IN THE SUPREME COURT
OF TURKS AND CAICOS ISLANDS
Appellate jurisdiction

Case No: CR-APM 26/10

BETWEEN

DESMOND ARTHUR

Appellant

AND

R

Respondent

Appellant in person
A Brooks for respondent

Hearing: 4 and 23 February 2011
Judgment: 1 March 2011

Judgment

[1] The appellant, Desmond Arthur, was charged with possession of cocaine with intent to supply to another. He appeared before the Magistrate's Court on the 21 September 2010, pleaded guilty and was sentenced to 18 months imprisonment. He appeals on the grounds:

1. that the conviction was unsafe and unsatisfactory;
2. that the sentence was manifestly excessive.

[2] At the hearing before the magistrate he was represented by counsel. He told this Court that, on the first two occasions the case was called on in the Magistrate's Court, he had a witness with him but, on the date of the trial, his witness could not attend because he had been shot in both legs. He said that his counsel told him it was hopeless without a witness and so he just pleaded guilty out of frustration

[3] He also said that the magistrate told him he would reduce the charge to one of simple possession but, when he passed sentence, he did so for possession with intent to supply.

[4] This Court will only allow an appeal against conviction where the appellant pleaded not guilty. Section 161 of the Magistrate's Court Ordinance provides that no appeal shall be allowed in any case in which the accused person has pleaded guilty and has been convicted on such plea, except as to the extent or the legality of the sentence. However, that provision is subject to the qualification that, if the plea was equivocal, an appeal may be brought against conviction because a plea of guilty must be a clear admission of the offence with which the person is charged. If there is any equivocation apparent then it should not be treated as an admission of the offence and the case should be tried as a plea of not guilty.

[5] In an appeal from the Magistrate's Court, the appellate court is bound by the record of the magistrate and will only accept a plea was equivocal if there is something on the record to suggest something less than a clear admission. I have called for the record the Magistrate's Court and there is nothing to support the suggestion of the appellant that this was a plea to anything but possession with intent to supply. I do not accept, therefore, the appellant's suggestion that the magistrate spoke of reducing the charge in any way. I have absolutely no doubt that, had such an incident occurred, his counsel would have corrected it.

[6] The amount of cocaine was 153.19 grams and it is quite clear that the magistrate considered such a quantity strong evidence of an intention to supply to others and sentenced on that basis. In the Reasons for his Decision, the magistrate stated:

> "... his lawyer said in mitigation that his client is a recreational use of cocaine and that the quantity of drugs was not on the high end of the scale."

[7] The magistrate's minute records the mitigation to have been:

> "Client is a recreational drug user supply to himself
> Quantity not huge not on the high end of the scale."

[8] The difference between these two records is significant. The fact that the appellant is a recreational user of cocaine is equally consistent with simple possession and with possession with intent to supply. However, the reference to "supply to himself" could be seen as qualifying the plea to the latter.

[9] When addressing this Court, the appellant explained that his case was that he had never had possession of this cocaine at all. He said his witness would confirm that, at the airport, the appellant was told to remove his trousers and nothing was found. The cocaine only appeared at the police station and was nothing to do with the appellant.

[10] Had that been his instructions to the very experienced counsel who represented him at the Magistrate's Court, I do not accept counsel would have agreed to a plea of guilty to any form of possession being entered. I am equally satisfied that, despite the wording in the magistrate's minute, if counsel's instructions had been that the appellant intended this cocaine to be for his own use, he would not have allowed his client to plead guilty to possession with intent to supply.

[11] I am satisfied that the plea of guilty to possession with intent to supply was unequivocal and there can be no appeal against conviction.

[12] In the magistrate's reasons for sentence, he pointed out that the appellant was 35 years old, had one previous conviction for possession of cannabis some eight years previously and convictions for other minor offences. He continued:

> "The court however had to consider that this was an offence of possession with intent to supply of a Class A drug. Cocaine is a serious scourge on society. Its victims gravitate to the large class of thieves and burglars who ply their trade to satisfy their craving for cocaine.
> Suppliers of cocaine are therefore responsible not only for the destruction of human life in particular, but of society in general. Therefore those who supply cocaine must be adequately punished and Desmond Arthur is no exception. I considered that he should have served two years for this crime but he has pleaded guilty and after hearing his counsel I impose a sentence of 18 months which I considered quite reasonable in the circumstances. In fact he got a larger discount because he has been in prison for some time although on unrelated matters. Outside of that he should have been imprisoned for 21 months."

[13] Although the learned magistrate's comments about the seriousness of cocaine are correct, there was no suggestion in this case that this appellant was involved to the degree described. It is right that others should be warned of the type of sentence they face on conviction. If such a warning is given, it is better made in an appropriately serious case either in terms of the quantity of drug involved or the number of previous offences. The facts of this case did no merit such a statement and it carried a risk that it could leave the defendant with a sense of injustice. It was, however, correct and appropriate to point out that anyone involved in the supply of cocaine to others must understand that immediate imprisonment is inevitable in all but very exceptional circumstances.

[14] The courts have treated the case of *Isaac Freites v R* in December 2005 as a guide for sentencing in drug cases. Gardner CJ suggested that possession of Class A drugs, whatever the

quantity, should normally be dealt with by an immediate sentence of imprisonment. Any offence of importing, producing or supplying drugs, whether Class A or B, should normally be sentenced by an immediate sentence of imprisonment of not less than a year. Larger amounts should normally be dealt with in the Supreme Court.

[15] In the present case, the learned magistrate clearly considered the quantity was sufficiently small for the case to be dealt with in the Magistrate's Court. Apart from the plea of guilty and the fact he was already in prison for other offences, the magistrate considered the proper sentence was one of two years imprisonment.

[16] An appellate court will only interfere with the sentence if it is manifestly excessive. The fact that it may be more or less than the appellate court would have ordered is not sufficient ground to allow the appeal and reduce the sentence.

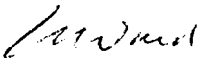
[17] 153 grams of cocaine as a quantity to be supplied to others is not a particularly large amount as counsel for the defence submitted on behalf of the appellant. It is, however, a sufficient amount to supply many customers.

[18] The learned magistrate was correct only to consider an immediate custodial sentence. Counsel's optimistic suggestion that it might have been suspended was properly rejected. Even though this was the appellant's first conviction for cocaine, there was a previous conviction for possession of cannabis, albeit eight years before, which was a factor properly taken into account in determining the appropriate sentence.

[19] I am satisfied that the sentence of 18 months imprisonment was not manifestly excessive and the appeal against sentence is dismissed.

[20] Before leaving this case I would mention one further matter. In his reasons for the decision, the magistrate added comments about the form of the notice of appeal and of the merits of the appeal itself. Allowing magistrates to write their reasons for the decision only after grounds of appeal have been filed carries the risk that they may be tailored the better to meet the appeal.

[21] The purpose of the reasons is to explain the magistrate's thinking at the time the hearing took place. It is quite wrong to adjust it in any way to answer the appeal. If there are any points to be made against the appeal, they will be made by counsel for the respondent. Any apparent views the magistrate may hold about the motive for bringing the appeal, the merits of the appeal or the manner in which it is presented are, at best, irrelevant and, at worst, may be seen as suggesting a lack of impartiality and/or objectivity. Such comments have no place in the magistrate's reasons and must be avoided.



Gordon Ward
Chief Justice