[2003–04 Gib LR 320]

GORDON v. ATTORNEY-GENERAL

SUPREME COURT (Pizzarello, Ag. C.J.): December 3rd, 2003

Sentencing—drugs—possession with intent to supply—wrong to follow English principles in sentencing but 6 months for possession of 242.5g. of cannabis resin with intent to supply not excessive

The appellant was charged in the magistrates' court with possession of 242.5g. of cannabis resin, with intent to supply.

The appellant was found guilty. Defence counsel did not offer mitigation and the Stipendiary did not invite it. He took a view of other offences which the appellant had committed, and concluded that the sentences for those offences should be subsumed within the present sentence, rather than treated separately, and sentenced the appellant to six months' imprisonment.

On appeal against sentence, the appellant submitted that (a) the Stipendiary Magistrate's approach to sentencing was not structured, as defence counsel had not offered mitigation and the Stipendiary had wrongly failed to invite it, and mitigating circumstances had therefore not been properly considered; (b) the Stipendiary Magistrate had erred in relating the offence and the jurisdiction of the court to English practice, and in doing so had been wrong to use the starting point of a six-month sentence; and (c) the present court had heard the mitigation, *i.e.* that he was young, had never been to prison, was going through marriage difficulties, was suffering from depression, had held a job for the past eight years, had a young daughter with whom he should maintain contact and had extra responsibilities to his mother following the recent death of his father, and could also take into account post-sentencing considerations, so as to reduce the sentence or partly suspend it.

Held, allowing the appeal in part:

The Stipendiary Magistrate had erred in relating the situation to English law, but this error did not result in a mistake as to the length of sentence. It was not improper for him to sentence the appellant to six months' imprisonment, as this was a fair sentence to cover the main charge of possession with intent alone, and, as it was not wrong for him to have taken a global view of all the offences the appellant had committed, it was certainly not too harsh a penalty. The error could, however, have affected his discretion to suspend or partly suspend the sentence, and having regard to the circumstances the appellant's sentence should stand, but two months of it should be kept in suspense (paras. 10–12).

Cases cited:
(1) *Chichon* v. *Correa*, Supreme Ct., Crim. App. No. 10 of 1996, unreported, considered.
(2) *R.* v. *Cox*, [1993] 1 W.L.R. 188; [1993] 2 All E.R. 19; [1993] RTR 185; (1993), 96 Cr. App. R. 452; 14 Cr. App. R. (S.) 479, considered.
(3) *R.* v. *Howells*, [1999] 1 W.L.R. 307; [1999] 1 All E.R. 50; [1999] 1 Cr. App. R. 98; [1999] 1 Cr. App. R. (S.) 335, considered.

Legislation construed:
Criminal Procedure Ordinance (1984 Edition), s.180:

> "(1) Where a court passes on an offender a sentence of imprisonment for a term of not less than three months and not more than two years, it may order that, after he has served part of the sentence in prison, the remainder of it shall be held in suspense.
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> . . .
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> (3) If at any time after the making of the order he is convicted of an offence punishable with imprisonment and committed during the whole period of the original sentence, then, subject to subsections (4) and (5), the court may restore the part of the sentence held in suspense and order him to serve."

R. Pilley for the appellant;
J. Fernandez for the respondent.

1 **PIZZARELLO, Ag. C.J.:** I think the thrust of Mr. Pilley's submission for the appellant is that, while he concedes a sentence of six months' imprisonment falls within the sentencing parameters available to him, the Stipendiary Magistrate's sentence was excessive in the present case because he did not have regard to all the circumstances of the case, and thus fell into error.

2 The submissions are that—

(a) the learned Stipendiary Magistrate did not have a pre-sentencing report before him, having decided that the circumstances of the offence were such that an immediate custodial sentence was called for; and

(b) his approach to sentencing was not structured, so that all the possible mitigating factors were not considered by him, defence counsel not offering any mitigation having stated, as recorded in the clerk's notes, that they could not "say anything on possession with intent to supply." A structured approach would have thrown up more forcefully in some relief and put before the Stipendiary the following mitigating circumstances, some of which were already in the Stipendiary's knowledge as they had been mentioned during the course of the trial, *viz*:

(i) the defendant was a young man, being only 25 years of age;

(ii) he had never been to prison;

(iii) he was going through a difficult period in his marriage;

(iv) he was suffering from depression;

(v) he had held the same job for eight years—a long period reflecting a good employment record with Master Services (Gib.) Ltd. and its predecessor. He had only just lost the job, possibly as a result of the charge which had led to his conviction, although it is true to say that he had administrative problems with his employer;

(vi) he had a two-year-old daughter, Shania, born on March 21st, 2001, loss of contact with whom a court would endeavour to keep to a minimum; and

(vii) his father had recently died from cancer, which entailed responsibilities to his mother.

3 Mitigation, Mr. Pilley submitted, would also have ensured that the Stipendiary would have had it made clear to him that the Mercedes car the appellant was driving on that occasion was, despite its registration number, a 10 year-old vehicle, and the other car, a Mazda, was worth not more than £300. The learned Stipendiary was not dealing with a ne'er-do-well: the appellant had a good work record with a fair wage, which gave him legitimate access to the cars. The natural inferences the Stipendiary drew, as set out in his reasons, might not have been so detrimental to the appellant if this factor had been made clear to him by way of a structured approach or by mitigation, for it cannot be doubted from the record that the learned Stipendiary approached sentencing on the basis that the appellant was carrying at least some of the trappings of wealth associated with commercial drug-dealers. This argument, he submitted, does not lose its force even though the learned Stipendiary found that the appellant had lied about the possession of the cannabis. Why defence counsel offered no mitigation nor sought to call for a report is incomprehensible, but the court is now aware of the more complex factors which needed to be specifically addressed by the learned Stipendiary before he decided on the length of the sentence.

4 In addition, Mr. Pilley submits that the approach taken by the Stipendiary Magistrate in relating this offence and the jurisdiction of the court in Gibraltar with that of England results in error because it is an error to take as a starting point the figure of not less than six months from the premise of English jurisdiction. The error remains even if on a structured approach the court were to conclude that a six-month sentence or more was merited. Having taken the decision that immediate custody was proper, he should have invited submissions in respect of mitigation of sentence.

5 In respect of the sentence itself, Mr. Pilley refers to the cases of *Chichon* v. *Correa* (1), *R.* v. *Howells* (3) and *R.* v. *Cox* (2), all of which point to the need for the court (a) to be aware of all the circumstances in ascertaining the seriousness of the offence; (b) to take into account the personal circumstances of the offender; and (c) not to impose a more severe sentence than is absolutely necessary.

6 The record seems to me to show that defence counsel was anxious to finish the case forthwith. I would assume he did this on instructions and the result is that the learned Stipendiary Magistrate proceeded with the case to sentence, but not before standing it down, presumably to reflect on the proper sentence and to hear mitigation. So Mr. Pilley's submission that the learned Stipendiary should have invited mitigation was in my view fulfilled.

7 I found the record a little puzzling as it seems from it that the defendant was then dealt with in respect of another charge of possession on June 27th, 2003, and a charge (or summons) for driving under the influence of drink on the June 5th, 2003.

8 The Stipendiary appears also to have been referred to a further incident of July 7th, 2003 (which presumably related to drugs and was to be taken into consideration) and for failing to provide a specimen (of breath, I assume), for which he had been disqualified for 15 months.

9 I called in the Clerk to the Justices and he has explained that on that day (August 21st, 2003) four offences of the defendant were being dealt with, as follows:

(a) May 5th, 2003: possession of 244.8g.—no separate penalty;

(b) May 5th, 2003: possession with intent to supply—six months' imprisonment;

(c) June 27th, 2003: possession of 35g.—no separate penalty;

(d) June 5th, 2003: excess alcohol—disqualified for nine months—no separate penalty.

The first two are the subject of this appeal. The remark made that "minor possession not relevant" appears to be directed to previous offences of September 7th, 2001, July 27th, 1998 and March 23rd, 1998. The reference in the record to "driving under the influence" of June 5th, 2003 is an error and should refer to driving with excess alcohol. The further incident of July 7th, 2003 was in respect of failing to provide a sample of breath which had already been dealt with and for which the penalty had been 15 months' disqualification.

10 With these matters before him, I do not consider it improper for the Stipendiary to have taken a global view of the totality of possible

sentences and have looked at the six months' sentence as sufficient custodial punishment (a) alone to cover the possession with intent; and (b) thereafter to subsume any other penalties he might have in mind in respect of the other two matters into those six months. I have to observe that the offence of the June 27th, 2003, in respect of drugs, was committed while the appellant was on bail on the charges on which he is appealing and is the fifth charge of possession since 1998, with the charges seemingly escalating. So too was the offence of June 5th, 2003 committed whilst on bail, but that was a different type of offence. The learned Stipendiary, if he had been so minded, could have passed sentences of imprisonment in respect of these two and made them concurrent, and so come to the same practical result. While that, however, would also have enabled the appellant to end up with a clean slate once he had served his sentence, he would be burdened on his record with other sentences. In what he did, the learned Stipendiary has dealt fairly with the appellant, or so I think, and it is what I would have done as a Stipendiary. I do not think the sentence of six months' imprisonment *per se* is excessive for possession with intent to supply 242.5g. of cannabis resin.

11 The only point that gives me some concern is Mr. Pilley's submission that the learned Stipendiary fell into some error by relating to the English law. A perusal of the record would suggest he did, but the error is not measurable in the length of the sentence the Stipendiary imposed because, as I have already indicated, I think six months is within the limits of the Stipendiary's sentencing parameters. The error could, however, have affected the Stipendiary's discretion to suspend or partly suspend the sentence. Mr. Pilley submits that this court is in a different position to that of the Stipendiary. It has heard the mitigation and there are now post-sentencing considerations which this court may look at—the appellant's conduct in prison has been excellent, he mixes well, is respectful, has had three drug tests which have proved negative and his partner from whom he had separated at the time of arrest has visited him in prison, as has his daughter. Mr. Pilley also submits that the court should consider the trend to downgrade cannabis to a Class C drug, but I discard this factor.

12 In the circumstances, and having regard to the appellant's counsel's seeming lapse, I consider it would be just if the original sentence stands, but that the appeal should be allowed in part. I order that the sentence of six months imposed on the appellant on August 21st, 2003, should be partly immediate and partly suspended, pursuant to s.180 of the Criminal Procedure Ordinance. The appellant will serve four months of his sentence and two months shall be kept in suspense, unless restored under sub-s. (3).

Appeal allowed in part.