

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

MCRAP 2009/025

BETWEEN:

COMMISSIONER OF POLICE

Appellant

and

JAMAL GRANT

Respondent

Before:

The Hon. Mde. Ola Mae Edwards
The Hon. Mr. Davidson Baptiste
The Hon. Mr. Frederick Bruce-Lyle

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Colin Williams, Director of Public Prosecutions with
Mr. Carl Williams and Ms Sejilla McDowell for the Appellant
Mr. Ronald Marks for the Respondent

2010: January 28;
May 3.

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Criminal Appeal - Drug Trafficking - Section 7 (3) Drugs (Prevention of Misuse) Act - Appeal against sentence – whether sentence is inappropriate, inadequate and insufficient - the correct approach to sentencing in drug cases - Sentencing guidelines - scope, intent and will of Parliament regarding drug trafficking cases - judge's discretion - mitigating factors - individualized approach - use of fines as opposed to custodial sentence - leniency - double jeopardy principle - suspended sentence -

The respondent pleaded guilty to the charge of possession of 16,798 grams of cannabis and was sentenced to a fine of \$17, 000.00 to pay \$3000.00 forthwith, remainder in 6 months and in default 18 months imprisonment. Section 29 (1)(b) of **The Criminal Code** states that for a fine exceeding \$500.00 the maximum period of imprisonment is 1 year. The appellant appeals against this sentence on the ground that it was inappropriate, inadequate and insufficient having regard that the maximum sentence prescribed for this offence is 7 years and \$500,000.00. The prosecution's case was that the police

intercepted a speed boat which was coming from the north of the island with the respondent being one of the persons on board. On conducting a search on him nothing was found. A white nylon sack containing 3 taped brown packages was found in the bow of the boat which contained cannabis plant material. The respondent was arrested and charged for possession of cannabis and taken before the court. He pleaded guilty and was remanded in custody 1 week prior to the date of sentence. The Chief Magistrate imposed the sentence after considering mitigating and other factors relevant for drug offences including the \$17,000.00 decreased street value of the cannabis and the prevalence of the offence. The respondent paid the \$3,000 on the date that the sentence was passed.

Held: allowing the appeal, imposing a sentence of 3 years on the respondent, suspending this sentence for 18 months from the date the judgment is delivered, ordering that the remainder of the \$17,000.00 fine is to be paid by the respondent within six months from the date of delivery of the judgment and in default of payment the respondent to be imprisoned for 1 year –

1. That the Chief Magistrate did not take into account when exercising her discretion that an individualized approach is in sharp conflict with policy objectives of Parliament for controlled drug offences in Saint Vincent and the Grenadines where cultivation, possession, supplying and trafficking of cannabis pose serious threat to the society.
2. Such offences are treated by Parliament as serious crimes for which fines may not be a sufficient punishment, and the discretion to impose fines should not be used to give persons of means an opportunity of buying themselves out of being sent to prison.
3. That the sentencer has no jurisdiction to impose a term of imprisonment exceeding the statutory maximum period prescribed for default of payment of a fine.
4. That the learned Chief Magistrate was unduly lenient in taking the view that only the imposition of a fine was desirable for this serious offence and she therefore erred in principle when she failed to reject the individualized approach and concluded that a term of imprisonment exceeding 12 months is appropriate in all circumstances.

Desmond Baptiste and The Queen Crim. App. No. 8 of 2003 and **Cosmus Bascombe and Commissioner of Police** Mag. Crim. App. No. 22 of 2003 followed.

5. That the practice of the Court of Appeal where an unduly lenient sentence was imposed and the sentence is increased is to take into account the distress and anxiety experienced by the offender in having to be re-sentenced, and discount the appropriate sentence on the basis of the “double jeopardy” principle. Since the respondent is a first time offender who committed this serious offence under

circumstances of substantial mitigation, it is appropriate to suspend the 3 years term of imprisonment in light of the exceptional circumstance of double jeopardy.

The Practice stated in **Archibald Criminal Practice 2009 at paragraph 7-368** adopted and applied.

JUDGMENT

- [1] **EDWARDS J.A.:** This appeal raises the question as to what is the correct approach to sentencing in drugs cases, bearing in mind the existing sentencing guidelines, the scope, intent and will of Parliament regarding drug trafficking offences, and all the variants in individual cases.
- [2] On 17th April 2009, the respondent Jamal Grant pleaded guilty to the charge of possession of 16,798 grams (16.80 kilos or 37.03 lbs) of cannabis, a controlled drug, contrary to section 7(3) of the **Drugs (Prevention of Misuse) Act¹** in the First Magisterial District Serious Offences Court at Kingstown, Saint Vincent. The mitigation and sentencing was adjourned to 23rd April 2009, when the learned Chief Magistrate heard the facts from the prosecutor and submissions from the respondent's lawyer Mr. Arthur Williams. The respondent was sentenced to a fine of \$17,000.00 – to pay \$3,000 forthwith, remainder in 6 months and in default 18 months imprisonment. The maximum punishment prescribed for the offence is 7 years and \$500,000.00²

Factual Background

- [3] On 11th December 2008, coastguard service officers including David Lewis LS were on patrol duty in the Richmond area. Officer Lewis saw a white speed boat coming from north of the island which was intercepted and signaled to stop by the coastguard who drew up alongside this speed boat. There were 5 persons on board the speed boat including the respondent Jamal Grant. After searching these 5 persons and finding nothing, the coastguard officers searched the speed

¹Cap. 219 of the Laws of Saint Vincent and the Grenadines, Revised Edition 1990

² See Act No. 4 of 2008 section 2 which repealed and replaced the Fourth Schedule to the principal Act. The Fourth Schedule prescribes the punishment for offences under the principal Act.

boat and Officer Lewis found a white nylon sack containing 3 taped brown packages in the bow of the boat. On cutting open these packages in the presence of the respondent and 4 other men the cannabis plant material was found. Upon being arrested and taken before the court, the respondent pleaded guilty and the prosecution offered no evidence against the other 4 men who were discharged. The speed boat owner George Brown was not on the boat and the court was told that he is incarcerated elsewhere for drugs. An application for forfeiture of the speed boat which had previously been made by the prosecutor was withdrawn on 23rd April 2009. The respondent was remanded in custody for 1 week prior to the date that he was sentenced. The street value of the cannabis is \$17,000.

Mitigation

- [4] The respondent is a 28 year old welder at Ottley Hall Mariner earning \$1,500 per month. The other 4 men who were on the speed boat were in Union Island. The speed boat had broken down at Duvalie and the respondent was asked by a sea captain to go and fix the boat and carry fuel for it. While the respondent was fixing the boat the captain of the boat gave him the package containing the cannabis and told him to put it on the boat for him. The respondent forgot to give the package back. The speed boat eventually left and soon after the coastguard approached it, searched the vessel and found the package by the anchor chain.

Reasons for Decision

- [5] The learned Chief Magistrate did not believe the respondent's explanation that he forgot to return the package containing cannabis to the captain. She took into account the following as mitigating factors: the age of the respondent; the respondent had no previous conviction; was gainfully employed as a welder earning \$1,500 monthly and had been incarcerated for 1 week pending sentence; there was no indication of the intended destination of the drugs although the Vincentian speed boat was in Saint Vincent waters; and the boat did not attempt to evade the coastguard.

- [6] The Chief Magistrate stated in her reasons for decision that the sentence imposed reflected these mitigating factors as well as the following other factors: the value of the drugs - \$17,000 which shows a decrease in value over recent years; the quantity – 16, 798 grams (approximately 37.03 pounds); the prevalence of drug offences in Saint Vincent, the sentencing guidelines set by the court for drug offences; and the legislative amendments and increased penalties in Saint Vincent and the Grenadines.

The Sentencing Guidelines

- [7] Byron C.J (as he then was) in **Desmond Baptiste and The Queen**³ at paragraphs 19 to 29 reviewed the correct approach to sentencing generally which I helpfully restate. The Honorable Chief Justice approved and recommended the practice in England whereby a sentencer accords a considerable discount to a defendant who pleads guilty, by discounting the notional sentence that might be handed down by one third or some other discount depending on the facts of each case.
- [8] The earlier the defendant pleads guilty, the greater the likelihood that he/she will receive the full discount permissible. “As to the fact that the offender was committing crime for the first time,...the importance of this circumstance should be left to the discretion of the sentencer as a matter that is to be taken into account with all other mitigating circumstances of the offence. ...[T]he more serious the offence, the less relevant will be the circumstance....Conversely, the lack of a criminal record would be a powerful mitigating factor where the offence is of a substantial nature.⁴ [30] On the issue of the age of the offender, a sentencer should be mindful of the general undesirability of imprisoning young first offenders. For such offenders, the Court should take care to consider the prospects of rehabilitation and accordingly give increased weight to such prospects. Where

³Criminal Appeal No 8 of 2003 (St Vincent and the Grenadines) delivered 6th December 2004. Mr Baptiste was sentenced to 8 years for burglary after he had pleaded guilty at the first available opportunity. He had a long record of previous convictions spanning a 10 year period for theft, burglary and possession of controlled drugs and his appeal against sentence was dismissed. In this same judgment the Court delivered its decisions for several other cases including appeals against sentence for drugs offences.

⁴ See paragraph 29 in *Desmond Baptiste*

imprisonment is required the duration of incarceration should also take such factors into account. ... [W]here the offender is a mature individual with no apparent propensity for commission of the offence; the sentencer may also take this circumstance into account in weighing the desirability and duration of a prison sentence. [and] ... the more serious the offence, the less relevant will be these circumstances."

[9] More particularly, Byron C.J. also considered the appeal of **Cosmus Bascombe and Commissioner of Police**⁵ a young man in his early twenties who was tried, convicted and sentenced to 2 ½ years imprisonment for possession of 18,160 grams (40 pounds) of cannabis of a street value of EC\$32,000.00 with intent to supply it to another. The police had seen Mr. Bascombe and others removing cannabis from a plastic bag into a locally constructed cannabis press. Mr. Bascombe grabbed a suitcase on the approach of the police who pursued him into a house where he was apprehended. The suitcase contained several taped packages of pressed cannabis.

[10] This was Mr. Bascombe's first offence. The maximum punishment was then 3 years and \$100,000.000. Byron C.J. having observed that Bascombe was clearly part of an operation that was engaged in the marketing of cannabis, stated: "We think that persons found in possession of such large quantities of drugs should receive a custodial sentence. The length of sentence will depend on the amount of drugs involved, whether there is a plea of guilty at the first available opportunity and the personal circumstances of the offender e.g. whether the defendant has previous convictions for a like offence. ...For the quantity of cannabis with which Bascombe was found, we consider that a custodial sentence ranging from 12 months is appropriate." Mr. Bascombe's sentence was reduced to twenty four months imprisonment.

⁵ Magisterial Criminal Appeal No. 22 of 2003 (St Vincent and the Grenadines) at paragraphs 18, 41 and 42

The Grounds of Appeal

- [11] The reason for the present appeal against sentence is that the sentence is inappropriate, inadequate and insufficient in the context of the case.

Submissions

- [12] Mr. Williams, Director of Public Prosecutions (“D.P.P.”) submitted that the starting point in imposing sentence on the respondent is the guidelines in **Desmond Baptiste** which the Chief Magistrate did not follow. The learned D.P.P. submitted further that the Chief Magistrate’s reasons for decision do not disclose any basis for the departure from the **Desmond Baptiste** guidelines; and she failed to correctly and properly apply her mind to the scope, intent and effect of the will of Parliament where Parliament had increased the punishment for the offence by Act No.4 of 2008. The D.P.P. compared the amount of cannabis found on the speed boat with the amount of cannabis recovered in **Bascombe** while contending that a sentence ranging upwards from one year imprisonment is appropriate for Jamal Grant.
- [13] On the other hand learned counsel Mr. Marks sought to justify the approach of the Chief Magistrate, arguing that the sentencing guidelines in **Desmond Baptiste** and **Bascombe** have not taken away the discretion of the sentencer. The human element must always be there, and the Chief Magistrate ought not to operate like a computer, Mr. Marks argued. Moreover, Mr. Marks distinguished the facts in **Bascombe**, submitting that the only similarity between the respondent and **Bascombe** is age and the comparable amounts of cannabis recovered.
- [14] This Court has to decide whether the sentence was wrong in principle having regard to the facts of the respondent’s case. Our task is to decide whether the sentence imposed in the light of the material before the learned Chief Magistrate

could properly be characterized as being unduly lenient. Leniency where the facts justify it is to be commended and not condemned.⁶

Determining the Issue

- [15] The guidelines were designed to give guidance to judges faced with the difficult task of passing sentences. The criteria laid down in the guidelines are of use in promoting a degree of consistency in sentencing while diminishing arbitrary and capricious sentences. But the guidelines cannot be slavishly followed in every case, since the sentencer in any given case has to determine what is appropriate for the individual case before the court. There may well be cases in which an appellate court will be justified in giving guidelines the force of a binding rule by treating a failure to observe it as constituting grounds for finding that the sentencer's discretion was exercised incorrectly.
- [16] Reported previous cases may provide a bench mark, and it must be borne in mind whenever previously decided cases are being relied on that in some of the cases there may be unstated factors which have influenced the length of custodial sentence or the imposition of a fine. There is of course tension between preserving the width of the discretion which the legislature has created, and the need for the guidance of the appellate court to assist consistency. The sentencer also must apply to the facts before him/her in each case the classical principles of retribution, deterrence, prevention and rehabilitation; and decide which of them has the greatest importance in the case.
- [17] There is no descending order of gravity in Saint Vincent and the Grenadines in relation to the maximum punishment on summary conviction for a Class A or Class B controlled drug where the offence is importation or exportation of the drug; production or being concerned in the production of the drug; supplying or offering to supply the drug; possession of the drug; and having possession of the drug with intent to supply it to another. The maximum penalty on summary conviction for all

⁶ See *R v Krivec* (Attorney General's Reference No. 8 of 2007), *The Times*, April 27, 2007, CA referred to in Archbold Criminal Practice 2009 paragraph 7-368 et seq.

of these offences is 7 years and \$500,000.00 regardless of whether it is a Class A or Class B controlled drug. To this extent the legislative framework does not reflect the distinctions in punishment recognized in sentencing practice for users or suppliers, and according to the nature of the substance involved (i.e. whether it is a Class A drug e.g. cocaine or a Class B drug e.g. cannabis). I note that for cultivation of cannabis the maximum penalty on summary conviction is 6 years and \$400,000.00. The increase in penalties legislated in 2008, reflect that Parliament regards the offence for which the respondent was convicted as a serious crime.

- [18] The learned Chief Magistrate obviously applied an individualized approach in sentencing based apparently on her perception of the needs of the respondent as an individual with a view to influencing his future behavior, instead of the normal choice of a custodial sentence according to the guidelines. Section 26(1)(b) of **The Criminal Code Act**⁷ enables the Chief Magistrate to impose the sentence that she did where it states:

“...(b) in the case of an offence punishable by a fine and a term of imprisonment ... the imposition of a fine or a term of imprisonment or both shall be in the discretion of the court.”

- [19] In exercising her discretion the Chief Magistrate apparently did not take into account that the individualized approach is in sharp conflict with policy objectives of Parliament for controlled drugs offences. In Saint Vincent and the Grenadines the cultivation, possession, supplying and trafficking of cannabis is a serious threat to the society. These offences including the respondent's offence are treated by Parliament as serious crimes for which fines may not be a sufficient punishment.
- [20] Faced with this conflict the learned Chief Magistrate ought to have considered also the principles governing the use of fines. Fines are “...generally used in cases where a deterrent or punitive sentence is necessary, but either the inherent gravity of the offence is insufficient to justify a sentence of imprisonment, or the presence of mitigating factors justifies the sentencer in avoiding a sentence of imprisonment.

⁷Cap 124 Laws of St Vincent and the Grenadines Revised Edition 1990

The first consideration for a sentencer contemplating the imposition of a fine is whether the offence and surrounding circumstances require the imposition of a custodial sentence.”⁸ A fine should not be imposed where imprisonment is the appropriate sentence.⁹ The power to impose fines should not be used to “give persons of means an opportunity of buying themselves out of being sent to prison.”¹⁰

- [21] It must be borne in mind also that where the sentencer decides to impose a fine, (although it is not expressed in statute), there is the well established sentencing principle that the financial penalty must be reasonable and relate to the evidence of the offender’s means;¹¹ and it is wrong in principle to impose a very large fine in drugs cases on the assumption that someone other than the defendant will pay the fine.¹² Consequently, the amount appropriate to the offence considered in the abstract should be reduced, where necessary, to an amount which the offender can realistically pay.
- [22] It must further be borne in mind that section 29(1) of **The Criminal Code** prescribes a scale for the maximum term of imprisonment which may be ordered by a court in default of payment of a fine which a defendant is ordered to pay under the **Misuse of Drugs Act**. This provision states that for a fine exceeding \$500.00 the maximum period of imprisonment is 1 year. The sentencer has no jurisdiction to impose a term of imprisonment exceeding the statutory maximum period prescribed for default of payment of a fine.
- [23] It cannot be said that a deterrent and punitive sentence is not necessary for the respondent’s offence having regard to policy objectives and the guidelines of this court. The issue therefore is whether the mitigating factors justified the imposition of a fine. “[T]he general principle is that credit for mitigating factors is not an entitlement of the offender, as the sentencer is permitted to refrain from making an

⁸ Principles of Sentencing (second edition) by D.A. Thomas at page 318

⁹ Op Cit at page 324.

¹⁰ See Markwick (1953) 37 Cr. App. R.. Also Lewis [1965] Crim.L.R. 121;Thompson [1974] Crim.L.R 720.

¹¹ Op cit. Principles of Sentencing at pages 320 to 321

¹² Lewis [1965] Crim.L.R. 121; Deaga [1974] Crim.L.R. 557

allowance for mitigating factors in order to achieve a recognized penal objective, such as general deterrence....”¹³

[24] A careful look at the mitigating factors which the Chief Magistrate took into account reveals that she may have been unduly impressed with the fact that the respondent was a skilled welder gainfully employed and earning \$1500.00 monthly. This factor along with the other mitigating factors she referred to, apparently weighed heavily in the imposition of the fine. However, once the guidelines and principles of sentencing are applied, it becomes clear that given the nature of the offence, the quantity of the cannabis, the role that the respondent played in committing the offence and the fact that he is not a young offender in law, the significance of these mitigating factors must pale in light of the seriousness of the offence. The learned Chief Magistrate was entitled to be lenient in the exercise of her discretion; but, in my view, she was unduly lenient in taking the view that only the imposition of a fine was desirable for this serious offence. She therefore erred in principle when she failed to reject the individualized approach and conclude that a term of imprisonment exceeding 12 months is appropriate in all the circumstances.

[25] The contemplated period of imprisonment should also take into account the absence of any evidence that the respondent was part of an organized group supplying substantial quantities of cannabis for gain. The facts suggest that the respondent was custodian of the cannabis and he stated that he had the intention to return it to the original supplier. Taking into account the quantity of cannabis, the increase in the prescribed maximum punishment since **Bascombe**, the range of sentences approved by this court in appeals involving similar offences, and all of the other mitigating factors, a proper custodial sentence would have been 3 years imprisonment in my view; and it also would have been proper to impose the fine of \$17,000.00 as a supplementary penalty with a maximum period of imprisonment of 1 year in default of payment of the fine.

¹³ Op. cit. at page 47

[26] I adopt and apply the practice stated in **Archbold Criminal Practice 2009** at paragraph 7-368:

“Where a sentence is increased, the practice of the Court of Appeal has been to allow some discount from what it considers to have been the correct sentence on account of what it commonly refers to as “double jeopardy” principle. In Att. Gen’s References (Nos 14 and 15 of 2006) (R. v French and Webster) [2007]1 Cr. App. R (S) 40, CA, it was said that double jeopardy is but one aspect of the court’s task when considering whether and how to intervene where an unduly lenient sentence has been imposed; where an offender had no responsibility for the undue leniency, justice required that some regard (the degree to which being fact-specific) should be had to the distress and anxiety experienced by the offender; these were likely to be particularly great where a custodial sentence was employed in place of a non-custodial sentence, where a custodial sentence has been completed, where the offender was young and immature, or where he is about to be released, and in such cases, discounts for double jeopardy should tend to be near the upper end of the range (generally about 30 per cent); distress and anxiety are much less significant where a lengthy period of imprisonment was still to be served, and, in such cases double jeopardy was of limited application and in some cases could properly not be taken into account (this being discretionary)...”

[27] The respondent paid the first instalment of the fine \$3,000.00 on the same day that he was sentenced; and upon the filing and service of the Notice of Appeal dated 23rd April 2009, on the magistrate's court, the execution of the decision appealed against was not suspended until the appeal has been determined, in the absence of an application for a stay of execution of the decision.¹⁴ Since then, the respondent has no doubt been in a state of anxiety about the outcome of this appeal. The custodial sentence of 3 years should therefore be mitigated further to allow for the fact that the respondent has had to face the prospect of being sentenced twice over. The respondent previously had a clean record and he

¹⁴ Although section 215 of the **Criminal Procedure Code Cap 125** provides for the suspension of the execution of sentence pending determination of the appeal, section 36 of the **Drugs (Prevention of Misuse Act)** states: “Notwithstanding the provisions of the Criminal Procedure Code or of any other law, to the contrary, an appeal from conviction and/or sentence in respect of proceedings for offences under this Act shall not have the effect of suspending the execution of the decision appealed against; but the court before which a person has been convicted and/or sentenced in respect of an offence under this Act, or to which an appeal has been lodged in respect of an offence under this Act, may, upon application made with notice to all parties concerned, grant a stay of execution of the decision appealed against on such conditions as the court may deem fit to impose, provided that any party concerned in the appeal, shall be heard in opposition to such application or otherwise.”

committed this serious offence under circumstances of substantial mitigation. Consequently, it is appropriate in my view to consider suspending the 3 years term of imprisonment in light of the exceptional circumstance of double jeopardy.

- [28] The offence for which the respondent has been convicted is not excluded from the offences for which the Court has a statutory power to suspend sentences of imprisonment in certain cases. Section 30 of the **Criminal Code** permits this Court upon passing the 3 year term of imprisonment on the respondent for the offence of possession of cannabis with intent to supply, to order that the sentence shall not take effect unless, during a period of 18 months from the date of the order the respondent commits in Saint Vincent and the Grenadines another offence punishable with imprisonment for a period exceeding six months, and thereafter, a court having power to do so orders under section 31 that the original sentence shall take effect. The law also requires that the Court passing the suspended sentence explain to the respondent in ordinary language his liability to serve the sentence if he is subsequently convicted during the operational period of the sentence. The consent of the respondent is not required in order to suspend the sentence.

Conclusion

- [29] I consider it desirable and in the interest of justice to allow the appeal against sentence, and vary the sentence of the learned Chief Magistrate in the following terms:
1. The appeal against sentence is allowed, and the sentence of 3 years imprisonment is imposed on the respondent Jamal Grant and this sentence is suspended for 18 months from the date the judgment is delivered. And the sentence of 3 years imprisonment shall not take effect unless during a period of 18 months from the date the judgment is delivered Jamal Grant commits in Saint Vincent and the Grenadines another offence punishable with imprisonment for a period exceeding six months.

2. The remainder of the \$17,000.00 fine is to be paid by the respondent within six months from the date of delivery of the judgment and in default of payment the respondent to be imprisoned for 1 year.

EXPLANATION

3. Jamal Grant you are liable to serve the sentence of 3 years if you are convicted for a subsequent offence in Saint Vincent and the Grenadines during the period of 18 months from the date the judgment is delivered; and the court before which you are convicted for the subsequent offence may order that the suspended sentence of 3 years shall take effect unaltered or that court may substitute a lesser term of imprisonment for the original 3 years. That court shall also determine whether the suspended sentence shall run consecutively or concurrently with any other sentence being served by you Jamal Grant.

Ola Mae Edwards
Justice of Appeal

I concur.

Davidson Baptiste
Justice of Appeal [Ag.]

I concur.

Fredrick Bruce-Lyle
Justice of Appeal [Ag.]