1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE
3
4 SCA #: 14/2018 (Case #00678/2016) (SWH) PWITS (Cocaine)
5 SCA #: 15/2018 (Case #00679/2016) (OLW) PWITS (Cocaine)
6 SCA #: 16/2018 (Case #00680/2016 (SWH + OLW) PWITS
7 (Cocaine) + Possession of an item used in the preparation or
8 consumption of a controlled drug
9
10
11 OSCAR LEE WATLER
12 STEPHEN WAYNE HURLSTON
13
14 v.
15
16 REGINA
17
18
19

20 **Appearances:** Mr. Nicholas Dixey of Nelson & Co. for
21 Oscar Lee Watler
22
23 Mr. Clyde Allen for Stephen Hurlston
24
25 Mr. Greg Walcolm of the ODPP for the
26 Respondent/Crown
27

28 **Before:** Justice Roger Chapple (Actg.)

29 **Heard:** 10th, 18th & 24th June 2020
30
31

32 **HEADNOTE**

33 ***Criminal Law – Appeals (against Sentence) from the Summary Court to the***
34 ***Grand Court – Possession of Cocaine with intent to supply – Points argued:***
35 *Sentence does not reflect mitigation relating to medical condition; Sentence*
36 *manifestly excessive in all the circumstances due to Incorrect starting point and,*
37 *having found the offending to be opportunistic, discount insufficient.*

38

39 **JUDGMENT**

40 **ON APPEALS AGAINST SENTENCE**
41
42
43
44

1. On 30 May 2018, these appellants were convicted following trial in the Summary Court of a number of offences contrary to the ***Misuse of Drugs Law***, the most serious of which was a joint charge of possession with intent to supply 1.6 lbs of cocaine. Having heard full mitigation and considered Social Inquiry Reports (SIRs) available in respect of both appellants, Magistrate Kirsty-Ann Gunn, imposed total sentences of 12 ½ years' imprisonment on each of the appellants.

2. The appellants appealed to this court against both convictions and sentence. In June 2019, having heard full argument over a number of days, this Court dismissed the appeals against conviction, delivering a full and reasoned judgement, in conjunction with which, this judgment should be read.

3. In an affidavit in support of his appeal against sentence, Mr Watler gave some details of his medical history, particularly the problems he had experienced following a kidney transplant in 2008. I gave leave for that affidavit to be admitted. The thrust of the submissions then made was that the regime at Her Majesty's Prison Service (HMPS) Northward, Grand Cayman, Cayman Islands, where he is serving his sentence, is such that his health is at risk. According to that affidavit:

> *"... the medication, the food in the prison and the environment of the prison are damaging to my kidney function.... Dr Nelson sent a letter to the prison instructing the prison to be careful to keep me in an infection free environment. However, that is impossible as the prison is crowded and I am in a cell with four other inmates."*

He concludes his affidavit in this way:

> *"I am afraid that this prison environment may cause me to lose my only transplanted kidney."*

1 4. Those matters having been raised, but being largely unsupported by any
2 independent evidence, it seemed to me – and to those then representing both
3 appellants – that there was no alternative but to adjourn the appeals against
4 sentence in respect of both appellants in order for further information to be
5 obtained. In my earlier judgement I dealt with that matter in this way:

6

7 *"Clearly these are matters which the interests of justice and humanity demand*
8 *should be investigated further.....As matters now stand there is altogether*
9 *insufficient evidence or information for me to take his appeal against sentence*
10 *further at this stage. First and foremost, I have no evidence from those charged*
11 *with his safe custody and well-being at HMP Northward. A court is, as a*
12 *matter of general principle, entitled to assume that the prison service is able to*
13 *provide the necessary care for those sentenced by the courts, including those*
14 *who have special needs, whether by reason of medical conditions or otherwise*
15 *– unless it is informed to the contrary. The first step is for the Governor of*
16 *HMP Northward to be sent copies of Mr Watler's affidavit and exhibits and*
17 *asked for his comments. Depending upon his response, it may be necessary for*
18 *further evidence and opinion to be obtained. Even if this court had the*
19 *resources to conduct these enquiries, it would, I am sure, be wrong as a matter*
20 *of principle for the court to become involved in these mechanics. It must be a*
21 *matter for the respondent to take this further in order to assist the court. It*
22 *was agreed by all parties – since it made obvious sense - that the appeals*
23 *against sentence of the appellants should be heard together."*
24

25 Accordingly, the appeal of Mr Hurlston was also adjourned.

26

27 5. It is only now, a year later, that sufficient information is available for these appeals
28 against sentence to be heard and this case concluded. This is wholly unsatisfactory,
29 from the point of view of these appellants, this Court and the interests of justice.
30 However, no useful purpose would be served now by dissecting the reasons for that
31 delay. I should add that neither Mr Dixey nor Mr Allen appeared in the court below
32 or when these appeals against conviction were heard. Both have been instructed
33 relatively recently. No criticism can be made of them. Rather, this court is indebted
34 to them for their industry. They have done all they reasonably can to inject a sense
35 of urgency into this case, which, before their involvement, was sadly lacking.

1 6. Whilst there is no record available of what was said in the court below in the
2 course of mitigation, it seems clear that no great reliance was placed upon Mr
3 Watler's medical condition as a mitigating factor. It appears from the original trial
4 bundle that only the first of Dr Nelson Iheonunekwu's letters, dated 4/6/18, was
5 before the Summary Court. It reads as follows:

6
7 "*This letter serves to confirm that Mr Watler is a patient of the Health Services*
8 *Authority and under my care. Mr Watler received a disease donor kidney*
9 *transplant on 14th December 2008 at St Luke's Hospital Houston Texas. He*
10 *also has a history of sleep apnoea for which he is on a CPAP and also has*
11 *Alport syndrome. He is on a complex regime of medication to prevent rejection*
12 *of the kidney. Failure to take his medications as prescribed will most certainly*
13 *result in loss of his transplanted kidney. Any consideration and assistance that*
14 *can be offered to Mr Watler would be greatly appreciated….*"

15
16 7. Magistrate Gunn summarised that aspect of the case in this way:

17 "*Although Mr Furniss [who then appeared for Mr Watler] has outlined Mr*
18 *Watler's health difficulties, it has not been suggested that incarceration would*
19 *be detrimental to his health and therefore provides only minimal mitigation.*"
20
21
22 8. The Learned Magistrate helpfully explained in detail in the course of her
23 sentencing remarks how she had arrived at her final sentence. Relying principally
24 upon the ***Statement on Tariffs and Guidelines for Sentencing for Certain***
25 ***Offences, dated 16th January 2002*** ("the ***Chief Justice's Guidelines***") and a
26 number of decisions of the Cayman Islands Court of Appeal (CICA) and the Grand
27 Court, in which sentences for supply and importation of hard drugs were examined,
28 she took a starting point to 15 years' imprisonment for both appellants. She then
29 reduced the sentences by 2 years to reflect her conclusion that the appellants "*are*
30 *not professional criminals who set out to traffic in drugs.*" She continued:

"The offending was born from an opportunistic find which they sought to exploit for their benefit. This is a mitigating factor of the offence that warrants an adjustment of 2 years to reflect the nature of their offending." She went on to deduct a further year from the sentences to take account of the fact that the appellants, until their conviction for the instant offences, were of good character, in the sense that they had no previous convictions. Finally, she reduced the sentences by a further 6 months in "for all other mitigating features."

9. In passing sentence, the Learned Magistrate said,

> *"Consequently, the final sentence for each defendant for possession of 1.61 lbs of cocaine with intent to supply to another is 12 ½ years' imprisonment."*

10. It is agreed on all sides that the Magistrate fell into error when computing the final sentence: having applied a total deduction of 3½ years from the specified starting point of 15 years should have resulted in a total sentence of 11 ½ years' imprisonment. At the very least, these appeals against sentence will succeed to the extent of reducing the total sentences to 11 ½ years' imprisonment. Concurrent sentences were passed in respect of all other offences of which the appellants were convicted.

THE GROUNDS OF APPEAL AGAINST SENTENCE

Mr Watler

11. As appears in Mr Dixey's written submissions, Mr Watler appeals against the sentence passed upon him upon the single ground that "*no weight (or insufficient weight) has been reflected in the sentence to account for the personal mitigation arising from [his] medical conditions, which, taken together, mean that his term of incarceration has weighed, and will continue to weigh, more heavily upon him than his fellow prisoners.*"

1 12. Thanks to Mr Dixey, a great deal more information is now available as to Mr
2 Watler's medical condition and the impact this has had and will continue to have
3 upon him while he is serving a sentence of imprisonment. Unsurprisingly, in the
4 circumstances in which the world now finds itself, he is particularly anxious about
5 his vulnerability to Coronavirus Disease 2019 ("COVID-19"). As Dr Iheonunekwu
6 explains in his letter dated 20th May 2020:
7
8 "*It is pertinent to state that in this era of COVID-19 pandemic, because he is*
9 *on powerful immune suppressants, he is at increased risk of infection,*
10 *especially viral infections. He is also at high risk of developing severe*
11 *complications from such infections.*"
12
13 13. Mr Dixey concluded both his oral and written submissions in this way:
14 "*It is respectfully submitted that this appeal should be allowed to the extent*
15 *that the sentence of 11 ½ years' imprisonment be set aside and a sentence of*
16 *10 years imprisonment be substituted.... with time already served to be taken*
17 *into consideration.*"

18
19 ***Mr Hurlston***
20
21 14. At case management conferences prior to the substantive hearing of this appeal
22 against sentence, Mr Allen indicated that he was making further enquiries into Mr
23 Hurlston's medical condition, arising from a reference in the SIR to a heart
24 murmur. The tentative submission made in Mr Allen's written submissions was
25 that "*the sentence failed to make any allowance for Mr Hurlston's medical*
26 *situation and his long-term heart problems and the consequent effect upon his*
27 *health of incarceration,*" although Mr Allen did make it clear that "*this is still*
28 *subject to review and conclusion.*" In the event, this potential argument was not

pursued, Mr Allen being able to report, following a medical consultation and ECG, that any medical problem "may have corrected itself."[1]

15. Mr Hurlston's sentence was, it is argued, manifestly excessive in all the circumstances of the case. The Learned Magistrate was wrong to take a starting point of 15 years' imprisonment, and the discount of two years to take account of her finding that his offending was opportunistic was "*wholly insufficient*."

16. Mr. Allen pointed out that it followed from the Magistrate's finding(s) that (i) the appellants took no part in the importation of this admittedly substantial quantity of cocaine (ii) they were not part of a larger enterprise, (iii) they had not "actively dealt a single wrap of cocaine prior to PC Leslie's intervention" and (iv) had not gained any financial advantage from their offending, (iv) the offences were committed on a single occasion and did not reflect a sustained period of intended drug dealing and/or any association with gang crime," and he continued to submit that the Magistrate's stated reductions to reflect (i) good character and (ii) "all other mitigating features", were not sufficient. Mr Allen prayed in aid particularly the following features:

a. Mr Hurlston was a long-serving immigration officer with an impeccable work record – he had now lost that employment. A character reference described him as "faithful, never late, got his job done, team player, extremely cooperative and got on well with all colleagues";

b. The impact of a custodial sentence both upon him and his family was substantial;

c. The contents of the SIR.

[1] Since this Judgment was prepared in draft, an email received from Mr Allen on the 7th July 2020 has confirmed medical opinion that Mr Hurlston now has no significant heart abnormality.

1 **THE POSITION OF THE RESPONDENT**

2
3 17. Mr Walcolm on behalf of the respondent urged that, leaving aside Mr Watler's
4 medical condition, the sentences of 11 ½ years' imprisonment were entirely apt. A
5 starting point of 15 years was in accordance with the ***Chief Justice's Guidelines***
6 and in accordance with guidance given by the higher courts. Putting that medical
7 evidence back into account, Mr Walcolm, in his written submissions, says this:
8 "*I agree that the medical conditions would constitute evidence from which the*
9 *court may conclude that a term of imprisonment would weigh more heavily*
10 *upon Mr Watler than his fellow prisoners. I agree that, in the circumstances,*
11 *Mr Watler would be entitled to a greater reduction for personal mitigation*
12 *than that which was identified by the Magistrate. On that basis, I would agree*
13 *that the sentence imposed by the Learned Magistrate was manifestly*
14 *excessive.*"
15
16 **LEAVE TO ADDUCE NEW EVIDENCE**

17
18 18. In the course of this appeal, the Court heard oral evidence, received via live video-
19 link, from Mr Steven Barrett, the Director of Prisons for HMPS, and from Dr
20 Iheonunekwu. It was agreed by all parties and by the Court that, given the
21 substantial delay that had occurred, the need for this appeal to be determined
22 sooner rather than later and the general restrictions imposed in response to the
23 COVID-19 pandemic, a pragmatic approach to the reception of new evidence was
24 appropriate. It was further agreed that the most effective way to place the entirety
25 of Mr Barrett's and Dr Iheonunekwu's evidence before the Court was for them to
26 give oral evidence to supplement their written evidence. An application for leave to
27 adduce affidavit evidence relating to Mr Watler's medical condition is to be found
28 in his original notice of appeal. In the course of the earlier appeal against

convictions, I gave leave as sought. As already mentioned, when adjourning the appeals against sentence, I directed that further evidence be obtained. Whilst perhaps not formally stated, it follows that leave is granted for all the further evidence that has been obtained to be adduced, written and oral. The fact that leave has been granted does not of course mean that all those matters which have been placed before me are necessarily relevant or can properly be taken into account – a question to which I will return to in due course.

THE NEW EVIDENCE AT THE HEARING

19. The new evidence was for the most part concerned with Mr Watler's medical condition. Mr Barrett was asked a number of questions about the general conditions at HMPS Northward. These matters are relevant only to the question of how the serving of the sentence has and will impact upon Mr Watler given his medical condition. Entirely properly, neither Mr Dixey nor Mr Allen sought to argue a "general discount" to reflect the conditions at HMPS Northward. I will summarise the oral evidence placed before me in some detail, since that evidence may be of assistance to the Advisory Committee on the Prerogative of Mercy ("ACPM"), who, I was told, will give further consideration to an application submitted on Mr Watler's behalf, once this appeal has been determined.

Mr Barrett

20. As at the date on which he gave evidence before me (24th June) the prison population at HMPS Northward was 166 – a reduction of 51 inmates since this time last year. This reduction, largely in response to the COVID-19 pandemic, had been achieved in partnership with the Court and other agencies, in a number of ways, including the exercise of the Director's executive power to release under

1 s.31B of the ***Prisons Law (2020 Revision)***, the exercise of the Prerogative of
2 Mercy, expedited decisions from the Conditional Release Board, repatriation and
3 renewed bail applications. However, the prison was however still over capacity. A
4 report in 2015 certified the capacity at 131. Most cells are really only suitable for
5 single occupancy, but most accommodate two prisoners. Mr Barrett candidly
6 accepted that HMPS Northward is not suitable for modern penal work and that
7 overall, conditions were poor. Whilst he had received few complaints about the
8 healthcare facilities, they were not acceptable. Mr Barrett and his staff had done
9 all they could to improve conditions, within the constraints of the present prison
10 estate.
11
12 21. C wing had been converted into an isolation area – any new inmate arriving at the
13 prison must be isolated for 14 days and thereafter only introduced to the main
14 prison when he has provided a negative COVID-19 test result.
15

16 22. Mr Barrett confirmed that he had assisted Mr Watler with an application to the
17 ACPM (the written application and a supporting statement from Mr Watler were
18 provided to the Court). The application was for respite of sentence, proposing that
19 Mr Watler be temporarily released under 24-hour home detention, because of his
20 susceptibility and vulnerability to COVID-19. Mr Barrett confirmed that he did
21 have a particular concern about Mr Watler, endorsing the note he had included in
22 the application that, "*Mr Watler is considered to be in the high-risk group of*
23 *prisoners. That, of course would become a more urgent matter should there be an*
24 *outbreak of COVID-19 in the prison.*" The ACPM refused Mr Watler's application
25 following a review conducted on 19th May – the day upon which two Northward
26 prisoners tested positive for COVID-19.
27

1 23. Mr Barrett explained that in any prison, there is an increased risk of viral
2 infections. The data available from other jurisdictions demonstrated that the 'R'
3 number is very high in prisons. He explained that he had introduced a whole raft of
4 measures to try to create a protective bubble around HMPS Northward, adding that
5 "we think they have been very effective." Immediate steps were taken to isolate the
6 two prisoners who had tested positive and put the prison into lockdown. Those two
7 prisoners have now tested negative and were asymptomatic throughout. Since then,
8 there have been no positive test results.
9
10 24. The biggest risk to prisoners is the prison officers, who of course come and go
11 from prison. Where possible, prison officers are working from home – for example,
12 education is now delivered remotely. "*We have been very careful to reduce*
13 *contact between staff and prisoners; we've encouraged common-sense and the*
14 *prisoners have engaged with us very well. HMP Northward continues to screen*
15 *inmates and staff in co-operation with the Public Health Department. Family visits*
16 *take place virtually by FaceTime, WhatsApp and similar applications. Although a*
17 *2-metre rule is impossible for us, we are as careful as we can be*." Separation is
18 important, but Mr Barrett indicated that he had to keep in mind mental health and
19 security considerations. There are sufficient supplies of face-masks for everyone to
20 have several. Mr. Barrett added: "*We have spent a fortune on PPE [Personal*
21 *Protective Equipment]. We were quickly given the same status as healthcare*."

22
23 25. Mr Watler is now accommodated on F wing – the "local top end" as Mr Barrett put
24 it. He had earned his place on F wing by reason of his good behaviour. He has
25 never featured in any misconduct report. He is now accommodated in a cell on his
26 own – that arrangement will continue for so long as the risk of infection is high.
27 He is not locked into his cell, and can come and go within the prison as he pleases.

26. Mr Hurlston shares a cell on B wing, the largest of the wings and the one that needs most attention and intervention. Mr Barrett explained that inmates on B wing are encouraged to engage in as much out-of-cell activity as possible. Mr Hurlston had earlier achieved a place on F wing by reason of his good behaviour, but lost it as a result of a mobile phone being found in his cell.

Dr Iheonunekwu

27. Dr Iheonunekwu is Mr Watler's treating physician and had been for some time. He confirmed that Mr Watler is obliged to take immunosuppressant medication: "*if he stopped, there would be a risk that his kidney would be rejected. He has to take those drugs for life.*" He also suffers from sleep apnoea, which means that he can stop breathing in his sleep. He has a CPAP machine in his cell to assist in that regard. COVID-19 is particularly dangerous for those (i) with respiratory disease, (ii) taking immunosuppressant medication, and (iii) who live in crowded and/or unsanitary conditions. However, sleep apnoea is not a respiratory disease – it affects the upper airway and not the lower airways so that condition does not increase susceptibility to COVID-19. Mr Watler is of course at risk of exposure to the virus, whether in or out of prison.

28. In answer to questions from Mr Allen, Dr Iheonunekwu said that people with a congenital heart problem need to take care, but not especially in respect of COVID-19. If it is an isolated murmur, that would not increase risk. Dr Iheonunekwu confirmed that, as he understood it, there are presently 195 confirmed COVID-19 cases in the Cayman Islands and there has been one death.

29. The frequency of Mr Watler's follow-up visits to Dr Iheonunekwu is the same now as before he was remanded to Northward. His condition remains stable, and is the same now as prior to his incarceration. Dr Iheonunekwu added this: "*I think the impact of his prison sentence upon him is more psychological than physical. He has a complex regime of medication.*"

DOCUMENTARY EVIDENCE

30. I have been asked to consider a number of documents, primarily:

   i. a series of reports, letters and emails from Dr Iheonunekwu;

   ii. a report from her Majesty's Chief Inspector of Prisons; and

   iii. the application submitted to ACPM on Mr Watler's behalf, together with Mr Watler's supporting letter to His Excellency the Governor dated 9th April and ACPM's decision letter dated 22nd May.

DISCUSSION AND ANALYSIS

31. The starting point in any case involving the supply or possession with intent to supply hard drugs is, there is no dispute, the ***Chief Justice's Guidelines***, published in 2002. The Sentencing Council for England and Wales has of course issued guidelines for drug offences. Such guidelines are always of interest and assistance in this jurisdiction but as the CICA has made clear, the applicable guideline for sentencing judges in this jurisdiction is the ***Chief Justice's Guidelines***. The correct approach is that set out by the CICA in the case of ***R v Millwood***[2] at paragraph 9:

[2] (Criminal Appeal 30 of 2014)

"... we start by reaffirming the court's awareness of the difference between levels of sentencing in drug offences in this jurisdiction and in England and Wales. It is indeed for this reason that it is common ground on the appeal that the applicable guidelines are the Chief Justice's guidelines and not the UK guideline. However, it is in our view important to emphasise that the Chief Justice's guidelines are, as they indicate, simply guidelines. It is, therefore, necessary for the judge in a case like this to have regard to the whole of the case before her, including the amount of drugs involved, and all the other circumstances of the case. It is essentially a discretionary exercise in which case several factors will inevitably come into play"

32. The relevant part of the ***Chief Justice's Guidelines*** provides:

"At the other end of the scale of gravity, that is to say, trafficking in hard drugs in any quantity as defined in the Misuse of Drugs Law, the maximum penalty prescribed for offences involving 2 ounces or more is 20 years for the first offence and 30 years for a second or subsequent offence with an unlimited fine in each case. That of course is the maximum the sentence for the worse possible offence by the worse possible offender. The tariff for a first such offence, involving less than 2 ounces of cocaine or less than 4 grams of cocaine base without mitigating circumstances, will be 8 years. For offences involving 2 ounces or more or 4 grams or more of cocaine base without mitigating circumstances the tariff will be 10 to 12 years. 15 years or more will be imposed where such an offence involves substantial importation or dealing in anyway either in powder or crack cocaine. We would define 'substantial importation or dealing' as any transaction involving several ounces or kilo quantities."

33. Given the quantity of cocaine involved here – 1.6 lbs (that is to say 25 oz.) the Magistrate was, at first blush at least, right to start with a tariff of 15 years. She then set about weighing the aggravating and mitigating features in the case in the exercise of her discretion as to the appropriate sentences. The first step in such an exercise is, as is made clear in the ***Cayman Islands Sentencing Guidelines (October 2015)*** for the court to "*consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.*" The harm that hard drugs cause generally, and that cocaine in particular causes in this jurisdiction, needs no emphasis or explanation here.

34. The ***October 2015 Guidelines*** set out four categories of culpability – not, in the view of this Court ideally suited to drug offences but given that the obvious plan was to supply at street level, category two –"*is reckless as to whether harm is caused, that is, where the offender appreciates at least some harm would be caused but proceeds giving no thought to the consequences even though the extent of the risk would be obvious to most people*" – would seem to be the most apt.

35. The appellants place substantial reliance upon the Magistrates' finding of fact that one or both appellants found the drugs. At paragraph 3 of her sentence ruling she says this:

> "*As part of my findings of fact I accept that one or both of the defendants found the drugs, as opposed to them having purchased the drugs for onward sale. Consequently, this was very much an opportunistic crime, with the defendants hoping to benefit financially from their find.*"

This, Mr Allen argues, is of "paramount importance," since it follows that their culpability was low.

36. Mr Allen continued that they were not typical drug dealers, purchasing in bulk for onward supply. They did not set out to deal in drugs. Rather, having found the drugs, the crime as it were came to them. This is a point well-made and is clearly a valuable mitigating feature for these appellants. However, its strength is substantially diminished by their decisions and actions after the original innocent acquisition. Rather than report their find to the appropriate authority, they resolved to turn the situation to their advantage. Thus, whilst things started with an opportunistic find, the appellants had, with some deliberation and planning, embarked upon a criminal enterprise to supply 1.61 lbs of cocaine onto the streets.

GRAND COURT - CAYMAN ISLANDS

1 37. It is instructive to look at the England and Wales guidelines to assist in assessing
2 culpability, since that guideline is specifically tailored to drug offences. Three
3 categories of culpability are suggested: leading role, significant role and lesser role.
4 Within that categorisation, the role of both appellants was clearly "significant" in
5 that they were motivated by financial advantage. It could also be said that they had
6 "expectation of substantial financial gain", a feature indicative of a leading role.
7
8 38. True it is, as Mr Allen highlights, they had not "actively dealt a single wrap of
9 cocaine prior to PC Leslie's intervention" and "had not gained any financial
10 advantage from their offending." However, this, in my judgement does not assist
11 these appellants. If such a feature were to be reflected in such cases, the result
12 would be that the courts, as a matter of course, would treat the offence of
13 possession with intent to supply drugs less seriously than the offence of supply.
14 That is not the law or the policy or practice of these courts. The offences are
15 created by the same section of the ***Misuse of Drugs Law***, they carry the same
16 maximum penalty. Neither the ***Chief Justice's Guidelines*** nor the England and
17 Wales guidelines suggest that possession with intent to supply is to be treated less
18 seriously than a completed supply.
19
20 39. Mr Allen submits that "*the offences were committed on a single occasion and did*
21 *not reflect a sustained period of intended drug dealing*" and that the appellants'
22 possession with intent to supply crystallised, for the purposes of the charges, at the
23 moment immediately prior to Police Constable Leslie's intervention.
24
25
26
27
28

40. That said, it cannot as a matter of common sense and reasonable inference be the position that they had only moments before found the drug. It is highly unlikely that, at the time of the finding, they were coincidently in possession of digital scales, a razor blade and a supply of small snap seal plastic bags (or if that were the position, it would not, for obvious reasons, reflect well on the appellants). It can only be the case that they had found the drug sometime earlier, had deliberated, and acquired the paraphernalia necessary to start preparing it for sale in street-sized deals. I accept that it may be the case that all this took place within a relatively short time-frame.

41. It is, on the face of it, difficult to fathom why these two appellants – long-serving and respected immigration officers of previous good character – decided to become involved in the supply of a large quantity of hard drugs. Presumably they found the prospect of rich rewards too much to resist.

42. They have lost a very great deal as a result of their actions – their freedom, their good character and their employment, together with the wherewithal to support their families. Previous good character is always a mitigating feature; how powerful it is depends on the circumstances of individual cases. In reducing the sentences by one year to reflect good character, the Magistrate relied on the authority of ***Seaford Laborde v R***[3]. Neither appellant seeks to argue with that authority, but asks this court to take a step back and look at the overall sentence against the actions and background of these appellants.

[3] CICA (Crim) 19 of 2013

1 43. That of course is the function of this Court – to step back and ask whether the sentences passed were manifestly excessive. It was helpful for the Magistrate to explain in detail how she arrived at her sentence and her evaluation of each of the mitigating features, although those features are in this case interlinked. One should not look at each feature in a vacuum. For example, good character may, and I think does in this case, bear upon the assessment of their culpability. In ***Laborde***, previous good character was the only mitigating feature.

44. The appellants' previous good character, their lack of any criminal experience, may go some way to explaining their actions. I suspect it may be that each was encouraged by the words or actions of the other and I am prepared to accept that the enormity and consequences of their actions had not fully dawned upon them by the time of their arrest.

45. Looking at all the circumstances I have discussed in the round, the appropriate reduction from the 15-year starting point, for both appellants, is, in my judgment, one of five (5) years.

MR WATLER'S MEDICAL CONDITION

46. There is no dispute about Mr Watler's medical condition. It is as explained by Dr Iheonunekwu in his correspondence, reports and oral evidence. It is common ground that "*since his admission to HMP Northward in June 2018 he has attended a number of appointments with the medical professionals including:*

a. 32 nurses visits

b. 14 General practice visits

c. 6 Nephrology (Renal) visits

1
2 *d. 4 surgical clinic visits*

3
4 *e. 2 hospital admissions*

5
6 *f. 4 respiratory therapist visits*

7
8 *g. 3 dietician visits*"

9
10 47. The majority of these visits would have been necessary, whether Mr Watler was
11 serving a sentence of imprisonment or at liberty in the community. Overall his
12 condition has not significantly changed since his incarceration and he remains
13 stable. That said, his concerns about his increased vulnerability to infection whilst
14 in the prison, as expressed in his affidavit, are readily understandable. Those
15 concerns have increased considerably as a result of the COVID-19 pandemic. In
16 his letter to His Excellency the Governor (in which he seeks a pardon, rather than
17 the respite of sentence requested in the application to ACPM submitted on his
18 behalf), Mr Watler explains:

19 "*To make matters even worst (sic), Coronavirus is now the biggest treat (sic)*
20 *to my healthy (sic). I am afraid that if this virus enters the prison under*
21 *whatever circumstances, I might not survive. As there is no cure for COVID-*
22 *19, the cure depends solely on our antibodies to defend and kill the virus once*
23 *it enters our bodies. Unfortunately, due to my health condition, this would not*
24 *be the case for me because my defense system is suppressed. I have already*
25 *fallen sick during my time here at Northward prison. It was diagnose (sic) as a*
26 *virus, possible from food (coil virus). I was treated for this and I am better*
27 *now.*"

28

1 48. How should the Court approach this aspect of the case? Firstly, as I said when

2 adjourning the appeals against sentence:

3
4 *"a Court is, as a matter of general principle, entitled to assume that the prison*
5 *service is able to provide the necessary care for those sentenced by the courts,*
6 *including those who have special needs, whether by reason of medical*
7 *conditions or otherwise – unless it is informed to the contrary"*[4].
8
9
10 49. I have been referred to ***Freddy Bodden Cordero v R***[5] in which Henderson, J,

11 allowed an appeal against sentence, "*to reflect the particular circumstances of this*

12 *defendant and the probability that his term of incarceration has and will weigh*

13 *more heavily upon him than his fellow prisoners.*" The principle is well

14 established. It was helpfully summarised by Hughes, LJ in ***R v Hill***[6] in this way:

15

16 *"the sentencing court is fully entitled to take account of [a defendant's]medical*
17 *condition by way of mitigation as a reason for reducing the length of the*
18 *sentence, either on the ground of the greater impact which imprisonment will*
19 *have on the defendant, or as a matter of generally expressed mercy in the*
20 *individual circumstances of the case: see R v Bernard ... It will not necessarily*
21 *do so, and normally will not do so if, for example, the powers of release under*
22 *the Prerogative Powers will provide sufficient response if it is a case of*
23 *possible future deterioration, nor will it normally do so if the prisoner*
24 *represents a danger from which the public needs to be protected. But in an*
25 *appropriate case, it may be right to do so."*
26

27 50. The extent of the reduction in any given case must depend upon the extent of the

28 disability, the practical difficulties which that imposes and a defendant's attitude

29 towards those disabilities.

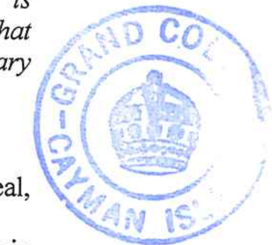
30
31 51. The Lord Chief Justice of England and Wales has given guidance to the Courts in

32 that jurisdiction as to how concerns about COVID-19 should be approached. In ***R***

33 ***v Christopher Manning (an Attorney General's Reference)***[7] he said this:

[4] See *R v Qazi and Hussain* [2010] EWCA Crim 2579
[5] SCA 11/2010
[6] [2013]EWCA Crim 82
[7] [2020] EWCA Crim 592

1 "*We would mention one other factor of relevance. We are hearing this*
2 *Reference at the end of April 2020, when the nation remains in lock-down as a*
3 *result of the Covid-19 emergency. The impact of that emergency on prisons is*
4 *well-known. We are being invited in this Reference to order a man to prison*
5 *nine weeks after he was given a suspended sentence, when he has complied*
6 *with his curfew and has engaged successfully with the Probation Service. The*
7 *current conditions in prisons represent a factor which can properly be taken*
8 *into account in deciding whether to suspend a sentence. In accordance with*
9 *established principles, any court will take into account the likely impact of a*
10 *custodial sentence upon an offender and, where appropriate, upon others as*
11 *well. Judges and magistrates can, therefore, and in our judgment should, keep*
12 *in mind that the impact of a custodial sentence is likely to be heavier during*
13 *the current emergency than it would otherwise be. Those in custody are, for*
14 *example, confined to their cells for much longer periods than would otherwise*
15 *be the case - currently, 23 hours a day. They are unable to receive visits. Both*
16 *they and their families are likely to be anxious about the risk of the*
17 *transmission of Covid-19. Applying ordinary principles, where a court is*
18 *satisfied that a custodial sentence must be imposed, the likely impact of that*
19 *sentence continues to be relevant to the further decisions as to its necessary*
20 *length and whether it can be suspended.*"
21
22



23 52. In ***R v Jones***[8], a very recent decision of the England and Wales Court of Appeal,
24 ***Manning***[9] was considered and applied. The court, noting that due to the pandemic
25 the defendant "*spends the entirety of each day, save for 30 minutes, locked in his*
26 *cell and he is unable to have any social visits*" and referring to ***Manning*** dealt with
27 the matter in this way:

28 "*we are of the view that in the present, exceptional circumstances it is*
29 *appropriate to take the conditions under which the applicant is presently held*
30 *in custody into account. We do not of course criticise the judge for the sentence*
31 *imposed because the judge was wholly unaware of the change in prison*
32 *conditions that would arise just days after the sentence was imposed.*"
33

34 The court reduced the sentence of 8 months' imprisonment to one of 6 months.

35
36 53. The correct approach to Mr Watler's medical condition and his anxieties that stem
37 from that – and his increased fears about COVID-19 - is to try to assess whether a
38 prison sentence has a greater impact for him than for an inmate without his
39 difficulties.

[8] [2020] EWCA Crim 764
[9] *Supra*

1 54. It is clear from the evidence of Mr Barrett that conditions at HMPS Northward are
2 very far from ideal, but that all reasonable steps have been taken to limit the risk of
3 infection for Mr Watler. He now has a cell to himself, although is not locked in.
4 Regular visits for medical care are a feature of Mr Watler's condition, whether in
5 prison or in the community, although such visits will involve greater upheaval
6 whilst he is at HMPS Northward. Whilst the situation can change rapidly, and there
7 is no room for complacency, lockdown conditions are easing, all tests at Northward
8 are negative and the infection rate in the Cayman Islands is very low.
9
10 55. In my judgement, a reduction of one year to take account of Mr Watler's condition
11 and anxieties (before during, and hopefully after COVID-19), on the basis that a
12 prison sentence will weigh more heavily with him, is appropriate. It follows that
13 Mr Watler's appeal against sentence is allowed to that limited extent.
14
15 56. At the conclusion of his written submissions (and repeated in oral submissions) Mr
16 Dixey submitted that this Court "*should recommend to ACPM that [Mr Watler] be*
17 *afforded a period of respite, perhaps with a 24-hour curfew monitored by an*
18 *electronic monitor, until the threat posed by COVID-19 has passed…… it would*
19 *seem that the ACPM would be assisted by this, given the decision to defer*
20 *reconsideration until after the sentence appeal*." I indicated in the course of oral
21 submissions that my instinct was that it would be wrong for this Court to seek in
22 any way to influence another body, particularly one exercising an executive
23 function – and having now given the matter further consideration, this remains my
24 firm view.
25
26 57. I have considered whether any further reduction of Mr Hurlston's sentence would
27 be appropriate, either by reason of the COVID-19 pandemic, or on the grounds of
28 disparity of sentence.

1 58. Mr Allen does not actively pursue a further reduction on either ground. Unlike the
2 defendant in ***Jones***[10], those accommodated in B wing are encouraged to spend as
3 much time out of their cells as possible. Arrangements have been made for social
4 visits by FaceTime, WhatsApp and similar. I readily appreciate that these are a
5 poor substitute for in-person visits, although this has become the norm for
6 everyone during lockdown.
7
8 59. I have considered the question of disparity. These appellants were convicted of
9 broadly the same offences and, all other things being equal, should be dealt with in
10 the same way. However, Mr Hurlston has been present throughout these
11 proceedings, in court during earlier hearings and latterly via video link, which he
12 has followed closely. I am satisfied that he understands the reason for a greater
13 reduction of Mr Watler's sentence and could have no justified sense of grievance.
14
15 60. Accordingly, these appeals against sentence are allowed, to the extent that:
16
17 a. For the original sentence passed upon Mr Watler for possession with intent to
18 supply 1.6 lbs of cocaine a sentence of nine (9) years is substituted for the
19 sentence originally imposed. The concurrent sentences passed by the
20 Magistrate for all other offences of which Mr Watler was convicted will not be
21 disturbed.
22
23 b. For the original sentence passed upon Mr Hurlston for possession with intent to
24 supply 1.6 lbs of cocaine a sentence of ten (10) years is substituted for the
25 sentence originally imposed. The concurrent sentences passed by the
26 Magistrate for all other offences of which Mr Hurlston was convicted will not
27 be disturbed.
28

[10] *Supra*

1 c. Credit is to be given to both appellants for time spent in custody from first
2 remand into custody until 22nd August 2018 (the date upon which sentence was
3 passed by the Summary Court). These periods are to count towards the serving
4 of their sentences.
5
6
7
8 **Dated this the 10th July 2020**

9
10
11
12 **Justice Roger Chapple**
13 **Acting Judge of the Grand Court**
14
15
16