[2015 Gib LR 1]

TAHER, NAVAS and DE VERA v. R.

COURT OF APPEAL (Kennedy, P., Potter, J.A. and Dudley, C.J.):
October 10th, 2014

Criminal Procedure—charges—incorrect charges—accused mistakenly charged with importing small amount of cannabis resin rather than larger amount actually imported—improper to negotiate with accused to be sentenced for importation of small amount as representing whole quantity—sentence on incorrect charge quashed as effectively not properly before court

Sentencing—drugs—importation—10-year starting point after trial only appropriate where at least 500 kg. of cannabis resin imported—intended importation of greater quantity of drugs than actually imported is aggravating factor justifying higher starting point

The appellants were charged in the Magistrates' Court with drugs offences.

The appellants were involved in the importation of 325 kg. of cannabis resin from Morocco to Gibraltar by sea. But for the intervention of the police, more cannabis would have been imported. The first appellant had helped to load the boat with cannabis in Morocco and to bring it over, and had started to unload the boat by the time the police intervened. The second and third appellants had both helped with the unloading of the boat.

The first appellant was charged with possession of 5g. of cannabis resin, importation of those 5g., obstructing the police, and possession of 325 kg. of cannabis resin. The second appellant was charged with being concerned in the importation of 325 kg. of cannabis resin, possession with intent to supply the 325 kg., and simple possession of the 325 kg. The third appellant was charged with being concerned in the importation of 325 kg. of cannabis resin, being concerned in the attempted exportation of the 325 kg., possession with intent to supply the 325 kg., and unrelated offences of assault occasioning actual bodily harm and dangerous driving. They gave indications of guilty pleas to the Magistrates' Court and were committed to the Supreme Court for sentencing.

The first appellant had been involved in the importation of the whole quantity of cannabis resin but had only been charged with and committed for sentencing for the importation of 5g. Having been wrongly assured by the prosecution that he had been charged with being concerned in the

importation of and possession with intent to supply the whole quantity of cannabis resin, the Supreme Court sentenced him to 6 years and 2 months' imprisonment in respect of each count to run concurrently, when in fact he had not been charged with those offences or committed for sentencing in respect of them.

On discovering this error, the Supreme Court suggested and the first appellant agreed that he should be sentenced for the importation of the small quantity of cannabis resin as representing the whole quantity. On this basis, the Supreme Court quashed the sentence of 6 years and 2 months imposed in respect of being concerned in the importation and possession with intent to supply the whole quantity of cannabis resin and then re-sentenced him to 6 years in respect of the importation of the small quantity of cannabis resin.

In respect of the second and the third appellants, the Supreme Court adopted the initial starting point of 10 years' imprisonment (after trial) but, as there was no trial, reduced the starting point for the third appellant to 7 years and 6 months with an additional year based on his previous drug conviction. There was similarly no trial of the second appellant, but the Supreme Court adopted a starting point of 9 years based on its view that he had played a more significant role in the importation than the third appellant. From these starting points, the Supreme Court sentenced the second appellant to 6 years' imprisonment on the count of being involved in the importation of 325 kg. of cannabis resin and 6 years concurrent in respect of the count of possession with intent to supply the same quantity, and the third appellant to 5 years and 8 months concurrent on each of the counts of being concerned in the importation of 325 kg. of cannabis resin, being concerned in the attempted exportation of the whole quantity (as he intended to drive it to Spain) and possession with intent to supply the whole quantity.

On appeal, the first appellant submitted that the Supreme Court's approach was wrong in principle in that his record would show a sentence of 6 years for importation of 5g. of cannabis resin and such a sentence would have been manifestly excessive and wrong in principle and should be quashed.

The second and third appellants submitted that the Supreme Court's initial starting point of 10 years (after trial) was erroneous in that the authorities held that the starting point (after trial) should only be 10 years when a defendant was convicted of importing 500 kg. or more of cannabis resin, whereas this case involved the importation of a much smaller quantity.

The second appellant submitted in addition that the Supreme Court had been wrong to use a starting point of 9 years' imprisonment since he had not played a significantly greater part in the importation than the third appellant.

Held, allowing the appeals of the first and second appellants and dismissing the appeal of the third:

(1) It was wrong in principle for the Supreme Court to have sentenced the first appellant for an offence which was not before the court. In these circumstances, it should have quashed the sentences, allowed the charges to be put to the first appellant in the Magistrates' Court and thereafter (if appropriate) committed him to the Supreme Court for sentence. The sentence of 6 years' imprisonment imposed upon him in respect of the importation of 5g. of cannabis resin would therefore be quashed and replaced with no separate penalty (para. 11).

(2) In respect of the second and third appellants, the 500 kg. threshold for the 10-year starting point had not been met and the correct starting point should therefore have been between 5 and 7 years. However, the intended importation involved a greater amount of cannabis resin than the 325 kg. landed and this was an aggravating feature justifying a starting point of 7 years and 6 months (paras. 14 and 15).

(3) In respect of the third appellant, the approach and starting point adopted by the Supreme Court could not be faulted and the sentence imposed was not manifestly excessive or wrong in principle and would be upheld (para. 15).

(4) The Supreme Court had been wrong to hold that the second appellant played a greater role than the third appellant and the same starting point of 7 years and 6 months should therefore have been used, though reduced to 7 years by virtue of the second appellant's good character. Thereafter, giving him full credit for his guilty plea, the second appellant's sentence would be reduced to 4 years and 8 months' imprisonment (para. 15).

Cases cited:
(1) *Bebeagua* v. *R.*, 2010–12 Gib LR 243, considered.
(2) *Portugues* v. *R.*, 2007–09 Gib LR 186, considered.

P. Canessa for the appellants;
J. Fernandez for the Crown.

1 **DUDLEY, C.J.,** delivering the judgment of the court: The three appellants gave indications of guilty pleas in the Magistrates' Court and were committed to the Supreme Court for sentencing.

2 In the Supreme Court, the appellant Navas was sentenced to six years' imprisonment on a count of being concerned in the importation of 325 kg. of cannabis resin; six years in respect of a count of possession with intent to supply the 325 kg., both to run concurrently; and no separate penalty was imposed in respect of a count of simple possession.

3 The appellant De Vera was dealt with in respect of five counts. In respect of the first three counts, namely, being concerned in the importation of 325 kg. of cannabis resin, being concerned in the attempted

exportation of 325 kg. of cannabis resin and possession with intent to supply the 325 kg., he was sentenced to five years and eight months' imprisonment on each count, to run concurrently. The fourth and fifth counts are wholly unrelated to the cannabis charges and he was sentenced to four months' imprisonment in respect of a count of assault occasioning actual bodily harm and a count of dangerous driving to run concurrently with each other but consecutive to the cannabis charges.

4 The position in relation to the appellant Taher is somewhat more confusing. He was committed for sentencing in respect of four counts: possession of 5g. of cannabis resin; importation of those 5g.; obstructing the police; and possession of 325 kg. of cannabis resin. Assured by the prosecution that a count of being concerned in the importation and a count of possession with intent to supply 325 kg. of cannabis resin were before him, the judge, in error, sentenced Taher to six years and two months' imprisonment in respect of each such count to run concurrently, when in fact the appellant had not been committed for sentencing in respect of these. In so far as the counts that Taher had in fact been committed for sentencing, namely simple possession of 325 kg. of cannabis resin and the two counts relating to the 5g., he imposed no separate penalty, whilst in relation to the obstruction, the sentence was of two months to run concurrently with the sentences imposed in error.

5 When the warrants were being prepared, the error was discovered and, relying upon s.487 of the Criminal Procedure and Evidence Act, the judge had the matter relisted. Counsel suggested that the sentences on both counts should be quashed and the charges could then be put to Taher in the Magistrates' Court and thereafter, subject to an indication of guilty pleas, those counts could be committed to the Supreme Court for sentencing. The judge suggested an alternative "pragmatic" route, which was to sentence Taher on the count of importation of 5g. as representing the 325 kg. of cannabis and if the defendant was prepared to consent to that course of action it would show additional remorse which would justify a modest reduction to the six years and two months to which he would otherwise eventually be sentenced. After taking instructions, counsel for Mr. Taher indicated that his client was happy to be dealt with in that manner. The judge quashed the sentence of six years and two months imposed in respect of the non-existent counts of being concerned in the importation and possession with intent to supply 325 kg. of cannabis and then re-sentenced Taher and imposed a sentence of three years and eight months in respect of simple possession of 325 kg.; six years in respect of importation of 5g. of cannabis resin; no separate penalty in relation to the possession of that 5g. quantity; and two months in respect of obstructing the police, all to run concurrently, thereby giving a total of six years' imprisonment.

Background

6 At about 6.05 a.m. on February 27th, 2014, a vessel was observed in the area of Little Bay. When Royal Gibraltar Police officers were deployed to the area, no vessel was to be seen. However, there were five individuals looking out to sea and as the officers approached, two of these, who remain unidentified, escaped. The three appellants remained, although just as they were about to be arrested, Taher fled the area and thereafter jumped into the sea, whereupon an officer dived in after him and he was arrested. Five bales of cannabis resin weighing approximately 180 kg. were next to the appellants and a further three bales weighing 145 kg. were found floating in the sea. One of two vehicles parked in the area was registered in the name of De Vera.

7 Interviewed under caution, De Vera admitted his involvement in the importation and claimed that a larger consignment was supposed to have been brought but that the vessel had been unable to unload and had fled the area. He further confirmed that the intention had been to export the drugs from Gibraltar to Spain by land. For his part, Navas admitted knowledge of the drug consignment but asserted that he did not play an active part.

8 Although not apparent from the summary produced by the prosecution, no doubt because these matters emerged during mitigation, the judge sentenced on the basis that Taher had helped load the boat in Morocco and bring it over and had started the unloading; that De Vera and Navas had helped in the unloading; that the original plan had been to unload in the area of Tarifa in Spain and that De Vera would have gone there to assist; and that Navas was to drive the drugs through the frontier to Spain. The judge further sentenced on the basis that Taher expected to be paid €9,000 and Navas €2,000 for their work.

9 The counts of assault and dangerous driving in respect of De Vera relate to an incident in July 2012 in which he used his vehicle for the purposes of assaulting the victim. Fortunately, the injuries were slight.

Grounds of appeal

10 The first ground of appeal relates exclusively to Taher and the imposition of a sentence of six years for the importation of 5g. of cannabis resin and raises a very short point. It is submitted that, notwithstanding Taher's agreement that the 5g. be deemed to be the 325 kg., adopting such a course of action was wrong in principle in that his record of previous criminal convictions will show a sentence of six years for importation of 5g. and that such a sentence is manifestly excessive and wrong in principle and should be quashed.

11 In the normal course of events, importation of 5g. of cannabis would almost invariably be disposed of in the Magistrates' Court with a financial penalty and it is almost inconceivable that the custody threshold would ever be met. We agree with the submission advanced that it was wrong to have sentenced the appellant in respect of an offence which was not before the court. Having sentenced Taher in respect of counts which were not before him, the judge should have quashed those sentences and allowed for the charges to be put to him in the Magistrates' Court and thereafter (if appropriate) committed to the Supreme Court for sentence. We therefore quash the sentence of six years' imprisonment for the importation of 5g. of cannabis and substitute it with no separate penalty.

12 The sentence imposed in respect of simple possession of 325 kg. of cannabis has not been appealed and evidently stands. Moreover, it is open to the Royal Gibraltar Police to charge Taher in respect of the importation and possession with intent to supply the 325 kg. of cannabis. However, in the event that he were to plead guilty, Taher may legitimately expect that any sentence imposed will not exceed six years.

13 The only other ground of appeal that remains is whether the judge in sentencing De Vera and Navas erred in adopting 10 years' imprisonment (after trial) as the appropriate starting point. It is clear from the decisions of this court in *Portugues* v. *R.* (2) and *Bebeagua* v. *R.* (1) that the starting point after trial where a defendant is convicted of importing 500 kg. or more of cannabis resin is 10 years' imprisonment.

14 Sentencing does not operate on a mathematical sliding scale but equally there is no ignoring that the amount involved in *Portugues* v. *R.* (2) was 765 kg., which is more than double the amount in respect of which the appellants in this case were convicted. Although not referred to by the judge, it appears from the prosecution summary that, but for the fact that the activities of the appellants were interrupted, more cannabis would have been unloaded. Therefore, although the 500 kg. threshold was not met, the intended importation involved a greater amount than was landed and this is an aggravating feature. The Sentencing Guidelines Council for England and Wales in its *Drug Offences: Definitive Guideline* indicates that the sentencing range for an offender playing a significant role in the importation of 200 kg. of cannabis is between five and seven years' custody. However, it is evident that where an operation is on a commercial scale, involving a quantity of drugs beyond the indicative quantity upon which the starting point is based, higher sentences may be appropriate.

15 Dealing with De Vera, the judge took a starting point of seven years and six months which he then increased by one year by reason of a conviction in Spain in 2002 for transporting 200 kg. of cannabis. In our view, that approach cannot be faulted and the sentence imposed cannot be said to be manifestly excessive or wrong in principle. In relation to Navas,

the judge took the view that he had played a greater role than De Vera and on that basis he took a starting point of nine years. We are of the view that there is nothing before us to suggest that he in fact played a more significant role. The same starting point of seven years and six months should have been used and this reduced to seven years by virtue of the fact that he was of good character. Thereafter, giving him full credit for his guilty plea, he should have been sentenced to four years and eight months.

16 We therefore quash the sentence of six years imposed upon Taher in respect of the importation of 5g. and substitute it with no separate penalty; quash the sentence of six years imposed upon Navas and substitute it with a sentence of four years and eight months; and dismiss the appeal of De Vera.

Orders accordingly.