IN THE SUPREME COURT OF BELIZE, A.D. 2016

(Criminal)

Inferior Appeal No. 15 of 2016
BETWEEN:

EMERSON VASQUEZ **Appellant**

AND

PC DESMOND RAMOS **Respondent**

Before: **The Honourable Madam Justice Shona Griffith**
Date of Hearing: **23rd February, 2018.**
Appearances: **Ms. Alifa Elrington for the Appellant and Ms. Jacqueline Willoughby for the Crown.**

DECISION

Introduction

1. This is an inferior appeal against sentence only by the Appellant Emerson Vasquez. Mr. Vaszquez pleaded guilty to simple possession of 453.5 grams of Cannabis on the 4th April, 2016. The charge was initially one of drug trafficking, however upon his plea of guilty to simple possession being accepted by the Prosecution, the Appellant was sentenced to a fine of $3,000.00 in default 3 years imprisonment. The Appellant appealed against the sentence on the following grounds:-

   (i) that the Magistrate failed to consider his good character when imposing the sentence; and

   (ii) that the fine was excessive and disproportionate to the offence charged.

   The appeal raised very short issues on the duty of the Magistrate upon sentencing and as such was heard and disposed of in a summary manner. The Crown attended to answer to the appeal but were obliged to make a few inescapable concessions which arose from the face of the record of appeal. The applicable law in relation to the appropriate sentence and Magistrate's exercise of discretion will be addressed subsequently, but for now the matters arising from the face of the record are highlighted to commence the Court's consideration of the appeal.

Consideration of Appeal

2. The record of appeal provided to the Court included the Magistrate's Notes of Evidence and the court book. The court book as per form, reflected the particulars of the defendant as well as of the arrest and charge, the plea, and other information related to the court's process and administration. The court book as usually would be the case, also reflected notations made by the Magistrate of the proceedings as they progressed from arraignment through to disposal. With respect to the actual hearing of proceedings, a record of what transpired is expected to be made available from the Magistrate's notes of evidence, insofar as a written record of the proceedings is mandated to be taken and kept, by virtue of section 44(5) of the (Summary Jurisdiction Procedure) Act, Cap. 99. In the case of a guilty plea such as the present, the proceedings will comprise only the arraignment and sentencing, however the Magistrate is still required make notes of the proceedings.

3. The above statutory duty to take notes and the importance of discharging this duty was discussed in the decision of this Court **– Robert Flores v The Police**[1] with further reference therein to the Guyana Court of Appeal's decision in **Canterbury v Joseph.**[2] The latter decision not only recognised the duty of the Magistrate to take notes of proceedings as a statutory one, but also stated that 'proceedings' include the prosecutor's statement of facts upon a guilty plea and any responses to the facts or upon sentencing, made by the defendant. In this regard, the Court reiterates as was stated in ***Canterbury v Joseph***, that notes of these proceedings are critical, as upon appellate review, they provide the only information from which the Court is able to assess the appropriateness or otherwise of the sentence appealed[3]. This duty of the Magistrate to take notes and its importance is restated, as same is belied by the consequences of the failure so to do in the instant case.

4. In considering an appeal against sentence, the first point of reference for the Court would be the facts and circumstances giving rise to the commission of the offence insofar as such facts and circumstances form part of the record of appeal.

[1] Inf. App. No. 7 of 2016 @ para. 12
[2] (1964) 6 WIR 205
[3] Ibid @ 206

As alluded to in paragraph two above, the court book would usually not contain the facts of the commission of the offence charged, but rather, only limited information pertaining to the particulars of the defendant, the charge and the progress or disposal of the proceedings as recorded by the Magistrate. Such facts and circumstances would however have been narrated by the prosecutor as part of the proceedings arising from the plea of guilty. In fulfillment of the duty under section 44(5) of Cap. 99, these facts and circumstances ought to be forthcoming from the Magistrate's notes of evidence. This however is not the case in this appeal. The Magistrate's notes of evidence in the instant case comprises two short paragraphs which speak to the charge and particulars of the offence (the date, and amount and type of drug); the prosecution's acceptance of the plea of guilty of simple possession in lieu of drug trafficking; a statement regarding mitigation which will be specifically addressed later in this decision; reference to the appellant's antecedent of one prior conviction for a traffic offence; and the sentence imposed of $3000 fine and imprisonment in default of payment of 3 years.

5. What ought to have been contained in the Magistrate's notes of evidence is the following information which it is presumed to some extent must have been provided by the prosecutor as a prelude to the imposition of sentence on the defendant. For example – the place and time of commission of the offence; whether the drugs found were on the person of the defendant, in a container or on premises of which he had possession or control; if in a container what type of container; the circumstances under which the police were led to or observed the defendant; the behavior of the defendant upon being apprehended by police; the responses, if any, made by the defendant at any point in time during his arrest and charge. Additionally, the Magistrate's notes of the proceedings should also have reflected if upon being asked, as ought to have been done - whether the defendant accepted the facts as narrated by the prosecutor[4]. None of this information has been provided as part of the Magistrate's notes of evidence, thus it is within this context that the Court will now examine the grounds of appeal.

[4] ***Canterbury v Joseph***, supra. affirms that the duty of the Magistrate arising under the equivalent to section 44(2) of Cap. 99, is to enquire from a defendant pleading guilty whether or not the facts are accepted.

6. As stated, the grounds of appeal are that (i) the Magistrate failed to take into account the appellant's good character; and (ii) that the sentence was excessive and disproportionate to the offence of simple possession. These grounds can be conveniently considered together as they are affected by the same issues and principles which are raised on the appeal. With respect to ground (i) there is no dispute that the appellant was essentially of good character, given the record of only one prior conviction for a road traffic offence. Having pleaded guilty, upon sentencing, the defendant would have been entitled to receive credit for saving the court the time and expense of a trial. The convention is that a discount of one third off the sentence can be expected to be applied in favour of a defendant pleading guilty. For the offence of possession of cannabis, the defendant was liable under section 7(1) of the Misuse of Drugs Act, Cap. 103 to a fine of up to $50,000, imprisonment not exceeding 3 years or to both fine and imprisonment. The sentence imposed of a fine of $3,000 and imprisonment in default of 3 years was thus clearly permissible according to law. On the face of the record however, there is no indication that the appellant was given the expected credit for his plea of guilty or his good character, and if not, there is no process of reasoning evidenced by the Magistrate's notes which accounts for why the discount was not applied or considered.

7. With respect to the consideration of ground (ii) which alleges that the sentence was disproportionate or excessive, the following sentence is extracted verbatim from the Magistrate's notes of evidence – *"…As the court book will reflect there was no plea in mitigation made by the Defendant nor his Counsel…"* This statement is considered startling, for it is the duty of the court, meaning in this case the Magistrate, prior to imposing sentence, to enquire from a defendant (or counsel for the defendant), whether he or she wishes to offer any words in mitigation of sentence. Where a defendant is unrepresented, this duty may even require a Magistrate to actively engage the defendant to extract relevant information for consideration on mitigation such as at the very least, the defendant's job or family commitments.

That the Magistrate has a duty to invite a defendant to mitigate before imposing sentence is evidenced by the case of **Adolfo Treminio v P.C. 668 Thomas Chulin** an inferior appeal decided in 1970**.**[5] In this case, then Chief Justice Dickson stated (emphasis mine):-

> *"…It is observed that the defendant was not asked if he had anything to say before sentence was passed – in short, there is absence of what is commonly called an allocutus. Magistrates are also reminded that it is their bounden duty to inquire from convicted persons whether they have anything to say before sentence is passed. They might very well be able to say something in mitigation."*

In the face of such a duty to invite a plea of mitigation from the defendant, it is no answer for a Magistrate to assert that there was no plea of mitigation from defendant or his counsel. Had the Magistrate's notes of evidence stated that the defendant was invited to make a plea of mitigation – or asked whether he had anything to say before sentence was passed – and said nothing, the position would have been different. The Magistrate's notes of evidence can be interpreted in no other way that the Magistrate failed to discharge this duty.

8. With respect to the actual sentence imposed, the maximum fine applicable to a charge of possession of cannabis is $50,000. At $3000, the Magistrate therefore imposed a fine far below the maximum fine, however the period of imprisonment in default for non-payment of the fine at three years, was the maximum period of imprisonment that could be imposed. The appellant alleges that sentence to have been excessive. Relevant questions for a sentencing court would have included the following:- the usual range of fines imposed relative to the quantity of the drug; was there some correlation between the fine and the street value of the drug; was there a response or indication from the defendant that suggested a likelihood of reoffending; given that the fine was at the lower range what was the reason for the maximum period of imprisonment on default of payment? In addition to the notes of evidence, a Magistrate is required to provide reasons for decision which includes a sentence imposed on conviction.

[5] Belize Inferior Appeal No. 30 of 1970

With reference to the questions identified above, there is in addition to the deficient note taking, no reasons provided by the Magistrate for the sentence imposed and as a result, no basis from which the Court can assess the appropriateness of the sentence or not.

Conclusion

9. With respect to the appeal on the stated grounds, it is concluded firstly that arising from her own notes of evidence, the Magistrate failed to discharge her duty to afford the defendant an opportunity to offer a plea in mitigation of sentence. Secondly, the fine of $3,000 imposed, whilst on the lower end relative to the maximum fine available, was at variance with the default period of imprisonment of 3 years, which was the maximum period of imprisonment available. Given the absence of reasons for the imposition of the sentence, there is a basis having regard to the maximum period of imprisonment in default of payment of the fine, for the suggestion that the sentence is excessive or disproportionate. Thirdly, again given the absence of reasons for the imposition of the sentence, there is no way to ascertain whether the appellant was given credit for his guilty plea or what weight was given to his good character. As a consequence of these findings which arise on the face of the record of appeal, the sentence imposed on the defendant must therefore be quashed.

10. The question remains however, as to what course of action should be taken to dispose of the appeal. Section 120 of the Supreme Court of Judicature Act, Cap. 91 stipulates the powers available to the Court upon determining an appeal. The proviso to section 120 empowers the Court to quash the sentence and substitute its own if of the opinion that a different sentence should have been imposed. This usually would be the course of action adopted by the Court but in this instance as illustrated in the preceding paragraphs, there is no evidence contained in the record of appeal which speaks to the circumstances of the commission of the offence. Further, there was no mitigation by the defendant thus there is no information at all which could be used by the Court to inform a different view of the sentence as contemplated by section 120.

The rationale as stated in ***Canterbury v Joseph***[6] of the importance of the Magistrate recording a note of the proceedings even on a guilty plea cannot therefore be overstated. The most appropriate course of action in the circumstances is to quash the sentence and remit the matter to the Magistrate for sentencing anew.

Disposition

11. The appeal against sentence is allowed and the following orders are made:-

    (i) The sentence of $3000 in default 3 years imprisonment is quashed;

    (ii) The matter is remitted to the Magistrate for sentence anew and the Magistrate is to take into account relevant factors of mitigation or aggravation as may arise from the statement of facts provided by the Prosecutor as well as any statement in mitigation provided by or on behalf of the defendant;

    (iii) The sentencing of the appellant is to be carried out by the Magistrate on or before the **30th March, 2018**;

    (iv) The appellant remains on bail pending the completion of sentencing by the Magistrate.

Dated this 5th day of March, 2018

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Shona O. Griffith
Supreme Court Judge.

[6] *Supra, n. 2*.