[2015 Gib LR 122]

GHIO v. R.

COURT OF APPEAL (Kennedy, P., Parker and Kay, JJ.A.): February 4th, 2015

Sentencing—tobacco smuggling—fines—fine not to be unrealistic for means of offender—offender to give evidence of lack of means to pay or court will infer can pay

Sentencing—tobacco smuggling—fines—if offender lacks means to pay any fine, may pass community order or custodial sentence—if limited means, fine to be related to means and may order payment by instalments up to two years with imprisonment in default

Sentencing—tobacco smuggling—fines—starting point for fine double value of tobacco on not guilty plea—deduction up to one-third for guilty plea, further deductions for personal circumstances and assistance to police but personal hardship and family responsibilities commonplace and of little weight

The appellant was charged in the Magistrates' Court with possession of cigarettes in a commercial quantity without a valid licence.

The police found 40,000 cigarettes, with a value of £4,000, at the appellant's home. She asserted that they were hers. She was charged with possession of cigarettes in a commercial quantity without a valid licence, contrary to ss. 12(2) and 14(2) of the Tobacco Act 1997, and pleaded not guilty on her first appearance in the Magistrates' Court. Nine months later, when the case came before the Stipendiary Magistrate, she changed her plea to guilty and put forward the following version of events by way of mitigation. At the time of the alleged offence, she had been aged 26 and married with two children. She had been asked to look after the cigarettes for a friend of her husband in return for either £40 or €40. She did not

know that what she was being asked to do was illegal. She had subsequently separated from her husband and submitted that she had insufficient means to pay any fine. She brought no evidence to support her version of events or her alleged lack of means.

The Stipendiary Magistrate sentenced her to a fine of £5,000 with 45 days' imprisonment in default. She appealed against this sentence to the Supreme Court (Jack, J.), which rejected her version of events and held that the Magistrates' Court had been entitled to sentence her on the basis that she had been involved in tobacco smuggling as a principal. It further held that the court had been entitled to infer that, as a party to tobacco smuggling, she had access to money, and that sentencing practice for tobacco smuggling should be updated, so that the starting point for a fine on a plea of not guilty should be twice the value of the smuggled goods, with a deduction of up to one-third to be made to reflect a guilty plea. On this basis, she should have been fined £8,000 with a deduction of 20% to reflect her (late) guilty plea and there was therefore no reason to allow her appeal. She appealed against that decision.

Held, allowing the appeal:

(1) The court would not pass a fine on the appellant which it was unrealistic to expect her to pay, but the burden was on her to provide evidence (in the form of a witness statement and a statement of truth) that her circumstances meant that she could not pay a fine, and that evidence could be subject to cross-examination by the prosecution. Her sentence would be quashed and the case would be remitted to the Supreme Court for re-sentencing to give her the opportunity to adduce evidence to support her submission that her lack of means meant that a fine was inappropriate (para. 14; paras. 16–18).

(2) A sentencing court was under no obligation to accept, as the basis for sentencing, a version of the facts of the case presented by the offender that it regarded as inherently unlikely, especially where no evidence had been adduced to support it (para. 12).

(3) When sentencing for tobacco smuggling, the court would first consider whether the offence crossed the custody threshold. If it did not, the court would not pass a sentence of imprisonment in default of non-payment of a fine if the offender had no real prospect of being able to pay the fine (para. 17).

(4) If an offender argued that his lack of means meant that he could not pay a fine, the burden was on him to adduce evidence to that effect. That evidence should be in the form of a witness statement with a statement of truth served on the prosecution in advance of the hearing and, if it was disputed, he and any other witnesses relied on could be called to give oral evidence and could be cross-examined by the prosecution. If he failed to adduce any evidence of lack of means, the court would be entitled to infer that he could pay an appropriate fine and sentence accordingly (para. 16).

(5) If an offender satisfied the court that he could not pay any fine, it was not obliged to make a community order, but if the offence passed the custody threshold, it could pass a custodial sentence instead. If he adduced evidence that he had some limited means, his fine would be related to those means, and, if necessary, an order to pay by instalments could be made—though not one lasting for more than two years—and there would be an order for imprisonment in default, related to the size of the fine (para. 14; para. 17).

(6) When it was appropriate to impose a fine, the starting point would be twice the value of the goods, subject to a deduction of up to one-third for a plea of guilty (although a deduction of only 20% was appropriate in the present case due to the appellant's late guilty plea) and further deductions for personal circumstances, assistance to the police, *etc*. However, personal hardship and family responsibilities could not be given much weight because those tempted to offend would very often be in need of money and many would have family responsibilities (paras. 13–14; para. 17).

Cases cited:

(1) *Ferrary* v. *Att.-Gen.*, 1999–00 Gib LR 449, not followed.
(2) *Hanley* v. *Att.-Gen.*, 1997–98 Gib LR *N*–7, considered.

P.H. Canessa for the appellant;
R. Fischel, Q.C. for the Crown.

1 **KENNEDY, P.,** delivering the judgment of the court: This is an application for leave to appeal from a decision of Jack, J. who, on October 21st, 2014, dismissed the appellant's appeal from a decision of the Stipendiary Magistrate in relation to a sentence passed on December 23rd, 2013. In this jurisdiction, a second appeal against sentence is permissible, but only with the leave of this court and where the sentence is not one fixed by law (see the Court of Appeal Act 1969, s.9(1)(c)). Because this case involves issues of principle, at the start of the hearing yesterday we granted leave to appeal.

Facts

2 On December 2nd, 2013, acting on information received, the Royal Gibraltar Police went to the home of the appellant at Moorish Castle Estate and found 40,000 Ducal cigarettes stored in eight master cases. They were valued at £4,000. The appellant asserted, in Spanish, that the cigarettes were hers. In Gibraltar, it is an offence, contrary to ss. 12(2) and 14(2) of the Tobacco Act 1997, to be in possession of cigarettes in a commercial quantity when not the holder of a valid licence, and the appellant had no licence. She was charged with that offence, for which the

penalty fixed by statute is a maximum of six months' imprisonment or a fine of £10,000 or three times the value of the goods.

3 On December 23rd, 2013, when she appeared in the Magistrates' Court, she pleaded not guilty and her case was put back for trial.

4 On September 18th, 2014, when the case was listed before the Stipendiary Magistrate, she changed her plea to guilty and her counsel put forward this mitigation. At the material time, the appellant, then aged 26, was married to a Spanish man and they had two children. She was asked to look after the cigarettes for a friend of her husband in return for £40, or possibly €40. She was of good character, and did not know that what she was being asked to do was illegal. She has now separated from her husband and is in no position to pay any significant fine. It seems clear that the Stipendiary Magistrate did not accept the factual mitigation, which was not supported by any evidence, and, as to that, Jack, J. said (Case No. 2014–CRIAP–009, at para. 5):

> "It is not credible that an adult Gibraltarian was unaware that there are the strict laws against cigarette smuggling in this city. Likewise, the assertion that she was storing the cigarettes for a man whose name she did not know is improbable and is belied by her admission when arrested that the tobacco was hers. The magistrate, in my judgment, was entitled to sentence on the basis that the defendant was involved in tobacco smuggling as a principal."

5 As to the starting point for sentence, both the Stipendiary Magistrate and Jack, J. were aware of two earlier decisions of Schofield, C.J., the first being in *Hanley* v. *Att.-Gen.* (2). In that case, an unemployed builder of no apparent means was involved in the illegal exportation of 850,000 cigarettes valued at £27,625, for which he was to receive £200. The court imposed a fine of £20,000, payable immediately, with one month's imprisonment in default, and the court explained that sentence thus (1997–98 Gib LR *N*–7):

> "In measuring the level of a fine against the gravity of the offence, the court would not regard the value of the goods as decisive. Some regard must be had to the offender's means (*R.* v. *Messana* (1981), 3 Cr. App. R. (S.) 88, followed). However, the court had to bear in mind the large profits made by persons behind a smuggling operation and it would not be in the interests of justice to base the penalty for an offence solely on the means of the offender. Thus a tariff approach would be adopted, taking into account the accused's financial straits, his co-operation with the police and the low level of personal gain involved. The court would also exercise its power to tailor the term of imprisonment on default to the accused's circumstances, since his means were in doubt."

6 In *Ferrary* v. *Att.-Gen.* (1), the Supreme Court was hearing an appeal from the Magistrates' Court by an unemployed 20-year-old who had pleaded guilty to transporting 50,000 cigarettes worth £1,315. He was fined £3,000, his vehicle (worth £500) was forfeited to the Crown and a period of 80 days' imprisonment was imposed in default of payment of the fine. He did not pay the fine, was arrested, and then appealed, asserting the fine was excessive because the value of the cigarettes (£1,315) should have been the starting point. The appeal was allowed and the fine was reduced to £900, allowing for half of the value of the forfeited vehicle and the time spent in custody.

7 Before Jack, J., counsel for the appellant put forward two submissions:

(1) that, because of the appellant's impecuniosity, no financial penalty should have been imposed. A community order with a requirement of unpaid work should have been made; and

(2) that the fine was too high, the existing link (suggested by Schofield, C.J.) to the value of the goods should have been maintained and this offender should have had further credit for her plea of guilty.

8 Jack, J. dealt with those submissions as follows:

(1) As to the first, he held that the Stipendiary Magistrate was entitled to infer that, as a party to tobacco smuggling, she had access to money. He pointed out that the court had taken a similar view in *Hanley* and he had no evidence to indicate that her children would not be properly cared for if she had to serve the short sentence of 45 days' imprisonment which the Stipendiary Magistrate had ordered if the fine of £5,000 originally imposed was not paid.

(2) As to the second submission, Jack, J. observed that sentencing practice needs to be kept up to date. He referred to the November 2013 recommendations of the European Commission on fighting tobacco smuggling between Gibraltar and Spain, and to the increased awareness of the damage to health caused by tobacco. *Ferrary* (1) was decided in April 2000, now nearly 15 years ago. Jack, J. also observed that Schofield, C.J. did not consider what effect a plea of guilty should have on the amount of the fine. That is not quite right, because it is clear that both of his cases related to pleas of guilty, and it is reasonable to infer that, as discounts for pleas of guilty were normal 15–20 years ago, had there not been pleas of guilty the sentences would have been more severe, possibly starting at 1½ times the value of the goods. Jack, J. said that, having regard to the current practice of articulating what allowance has been made for a plea of guilty, and in particular for an early plea, the starting point on conviction, following a plea of not guilty, should now be double the value of the goods with a reduction of up to one-third being made to allow for a plea of guilty. Thus, in the present case, the starting point would have been £8,000

but the reduction for the plea of guilty should not have been as much as one-third because it was a late plea. He therefore saw no reason to allow the appeal. He purported to grant limited leave to appeal, but, in fact, not being a member of this court, he had no power to do that.

9 Before us, Mr. Canessa invites us to look again at the circumstances of the offence. He submits that the appellant's first response has been misunderstood—she only intended to admit to being the custodian of the cigarettes.

10 He submits that the Stipendiary Magistrate did not reject her account, he simply imposed a tariff sentence and made no allowance for a guilty plea. As we have explained, the tariff sentence suggested by Schofield, C.J. was related to a guilty plea.

11 Furthermore, the precise unrecorded reasoning of the Stipendiary Magistrate is of little weight if, for the reasons given by Jack, J., the sentence was correct.

12 A sentencing judge is under no obligation to accept a version of the facts which he or she regards as inherently unlikely, especially where no evidence has been called to support that version. That was the situation in this case. The appellant is of good character, and she may well now be separated from her husband, leaving her with young children to support and financial problems, but, on the known facts, the sentencing judge was entitled to infer that she was a full participant in tobacco smuggling who knew perfectly well that what she was doing was illegal. Even on her version, why else was she paid, or to be paid, for what she did? It follows that her plea of guilty was not only late, but also incomplete.

13 As to the starting point for sentencing in an offence of this kind, we agree with Jack, J., and Mr. Canessa did not seek to persuade us otherwise, that, for the reasons which were given by Jack, J., in a contested case, the starting point should now be normally be twice the value of the goods, then a deduction can be made with an allowance of up to one-third for a plea of guilty. In the present case, the plea of guilty was late and incomplete so an allowance of, say, 20% would have been appropriate.

14 That leaves only the personal circumstances of the appellant and her ability to pay. In cases of this kind, personal hardship and family responsibilities cannot be given much weight. Those tempted to offend are very often in need of money and many may have family responsibilities, but it is important that courts should not impose a financial penalty which, for the individual in the dock, is unrealistic. If he or she cannot pay, that does not mean that there must be a community order; it may be appropriate to impose at once a custodial sentence, possibly the sentence

which would otherwise have been ordered to be served if the fine were not paid.

15 When the fine of £5,000 was imposed on September 18th, 2014, this appellant was given until December 31st to pay, with 45 days' imprisonment in default. As Jack, J. pointed out, there is no evidence that her children will not be adequately cared for if she has to serve that sentence.

The problem

16 The real problem in this case (and others like it) is that neither before the Stipendiary Magistrate nor in the Supreme Court was there any reliable evidence as to the offender's means, or as to how her children might be cared for in her absence. It was easy to infer that she was a full participant in a smuggling operation, and that money must have been paid by someone to obtain the tobacco which was found with her. But did she still have access to funds which could be used to pay a fine—even by instalments? As to that, the court had no evidence, only the submission of defence counsel, and, with no disrespect to defence counsel, that was not enough. Mr. Canessa accepted that, if he were to argue that his client could not pay a fine, or a fine of more than a certain amount, the burden would be on him to provide the necessary evidence. In the end, it was agreed by counsel before us that the evidence would probably have to be in the form of a witness statement from the defendant, with a statement of truth, served on the Crown well before the hearing date so that, if the contents of the statement were not accepted, arrangements could be made for the defendant and any other witness relied upon to give evidence on oath and be cross-examined. A pre-sentence report might be of some assistance, but it has to be recognized that a probation officer preparing such a report would normally be unable to do more than reiterate what the defendant said, hence the need for evidence which could be subjected to cross-examination.

The approach of the sentencing court

17 It seems to us that, in a case like this, the proper approach of a sentencing court should be to consider:

(a) Whether, on the facts, the offending crosses the custody threshold. If not, it is particularly important not to pass a sentence of imprisonment in default for non-payment of a fine if the offender has no real prospect of being able to pay the fine.

(b) The court should consider, whether or not the custody threshold is passed, would it be appropriate to impose a fine? Obviously not if the offender clearly cannot pay. As a starting point, it would usually be appropriate to begin with twice the value of the goods and then discount

for a plea of guilty, personal circumstances, assistance to the police, and so forth.

(c) If the evidence shows that the offender only has limited means, the fine must be related to her means (which, in some cases, can be inferred). If necessary, an order can be made to pay by instalments, but the order should not extend for more than, say, two years, and there must be an order for imprisonment in default, related to the size of the fine.

(d) Henceforward, if the court is not provided by the defence with acceptable evidence (as opposed to submissions) of impecuniosity, it can properly infer that the offender can pay an appropriate fine, and sentence accordingly.

Conclusion

18 Because this judgment represents, to some extent, a change in sentencing policy, we propose to give the appellant an opportunity to adduce evidence as to her means by quashing the sentence imposed and remitting the case to the Supreme Court (possibly but not necessarily to Jack, J.) for that court to hear such evidence as may be tendered in relation to the appellant's means and any other relevant matters before re-sentencing. To that extent, this appeal is allowed.

Appeal allowed.