[2014] UKPC 19

Privy Council Appeal No 0050 of 2013

JUDGMENT

Sabapathee (Appellant) v The Director of Public Prosecutions (Respondent)

From the Supreme Court of Mauritius

before

Lord Mance

Lord Clarke

Lord Wilson

Lord Hughes

Lord Toulson

JUDGMENT DELIVERED BY

Lord Toulson

ON

25 June 2014

Heard on 27 March 2014

Appellant	Respondent
Yanilla Moonshiram	Geoffrey Cox QC
	Iqbal Maghooa
(Instructed by MA Law (Solicitors) LLP)	(Instructed by Royds Solicitors)

LORD TOULSON:

1.
This is an appeal against a judgment of the Supreme Court (Y K J Yeung Sik Yeun CJ and R Teelock J), allowing an appeal by the Director of Public Prosecutions ("DPP") against a sentence passed on the appellant in the Intermediate Court of Mauritius by Magistrate Mrs A Ramdin for an offence of possessing cannabis for the purpose of distribution, contrary to section 30(1)(f)(i) of the Dangerous Drugs Act 2000 as amended by Act 30 of 2008 ("DDA"). The appeal is brought by special leave of the Board. The appeal raises questions about the proper approach to the relevant sentencing provisions.

Facts

2.
On Saturday, 5 June 2010, police officers with a search warrant went to an address where the appellant was living at Flic en Flac. On their arrival the appellant tried unsuccessfully to dispose of two plastic bags by flushing them down the lavatory. Each bag contained 100 packets of cannabis leaf. In all the drugs weighed a little over 70g. In an interview with the police three days later the appellant said that he had bought the cannabis on the afternoon of Thursday 3 June after he was approached near the jetty at Flic en Flac by a man whom he did not know. The man was selling the packets for 75 rupees each but offered a reduced price of 50 rupees for buying all 200 packets, amounting to 10,000 rupees, which the appellant paid him in cash. The appellant said that the drugs were for his own consumption.

3.
The appellant was aged 29. He was not in paid employment, but he said that he acted as an agent for renting bungalows and that the cash which he used to buy the cannabis had come from that activity. He had two previous convictions for possession of heroin, for which he was fined, and a conviction in 2005 for dealing in heroin, for which he was sentenced to 2 years' imprisonment.

4.
The appellant initially pleaded not guilty to the charge of possession for the purpose of distribution, but on the day of the trial, 28 September 2010, he changed his plea to guilty. He gave evidence in which he confirmed that he had bought the cannabis to consume, because it was a cheap offer, but he had decided to stop smoking. It was not of course open to him to go behind his plea of guilty to being in possession for the purpose of distribution at the time when the cannabis was found. He was not cross-examined.

5.
In her sentencing remarks the magistrate referred to the time that the appellant had spent on remand (about four months), his guilty plea, the value of the drugs (put at 30,000 rupees), his previous drug-related offending and the fact that he had shown remorse. She concluded that a heavy fine would meet the ends of justice. She sentenced him to pay a fine of 150,000 rupees and costs of 500 rupees.

6.
On 15 October 2010 the DPP issued a notice of appeal. The grounds of appeal were that the magistrate was unduly lenient; that she failed to give proper consideration to the appellant's previous convictions for drug offences; and that she was wrong not to have imposed a custodial sentence. The appeal was heard on 13 February 2012 and judgment was given on 27 July 2012. In its judgment the Court recognised that the possible sentencing range was large and allowed the trial court to exercise its discretion according to the circumstances of each particular case. The judgment continued:

"However, in the present case a fine sits uncomfortably with the circumstances of the present offence. The appellant is not at his first offence, the present one is his fourth offence, all drug related. It is his second drug dealing offence albeit after five years. The amount found on him exceeds what would be found on a small-time dealer or someone feeding his own drug addiction. Two hundred packets worth Rs30,000 indicates a medium range stock of illegal drugs. He did not plead guilty at the first available opportunity; he did not assist the police in arresting other persons involved in the illegal business; the time spent on remand was on the low side and finally, even after his guilty plea, he did not wholeheartedly embrace the fact that the drugs were in his possession for distribution but attempted to downplay his criminality by saying the drugs were for consumption. In principle, the present

circumstances deserve a custodial sentence and is in keeping with precedents in sentencing for such offences."

7.
The court quashed the fine imposed by the trial court and substituted a sentence of three years' penal servitude, less time spent on remand. The execution of the sentence has been suspended pending the outcome of this appeal.

Legislative provisions

8.
Section 30(1)(f)(i) of the DDA, as amended, provides that a person who commits an offence under that section in relation to cannabis shall be liable on conviction "to a fine not exceeding one million rupees and to penal servitude for a term not exceeding 25 years". Section 47 of the Interpretation and General Clauses Act 1974 states that where several penalties are provided for an offence, the use of "and" means that the penalties may be inflicted alternatively or cumulatively.

9.
Section 11(1) of the Criminal Code provides that the punishment of penal servitude is imposed for life or for a minimum term of three years. However, section 7 of the Constitution, which provides that "no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment", has been interpreted as making it unconstitutional for a court to impose a sentence which is grossly disproportionate to what the offender deserves and therefore capable of overriding a statute dictating a minimum sentence: Aubeeluck v The State of Mauritius [2010] UKPC 13. In the case of a cannabis related offence under section 30 of the DDA, the combined effect of that section and section 7 of the Constitution is that if the court considers a custodial sentence to be necessary, it must pass a sentence of penal servitude for not less than three years, unless a sentence of that length would be grossly disproportionate. If a sentence of that duration would be grossly disproportionate, the proper sentence will be a custodial sentence for such shorter term as will not involve a violation of section 7 of the Constitution.

10.
The DPP's appeal to the Supreme Court was brought under section 92 of the District and Intermediate Courts (Criminal Jurisdiction) Act 1888, as amended ("DIC"). That section provides:

"Where any person is charged with an offence before a Magistrate or before the Intermediate Court, an appeal shall lie to the Supreme Court against any final decision of the Court –

(a) by the person charged, against his conviction or sentence, where he is sentenced to undergo penal servitude or imprisonment with or without payment of a fine, or to pay a fine of Rs500 or more;

(b) by the Director of Public Prosecutions or, in the case of a private prosecution, by the prosecutor, against any dismissal of a charge or, in the case of a conviction, against the imposition of any sentence."

The powers of the Supreme Court on hearing such an appeal are set out in section 96. Under subsection (2), it may affirm or reverse, amend or alter the conviction, order or sentence.

11.
Where the Supreme Court is exercising its jurisdiction as court of trial in a criminal matter, rather than an appellate court, appeal lies to the Court of Criminal Appeal under section 5 of the Criminal

Appeal Act 1954. Under section 5(2) of the Act, as amended, the DPP may appeal to the Court of Appeal against a sentence passed in the Supreme Court if “he is of opinion that the sentence passed is wrong in law or unduly lenient”.

The proper approach on an appeal against sentence

12.
It was submitted on behalf of the appellant that the Supreme Court should only allow an appeal by the DPP against a sentence passed in the Intermediate or District Court under section 96 (2) of the DIC if it is satisfied that the sentence passed in the lower court was wrong in principle or manifestly inadequate. In other words, it was submitted that the Supreme Court as an appellate court should adopt the same test in substance as that which applies under section 5(2) of the Criminal Appeal Act in the case of an appeal by the DPP to the Court of Criminal Appeal.

13.
The appellant’s submission accords with the opinion of the Board delivered by Lord Steyn in Kailaysur v The State [2004] UKPC 23; [2004] 1 WLR 2316. Referring to the power to increase a sentence on appeal under section 96(2) of the DIC, he said at para 9:

“It is . . . a power which must be relatively sparingly exercised and then only in cases where the sentence imposed by the trial court was manifestly inadequate. And in all cases the reasons for exercising this drastic power must be explained.”

14.
This passage was cited by the Board as a statement of general principle governing a statutory power to increase sentence in the case of Oliver v The Queen [2007] UKPC 9 (on an appeal from a decision of the Court of Appeal of The Bahamas).

15.
On behalf of the DPP it was submitted that the power of the Supreme Court to increase a sentence passed in the Intermediate Court under section 96 of the DIC is not so constrained. In support of that submission the Board was referred to its decision in DPP v Sabapathee [1997] 1 WLR 483. This was an appeal by the DPP against a decision of the Supreme Court of Mauritius allowing an appeal against the defendant’s conviction before the Intermediate Court of offences of supplying or possessing drugs and possessing ammunition. The Supreme Court had allowed the appeal because they were not persuaded that the prosecution had proved the defendant’s guilt beyond reasonable doubt. The DPP submitted that the power of the Supreme Court to interfere with the findings of the magistrates was a narrow one. Lord Hoffmann said of section 96 at pp 485-486:

“Their Lordships consider that this section confers a full right of appeal by way of rehearing in the Supreme Court. That Court will ‘revise’, ie go over again, the ‘information, depositions and other evidence and conviction before the Intermediate or District Court’ and after such revision may ‘affirm or reverse, amend or alter’ the conviction, order or sentence. The reference to affirming the conviction, rather than dismissing the appeal, shows that the Supreme Court is not concerned merely to decide whether the lower court acted within its powers. If it affirms the conviction after revising the evidence, it makes that verdict its own. This requires that the Supreme Court should itself be satisfied that the prosecution has proved the guilt of the defendant beyond reasonable doubt.

The great difference between the hearing in the District or Intermediate Court and the revision of those proceedings in the Supreme Court is that the former Court hears oral evidence and is able to

observe the demeanour of the witnesses. The Supreme Court has only the written record, which is seldom verbatim and often translated. It follows that in hearing an appeal the Supreme Court is ordinarily entitled to assume that the findings of the lower court on questions of credibility were properly founded upon their assessment of the merits of the witnesses. It will therefore be unusual for such findings to be set aside merely because on a reading of the record the Supreme Court would have been inclined to form a different view. But this observation is not based on any rule of law restricting the revising jurisdiction of the Supreme Court. Acknowledgement of the advantages enjoyed by the magistrates in assessing credibility is no more than a matter of common sense. On the other hand, the facts may be such that the Court of Appeal is nevertheless left with a genuine doubt about the guilt of the defendant; a feeling that the magistrates may have made a mistake in accepting the prosecution evidence. Much depends upon the nature of the case. If, however, the Court is not satisfied that the prosecution have proved the guilt of the defendant beyond reasonable doubt, it is their duty to allow the appeal."

16.
That decision was not cited in subsequent cases of Kailaysur and Oliver, but it is not surprising. The issues were very different. In Sabapathee the Board was not considering the power of the Supreme Court to increase a sentence passed in the Intermediate Court, and its decision should not be read as authority on how that power should be exercised. The Board is in no doubt that the principle stated in Kailaysur and repeated in Oliver is sound and should continue to be applied.

17.
The reasons were powerfully stated by the Court of Criminal Appeal (YKJ Yeung Sik Yeun CJ and Domah and Matadeen JJ) in Dookee v Director of Public Prosecutions [2010] SCJ 71 on an appeal by the DPP under section 5(2) of the Criminal Appeal Act, as it then was. The DPP's power to appeal against a sentence passed by the Supreme Court was not at that time expressly limited by the words "where … he is of opinion that the sentence passed is wrong in law or unduly lenient", but the court said at para 177:

". . . sentencing is not a science of mathematical application of any set formula. It is a normative science rather than a physical science which takes into account the circumstances of the offender as well as the offence and the impact of the offence on the community. A sentence may look to be lenient because it is tailored to fit the offender, the offence and the offended but, in our system of justice, the trial court is the only constitutional institution which is empowered and sovereign in determining which sentence to impose on an offender on the facts of the particular case. An appellate court would scarce intervene unless the sentence is wrong in principle or manifestly harsh and excessive or unduly lenient. However, even if there is nothing wrong with the principle, the sentence may be increased by the appellate court if it is unduly lenient. The principle of proportionality pervades through the whole system of justice, in procedure, substance and sanctions."

18.
In applying the "unduly lenient" test, used in that passage and now in section 5(2) of the Criminal Appeal Act, the Board would caution against reliance on English authorities because the sentencing regimes are not identical. The words should be understood in the same sense as the expression "manifestly inadequate", used by the Board in Kailaysur and Oliver. When it is considering an appeal against sentence by the DPP, the question for an appellate court in Mauritius is whether the sentence was wrong in law or plainly too low, making full allowance for the matters properly stressed in Dookee, namely that sentencing is not a mathematical exercise but is one in which the sentencing court has a wide area of judgment. An appellate court must also make full allowance for the fact that

by the nature of things generally speaking a sentencing court has advantages in its feel for the case and its ability to assess all the relevant facts and circumstances, including the effect on any victim and the attitude of the offender, which are not shared to the same extent by a court subsequently reviewing its decision on the written record.

The DPP's decision to appeal

19.
The first ground of appeal raised by the appellant in his petition is that the DPP's decision to appeal was an arbitrary use of his power under section 92 and a breach of the principle of fairness.

20.
In support of this ground it was said that this was the first occasion on which the DPP had exercised his right of appeal under section 92 of the DIC, except by way of cross appeal in cases where the defendant had initiated an appeal against conviction and/or sentence. The appellant also pointed to other cases in which the DPP had not exercised his power to appeal against sentences which allegedly involved greater leniency than the present case.

21.
The logic of the submission is that by not previously exercising his power to appeal in comparable cases the DPP made the statutory provision a dead letter, except in cases where an appeal is initiated by the offender. This "use it or lose it" approach to the exercise of a statutory power is a novel constitutional proposition and is unsound. The existence of the statutory power means that Parliament must have intended that the DPP should exercise it in circumstances in which, exercising his discretion, he considers it right to do so. A decision not to exercise that power in the case of X cannot, without more, make it wrong as a matter of public law for the DPP to exercise his discretion to bring an appeal in an unrelated subsequent case involving Y. It should be added that there is no suggestion in this case that the DPP's decision to appeal was activated by some improper motive.

Unconstitutional delay

22.
Section 10(1) of the Constitution provides:

"Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law."

23.
It was submitted on behalf of the appellant that his constitutional right to the conclusion of the proceedings within a reasonable time was breached by the Supreme Court allowing the DPP's appeal against sentence 1 year 10 months after the imposition of the original sentence.

24.
The Board accepts that a defendant's rights under section 10 could be violated by inordinate delay in the processing of an appeal by the DPP. The question is whether the delay is sufficiently inordinate to have that effect.

25.
The Board is aware that judicial resources in Mauritius are strained, but that is not a satisfactory explanation for the length of time which elapsed in this case. The Court record shows that the hearing

of the appeal on 13 February 2012 occupied the Court for 47 minutes. The date of the appeal appears to have been fixed at hearing on 15 February 2011, at which the parties were represented. The Board is not aware of the full circumstances, but on the face of it the Board considers it highly regrettable that an appeal of this kind should be fixed for a hearing date in a year's time. It is also regrettable that it took nearly six months thereafter for the court to deliver a 4 page judgment.

26.
An appeal against sentence by the DPP is exceptional and involves double jeopardy for the offender. Such cases ought to be processed expeditiously. This is especially so where the defendant has received a non-custodial sentence (or where a custodial sentence imposed by the sentencing judge will have expired by the time that the appeal is heard) and the DPP is arguing that he should receive a custodial sentence (or be returned to prison to serve a longer sentence).

27.
The Board is troubled by the overall delay in this case but it is not persuaded that the period was so long as to make it unconstitutional for the Supreme Court to disturb the original sentence. It was nevertheless a factor which justice required should be taken into account in deciding the outcome of the appeal.

The Supreme Court's decision

28.
It was submitted on behalf of the appellant that the Supreme Court failed properly to address the question whether the original sentence was unduly lenient; that the judge gave due consideration to the mitigating and aggravating circumstances and arrived at a decision which was properly open to her; and that the Supreme Court failed to give adequate reasons for allowing the appeal.

29.
The judgment began by setting out the DPP's grounds of appeal, the first of which was that the appeal was wrong in principle and unduly lenient. The court did not state in express terms that it considered the sentence to be unduly lenient, and it would have been better if it had done so, but it is clear in the Board's view that the court came to that conclusion for the reasons which it gave in the passage set out in para 6 above, and it supported that conclusion by referring to sentences passed in a number of other cases.

30.
The Board considers that the Supreme Court was entitled to reach that view and gave sufficient reasons. The quantity of drugs with which the appellant was caught was not inconsiderable. Importantly, it was not his first offence of drug dealing. Having pleaded guilty only at the last minute, he was entitled to very little discount for doing so. Moreover, the Supreme Court is in a far better position than the Board to assess the proper tariff for drugs offences in Mauritius, and the Board would be accordingly slow to interfere with its decision in such a matter.

31.
Ms Moonshiram submitted that it was unfair for the Court to say that "even after his guilty plea, he did not wholeheartedly embrace the fact that the drugs were in his possession for distribution but attempted to downplay his criminality by saying the drugs were for consumption", since the appellant had not been cross-examined. The Board does not consider this to be a point of significance. The appellant's evidence on the point was either inconsistent with his plea or involved a novel suggestion, not expressly stated, that during the 48 hours between buying the drugs and the visit by the police he

had decided, implausibly, to sell the drugs initially bought for his own consumption. The transcript of the proceedings before the Supreme Court shows that this explanation was not put forward by Ms Moonshiram when the court pointed out that by his evidence the appellant appeared to be going back on his plea. On the contrary, she had no answer to the court's suggestion that his evidence was in contradiction of his plea.

32.
The Board considers that the Supreme Court was entitled to conclude that the original sentence should have been a custodial sentence for three years and that a non-custodial sentence was manifestly inadequate. However, the Supreme Court did not go on to consider the factor of double jeopardy and the length of the delay which had elapsed since the imposition of a non-custodial sentence, nor did it consider whether in these circumstances the substitution of a three-year sentence would be grossly disproportionate so as to involve a violation of section 7 of the Constitution. In these respects it fell into error.

33.
The Board has considered whether the right course would be to send the matter back to the Supreme Court for its reconsideration. However, this would involve yet further delay and uncertainty for the appellant.

34.
There have been changes in the appellant's personal circumstances since his conviction. He is now married, his wife is pregnant and he has employment at a gym. The offence was a serious one and the Board is not persuaded that it would be grossly disproportionate for the appellant to serve a period in custody for it, but it is satisfied that it would be grossly disproportionate, in all the circumstances that he should now be required to serve a sentence as long as three years. The Board concludes that the appropriate course is that his appeal should be allowed, the sentence of three years imposed by the Supreme Court should be quashed and there should be substituted a sentence of 18 months' imprisonment, less the period spent by the appellant on remand in custody.