Spoutz v Police

Supreme Court, Nuku'alofa
Hampton CJ
Cr App 323/97

11 April, 1997

Criminal law - appeal - importing cocaine - increased sentence
Drug offending - sentencing - principles

The appellant pleaded guilty in the Magistrates Court to importing into Tonga and possessing cocaine. He was sentenced to a total of one month's Imprisonment. He appealed against that sentence.

Held

1. This was the first time the Supreme Court had dealt with a cocaine offence.
2. The penalties for drug offending (in the Drugs and Poisons Act)need looking at by the Legislature and the maximum fine in particular might be seen as a derisory amount.
3. The appellant, a United States of America citizen was a mature businessman, experienced in the world. He was not a person with the impetuosity and experimentation of youth.
4. Tonga is not a state where people can come and go with impunity with drugs.
5. For first offenders the clang of the prison doors, the realisation for the first time of the loss of freedoms that comes with imprisonment, is a salutary and sobering experience and the length of the sentence of imprisonment is not all that important.
6. But there were other factors here. There was no error of principle in a sentence of imprisonment here. Nor was one month manifestly, or clearly, excessive. Indeed it was a very very lenient one and without interferingin any way with the important principle, that a sentencer is given a discretion which includes the application of mercy and leniency when the circumstances call for it, the sentence was so light it was manifestly wrong.
7. One of the risks of appealing against a sentence (and appellants and their advisers should have regard to it) is that the sentence is open for review in the appellate court. A court can, and will, in appropriate circumstances impose a greater penalty. The courts will move to deter such offending.
8. Sentence increased to 6 months imprisonment, concurrent, on each charge.

NOTE - The appellant successfully appealed to the Court of Appeal and the report of that judgment immediately follows).

Counsel for appellant - Mr Tu'utafaiva
Counsel for respondent - Mr Cauchi

Judgment

This case is important in various respects, but primarily it's importance attaches to the fact that, as I am told, this is the first time that this Court has had before it a case involving the prohibited drug cocaine.

Cocaine is regarded the world around as one of the more serious of illegal, unlawful, drugs or substances, and is frowned on by the authorities in various countries, as Mr Cauchi for the Crown has put it to me today.

In many common law jurisdictions, there are gradations, there is a scale of seriousness of various types of drugs, or the seriousness with which particular types of drugs are regarded.

In the Kingdom, and no doubt reflecting the fact that historically drugs have not been a difficulty, a problem, in the Criminal justice area, there is no such gradation - unfortunately, and I stress the word "unfortunately". It is something that perhaps the legislature should give attention to. Here in the Kingdom, there is simply a blanket provision in relation to drugs of whatever nature and character.

There is a need, in any event, for the legislature to look at the punishment provision which is contained in the Drugs and Poisons Act (Cap.79) section 43 sub-section 2. It would seem that sub-section has not been looked at for the last 22 or so years; and again there was force in what Mr Cauchi said as to the maximum penalties and in particular as to the monetary penalty, the maximum fine that is able to be imposed. $2,000 only might be seen to be a derisory amount in some circumstances. Certainly it is too small in my view.

In those common law jurisdictions where gradations are made as to the state of seriousness of drugs, cocaine is ranked as one of the most serious. It is known, in various jurisdictions, as a "Class A category drug". In some jurisdictions dealing with trafficking, importing, such a drug carries with it life imprisonment.

Here the penalty provisions stop at a maximum of 10 years imprisonment. That is still a substantial imprisonment and shows something of the seriousness with which the legislature regards such offending.

I am making these remarks to put what I am going to turn to soon into proper context, in my view. Also to put it into proper context, I note what Mr Cauchi has said about a presumption in some states or countries of possession of 5 grams or more of cocaine, as being seen then as being a quantity in possession for the purpose of supply to others.

I add to that this. That in the common law jurisdiction most known to me, that is New Zealand, the presumptive limit for cocaine is much lower. You are deemed to be in possession of cocaine for supply if you have possession of half a gram or more of cocaine.

Here in these proceedings, this appeal before me, I am told that the quantity of cocaine in question was 1.56 grams, one and a half grams. A distinctly useable, a distinctly significant, quantity. I note what has been said on behalf of the appellant, that perhaps a fourth of the quantity which he says he purchased in Fiji was used, so he brought the other 3/4 with him or the other 3/4 were in his possession when he arrived in Tonga. That only a quarter had been used of the amount purchased, indicates that a considerable other useable quantity was left to him.

This is an appeal against the sentences of imprisonment of one month (possession of cocaine) and two weeks concurrent (importation of cocaine) imposed on the appellant in the Magistrates' Court on 9 April 1997.

The appellant arrived in the Kingdom on the 5th of April 1997. He is a citizen of the United States of America. He is 45 years of age. He is a businessman. So he is a man of mature years, and a man, it would seem, with experience in the world. His position is to be contrasted, as I put it to counsel in the course of hearing submissions, with someone in their teenage or early twenties who, with all the impetuosity and the experimentation of youth, may well involve themselves in a fool-hardy way in involvement with drugs. That is not the case with this appellant.

While the appellant was in Fiji (I am told as part of a wedding celebration for friends who had travelled also to Fiji from the United States, as I understand, it and who were then to travel together with the appellant after the wedding to Tonga, and to holiday for a time, alltogether in Vava'u), at this wedding celebration in Fiji, the appellant was offered and purchased a quantity of cocaine. He says he was somewhat intoxicated. Whatever, it indicates something about him, the fact that at age 45, he is prepared to enter into such transactions and purchase what he knew to be an unlawful substance. He then used it, he says for his own purposes.

It is I suggest somewhat naive to submit to the Court below and to this Court that having purchased a significant quantity of cocaine, havin outlayed money to do so, and then used some of it within a few hours, that when it came to travel from Fiji to Tonga, he had completely forgotten about the cocaine in his trouser pocket.

On arrival at Fua'amotu Airport in Tonga, it would seem from what I am told, that the appellant by his own actions drew some attention to himself. A drug-dog sniffed at him, the cocaine was located, and he then admitted to the authorities his possession and the circumstances in which he said he came into possession of the drug.

If there is any view abroad that Tonga is an easy mark, that drugs can come easily in and out of Tonga, then this incident would show that is not the case. It is not as simple as some might think - that this is a simple country in the middle of the Pacific into which people can come and go with impunity and take substances through with impunity.

The authorities (and the Court in it's role will back those authorities) have set their face against the importation (or indeed the exportation, the use of Tonga as a transitting station) of drugs into this Kingdom. The fact that this is the first occasion in which a prosecution has been taken in Tonga for cocaine possession, might be seen as an indication of the success of the authorities in trying to prevent serious and "hard" drugs, as they are sometimes described, from coming into the Kingdom.

This appellant was treated more seriously on the possession charge than on the importing charge by the Magistrate in the Court below. I can see and understand why the Magistrate may have dealt with it in that way. He in effect accepted that the appeallant had not brought the drug in as a commercial or trafficking operation. Accepted that this was drugs in his own personal possession. So that the possession was the more seriously regarded by the Magistrate, rather than the importing (and on the possession charge, leaving aside the fine of $600, one month's imprisonment was imposed, and on the importing charge a concurrent 2 weeks imprisonment was imposed).

It was clear and deliberate possession and that was, in reality, the substantive offence which the Magistrate dealt with. The appellant was arrested on the 5th of April. He spent the weekend in custody. He says now, he bemoans, that he does not like the experience of life behind bars. Two days is not life behind bars, but it is enough to give one a taste, I imagine, of what life behind bars might be like.

There is something to be said for first offenders, that the clang of the prison doors behind that first offender when he first goes to jail, and realises the loss of freedoms that comes with the clang of the doors, is a salutary and sobering experience. So that, it is said, the length of the sentence of imprisonment is not necessarily all that important for a first offender, because it is the effect of imprisonment for the first time, that has the real sting.

But there are other factors to be weighed in this particular case. First, this is an appeal. It is an appeal against the sentence of imprisonment. Given the drug involved, given the circumstances involved, given the quantity involved, I am not persuaded that there was anything wrong in principle with a sentence of imprisonment as imposed by the Magistrate. So there was no error of principle in my view.

The other general ground of appeal in relation to appeals against sentence is whether the sentence was manifestly excessive, clearly excessive. Can one month's imprisonment be said to be manifestly excessive? The answer I give is "no".

Mr Tu'utafaiva valiantly argues the personal circumstances of this man and says that they are special enough to make a month's imprisonment exececessive. And he said, in the course of making submissions, that in any other circumstances, the sentence might be seen as a lenient one. To some extent the prosecution is of the same mind. They describe the sentence as being a quite lenient sentence, and suggest it is one that is so lenient that in fact it needs to be corrected.

Far from being manifestly excessive, it is indeed a very, very lenient sentence. And without interfering in any way with the principle (which is important - the principle that any sentencing officer, whether Magistrate or Judge, is given a discretion and as part of that discretion, there is an element of application of mercy and leniency when the circumstances call for it) so without interfering in any way with that principle, I have reached the view that this sentence is so light, that it is manifestly wrong.

One of the risks of appealing against a sentence (and appellants should have regard to this, and their counsel should have regard to this) is that the sentence is open for review by the appellate court. And a court can, and in appropriate circumstances will, impose a greater penalty. Because of the circumstances here (i.e. the bringing into the Kingdom of cocaine in a small but still useable amount, by a mature man who knows full well what he does, and the affects of what he does) a sentence that clearly marks out to the world that Tonga will not countenance such offending, the Courts will move to deter such offending, a sentence of far more than one month's imprisonment is required.

I have reached the view that each of the sentences of imprisonment imposed should be quashed and in substitution for those sentences of imprisonment.

1. On the charge of possession, a sentence of imprisonment for a term of 6 months should be imposed.
2. So far as the importation of cocaine is concerned, a sentence of imprisonment for a term of 6 months imposed.
3. I have decided that the terms should be concurrent but the appellant should consider himself lucky as to that.
4. A total of 6 month's imprisonment on the charges is the result.

I make no other orders. It is over to the appropriate authorities in the Kingdom as to what happens to this man, as to whether he serves all or any part of his sentence here, or whether he is deported and serves all or any part of his sentence in the United States of America.

Those that come as tourists from America or any other part of the world can be sure that this is not a soft option; somewhere in the Pacific where you can do what ever you like. And that is the message that this Court on this appeal is giving.

I add this - pursuant to s 43(2) of the Act this Court Orders that the cocaine seized be forfeited to the Crown and be destroyed.