The Republic of Trinidad and Tobago

IN THE HIGH COURT OF JUSTICE

Criminal Division

Scarborough

CR T003/2012

THE STATE

v

NAZIM ALI

For

POSSESSION OF MARIJUANA FOR TRAFFICKING

Before The Honourable Mme Justice Lisa Ramsumair-Hinds

Date of Delivery: Tuesday 30 July 2019

APPEARANCES

Mrs Stacy Laloo-Chong and Ms Josanne Forrester for the State

Mr Criston J Williams, instructed by Ms Shanice Edwards, for the Prisoner

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SENTENCE RULING

INTRODUCTION

1. Mr Nazim Ali was charged in November 2000 for one count of Possession of a Dangerous Drug, namely Marijuana for the purpose of Trafficking, contrary to **section 5** of the **Dangerous Drugs Act, Chap 11:25**.

2. On 10 July 2019, he was arraigned and pleaded Not Guilty. He was subsequently tried and convicted by a jury of his peers, who returned a unanimous verdict of Guilty, one day later on 11 July 2019.

3. He now falls to be sentenced.

THE SENTENCING METHODOLOGY AND AIMS

4. The authorities are well-settled as to the aims of sentencing and the methodology to be used by judges.

5. The five principal objects of sentencing are set out in **Mano Benjamin v R**[1], and bear repeating:

    i. The retributive or denunciatory, which is the same as the punitive;
    ii. The deterrent vis-à-vis potential offenders;
    iii. The deterrent vis-à-vis the particular offender then being sentenced;
    iv. The preventative, which aims at preventing the particular offender from again offending by incarcerating him for a long period; and
    v. The rehabilitative, which contemplates the rehabilitation of the particular offender so that he might resume his place as a law-abiding member of society.[2]

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[1] (1964) 7 WIR 459.

[2] ibid, 460 – 461, per Wooding C.J.

6. I have also been guided by the four-tiered methodology which is expected to be applied by all sentencing judges, as set out by their Lordships in **Aguillera, Ballai, Bali and Ayow v The State**[3]. The overall sentencing structure is set out as follows:

    i. The calculation of the starting point which takes into account the aggravating and mitigating factors of the offence only; these are the objective circumstances which relate to the gravity of the offence itself and which assist in gauging the seriousness, that is the degree of the harmfulness of the offence;
    ii. An upward or downward adjustment of the starting point (or dependent on the circumstances, and if there is in effect, a cancelling out, no adjustment at all), which takes into account the aggravating and mitigating factors relative to the offender; these are the subjective circumstances of the offender which in turn inform the degree of culpability of the particular offender;
    iii. (Where appropriate), a discount for a guilty plea; any deviation from the discount requires particularly careful justification and an explanation which is clearly expressed; and
    iv. Credit for the period of time spent in pre-trial custody.[4]

7. **Section 7 of Chap 11:25** states:

> A person who commits the offence of trafficking in a dangerous drug or of being in possession of a dangerous drug for the purpose of trafficking is liable upon conviction on indictment to a fine of one hundred thousand dollars or, where there is evidence of the street value of the dangerous drug, three times the street value of the dangerous drug, whichever is greater, and to imprisonment for a term of twenty-five years to life.

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[3] Crim. App. Nos. 5, 6, 7, 8 of 2015.

[4] ***Aguillera et al***, [24].

CONTEXTUAL BACKGROUND FOR SENTENCING EXERCISE

8. I pause to note that the sentencing exercise requires a dispassionate and somewhat detached approach. Indeed, in New South Wales, Street CJ perspicaciously observed some four decades ago that, "It is cool reason, not passion or generosity that must categorize sentencing as all other acts of judgment."[5] Sentencing considerations are rooted in fairness, so that an offender is and must be punished for the crime he commits. Unfair outcomes undermine public confidence in the legal system and in the rule of law.

9. This particular offence has been one which has been difficult to sentence, not only in this jurisdiction, but all others in which society suffers from the scourge of the illicit drug trade. There is some disquiet from the Executive regarding the perception of a divide between Parliament's clear intention and the Courts' interpretation. The doctrine of separation of powers is sacrosanct, but in the exercise of our clear discretion, we must consider the reasoning behind the creation of certain laws.

10. I cannot and do not seek to simply disregard Parliament's clear intention considering the punishment mandated by the **Act** and, as Parliament has by its provisions noted, the distinction and import of the criminality involved in the trafficking of dangerous drugs. The simple fact is this – by Act No. 44 of 2000, Parliament expressed its abhorrence for those involved in the illicit drug trade and in its wisdom, with a mighty hand, by amending the substantive legislation, prescribed a severe sentencing range of a minimum of 25 years to life imprisonment.

11. That having been acknowledged, it bears repeating that the issue of regard by sentencing judges to Parliament's intention was decisively addressed in ***Barry Francis and Roger Hinds v The State***[6], where the learned judges of

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[5] ***R v Rushby*** [1977] 1 NSWLR 594, 598 (CA, AU).
[6] Crim. App. No. 5 and 6 of 2010

the Court of Appeal held that the mandatory minimum imposed by the conjoint effect of sections 5(5) and 61 of the Act was unconstitutional.

12. The practical effect of that decision therefore, is that the sentencing range for the offence of Possession of a Dangerous Drug for the Purpose of Trafficking "may vary from a maximum sentence of life imprisonment to such minimum sentence as the court sees fit, and in determining the appropriate sentence in any case the court must have regard to all of the factors set out in Smith, many of which are encompassed and repeated in Mano Benjamin. In addition, the court must have regard to the significant factor of Parliament's clear intention.[7]"

13. I note though that with that same heavy hand, Parliament included in the very Act, a section which bears the Short Title 'Lesser Penalty for Younger Offenders'. That was the newly included section 56A which reads:

    "Where a person under the age of 21 years appears before a Court and is found guilty of an offence under this Act, the Judge or Magistrate may impose a lesser penalty on such a person other than that specified for the offence in the Act."

14. Further, at paragraph 12 of ***Barry Francis and Roger Hinds***, Yorke-Soo Hon JA noted:

    "On the question of approach by the sentencing judge, we are all of the view that all the pertinent factors including, of course, the minimum sentence, should be "put into the pot" and a balance struck where there are competing factors … The approach adopted will in no way ignore or diminish the intended purpose of Parliament."

[7] ***Barry Francis and Roger Hinds***, above

THE SENTENCING POT

15. Mr Nazim Ali chose to contest the charge. That was his entitlement, certainly, but it exposed him to the position he now finds himself facing. He has disqualified himself from the very significant discount to be applied generally where remorse is demonstrated by a guilty plea.

16. Whereas a guilty plea, which avoids the wastage of judicial time and the need to put witnesses through the rigours of cross-examination, will in most circumstances occasion a significant mitigating effect, the converse, that is, pursuing a defence, even where it casts aspersions on the Prosecution witnesses, cannot and does not amount to an aggravating factor.

17. The consequence of having his allegations disbelieved is the resulting conviction itself. In principle therefore, I cannot find favour with the State's contention that the mere fact of contesting the charge and protesting his innocence is an aggravating factor. Nor will I attach such a consideration to the aspersions cast on the Police Complainant on the facts of this case.

18. All that having been said, the starting point must therefore be an assessment of culpability bearing all the factors in mind. I begin with a consideration of the aggravating factors relative to the offence:
    i. The seriousness of the offence, which necessarily includes prevalence and the need to protect society.
    ii. The fact that the Officer heard the Prisoner say, "See if the way clear", suggests that this was an enterprise some degree of collaboration.
    iii. The drugs were discovered in the bag in the Prisoner's hand as he was disembarking a passenger vessel, that is the inter-island ferry.

19. Turning to the mitigating factors relevant to the offending, there is but one for my consideration:

i. Though certainly measuring more than the minimal weight for the application of the deeming provision, the quantum of drugs was relatively on the lower end of the scale.

20. Counsel for both sides have volunteered case law as providing sentencing norms and precedents. I have considered them all as being relevant. Taking all relevant factors into consideration, I am of the view that the appropriate starting point is **2 years' imprisonment**.

21. I turn now to the second tier of the **Aguillera** methodology to ascertain whether there are any factors personal to Mr Ali which can occasion an upward or downward adjustment of the starting point.

22. I bear in mind two cases which were decided before the specific formula in ***Aguilera*** had been prescribed. To my mind they address considerations which would squarely fall under the 2nd tier. In ***Nicholas Mathura v SRP Raymond Mendoza***[8], a sentence of 3 years imprisonment for a similar offence swas varied on appeal to a period of supervision under the Probation Department with stipulated conditions. More significantly, I note the ruling of my sister in ***The State v Grace Pierre Holder and Daenah Johnfinn***[9]. Her Ladyship Browne-Antoine J in sentencing Johnfinn, considered two factors, amongst others, which arise here. This exercise was at the end of a trial where she had originally pleaded Not Guilty and was later convicted of possession of 771 g of Cocaine, some hidden in false soles of Clarks shoes, at the Piarco International Airport and bound for an international destination. Certainly, that matter involved more serious aggravating features, particularly in arriving at a starting point. However, there were specific considerations in mitigation which were personal to Johnfinn, namely that she was just 18 years old at the time of her arrest and, it took 12 years for the trial to be determined.

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[8] C.A. Mag. 31/2012, outlined in the JEITT Sentencing Handbook @ A-317
[9] H.C. 32/2007

23. In general terms, I found no aggravating factors personal to Mr Ali. The considerations listed below were favourable and they are explored further for the fullness of their mitigating effect:

    i. He is the father of four children, three of whom are minors.
    ii. He is ordinarily gainfully employed, though not in a permanent capacity.
    iii. He waited 19 years for this trial.
    iv. His second offence for this propensity to commit drug trafficking offence, which later became his only conviction on record, was for an offence committed when he was yet still under the age of 21.
    v. In the years since that offence and more particularly, since the conviction in 2011, there is no evidence of re-offending.

24. Certainly, as he stands before me now, he has a prior conviction and indeed, it is for the same offence. As Counsel for the State has noted, this conviction demonstrated his continuing propensity to involve himself in the illicit drug trade. Indeed, he may have become emboldened, as the quantum involved in that conviction was quite substantial. However, it would be remiss of me and a warped understanding of Lady Justice's blindness, if I failed to appreciate that the unlawful actions which engage my attention now took place when Mr Ali was but 18 years old, and are actually his first offence. Further, the second offence, which became the first conviction took place when he was still under the age of 21 years. It is equally important to note that, although he was convicted less than 10 years ago, that conviction was for a crime committed in the year 2002, 17 years ago.

25. It is always important to look closely at this 2nd tier of the Aguillera methodology, as we might miss the crucial opportunity and <u>lose sight of</u>

the man in the shade of the offence. The sentencing exercise is not a purely mathematical consideration.

26. Mr Ali continued offending after 2000. That is a fact. He was caught and later punished with a term of imprisonment. That too is a fact. It is imperative that I look at who he was at the time of both the 1st and 2nd offences. I am grateful therefore to the Probation Services Department for their assistance and especially for their diligence given the geographical and time constraints. Their Report reveals that when he was first charged, the young man who had never been facilitated with a secondary school education, had just become a father.

27. I am loathe to encourage or to seem to suggest that unlawful activity is an acceptable means of contending with the rigours and responsibilities of life. Categorically, I denounce the 'circumstances made me what I am' philosophy. Nevertheless, I must acknowledge as having mitigating effect that this was a young man who was poor, so poor that he was not allowed to attend High School. I take notice from his Bail Bond, that he can barely scribble his name as a signature, suggesting a high degree of illiteracy. He had just been ushered into adulthood and was a newly minted father. I am not out of touch with the common man. I firmly believe that in those circumstances and in that period of his life, Mr Ali was one of the victims of the illicit drug trade himself. We must as a society realize that our young persons, especially our young men (look at Remand Yard) are fertile ground from which the proverbial 'big fish' reap a steady supply of utterly dispensable dealers and traffickers. I am confident in this assessment and reject any assertion that this is reflective of a bleeding heart. The simple fact is that he entered adulthood, made this mistake to earn some quick cash, made the same mistake two years later, got caught twice and then got out. He has already paid the heavy price of a 3 year sentence. He now earns a humble and decent living. He lives well with his family, four children and more than one 'child-mother', four as I now understand. More than

one of those mothers lent their support to the plea in mitigation through the Probation Officer and by their presence in Court. That is commendable. He has no other convictions, which suggests that his last criminal venture was 17 years ago. With the benefit of time and maturity, he has reformed himself.

28. I must add that the length of time for this matter to go to trial is of significance as well. It took 19 years to try him, in a trial that lasted two days. This remained hanging over his head, already stymied regarding job prospects, for almost two decades. To punish a man with a heavy hand now is to have a heart of stone. It frankly would be unjust. 17 years is almost enough to take a baby to adulthood. That is the date of his second and last offence. Certainly 17 years allows a man room to change his life's course. A scrupulous examination of Mr Ali's record reveals an otherwise decent character. Indeed, if the young 18 year old Nazim Ali was tempted to explore a career in the drug trade, as it seems he was, having been caught twice before his 21st birthday, he thereafter sought to earn his bread from other lawful ventures.

29. I add these considerations to the 'pot' and juxtapose it with section 56A. I am of the firm view that Parliament fully expects that had I been sentencing the 18 year old who committed this offence any time before he turned 21, section 56A would be of strong mitigating effect. It would not be right to ignore that.

30. There is no need to address the 3rd tier as it does not arise. Further, as will be understood from the disposition noted below, although he did spend a considerable period in custody, that too does not arise mathematically.

DISPOSITION

31. Before I give my decision, I wish to apologize to Mr Ali for the length of time this matter took to come to trial. I do not wish to cast blame

anywhere, and those who operate in and understand without pretence, how the criminal justice system is structured and staffed, appreciate how challenging it is to attribute fault. I am extremely heartened, though tired, by the early successes of the new Calendaring System (sometimes called the Docket System) which was introduced by the Honourable Chief Justice on 1st February 2019. This system has allowed the 10 Puisne Judges of the Criminal Division to approach their individual portion of the criminal caseload strategically. I thank the attorneys for both sides for creating room in their schedules burdened with weightier trials in Port of Spain and San Fernando, with some prodding from the Court, to hear this short but old matter on the Tobago list. With all due respect, Lady Justice may have been slow to address Mr Ali's wrongdoing, but she is not blind.

32. I therefore impose the following sentence on Mr Ali:
    i. A Bond in the sum of $50, 000 to keep the peace and be of good behaviour;
    ii. In default of the stipulated condition on the Bond, he is to pay a fine of $25, 000.