STALKIE v. R.

COURT OF APPEAL (Fieldsend, P., Huggins and O'Connor, JJ.A.): February 23rd, 1995

Criminal Procedure—sentence—reasons for decision—wrong for judge to file "Notes on Sentence" after reasoned decision already given at trial, since duplication creates scope for confusion, and practice to be discontinued—may defer giving of reasons until later date

Criminal Law—drugs—importation—sentence—importing 7.35 kg. cannabis resin, accused giving no help to police, not intending to make profit: 18 months' imprisonment

The appellant was charged in the Supreme Court with importing, unlawfully possessing, possessing with intent to supply and attempting to export cannabis resin.

The appellant was found in possession of 7.35 kg. of cannabis resin while entering Gibraltar from Spain on his way to the United Kingdom and was subsequently charged with offences in respect of that drug. He had not answered any questions put to him by customs officers and had only admitted carrying the drugs after they had been discovered. He pleaded not guilty to importing and attempting to export the drugs, and guilty to the other charges; he alleged that he had imported them for his own use and had not intended to make a profit from them. After the trial had begun, the Crown indicated that it would drop the charge of possession with intent to supply, and the appellant then pleaded guilty to the remaining charges, claiming that if he had not been charged with possession with intent to supply at all, he would have pleaded guilty at the outset.

It was not clear whether the judge had been aware of this claim of the appellant's. The appellant was sentenced to 34 months' imprisonment on the importing charge, 24 months' imprisonment for unlawful possession and 30 months' imprisonment for attempting to export the drugs, the judge recording that he had made allowance for the guilty pleas but not saying how much. He later filed "Notes on Sentence" in respect of the case, in which he noted that the appellant had pleaded guilty "in the end."

On appeal against sentence, the appellant submitted, *inter alia*, that (a) the judge had given insufficient weight to his guilty plea, since it was the behaviour of the prosecution that had led to his delay in pleading guilty and his behaviour had not caused any unnecessary delay or expense to the court; and (b) the sentences were manifestly excessive, having regard to sentences passed in previous cases (for offences involving both cannabis

resin and herbal cannabis); in particular, the judge should have given greater weight to the fact that the drugs had been imported for his own use.

Held, reducing the appellant's sentences:

(1) Having given his reasons for the sentence he had passed, the judge had been wrong to go on to duplicate them by filing "Notes on Sentence." This practice was undesirable and should be discontinued, because it created scope for confusion and on giving his original reasons, the judge became *functus officio*. However, there was nothing to prevent a judge from pronouncing sentence but deferring the statement of reasons for his decision until a later date (page 15, line 26 – page 16, line 7).

(2) In the present case, the appellant's guilty plea should have been given similar weight to a plea of guilty made at the outset, since he had not been responsible for the delay in pleading guilty which, in any case, had not itself caused any further delay or expense. Although it was not clear to the court what was the proper relationship between sentences passed in respect of herbal cannabis and those relating to cannabis resin (and probably in the course of time this relationship could become a matter of judicial knowledge), having regard to the sentences passed in previous cases, the appropriate sentences in the present case were 18 months' imprisonment on each count, the sentences to run concurrently (page 16, line 31 – page 17, line 15).

Cases cited:

(1) *R. v. Aramah* (1982), 76 Cr. App. R. 190; 4 Cr. App. R. (S.) 407, considered.

(2) *R.* v. *Danino*, Supreme Ct., Crim. Case No. 5 of 1992, unreported, considered.

(3) *R.* v. *Delgado*, [1984] 1 W.L.R. 89; [1984] 1 All E.R. 449, considered.

(4) *R.* v. *Lima*, Supreme Ct., Crim. Case No. 18 of 1992, unreported, considered.

(5) *R.* v. *Segovia*, Supreme Ct., Crim. Case No. 13 of 1993, unreported, considered.

A. Trinidad, Acting Senior Crown Counsel, for the Crown;
Miss A. Jones for the appellant.

HUGGINS, J.A., delivering the judgment of the court: The appellant was indicted on four counts:

Count 1: Importing a prohibited import;

Count 2: Unlawful possession of a controlled drug;

Count 3: Unlawful possession of a controlled drug with intent to supply it to another; and

Count 4: Attempting to export a prohibited export.

All four charges related to 7.35 kg. of cannabis resin. He was convicted on three of these charges and sentenced to 34 months' imprisonment on Count 1, 24 months' imprisonment on Count 2 and 30 months' imprisonment on Count 4. He appeals against those sentences.

The facts were that the appellant came to Gibraltar from Spain, with the drugs, on his way to the United Kingdom. He was stopped at the border and asked if he had anything to declare. He did not reply, and he was then asked if he was carrying any drugs. Again he did not reply. He was searched and the drugs were found in a cloth harness round his body. Only then did he admit that he had "hash."

Counsel has complained of the sentences on four grounds. First, she contends that the judge gave insufficient weight to the appellant's pleas of guilty on the three counts on which he was convicted. The position is that upon arraignment, the appellant pleaded not guilty to the two charges under the Imports and Exports Ordinance, guilty to simple possession under the Drugs (Misuse) Ordinance and not guilty to possession with intent to supply. After the trial had started, the prosecution indicated that it was disposed to ask the court not to proceed with the charge of possession with intent to supply pending the decision of another case in this court, whereupon the appellant pleaded guilty to the remaining two charges. When passing sentence, the trial judge said that the appellant must be given credit for his pleas of guilty, although he did not indicate what allowance he would make. Subsequently, the judge filed "Notes on Sentence" in which he observed that the appellant had pleaded guilty "in the end."

Here we would interpose that we have been told that it is a common practice for judges in Gibraltar to file "Notes on Sentence" even when reasons for sentence have been given at the time sentence was pronounced and, presumably, recorded. In our view, this is an undesirable practice and should be discontinued. There are obvious dangers when two sets of reasons are given. It is permissible for a judge to pronounce sentence and to say that he will give his reasons in writing later, but where he has given reasons at the time of sentence, he becomes *functus officio* and no further reasons should be given. It should be possible to provide a convicted person with a separate transcript of any reasons given at the trial at least as quickly as "Notes on Sentence" can be prepared after the trial.

What is complained of here is that the "Notes on Sentence" imply that the appellant was to blame for the delay in pleading guilty, whereas he had indicated at the stage of directions for trial that he was willing to plead guilty to the charges under the Imports and Exports Ordinance, although this might not have been known to the trial judge. It is said that the appellant did not plead guilty because the prosecution insisted initially on continuing with the charge of possession with intent to supply. Counsel for the Crown concedes that the appellant had said that he was

willing to plead guilty to the two further charges, but says that upon arraignment he did not do so. To that it is replied that the trial had to proceed on the remaining charge under the Drugs (Misuse) Ordinance and that the course adopted did not lead to any additional trouble or expense, so that it would be fair to give the pleas the same weight as if they had been tendered at the beginning of the trial. We think there is some force in this submission.

The second ground of complaint is that—and again this appears from the "Notes on Sentence"—the judge said that the appellant helped Customs only "to a slight extent." Counsel submits that he answered most of the questions put to him by the Customs Officer. That is true, but he declined to answer those questions the answers to which might have assisted the Customs to further their investigations into the traffic in drugs, *e.g.* he refused to say where he had obtained the drugs. We do not think he was entitled to any discount for helping the Customs beyond that given for his pleas of guilty.

Thirdly, it is said that the judge took into account a previous conviction in Canada for trafficking in a narcotic upon which a sentence of 12 months' imprisonment was passed. It is objected that he had been "squeezed" into entering a guilty plea to the charge by harassment by the police. We do not think we can properly entertain such an argument in Gibraltar.

The fourth, and strongest, ground of complaint is that the sentences were manifestly excessive because they were too far above those imposed in other cases for comparable offences. In this connection, it was emphasized that the judge had, albeit with hesitation, proceeded on the basis that the appellant had told the truth when he had said that the drugs were for his own consumption: the charge of possession with intent to supply to another had been left on the file and was not to be proceeded with without leave. This was not, therefore, a case in which the appellant was going to make a profit. We were referred to *R. v. Aramah* (1) as showing that for importing this quantity of drugs, the sentence should be between 18 months and 3 years. We must observe that the court in that case was concerned with herbal cannabis and not with cannabis resin and that we have not been told what is the equivalence. Such equivalence could probably in due course become a matter of judicial knowledge. In addition, we were referred to various cases indicating that the present sentences were considerably longer than any which had been passed in Gibraltar where the quantity of Class B drugs in question was in the range of up to 20g. In *R. v. Lima* (4), the defendant received only two years' imprisonment for having 15.25 kg. of cannabis resin with intent to supply and 12 months concurrent for simple possession of the same drugs, but he was a very sick man and had kept the drugs for friends. All but nine months of the sentence was suspended. In *R. v. Danino* (2), there was a sentence of 12 months' imprisonment for possession of 7.71 kg. of

cannabis resin with intent to supply. It is of interest that in *R. v. Segovia* (5), the judge passed a sentence of 18 months' imprisonment for the importation of 2.531 kg. of cannabis resin whilst giving 24 months' imprisonment for possession of the same drugs with intent to supply. On the other hand, in England, in *R. v. Delgado* (3), sentences of four years' imprisonment for possession of 6.31g. of cannabis (form unspecified) with intent to supply on a plea of not guilty and two years for simple possession of the same drugs on a plea of guilty were upheld, the court surprisingly observing ([1984] 1 All E.R. at 452) that these sentences were "well within the range suggested for this type of offence in the decision in *R. v. Aramah*."

Having regard to the general level of previous sentences and to the particular facts of this case, we think that the proper sentences would be 18 months' imprisonment on each count, those sentences to run concurrently. We allow the appeal and order accordingly.

Order accordingly.