The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 6 of 2018

B E T W E E N:

ROMONITO ADLAWAN

Appellant

- v -

THE QUEEN

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Marc Daniels, Marc Geoffrey Ltd, for the Appellant;
Maria Sofianos, Office of the Director for Public Prosecutions, for the Respondent

Date of Hearing: **22 November 2018**
Date of Judgment: **23 November 2018**

J U D G M E N T

Conspiracy to import firearms, drugs, - level of sentence - discount for assistance – whether to adjourn sentencing when intention to give evidence in discretion of sentencing judge

BELL, JA

Introduction

1. The Appellant in this case, Romonito Adlawan, pleaded guilty on 4 June 2015 to the following charges: -

   (i) Importation of a Prohibited Weapon, contrary to section 2(1)(b)(iv) of the Firearms Act 1973

(ii) Importation of a Controlled Drug, contrary to section 4 of the Misuse of Drugs Act 1972, and

(iii) Money Laundering, contrary to section 45 of the Proceeds of Crime Act 1997

Sentencing took place that same day.

2. The learned sentencing judge took note of Adlawan's early guilty plea, as well as "the assistance you have given to the Police in this matter". She then referred to the appropriate starting point for sentences in respect of each of the offences to which Adlawan had pleaded guilty; these being ten (10) years or upwards for the importation of a firearm, five (5) years or upwards for the amount of cannabis Adlawan had in fact imported, and six (6) months for the money laundering offence. Taking into account the mitigating factors in terms of Adlawan's early guilty plea, his assistance to the Police, and his previous clean record, the Court imposed a sentence of 5 ½ years' imprisonment in respect of the importation of a firearm, three (3) years' imprisonment for the importation of cannabis, to be served consecutively to the firearms sentence, and six (6) months' imprisonment for the money laundering offence, to be served concurrently. The total was therefore 8 ½ years' imprisonment. In addition, the funds which were the proceeds of drug trafficking were ordered to be forfeited.

3. On 7 August 2018, that is to say more than three years after the initial sentencing, an application was made to the Acting Registrar of the Court of Appeal for an extension of time within which to appeal against sentence, and this was not opposed by the Crown, and accordingly granted.

Background facts

4. Adlawan was employed as a seaman on the M.V. Somers Isles, when he was first recruited to bring drugs into Bermuda in February 2015. His first pick-up

and delivery was in February 2015, his second was the following month, his third the month after, and it was at the conclusion of his fourth pick-up that he was arrested. For each of these drug importations, Adlawan was paid between $3,500 and $7,000. For the pick-up for which he was arrested, Adlawan was to be paid $8,000. It follows that by the time of his arrest, Adlawan was acting as a regular drug courier.

5. The various drug pick-ups involved two other persons, one male (Butterfield) and one female (Perinchief), and in due course, those two persons were tried in the Supreme Court. That trial commenced on 24 October 2017 and ended on 30 November 2017 with both defendants being convicted. Adlawan gave evidence which was said by the Crown to be consistent with his witness statement. He testified for four days, and was apparently vigorously cross-examined by counsel for the defendants.

The Law

6. The difficulties in determining how the Court should approach sentencing in cases where a defendant has co-operated with the Crown were canvassed in detail by this Court in the case of *J.R. v The Queen [2018] CA (Bda) 25 Crim*, judgment in which was delivered on 14 August 2018. While we were referred to other, older authorities, *J.R.* should now be regarded as the definitive authority on this area of the criminal law. As appears from the report of that case, counsel for both the defence and the Crown were operating under a misapprehension, as it now transpires, in regard to the appropriate practice to be followed. Sir Scott Baker P, giving the judgment of the Court, identified the three options, and rather than paraphrase his judgment, I would set out paragraph 17 of the judgment which is in the following terms:

> *"In principle a defendant should be sentenced on the basis of all relevant information at the time of sentence. The purpose of an appeal is to correct errors, not to let the defendant or the prosecution have a second bite at*

> *the cherry. An appellate court will only interfere if there has been some error of principle or the sentence is manifestly excessive or inadequate. Fresh evidence is not ordinarily admissible if it was available at the time of sentence. The particular issue that falls for decision in the present case is how to give credit to a defendant who has assisted the police in implicating a co-defendant, indicating that he will give evidence at the co-defendant's subsequent trial. There are three possible options. The first is to delay passing sentence until after the subsequent trial. The second is to pass sentence in the ordinary way following the plea of guilty, giving the defendant credit for his assistance and assuming that he will keep his word and give evidence at the subsequent trial. The third is to divide the credit, giving part at the time of sentence and the remainder following the trial if he keeps his word and gives evidence against his co-defendant."*

7. Baker P then recognised that there were disadvantages to each of the options identified. He examined the practice followed in a variety of other jurisdictions, and in paragraph 25 of his judgment said:

> *"…the purpose of an appeal is …. not to exercise the function of the sentencing judge. At the point of sentence the judge has to take into account all relevant factors known at that time. If the offender is to give evidence against a co-defendant or someone else involved in the same criminality there are two courses open. Either the judge must past sentence there and then or he must defer sentence until the trial of the other or others is concluded. He has a discretion to exercise. In doing so he will need to take all relevant factors into account including the nature of the evidence that he is likely to give, the need to have a clear picture of the relative responsibility of all those involved in the criminality, how soon the outstanding trial is likely to take place, whether the defendant had made a witness statement and the danger of an allegation that his evidence is tailored to achieve a more lenient sentence. In R v Sinclair, The Times 18 April 1989, CA. O'Connor L.J. said it was undesirable to say what must be done in every case because circumstances are so infinitely*

variable, although in England and Wales the practice has been generally to defer sentence."

8. So the discretion as to which course to follow lies with the sentencing judge, and it is not for this Court to lay down a hard and fast rule in relation to the exercise of the judge's discretion. What is clear from the passages cited above is that in exercising his discretion as to whether to pass sentence as soon as conveniently possible, or to defer sentencing until after the trial of other persons have been concluded, the sentencing judge will need to take into account all of the relevant factors. In this regard, the onus is on counsel on both sides to ensure that the sentencing judge does indeed have all necessary information. This will include not simply the fact that the person accused will have given assistance to the Police following arrest, but whether there is likely to be a trial involving others at which the accused person may or will be called on to give evidence.

9. While the sentencing judge made no reference in her sentencing remarks to the nature of the assistance which Adlawan had agreed to give to the authorities, Ms Sofianos informed the Court that the Crown's written submissions on sentence did advise the judge both that Adlawan had agreed to provide a witness statement, and that he had agreed to give evidence in the subsequent trials of his co-conspirators, Butterfield and Perinchief.

Additional Assistance

10. In his submissions on behalf of Adlawan, Mr Daniels urged that a discount above 50% should be given in this case, because Adlawan had given "additional assistance in respect of other matters". For the Crown, an affidavit of Ms Clarke has simply said that Adlawan's assistance in relation to the other conspiracy to import controlled drugs has not yet led to an arrest or

prosecution of any person. Further enquiry by the Court revealed that while Adlawan had given the first names of certain persons and a telephone number to the authorities, these had not led to any arrests, much less prosecutions. In this regard, it should be remembered that the information was provided more than three years earlier, so that for practical purposes it cannot now be said that Adlawan had given assistance in relation to cases other than that with which he was himself charged. This Court will not act on the basis of unsubstantiated assertions of assistance made by counsel, without any evidential detail being provided.

11. As Baker P said in *J.R.*, while there are circumstances in which an appellant's sentence may be varied on appeal, in consequence of assistance given to the authorities, it is a jurisdiction which should be sparingly exercised. In relation to drug offences, regard should be had to the requirements of section 27E of the Misuse of Drugs Act 1972 where a distinction in drawn between assistance in relation to the investigation and prosecution of any offender in the same case as that in which the person that gives assistance is charged, and in a case other than that for which such a person had been charged. In the former case, the discount should not exceed 50% of the basic sentence, and in the latter case, there may be a discount as high as 75% of the basic sentence. The distinction between assistance given in relation to the case for which a person is charged and a wholly unrelated case is what elevates the cooperation to the level of true "supergrass" cases. Since for the purposes of this appeal, there is no evidence to support Mr Daniels' assertion as to some wider level of assistance, the only point which might have been made on Adlawan's behalf is that the sentencing judge appears to have given Adlawan credit for his assistance to the Police, without saying in terms whether she understood that Adlawan was expected to go further than giving information to the Police, and to act as a witness at the trial of others (Butterfield and Perinchief) who were Adlawan's co-conspirators. But as we now understand the position, this is something of which the judge was apprised, so that point goes no further.

The Crown's Position

12. In broad terms, the Crown supported some further reduction in Adlawan's sentence, purportedly on the basis of the authority of *Carrie Spencer v the Queen*, Criminal Appeal No.13 of 1998, per Sir Denys Roberts JA in relation to discounts generally. That case laid down that the appropriate discount for an a defendant who had both given "assistance to the Police" and given "evidence in relation to the same offence with which he has been charged", putting the range at between 30% and 50%. In this case, since the sentencing judge was said to have given a discount of 40%, the Crown accepted that some further discount was appropriate. But it applied the greater discount both to the total sentence and to the first offence, where the learned judge appears to have given a discount of 45% (5 ½ years). The Crown then arrived at a sentence of 3 ½ years for count 1.

Conclusion

13. The first point to be made in relation to the Crown's submissions, always bearing in mind that sentencing is not a mathematical exercise, is that the numbers do not make sense. First, the discount given by the sentencing judge differed in respect of the firearm and the drug offences. For the firearm offence the discount was 45%, and for the drug offence it was 40%. The Crown's submissions do not set the discounts out correctly. Next, the Crown's submissions refer to the starting sentence being 14 years. In fact it was 15, 10+5, as Ms Sofianos accepted. So a 50% discount would produce a sentence of 7 ½ years, not 7, as stated by the Crown. But where the Crown's submissions go seriously awry is when they refer to "a slight further reduction" being allowed for Count 1 only. Discounts should be applied to the total sentence. Even then, the Crown's submissions suggest a sentence of 3 ½ years for Count 1, (a discount of 65%, for which there is no warrant), leaving the other sentences undisturbed. That, according to the Crown, should leave an aggregate final sentence of 6 ½ years. But such a sentence represents a

discount of just over 56% in respect of that charge, when the Crown has already maintained that the appropriate discount range does not exceed 50%. That exercise demonstrates the problems occasioned by looking at discounts for co-operation in respect of only one out of multiple charges.

14. One further point which was clarified in the course of argument is that while the learned judge referred to the starting point for the importation of a firearm as being "generally 10 years or up", the statutory minimum is in fact 12 years, although where appropriate the sentencing judge may sentence below that figure. Had the starting point been put higher, so too would the end figure following discount have been higher.

15. The reality is that Adlawan received a discount of just over 43% at his sentencing, so moving close to the top of the range described by Sir Denys Roberts in *Spencer*. And there are two features of Adlawan's conduct which do not seem to me to merit the fullest possible discount. First, he had set out on a course of regular drug importations. As Sir Denys Roberts commented in *Spencer*, since Spencer had admitted the importation of cocaine on three previous occasions, "She was a professional courier and should be so treated". The same applies to Adlawan. Secondly, he had told the Police that while he knew the packages he was importing contained drugs, he did not know the type of drug. That could be said to count as much against him as for him. The drug might as well have been cocaine or heroin for all Adlawan knew, and if that had been the case, his sentence for the drug importation would no doubt have been higher.

16. In the circumstances, it seems to me that Adlawan was perhaps fortunate at sentencing, and the sentences imposed by the sentencing judge should not be varied by this Court, even taking into account the evidence he gave at the trials of Butterfield and Perinchief. No further discount is warranted.

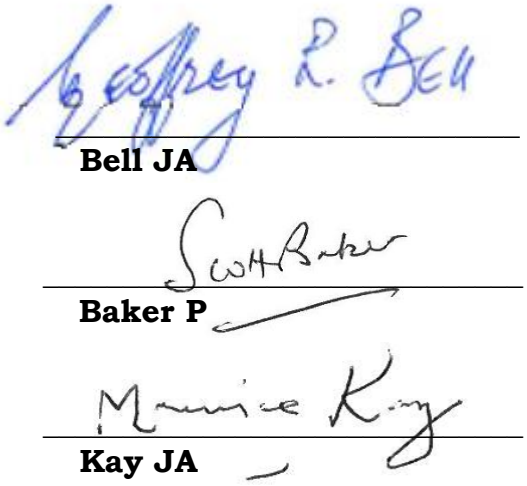
17. Accordingly, I would dismiss this appeal.

BAKER, P

18. I agree.

KAY, JA

19. I agree.



Bell JA

Baker P

Kay JA