[2007–09 Gib LR 186]

PORTUGUES v. R.

COURT OF APPEAL (Stuart-Smith, P., Aldous and Kennedy, JJ.A): February 12th, 2008

Sentencing—drugs—starting points—Class B drugs—10-year starting point appropriate for possession and importation of large quantity of cannabis (765 kg.) by courier—cannot compare transportation to smuggling cases sentenced for simple possession since only 5-year maximum sentence for possession

The appellant was charged in the Supreme Court with the possession and importation of Class B drugs.

The appellant and his co-accused were seen ostensibly fishing on a boat about 100m. offshore which was then intercepted by the police. Both were arrested and found to be in possession of 765 kg. of cannabis with the majority of it hidden in the hull of the boat. The appellant admitted to knowing that the drugs were hidden on the boat which, although it did not belong to the appellant, had been registered in his name. For his role in the offence, he was paid €10,000 and his co-accused was paid €6,000, the street value of the drugs (in Spain) being between £700,000 and £1m.

Following an early guilty plea, the Supreme Court sentenced the appellant to 4¼ years' imprisonment for possession and 6½ years for the importation of cannabis, 6 months more than his co-accused. The court used a starting point of 10 years' imprisonment and accepted that although the appellant was merely a courier, he had played an essential part in the offence. Credit was given for his early guilty plea and for his co-operation with the police in that he did not resist arrest and confessed his contribution to the offence when interviewed.

On appeal against sentence, the appellant submitted, *inter alia*, that (a) given that English authority had imposed a final sentence of 12 years in a case involving "massive" quantities of cannabis (valued at £57m. and involving 17½ tons) the starting point of 10 years in this case was too high; (b) the sentence was excessive since the court had been wrong to depart from sentences passed in recent Gibraltar cannabis smuggling cases, though admittedly they had been charged and sentenced as cases of simple possession rather than importation; (c) the court had failed to take account of the fact that the Gibraltar Prison was a harsher environment than was usual in England and that it was therefore standard practice to pass shorter custodial sentences in Gibraltar than in England; (d) there had been insufficient consideration of his personal circumstances (his early

guilty plea, co-operation with the police in not resisting arrest, admitting the offence at interview, his serious financial difficulties and that he deeply regretted his offence); (e) that he was merely a courier and not the organizer of the importation; and (f) too much emphasis was placed on his being the registered owner of the boat.

Held, dismissing the appeal:

(1) The sentences of 4¼ years' imprisonment for possession and 6½ years for the importation of cannabis would be affirmed. They were neither excessive nor wrong in principle since the appellant, although not the organizer of the offence, had played an instrumental part in it and a lengthy period of imprisonment was to be expected (para. 16).

(2) The starting point of 10 years was appropriate for the quantity of cannabis involved and, for the appellant's role in transporting the drugs and manning the vessel, the offence could not be compared with cases of possession which carried a maximum 5-year sentence (para. 5; para. 8).

(3) The court had considered all relevant information in sentencing the appellant. The conditions in prison in Gibraltar had been accounted for in the more lenient sentence passed on him than would have been passed in the United Kingdom. His good conduct, early guilty plea and role as a courier had been recognized as they were specifically mentioned by the Supreme Court in its reasoning. His conduct had merely shown co-operation during his arrest in admitting his involvement and not evading arrest which, in themselves, did not warrant extensive mitigation of his sentence. Reasonable weight had been placed on the appellant being the registered owner of the boat and a justifiable distinction drawn in sentencing between the appellant and his co-accused since he had been paid more, could have helped to disguise the identity of the true owner of the boat and prevent the detection of other persons involved throughout the course of the offence (paras. 9–12; para. 14).

Cases cited:

(1) *R.* v. *Martinez,* Supreme Ct., 1995, unreported, referred to.
(2) *R.* v. *Reina*, 1997–98 Gib LR 1, referred to.
(3) *R.* v. *Ronchetti*, [1998] 2 Cr. App. R. (S.) 100; [1998] Crim. L.R. 227, referred to.
(4) *R.* v. *Somoano*, Supreme Ct., Crim. Case No. 22 of 2004, October 11th, 2007, unreported, referred to.
(5) *R.* v. *Tejero,* Supreme Ct., Crim. Case. No. 21 of 2004, unreported, referred to.
(6) *R.* v. *Vickers*, [1999] 2 Cr. App. R. (S.) 216, referred to.
(7) *R.* v. *Wagenaar*, [1997] 1 Cr. App. R. (S.) 178; [1996] Crim. L.R. 839, considered.
(8) *R.* v. *Wijs*, [1998] 2 Cr. App. R. 436; [1999] 1 Cr. App. R. (S.) 181; [1998] Crim. L.R. 587, referred to.

C. Miles for the defendant;
L. Yeats for the Crown.

1 **STUART-SMITH, P.,** delivering the judgment of the court: The appellant pleaded guilty to one count of importation of 765 kg. of cannabis and a further count of possession. On October 17th, 2006, he was sentenced as follows: 6½ years on the importation count and 4¼ years to run concurrently on the possession count.

2 The brief facts were these: On May 17th, 2006 the Royal Gibraltar Police, Marine Section, in a police launch, intercepted a vessel about 100m. off Europa Point. The two occupants were the appellant and Mr. Conde Ordonez, his co-accused. They were ostensibly fishing. A few dead fish were lying about on the boat, probably bought in the market, and some rather unconvincing tackle which the police immediately thought had not been used for fishing. The appellant and co-accused were arrested and the vessel was taken to the Marine Base. The defendants were searched and were in possession of small amounts of cannabis but the bulk of the cannabis resin was found concealed in the hull of the vessel. In interview under caution, the appellant admitted that he knew the drugs were there. They had taken the vessel to Morocco, but had not been present at, or taken part in, the loading. The appellant was paid €10,000, his co-accused €6,000. That difference no doubt reflected the fact that the organizers required the boat to be registered in the appellant's name and that was done, although it was not in fact his boat. The value of the drugs was put between £700,000 and £1m. and the drugs were destined for Spain, not for importation into Gibraltar.

3 The judge, in passing sentence, accepted that the two men were couriers but he said they were essential cogs in the wheel of importation, as of course they were. He gave credit for the early pleas of guilty and for co-operation with the police. That is to say, they did not resist arrest and they confessed their part in the offence when they were interviewed. It did not go further than that. We are told by Mr. Miles that in fact the appellant did not know the people who were setting up this enterprise.

4 There are a number of grounds of appeal. The first one is that the judge's starting point of 10 years for this type of case was too high. We were referred, in that regard, to the case of *R.* v. *Wagenaar* (7). That was a case where there was a massive quantity of cannabis resin valued at £57m., 17½ tons destined for Holland. Wagenaar, who was known to be a dealer or involved with drugs, was sentenced to 12 years and Pronk, his co-accused, to 9 years after a contested defence.

5 Mr. Miles submitted to this court that if those are the appropriate sentences after conviction for massive quantities, then a starting point of 10 years is too high in relation to what is a large quantity but is much

smaller than the quantities involved in *Wagenaar*. The problem in *Wagenaar*, it seems to us, is that since the maximum penalty is 14 years, that would have to be reserved for the organizers of an offence of the magnitude that was involved in that case and it was accepted that Wagenaar and Pronk were in much the same position as the defendants in the present case, that is to say they were manning the vessel that carried the goods.

6 There are a number of cases to which the judge referred, including *R.* v. *Ronchetti* (3) and *R.* v. *Vickers* (6). The court said that the starting point for importation of cannabis of this sort of quantity is 10 years. We think that this is the appropriate starting point. Counsel referred us to the case of *R.* v. *Wijs* (8). That is a case of importation of amphetamines where the value of the drugs is much higher than cannabis, although smaller quantities are involved. It seems to us that it is not helpful to try and compare valuations of cannabis cases with amphetamines. There is a mass of authority on the appropriate sentence for cannabis resin and it only confuses the issue to compare it with some other Class B drug.

7 The second ground of appeal is that the learned judge erred in departing from sentences passed on Spanish nationals in two separate Gibraltar cannabis smuggling cases in a manner which, in all circumstances, was excessive.

8 These two cases are *R.* v. *Somoano* (4) and *R.* v. *Tejero* (5). The problem about these cases is that they were not importation cases at all. They were regarded as pleas to simple possession and we do not know on what basis they were treated as possession and not importation. It may be, as Mr. Miles submits, that it was because they were much further out and there was some doubt as to whether they entered territorial waters. We do not know, but it is not helpful in our judgment to compare cases of simple possession, where the maximum sentence is 5 years, with cases of importation.

9 The third ground is that the learned judge failed to consider that H.M. Prison in Gibraltar is a harsh environment in which to serve a sentence of imprisonment. It was submitted that it was an established principle of sentencing in Gibraltar that sentences in Gibraltar are lower than those imposed in England and Wales in order to reflect the harsh environment and the limited facilities. This is referred to in a case of *R.* v. *Martinez* (1), which was referred to in argument. The judge seems to have taken the view that there were advantages in going to a small prison which perhaps counteracted, to some extent the harsher conditions in H.M. Prison in this jurisdiction.

10 The fourth ground of appeal was that the learned judge failed to pay sufficient regard to the appellant's personal circumstances. It is said that there was a very early plea of guilty and the judge did not pay regard to that, but the judge did mention it in his reasoning. Then it is said that the

appellant's co-operation with the police was not sufficiently recognized. Again, the judge referred to this. We have been referred to a case of *R.* v. *Reina* (2) where a similar sort of conduct on the part of the defendant was regarded as co-operation.

11 As a rule, when one talks about co-operation with the police it involves conduct rather more than simply admitting the offence in interview and not attempting to evade capture. But, be that as it may, it seems to us that the learned judge did pay attention to their co-operation, as he specifically referred to it.

12 Then it is said that the appellant was merely a courier—well, that was recognized by the judge. It is said that the appellant's financial and family circumstances were such that he should have been treated more leniently. It is right to say that he was in financial difficulties, owing the bank €12,000 which he borrowed to finance an operation for his son. And there is a letter from the counsellor, Mrs. Audria Boratelo from H.M. Prison, which was before the judge, describing the appellant as a passive man, deeply regretful of what he had done, which he had done in desperation.

13 It said that the appellant suffers from anxiety attacks and has chronic asthma and that is a condition which is perhaps aggravated by the conditions in the prison, but I do not think there is really any medical evidence to support that ground of appeal.

14 Finally, it is said in the fifth ground of appeal that the learned judge gave too much weight to the effect that the appellant was the registered owner of the vessel. He did distinguish between the two defendants; he imposed 6 months more on this appellant than on the co-accused. In our judgment he was right to reflect the fact that the appellant had been prepared to have the vessel registered in his name—he was being paid €4,000 for that additional service and it may well be that that helped to disguise the true owner of the vessel and helped to prevent a further detection up the line.

15 It is to be noted that in the course of his submissions, Mr. Bossino, who appeared in the court below for the appellant, submitted that the proper bracket in this case was between 5 and 8 years. The learned judge took a midway point of 6½ years. Mr. Miles submits that 5 years was too high as the bottom of the bracket, that it should have been 4 years.

16 In our judgment it is difficult to say, in this case, that the sentence was manifestly excessively and it certainly cannot be said that it was wrong in principle—a custodial sentence of considerable length was obviously to be imposed. For those reasons this appeal will be dismissed.

Appeal dismissed.