

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL 30/2014

(Ind. 48/14)

C#02192/2014

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

Kenecia M Millwood

Appellant

BEFORE

**The Hon Sir George Newman, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal
The Hon (Cecil) Dennis Morrison, Justice of Appeal**

Appearances: Patrick Moran DPP/Amelia Fosuhene (Brady Law) for the appellant.

JUDGMENT

Revised from transcript of oral judgment given on 1 September 2016
and Approved

Released 7 November, 2016



The Honourable Dennis Morrison, JA

1. On the 25 September 2014, after a trial in the Grand Court before Mangatal J and a jury, the appellant was convicted of the offence of importation of cocaine, contrary to section 3(1)(a) of the Misuse of Drugs Law. On 10 October 2014, after a sentencing hearing at which the judge had the benefit of a full social inquiry report, the appellant was sentenced to 12 years' imprisonment. The court also ordered that the time spent in custody by the appellant pending trial should be taken into account. The appellant has appealed against the sentence imposed by the judge on the ground that it is manifestly excessive. Specifically, the

appellant complains that the starting point chosen by the judge in seeking to arrive at the appropriate sentence was too high in all the circumstances of the case.

2. The brief facts of the case were these: At about 9:30 in the evening of 21 April 2014, the appellant arrived at the Owen Roberts International Airport on a Cayman Airways flight from San Andres, Colombia. She had with her three hammocks which, upon investigation, were found to contain cocaine concealed within the wooden ends used to support the hammocks. The amount of cocaine involved was 6.28 pounds or 2.86 kilograms. That same evening the appellant was arrested and cautioned on suspicion of importation and possession of cocaine, and she was formally charged with importation of cocaine the following day.
3. The maximum sentence prescribed under Schedule 2 of the Law upon conviction before the Grand Court of an offence of importation of cocaine is 35 years' imprisonment and an unlimited fine. In determining the sentence to be imposed in this case, the judge had regard to the contents of the social inquiry report, the Statement and Tariffs and Guidelines for Sentencing for certain offences issued by the Honourable Chief Justice on 16 January 2002 ('the Chief Justice's guidelines') and the Definitive Guideline for Drug Offences issued by the UK Sentencing Council and revised in 2012 ('the UK guideline'). The judge also had before her psychiatric and psychological reports which were submitted to the court on the appellant's behalf. From the social enquiry report, it appeared that the appellant was 24 years old at the time of commission of the offence and that she had no previous convictions. However, the report detailed a long personal history of what the judge considered to be significant mitigation, which it is not necessary to rehearse for the purposes of this judgment.
4. As regards the Chief Justice's guidelines, the relevant guideline indicates that 15 years or more will be imposed where the offence involves "substantial importation or dealing in anyway either in powder or crack cocaine". 'Substantial importation or dealing' is defined as "any transaction involving several ounces or kilo quantities". The guidelines go on to indicate that the courts recognise that many of the people caught are couriers or intermediaries and that the worst offenders in the chain of distribution often remain concealed; therefore, there should be a substantial discount on sentence for those offenders who are prepared to cooperate with the police in their inquiries.

5. Lastly, we will mention the UK guideline, which indicates that, for a person playing a lesser role in the importation of one to five kilograms of cocaine, the usual starting point should be eight years' imprisonment, in a range of six to nine years. The UK guideline seeks to identify different levels of culpability in offending by differentiating between leading, significant and lesser roles.

6. All of this material was before the judge, who accepted that the appellant's role could be considered, as was urged on her behalf, to be a lesser role. The judge also took into account the various matters detailed in the report, the appellant's age, lack of any history of any previous offending and health issues. However, the judge considered the amount of cocaine involved to be substantial and regarded the sophisticated manner of its concealment to be an aggravating factor. The judge accordingly considered that the starting point should be 17 years and, taking all the relevant factors into account, she determined that the appropriate sentence should be 12 years' imprisonment.

7. For the appellant, Miss Fosuhene submits that the sentence is manifestly excessive because the judge's starting point was too high, based on the Chief Justice's guidelines and the substantial mitigation placed before the judge on the appellant's behalf. She points out that, although the Chief Justice's guidelines refer to a starting point of 15 years for substantial importation of drugs, they do not differentiate between the differing roles played in importation. In this regard, in her printed submissions, Miss Fosuhene draws our attention in particular to the judgment of Hughes LJ in **R v Christiana Boakye & Ors** [2012] EWCA Crim 838 (para 3), which emphasises that the culpability of persons coming within the generic description of courier may vary from case to case:

"At its simplest there are those who are exploited or oppressed by others, and there are those who engage voluntarily in the couriering of drugs, are in it for the money and have the freedom to make the decision. There are many other gradations of culpability which it is unnecessary at present to attempt to sketch."

On this basis, Miss Fosuhene submits that, in all the circumstances of this case, a starting point of 15 years would have been appropriate.

8. For the Crown, Mr Moran submits that the judge had had regard to all the relevant factors, in particular to the Chief Justice's guidelines, and that, given the substantial amount of cocaine involved, a starting point of 17 years cannot be said to have been excessive. Mr Moran has been careful to make the point that if

drugs in that quantity were to attract a starting point of 15 years, then there would be no room for distinction between that amount and a lesser amount of drugs, which would also attract the same 15 years as a starting point. Mr Moran therefore submits that, in this case, as the guidelines now stand, there would be no room for reduction in the starting point chosen by the judge. In his printed submissions, Mr Moran very helpfully refers us to a brief note of a sentencing decision in the Grand Court in the case of **Watson & Manahan v R**, [2000] C.I.L.R. Note 16, in which it was held that the appropriate sentence for importation or being concerned in the importation or supply of two kilograms of cocaine was 15 years' imprisonment on a not guilty plea and 12 years on a guilty plea. Finally - and this has been the burden of his submission before us this morning - Mr Moran draws our attention to some evidence which had been before the jury which suggested that, rather than the appellant's role in the importation of the cocaine being as a result of her vulnerability, as was now being put forward on her behalf, she was an active participant in the enterprise.

9. In considering these submissions, 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.
10. In this case, we are quite unable to say, as Mr Moran hinted that we might, that the judge erred in anyway in assessing the appellant's role in this offence as being a lesser role. In our view, the evidence on which Mr. Moran particularly relied for this purpose is not at all inconsistent with the view that the role was a lesser role. We have taken into account in dealing with the matter in this way the fact that the sentencing was done by the trial judge, who had heard all the evidence after a contested trial. We therefore, approach the matter on the same basis as the judge did.
11. However, having said that, we remain concerned, as we indicated at the outset of the appeal, that the starting point of 17 that the judge chose may have been too high. For if, as it seems to us the judge was entitled to conclude, the appellant's role in the importation was a lesser role, we would have thought that the minimum starting point of 15 years laid down by the Chief Justice's guidelines would have been more appropriate. In these circumstances, notwithstanding our natural reluctance to interfere with the judge's obviously careful exercise of her

sentencing discretion, we consider that the judge erred in principle in choosing a starting point above the minimum. For these reasons, we think that, applying a starting point of 15 years, mitigated by the factors taken into account by the judge, a sentence of 10 years' imprisonment would have been appropriate in this case. Accordingly, the appeal is allowed, the sentence imposed by the judge is set aside, and a sentence of 10 years' imprisonment is substituted therefor.

Newman, JA

Field, JA

Morrison, JA

