

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Lusog 2/9/09

APPEAL NO 10 OF 2009

SCA No. 10/09)  
C#8209/2006

**CAYMAN ISLANDS  
DIRECTOR OF PUBLIC  
PROSECUTION LIBRARY**  
**BETWEEN**

**HER MAJESTY THE QUEEN**

Appellant

and

**MARK TRAVIS SEYMOUR**

Respondent

**BEFORE: THE RT. HON. SIR JOHN CHADWICK, P.  
THE HON. MR. JUSTICE MOTTLEY, J.A.  
THE HON. MR. JUSTICE VOS, J.A.**

Appearances: Ms. Kirsty-Ann Gunn for the Crown and Mr. Ben Tonner of Samson & McGrath for the respondent, Mark Travis Seymour.

Heard and Judgment given: 25<sup>th</sup> August, 2009. Reasons released: 2<sup>nd</sup> September, 2009.

Vos, J.A.

Reasons for Judgment



Introduction:

1. On Friday 1<sup>st</sup> December 2006, an unmarked police car drew up alongside, the Respondent, Mark Travis Seymour, in Martin Drive, George Town, outside the Zodiac Bar. As they did so, Seymour began running in the direction of another unmarked police car. A chase ensued, and Seymour fell over at the junction of Martin Drive and Shedden Road. DC Maxwell caught up with Seymour, identified himself as a police officer, and asked to search him. Seymour refused, and there was a struggle involving 3 police officers. The violence of the struggle was such that the officers had to use pepper spray to bring Seymour under control and to hand-cuff him.
2. In the course of the struggle, a zip lock bag containing a white powdery substance resembling cocaine fell from Seymour's pocket, and was recovered by WDC Davidson. At 11.18pm, Seymour was arrested.

3. Seymour was later searched at George Town police station, and found to be in possession of a second zip lock bag, identical to the first, containing a similar substance.
  4. After treatment for the injuries he sustained in his fall, Seymour was kept in custody until he was eventually interviewed on Monday 4<sup>th</sup> December 2006, at which time he provided a sample of urine, which showed no evidence of cocaine usage. Seymour was released on bail on 6<sup>th</sup> December 2006.
  5. In due course, on 20<sup>th</sup> September 2007, Seymour pleaded guilty to possession of cocaine, and not guilty to possession with intent to supply. The Crown refused to accept the plea, and proceeded with the more serious charge. As appears later in this judgment, it was on 31<sup>st</sup> October 2007, after these pleas had been entered, that Seymour applied to be admitted to the Drug Rehabilitation Court Programme ("DRCP").
  6. Seymour was convicted on 21<sup>st</sup> February 2008 by Chief Magistrate Margaret Ramsay-Hale on the following 2 counts:-
    - (1) Possession of a total of 26.8 grams of cocaine with intent to supply contrary to section 3(1)(m) of the Misuse of Drugs Law (2000 revision).
    - (2) Resisting a lawful search.
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7. The Chief Magistrate sentenced Seymour to 7 years imprisonment on the first count, and 6 months to run concurrently on the second count.
  8. When Seymour appealed to Henderson J on 17<sup>th</sup> April 2009, the 7 year sentence was reduced to 2½ years imprisonment with time spent in custody to be taken into account. Seymour was released from custody on parole on Friday 21<sup>st</sup> August 2009, just a few days before the hearing before us.

#### The appeal

9. This is the Crown's appeal against the sentence of 2½ years imprisonment on the grounds that it was unduly lenient in all the circumstances, under section 30(1)(a) of the Court of Appeal Law (2006 Revision).
10. Seymour's previous convictions are relevant to this appeal. He was convicted of a number of offences in May 1999. The most relevant were 3 counts of possession of cocaine with intent to supply, for which he received, 1 year, 1½ years consecutive, and 2 years consecutive,

respectively. He was convicted at the same time of a number of lesser offences of possession and consumption of ganja, for which he received shorter concurrent sentences. Thus, Seymour's previous history was that he had served a total of 4½ years for drug offences including 3 offences similar to the one presently under appeal. Mr Ben Tonner, counsel for Seymour, told us on instructions that Seymour was released from prison for these offences in 2000.

11. In convicting Seymour, the Chief Magistrate inferred an intention to supply from the amount of cocaine that was found on his person, and from the fact that there was no evidence before her that he was a cocaine user. In sentencing, she relied on the following matters:-

- (1) The Chief Justice's Guidelines to the effect that the "*tariff for a first such offence [of dealing], involving less than 2 ounces ... without mitigating circumstances, will be 8 years*".
- (2) The fact that, on a second conviction, the maximum term for this offence was 20 years, so that a sentence in excess of 8 years would be indicated for a fourth dealing offence.
- (3) The short duration of the previous sentences, so that the Defendant might not have expected a sentence in excess of 8 years for the next offence.

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12. On appeal, Henderson J recited a number of facts concerning the DRCP and Seymour's approach to it (to which we shall return), and then relied on the following specific matters in reducing the sentence:-

- (1) Seymour had asserted through counsel that at all material times he wanted to enter the DRCP.
- (2) The Judge preferred to impose a sentence which had some rehabilitative effect, and to encourage Seymour's efforts to cure what "*he says is an addiction to cocaine*".
- (3) The 7 year term was excessive in the light of the circumstances he had outlined.
- (4) The circumstances were particular and peculiar and were unlikely to arise with any frequency in the future.
- (5) Seymour's three convictions for possession of cocaine with intent to supply were on the same day in 1999, for which (according to the Judge) he received a global sentence of 2 years and 3 months. Seymour had not been convicted of anything in the last 10 years.

- (6) The Judge said he was justified in imposing a sentence only slightly longer than the previous sentence.
13. In support of the Crown's appeal, Ms Gunn submits that Henderson J failed to pay due regard to:-
- (1) The sentencing tariffs.
  - (2) The fact that Seymour had three previous convictions for identical offences.
  - (3) The prevalence of the offence and of cocaine abuse within these Islands (as mentioned in the Chief Justice's Sentencing Tariff).
  - (4) Seymour neither pleaded guilty nor assisted the police, so that standard discounts did not apply.
  - (5) The fact that there was no evidence of Seymour's addiction to cocaine, so that the Judge had placed too much weight on the need for rehabilitation.
  - (6) 2½ years was not in fact "*only slightly longer*" than the previous sentence. It was shorter than the total of 4½ years he actually received.
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#### The Drug Rehabilitation Court Programme

14. On 31<sup>st</sup> October 2007, Seymour applied to be admitted to the DRCP. In the Crown Questionnaire that Seymour completed with the aid of his lawyer, Mr Tonner, he said that he used ganja every day, and cocaine 1-3 times a month, yet he maintained that cocaine was his most serious problem. Part II of Seymour's Application Form was completed by Crown Counsel, and accepted that he satisfied the eligibility criteria for the DRCP, despite having resisted arrest. It may be noted at this point that, since 2006, the DRCP eligibility criteria (annexed to the DRC Rules 2006) have stated that "*persons dealing drugs primarily to support the offender's drug habit may be included ... Persons trafficking drugs for commercial gain are excluded*". Thus, on the premise that Seymour's application form was true, he was *prima facie* eligible for the DRCP. He would also not have been any the less eligible, on his view of the facts, even if he had pleaded guilty to the charge of possession with intent to supply.
15. Indeed, section 12(2)(c) of the Drug Rehabilitation Court Law, 2006 (the "DRC Law 2006"), and rule 8(3) of the Drug Rehabilitation Rules

2006 (the "DRC Rules 2006") make it clear that his eligibility was dependent on his willingness to plead guilty to the offences with which he was charged. Thus, at the date of Seymour's application to the DRCP, it appears that he can only have envisaged one of three routes to his ultimately being accepted on the DRCP – either the Crown would drop the charge of possession with intent to supply, or he would change his plea to guilty, or he would be acquitted. Defending the charge at a trial was inconsistent with his acceptance on the DRCP. Moreover, of course, Seymour would have been aware that his acceptance on the DRCP was also subject to a full assessment being made in accordance with section 12 of the DRC Law 2006 and the DRC Rules 2006.

16. On 27<sup>th</sup> November 2007, the Chief Magistrate put Seymour on a 30-day Provisional Treatment Order under Rule 8(9) of the DRC Rules so that he could be assessed for his suitability to participate in the DRCP. On 18<sup>th</sup> December 2007, the Chief Magistrate set the trial date for 31<sup>st</sup> January 2008, and ordered Seymour:-
  - (1) to attend an Orientation Session;
  - (2) to attend a Treatment Counselling Centre and Probation; and
  - (3) to attend the laboratory for a urine analysis test that day

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17. Seymour reported to the DRC, attended the Orientation Session and the Treatment Counselling Centre, but missed the Probation appointment, and failed to attend the laboratory for the urine analysis test.
18. On 15<sup>th</sup> January 2008, the Provisional Treatment Order was extended to allow completion of the assessment, and Seymour was ordered to attend the Options Programme at the Treatment Counselling Centre.
19. On 22<sup>nd</sup> January 2008, the assessment was incomplete. The matter was referred back to the regular court for trial, and on 21<sup>st</sup> February 2008, Seymour was convicted of possession with intent to supply. The DRC Order was revoked following his conviction, as was, in effect, required by section 12 of the DRC Law.
20. This history is inconsistent in a number of respects with that set out and relied upon by Henderson J. In particular:-
  - (1) Seymour was never finally accepted into the DRCP.
  - (2) Seymour did not follow the DRCP appropriately for several months. He attended some, but not all, of the required assessment sessions, and had not received any treatment for

substance abuse when his Provisional Treatment Order was revoked.

- (3) Seymour could have been accepted into the DRCP had he pleaded guilty to possession with intent to supply, provided he could have shown he was dealing to feed his own addiction.
  - (4) There was never any relevant change in the policy of the DRC, as recorded by the Judge.
  - (5) Seymour could never have been accepted into the programme having been convicted after a not guilty plea.
21. We should, however, record that much of this information derives from a chronology dated 11<sup>th</sup> August 2009, from Catherine A. Chestnut, DRC Co-ordinator, that was put before us by the Crown. This chronology was not available to the Judge.

#### Discussion

22. As we have mentioned above, the facts of Seymour's involvement with the DRCP were inaccurately recorded in Henderson J's Reasons for Judgment. It seems inevitable that several of these inaccuracies must have been caused or contributed to by submissions made to Henderson J by Seymour's counsel (who was not at that stage Mr Tonner, who appeared before us), made on Seymour's instructions.
23. For example, it must, most importantly, have been submissions on behalf of Seymour which led the Judge to believe that the reason why he had pleaded not guilty to the charge of possession with intent to supply was because he believed that it was only by so doing, and being acquitted, that he could be admitted to the DRCP. In fact, the truth was rather different. The Judge cannot, in our judgment, have obtained this impression from any other source.
24. It was the Judge's acceptance of this submission that seems to us to have underlain the Judge's reasoning. He thought, in effect, that Seymour had been caught in a Catch 22 situation, whereby he could only enter the DRCP (which it was submitted to the Judge that he much wanted to do) by pleading not guilty to the more serious charge in the expectation of being acquitted. As we have explained above, this was simply wrong. Admission to the DRCP was available to him on his pleading guilty to the charges and demonstrating that he had dealt to feed his own cocaine addiction. Had he done so, he could have been admitted to the DRCP.

25. In the result, Seymour was not admitted to the DRCP for a series of cumulative reasons, all of which were, to a greater or lesser extent, of his own making.
- (1) Seymour did not comply fully with the assessment requirements of the DRCP, once the Provisional Treatment Order had been made.
  - (2) Seymour never showed to the satisfaction of the DRCP either that he was actually addicted to cocaine, or that he had dealt in the drug to feed his addiction.
  - (3) Seymour did not plead guilty to the offence of possession with intent to supply (nor was he acquitted).
26. The Chief Magistrate's finding at Seymour's eventual trial that there was no evidence that he was a cocaine user came after Seymour's failure to take the steps that were necessary if he was to enter the DRCP. In this connection, we accept Ms Gunn's submission that, notwithstanding that it was the Crown's case at the trial that Seymour was not addicted to cocaine, this position would not necessarily have prevented his admission to the DRCP, which depended on a detailed evaluation of his situation under the DRC Law and Rules.
27. Henderson J, therefore, seems to have been misled into making two fundamental errors: first, as we have said, finding that Seymour had only pleaded not guilty because he (Seymour) thought he had to do so in order to be admitted to the DRCP; and secondly, finding that there had been some change in the policy of the DRC in relation to charges of possession with intent to supply. In truth, there was no such change, and it seems most likely (though we have no way of knowing for certain) that this impression too will have been created by submissions made to the Judge on Seymour's behalf.
28. The result of these two errors was that the Judge thought, mistakenly, that Seymour had become a victim of faults in the system, and had, in effect, been deprived of a place on the DRCP through no fault of his own. Accepting, as the Judge did, that Seymour was keen to join such a programme, he reduced the sentence to the lowest level he thought he could justify in order to promote his chances of obtaining a place on a comparable rehabilitation programme. The Judge recommended, in accordance with this reasoning, that Seymour should be assessed and transferred to Caribbean Haven for drug rehabilitation counselling.
29. Unfortunately, however, the Judge made one further crucial error in his reasoning. He mistakenly calculated that Seymour had only been sentenced, for his 3 previous offences of possession with intent to supply, to a total of 2 years and 3 months imprisonment. In fact, as we

have said, Seymour had been sentenced to a total of 4½ years imprisonment for those offences in 1999. Thus, when the Judge said that he was imposing a sentence that was “*only slightly longer*” than the previous sentence, he was wrong.

30. For the reasons we have given, we have formed the clear view that the Judge’s ruling was based upon fundamental errors of fact, and cannot therefore stand. The sentence was indeed too lenient, as the Crown has submitted. We would go so far as to suggest that Seymour seems to have been attempting to manipulate the Court in allowing a wholly inaccurate picture of events to be placed before Henderson J. We have no way of knowing whether Seymour is or was ever addicted to cocaine (apart from being prepared to accept at face value the finding of the Chief Magistrate that he was not), or whether he ever genuinely wished to join a rehabilitation programme. But we can say that, if he is or was a cocaine addict, and if he wished to join the DRCP or another programme, he seems to have taken a series of deliberate steps that would inevitably, once the truth came out, prevent his doing so.

#### The appropriate sentence

31. Having decided that Henderson, J imposed an inappropriately lenient sentence, we have to consider the appropriate sentence to impose. In our judgment, the factors relied upon by the Chief Magistrate and by the Crown in its submissions are appropriate to take into account.
32. The Chief Justice’s tariff provides for a sentence of 8 years for a first offence of this kind. Seymour received only 4½ years in total for his first offences. This may have led him to expect a sentence of less than 8 years for a subsequent offence. If it did, this is not something that Defendants should expect in future. The tariff has, in our judgment, been laid down in order to be followed, subject, of course, to aggravating and mitigating circumstances.
33. We take the view that, bearing in mind the prevalence of cocaine abuse in these Islands, the fact that Seymour pleaded not guilty, and his previous convictions, he could properly have expected a sentence in excess of the 8 year tariff laid down for a first offence.
34. Nonetheless, bearing in mind that he had not been convicted for some 6 years after his release in 2000, we take the view that the proper sentence to impose was that set by the Chief Magistrate, namely 7 years.

### Double jeopardy

35. It only remains for us to consider Mr Tonner's submission that this 7 year sentence should nonetheless be reduced because Seymour will have been subjected to some anxiety as a result of having had his sentence reduced, and having been actually released from prison, before now having his original sentence reinstated and being returned to prison. Mr Tonner relied, in particular on paragraphs 57 to 61 in the judgment of a 5 member English Court of Appeal in Attorney General's References Nos 14 and 15 of 2006 (Tanya French and Alan Robert Webster) [2007] 1 Cr. App. R. (S.) 40.
36. We do not doubt in any way the principles enunciated in that case, which indicate that, where anxiety has been created by this kind of situation, a discount of between 12 and 30% in the ultimate sentence is appropriate.
37. In this case, however, we have concluded that no discount is appropriate for the following two reasons, the second of which arises from the circumstances we have described above:-
- (1) First, Seymour cannot legitimately have expected to retain the benefit of the reduced sentence for long (if at all), since we understand that the Crown gave notice of its intended appeal within a very few days of Henderson J's ruling.
  - (2) Secondly, we have found that Seymour was himself significantly responsible for the misunderstandings on which Henderson J's ruling was based. Paragraph 60 of Lord Phillips's judgment in French and Webster case makes clear that the discount is only appropriate where the defendant "*has had no responsibility for the fact that he has been given a sentence which is unduly lenient*".
38. There will, therefore, be no discount for double jeopardy from the 7 year sentence, which we have found to be appropriate.

### Conclusions

39. For the reasons we have given, the Crown's appeal will be allowed, and the Chief Magistrate's sentence of 7 years imprisonment will be reinstated, time in custody to count against the sentence.
40. We would not want to leave this judgment without expressing our support for Henderson J's admirable desire to promote rehabilitation of drug offenders both under the DRC regime and outside it. The

promotion of rehabilitation cannot, however, be used to disregard the application of the tariff, subject to appropriate account being taken of aggravating and mitigating factors.

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Chadwick, P.

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Mottley, J.A.

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Vos, J.A.

