief Justice