

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Crim. No. 01 of 2018

BETWEEN

THE STATE

v

VAIDO VILLEM

FOR

CONSPIRACY TO TRAFFIC IN A DANGEROUS DRUG

BEFORE THE HON. JUSTICE GILLIAN LUCKY

APPEARANCES:

Ms. Heller on behalf of the State

Mr Rajcoomar on behalf of the Defence

JUDGEMENT

EARLY HISTORY

1. The prisoner Vaido Villem first came before this Court on a bail application on the 16th November, 2017. A bail application had been adjourned earlier in the year in another Court. At the hearing of that earlier bail application, Mr. Rajcoomar indicated that his client was committed for sentence since 24th June, 2014 and no indictment had yet been filed in the matter.
2. Mr. Rajcoomar correctly, in the view of this Court, lamented that his client was being deprived of an early opportunity to plead guilty because of the decision to hear the matter by way of indictable proceedings as opposed to summary proceedings.

3. The learned Judge in that Court fully cognisant of the situation, called upon the prosecution to have the indictment filed so that the matter could be listed and dealt with in accordance with the prisoner's indication in the magistrates' court that he wanted to plead guilty to the offence.
4. In order to ensure that the matter of the filing of the indictment was 'hotly pursued', Mr. Rajcoomar resorted to a measure which this Court labels '**creative legitimate management/means**' (CLM) by leaving the matter on the bail list so that a status on the indictment could be monitored by a Court.
5. Mr. Rajcoomar confirmed that sometime ago he had written to the Office of the Director of Public Prosecutions (DPP) inquiring about the indictment and was now left with no alternative but to seek the intervention by the Court to have the matter expedited.
6. The prisoner's bail application came before this Court on the 16th November, 2017 and the circumstances surrounding its listing, as outlined above, were explained.
7. This Court was informed that there was another matter in which a person named 'Vambola' who was known to the prisoner and who was charged at the same time for being in possession of a dangerous drug namely cocaine, had pleaded guilty in the magistrates' court and was sentenced to four years imprisonment. Vambola, although not jointly charged with the prisoner, was a person who, like the prisoner, had been asked by a man called 'Mike' to ingest drugs. Vambola ingested packets of cocaine amounting to 774g and was charged for being in possession of drugs for the purpose of trafficking. The prisoner was unable to ingest the drugs but was part of the agreement to traffic the cocaine. Accordingly, he was charged for conspiracy to traffic in drugs.

8. Vambola served a remitted sentence of 2 years and 8 months and was returned to his home of Estonia some 8 months after serving this sentence. Mr Rajcoomar indicated that Vambola was kept at the Detention Center for an 8 month period while arrangements were made by the State to have him escorted by local police to Estonia. Mr Rajcoomar submitted that had his client been allowed to plead guilty in the magistrates' court in February 2013, he would have been most likely sentenced for a period similar to that of Vambola, and like Vambola, his sentence would already have been served.
9. Further, if the indictment had been filed soon after the 24th June, 2014 when the prisoner was committed to be sentenced in the High Court, the position would have been the same in that, more likely than not he would have already served his sentence.
10. The fact confronting the Court was that the prisoner had been in custody since the 31st January, 2013 with no indictment filed in the matter up to its last bail listing on the 29th January, 2018.
11. It must be stated that at each bail hearing, the prosecutor undertook to do all possible to expedite the filing of the indictment which was eventually done on the 6th February 2018.
12. From that date, the matter was deemed urgent by the Court and actively case managed so that all relevant documents could be filed by both sides to proceed with the guilty plea of the prisoner. The matter was listed for the 22nd February 2018 for the Court to hear submissions and impose sentence.

AGREED FACTS

13. At around 10:05am on Thursday 31st January 2013, the complainant in company with a party of officers all dressed in plainclothes went to the Trini Guest House at 27 Belmont Circular Road, Belmont.
14. On arrival, the complainant and the other officers proceeded to Room 7 of the guesthouse where she met the Accused. She identified herself to the Accused by showing him her Trinidad and Tobago Police Service Identification card and asked him if he could speak English to which he replied “Yes.” The complainant also asked the Accused his name to which he replied, “Vaido Villem”. The complainant then informed the Accused that she was investigating a report of conspiracy to traffic a dangerous drug namely cocaine and that he was a suspect. The complainant then informed the Accused that she also had information that he the Accused had in his possession dangerous drugs which he conspired with other persons to ingest and traffic to Europe. The complainant then cautioned him and he remained silent.
15. The complainant, with the assistance of other officers then conducted a search of the room after informing the Accused of her intentions to do same. Nothing illegal was found, however the complainant seized one HP laptop and one black Xperia cell phone, one red Nokia cell phone, Estonian passport in the name and likeness of the Accused, travel itinerary and other items. The complainant then told the Accused that he was under arrest, told him of his legal rights and privileges and he made no request.
16. The complainant then conveyed the Accused to the Port of Spain General Hospital to ascertain whether he had ingested any foreign objects. A medical report on behalf of the Accused revealed that this had not been the case.

17. The complainant then conveyed the Accused to the office of the Organised Crime, Narcotics and Firearms Bureau where at 11:50am, Ag Sgt Stanley identified himself to the Accused and cautioned him. The Accused in reply to the caution said, "I would like a cigarette to smoke, something to eat and I want to talk to my friend Vambola and I will tell you everything."
18. At 4:00pm on that said day, the Accused in the presence of the complainant and Ag Sgt Stanley stated, "My friend had 500 grams of cocaine in his stomach. Mike told me that they were 5 grams each. He had some carrots like cocaine capsules but I couldn't swallow it."
19. At 4:13pm, the complainant heard the Accused's cell phone ring. The number "4" appeared on the screen and the Accused indicated that Mike was calling. The complainant set the phone to speaker mode and heard a male voice say "Where are you?" and the Accused replied, "On my way to the airport." The voice then said, "Where are you now?" and the Accused replied, "On the highway". A short while later a text message was received on the Accused's phone and the complainant observed the text which read "VAIDO VILLEM. 31th (sic) Jan time 19:40pm. Ticket Number 1062402698359. Rloc Bw- PG3V5 CARIBBEAN AIRLINES. The sender was the number which the Accused had stored as "4". There were two more texts received on the Accused's phone from the number stored as "4" and the last one instructed him to delete all messages on the phone before he left.
20. At 5:30 pm, the complainant collected \$300 from Ag Cpl Stoute which represented cash sent to the Accused for the furtherance of the offence of conspiracy to traffic, cautioned him and he remained silent. During the period Thursday 31st January and Friday 1st February 2013, the complainant recorded a caution statement from the Accused and it was subsequently authenticated by Justice of the Peace Joseph Granhum.

21. The complainant later received instructions from the Director of Public Prosecutions to charge the Accused for the offence of conspiracy. She further cautioned the Accused who remained silent. He was formally charged on February 4th 2013 and told of his legal rights and privileges. He requested a phone call to his friend in Estonia which was granted to him.

RULING

22. Submissions were made by Counsel as to whether the offence of conspiracy to traffic in a dangerous drug could be heard summarily.

23. The information upon which the prisoner was charged states the offence as “...conspired to traffick in a dangerous drug namely cocaine. **Contrary to Common Law**”. (emphasis mine).

24. Therefore, from the record of the proceedings, it appears that the prisoner was not charged according to **Section 26** of the **Dangerous Act, Chapter 11:25** which states:

“Any person who is convicted of conspiracy to commit an offence under this Act is liable, notwithstanding anything contained in any other written law, to the same penalty provided for that offence under this Act.”

25. The relevance of this observation is that while Vambola was allowed to plead guilty in the magistrates’ court, the prisoner was informed that his matter must be heard following preliminary enquiry proceedings.

26. In fact, there is a written endorsement on 12th February, 2014 which states - “*DPP to give instructions re summary trial.*” And a written endorsement on the 12th March, 2014 which states - “*State attorney states this matter **must** be dealt with indictably*” (emphasis mine).
27. The Court is aware of **Section 5 (7A)** of the **Dangerous Drugs Act** which states:
“Notwithstanding subsections (3A), (5), (6) and (7), where a person is charged for a drug trafficking offence under this Act, the Director of Public Prosecutions may, at the preliminary enquiry, elect to proceed with the matter summarily and if the Accused so consents, the Court may adjourn the matter to be dealt with accordingly”.
28. This means that the consent of the DPP was required for the matter to proceed summarily. According to the endorsement already referred to, the approval was not granted.
29. There are no reasons stated for the refusal of the DPP to proceed summarily.
30. The Court would have found it helpful if such reason(s) was/were recorded, especially since Vambola, who was charged for the substantive offence of trafficking had his matter proceed summarily.
31. The fact that the prisoner was charged according to the common law when the offence is one which is created by statute suggested to this Court that because matters involving conspiracy are tried by indictment, no consideration was given to the statutory provision. That having been said, it is the position of this Court and counsel for both sides that conspiracy to traffic in narcotics is governed by statute and is triable either way.

32. This Court expressed the view that, without the benefit of any explanation on record, it seems unfair that in a situation in which the facts concerning the commission of the respective offences were so intimately related, Vambola gained the benefit of a summary proceeding while the prisoner was deprived of same. The net effect was that Vambola was sentenced in early 2013 while the prisoner was committed for sentence in June 2014 and had been in custody awaiting the filing of his indictment.
33. The timeline of 3 years and eight months for the filing of an indictment in a situation in which a person has indicated from early in the day in the magistrates' court, his intention to plead guilty, is nothing short of a travesty of justice. This situation gives unfortunate reality to the saying that *'justice delayed is justice denied.'*
34. This Court has the highest regard for the late Dana Saroop Seetahal S.C. who wrote in her book entitled **Commonwealth Caribbean Criminal Practice and Procedure 4th ed.** at p 192-

“Speedy trial

An Accused person who admits he is guilty on a preliminary enquiry is usually assured of a speedy trial. Statute in some jurisdictions such as Barbados⁶ provides for this, but even where the law does not so specify, the prosecuting authorities are under a duty to ensure that this is done. One of the reasons for this is the fact that the Accused person is proposing to dispense with the requirements of proof at trial and save the prosecution time, expense and the uncertainty of a trial. It is only fair, then, that in recognition of this he should be given the opportunity to be sentenced early so as to begin serving his sentence without delay. Related to this is the fact that most defendants who have admitted guilt are committed to custody pending the listing of their case in the High Court. This seems to be on the assumption that the Accused person will obtain a speedy hearing of his case at the Assizes. If he does not, then bail is usually granted, but the failure to grant a defendant who has admitted guilt a speedy trial would serve to defeat the purpose of the statute.

In such a case, an Accused person may very well withdraw his admission of guilt, possibly because of subsequent advice, but more likely as a consequence of the delay”.

35. In this case the prisoner did not withdraw his intention to plead guilty but was made to lay waiting for an inordinate period of time, until the filing of his indictment.

SENTENCE

36. The case of **Aguillera & Others v The State Crim. App Nos 5-8 of 2015** prescribes the methodology to be used by a judicial officer when sentence is being imposed. In this case, it is agreed by counsel for both sides that it would be unfair for the prisoner to be sentenced to more than 4 years imprisonment, bearing in mind, that was the sentence imposed on Vambola. The Court must be accountable and transparent in its sentencing process and an appropriate arithmetical formula should not be skewed to obtain a particular result.

37. According to **Section 5 (5)** of the **Dangerous Drugs Act**, the maximum penalty for this offence, upon conviction on indictment is 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.

38. The Court of Appeal in **Barry Francis & Roger Hinds v The State, Crim. App. Nos. 5 & 6 of 2010**, found that the mandatory minimum sentence described in **Section 5(5)** above (together with Section 61 of the Act) was disproportionate and unconstitutional.

It was further stated:

*“The effect of our decision is that the sentence 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.”*

39. The Court of Appeal in **Barry Francis** expressed that all pertinent factors, including the minimum sentence should be “put into the pot”, and a balance struck where there are competing factors.
40. In this matter, the aggravating factors of the offence are its prevalence, its seriousness, its transnational nature, the narcotic being cocaine, its weight of 774g and the fact that there was significant planning and premeditation surrounding the commission of the offence. The starting point would therefore be 8 years.
41. The mitigating factors concerning the commission of the offence are the young age of the prisoner (19 years), his willingness to assist the police in the investigation of the matter and his overall voluntariness to be part of a minor ‘sting’ operation. This would result in a downward adjustment of the starting point to 6 years.
42. The prisoner has pleaded guilty at the earliest opportunity and is entitled to a one third discount of 2 years. This takes the figure to four (4) years.
43. The time spent in custody is 5 years and 22 days.

44. After giving credit to the prisoner for the time spent in pre-trial custody, the Court indicates that the time is **already spent**.

45. Mr. Rajcoomar expressed his concern about a further time lapse which may occur if effort is not placed in ensuring the timely and safe return of the prisoner to his homeland, Estonia. The experience of Vambola is that it took 8 months after serving his term of imprisonment for his return.

46. All must therefore be done, even if resort is to be had to **CLM**, to ensure that there is no prolonged detention of the prisoner.

47. That having been stated, the Court will adjourn this matter to an early date next week, the last day of this month, to determine the progress in this final leg of the prisoner's journey home.

CONCLUSION

48. It will be remiss of this Court if it did not take the opportunity in its ruling to suggest mechanisms that can be implemented to ensure that justice is swift and fair, especially for those who wish to plead guilty but can only do so before the High Court.

49. There can be no excuse of lack of resources if the result is a harsh, cruel and undeserving consequence.

50. No blame has been apportioned to any department or institution in this matter, suffice to say that it was with the intervention of the Court, the persistence of Mr. Rajcoomar and the diligence of the prosecutor, that the indictment was finally filed.

51. The system of justice however should not be premised on the individual capacities and commitment of those who are involved in the process. The system is meant to operate efficiently and effectively at all levels. The kinks in the system must be straightened and chokes must be unclogged.

52. The work of the 'Project Backlog Reduction' (PBR) Committee established by the honourable Chief Justice is mandated to make practical suggestions as to the manner in which the backlog of criminal matters can be significantly reduced.

53. This Court which sits as the Chair of the committee, with the Registrar Mrs. Nirala Bansee-Sookhai as the Deputy Chair, uses this case as a catalyst to forward a list of recommendations for consideration by the individuals who are responsible for aiding in the smooth flow of the criminal justice process.

54. The list is by no means exhaustive and I urge those who may condemn it to replace it with something that will be workable and functional while the process is being perfected.

55. In this country we tend to shoot messengers, metaphorically speaking, and quickly indicate the reason suggestions for improvement will fail rather than giving the suggestions meaningful consideration.

56. The list is as follows -

- 1) A Registry should be established for the Magistrate's Court to promote and upgrade proper and efficient record keeping.

- 2) Upon committing a person(in the magistrates' court) for sentence in the High Court, in accordance with the Preliminary Inquiry Act – the name of the Accused, the number of the matter and all other relevant details should be sent to the Magistrate Court Registry or until its establishment, a specific department with the magistracy.
- 3a) The name of the Accused should also be sent to the DPP's Office indicating basic information about the matter (eg. The magistrates' court where the case was heard and the date of the committal) and the documents should be fast tracked to the Office of the DPP.
- 3b) Protocols should be established between the relevant offices and departments to ensure the safe, efficient and reliable transmission of documents.
- 4) The DPP's office should devise a system to have the indictments for those matters fast tracked re the filing.
- 5) The High Court Registry upon receiving the fast tracked indictment should assign the indictment to a particular Court or Courts for early determination. This can be done by the establishment of a Guilty Plea Court in each High Court Jurisdiction.
- 6) Further, the Commissioner of Prisons should compile a list of all persons in custody who want to plead guilty and all indictments for such persons, if not yet filed, should be prepared by the DPP for filing in the High Court Registry.

57. The aim is to ensure that the matters do not fall through the cracks and that matters are dealt with expeditiously. A comprehensive process flow for all matters in the criminal justice system, will assist in alleviating the backlog of criminal cases and the intent of the criminal justice system that justice be fair and swift.

58. I commend Mr. Rajcoomar and Ms Heller for their commitment to ensure justice in this case. I also commend the police officers in this matter who used a well-coordinated approach to investigate the case. And finally, the Court recognizes the industry of Ms Shacare' Gordon who did research on issues which arose during the course of this matter.

Dated this 22nd February, 2018

Justice Gillian Lucky