WONG KAM HONG v STATE

SUPREME COURT — CRIMINAL JURISDICTION

FRENCH, HANDLEY and WEINBERG JJ

23 October 2003

[2003] FJSC 13

Criminal law — sentencing — special leave to appeal — importing large quantity of heroin — "one-transaction rule" — "totality principle" — Dangerous Drugs Act (Cap 114) s 41(2) — Supreme Court Act 1998 s 7(2).

Petitioner pleaded guilty and was sentenced to 12 years' imprisonment on three counts relating to the importation into Fiji of a large quantity of heroin. The learned sentencing judge ordered that the sentences on counts 1 and 2 be served concurrently, but consecutively with the sentence imposed on count 3, making a total effective sentence of 12 years' imprisonment. Petitioner sought special leave to appeal from the decision of the Court of Appeal dismissing his appeal against sentence.

Held — The Petitioner fell to be sentenced for his role in the importation and possession of the entire quantity of heroin contained within the two containers. His offences were of a continuing nature, and the sentencing judge recognised that the one-transaction rule applied to counts 1 and 2, those of importation and possession. However, the Petitioner's conduct in separating out the heroin for the purpose of exporting it to Australia, though part of an ongoing criminal enterprise was a separate and distinct act of criminality. There were two distinct components in this criminal enterprise — the act of importation, and the attempt to export the heroin. As such the imposition of a cumulative sentence on count 3 was warranted.

Special leave disallowed.

Cases referred to

R v Bradley [1979] 2 NZLR 262; *R v Henderson* [1999] 1 VR 830; [1998] VSCA 83, cited.

R v Spiero (1981) 26 SASR 577, considered.

The Petitioner appeared in person.

G. H. Allan for the Respondent.

French, Handley and Weinberg JJ. 8 February 2002, the Petitioner was sentenced by Fatiaki J, as his Lordship then was, to 12 years' imprisonment on three counts relating to the importation into Fiji of a large quantity of heroin. He pleaded guilty to all three counts, and was sentenced:

- on count 1, importing heroin, to 7 years' imprisonment;
- on count 2, being in possession of heroin, to 5 years' imprisonment; and
- on count 3, attempting to export heroin, to 5 years' imprisonment.

The learned sentencing judge ordered that the sentences on counts 1 and 2 be served concurrently, but consecutively with the sentence imposed on count 3, making a total effective sentence of 12 years' imprisonment.

Factual background

On an unknown date, late in 1999, 357.7875 kg of heroin were imported into Fiji. This was by far the largest quantity of heroin ever imported into this country, and one of the largest shipments of drugs ever detected anywhere. The heroin was concealed within two containers.

The Petitioner is a resident of Hong Kong. He first came to Fiji in April 2000 on a false passport. His instructions from others in Hong Kong were to arrange for the clearance of the two containers. He did so with his brother's assistance. He arranged for the storage of the containers at premises which he rented at 50 Panapasa Road, Tamavua, Suva.

The Petitioner next came to Fiji on 6 September 2000. On that occasion, he again entered this country on a false passport. On 27 October 2000, he attended at the storage premises, and selected 50 blocks of heroin weighing a total of 35.1947 kg for the purpose of export to Australia. The heroin was of an average purity 72.49%, or equivalent to 25.5126 kg of pure heroin. The prosecution claimed that the potential wholesale value of the heroin to be exported to Australia was approximately A$50.8 million, and that it had a potential street value of many times that amount. The remaining heroin was still at the premises when seized by the police the following day. When the Petitioner was arrested, he had in his possession plastic stencils of counterfeit immigration stamps, stolen travellers' cheques to the value of approximately $3000, and a false Singaporean passport. The primary judge described these items as an "international drug trafficker's kit".

The primary judge's sentencing remarks

The sentencing judge commenced his remarks by noting that the maximum penalty for the offence of importation of heroin, provided for in s 41(2) of the Dangerous Drugs Act (Cap 114), was 8 years' imprisonment and/or a fine of $2000. He observed that the Dangerous Drugs Ordinance, which sets out the penalties for offences involving drugs, had not been amended in relation to morphine or heroin, since 1978. The maximum penalty for offences involving those drugs was significantly below that for Indian hemp, coca leaf and raw opium. Trafficking in Indian hemp where the quantity exceeds 100 gm carried a maximum penalty of 20 years' imprisonment while trafficking in prepared opium weighing in excess of a mere 10 gm carried a sentence of life imprisonment.

His Lordship was understandably concerned at the extraordinary fact that dealing with a quantity of well over 300 kg of heroin with an average purity in excess of 70% carried a maximum penalty of only 8 years. In his Lordship's words, it was " … difficult to imagine a worse case than this ever occurring in this country".

The sentencing judge noted that the Petitioner had pleaded guilty, and was entitled to some measure of leniency by reason of having done so. He also noted that the Petitioner had no relevant antecedents, and took into account his age and family circumstances. He concluded, however, that the Petitioner was the principal operative within this country of an importation of an extremely large quantity of heroin originating from Myanmar, directed and financed from Hong Kong. He found that in April 2000, on his first visit to Fiji, the Petitioner had organised and financed the release of the two containers from Customs, and their transfer and storage thereafter. He also found that some 6 months later, the Petitioner, with the assistance of a co-accused, personally prepared and packed the 35 kg of heroin from the larger cache and transported it to the Suva Yacht Club with the intention of accompanying it to Australia.

His Lordship concluded that the Petitioner had to be considered a "distributor" for whom a deterrent sentence could not be avoided. In sentencing the Petitioner as he did, he was mindful of the fact that state counsel had conceded that

consecutive sentences were not appropriate on the basis that the offences related to the "one shipment" of heroin into the country. In rejecting that concession, he said:

> … I am firmly of the view that the evidence giving rise to the offence of *Attempting to Export Heroin* charged in the 3rd count involves a distinct and separate offence arising out of involving [sic] the movement on a known date of an identifiable quantity of the heroin entirely unconnected to the original movement and possession charged in Counts 1 & 2 and ought properly to be treated differently.

The judgment of the Court of Appeal

The Petitioner appealed against his sentence to the Court of Appeal. He relied upon two grounds. They were:

> (1) That the learned Judge erred in law and fact in determining that count 3 was a separate transaction from the other two counts.
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> (2) That when the Prosecutor came to outline facts for sentencing he failed to mention that the Appellant had agreed to plead guilty, one of the bases for which was that the State was supposed to support a concurrent sentence for all counts.

The Court of Appeal observed that the primary judge had accepted that the heroin was not intended for local consumption. The intention was to use this country as a "staging post" for drug trafficking. Their Lordships did not regard this as a significant mitigating factor.

In dealing with the first ground of appeal, they rejected the submission that all three counts involved the same drugs, and that the charges under counts 1 and 3 were therefore not "distinct and separate". They observed that the offence under count 3 was separate in time, and involved a different quantity of heroin from that under count 1. A sentence on the charge of attempting to export which was cumulative upon the sentence imposed on the other two counts was therefore appropriate.

Turning to the second ground of appeal, their Lordships referred to an affidavit filed by a partner in the law firm then acting for the Petitioner. The deponent said that shortly before the commencement of the trial, a meeting took place with counsel for the state at which he was present. He said that an arrangement was made whereby if the Petitioner pleaded guilty, the prosecution would recommend a sentence of 7 years in total.

Their Lordships dealt with this ground succinctly. They said that the prosecution had met its part of the bargain into which it had entered by making clear to the primary judge that consecutive sentences were not sought, and that an appropriate sentence would be a total of 7 years' imprisonment. It was not the fault of the prosecution that his Lordship had rejected those submissions. The question was simply whether he had fallen into error in concluding that there ought not to be concurrency between counts 1 and 3. The answer to that question was that he had not.

The Court of Appeal went on to consider whether the total sentence passed was excessive. Their Lordships referred to the "totality principle" in sentencing as explained by the New Zealand Court of Appeal in *R v Bradley* [1979] 2 NZLR 262. They concluded that the sentence of 12 years for offences when the maximum sentence for each was 8 years was undoubtedly severe. However, this was a series of offences of such extraordinary seriousness as to call for a severe sentence. The Petitioner had been actively involved in a massive criminal operation relating to a huge volume of heroin of enormous value. There

had to be imposed sentences of sufficient severity to deter any person minded to use this country as a "staging post" for their criminal activities from doing so. In the result, the appeal was dismissed.

The petition to this court

The Petitioner was unrepresented before this court. He relied, in substance, upon the same arguments as had been put before the Court of Appeal. In addition, he contended that his plea of guilty in relation to the count of importation had been made under pressure, and in response to a plea bargain negotiated with the prosecution and that the conviction on that count should be set aside. There was no appeal against conviction to the Court of Appeal, and it is plain that this court will not entertain a ground of appeal of this type in these circumstances. He faces the additional hurdle, in this court, in relation to his appeal against sentence of having to satisfy the requirements for the grant of special leave in criminal cases. These are set out in s 7(2) of the Supreme Court Act 1998. That subsection provides:

> In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless—
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> a question of general legal importance is involved;
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> a substantial question of principle affecting the administration of criminal justice is involved; or
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> substantial and grave injustice may otherwise occur.

The main argument advanced by the Petitioner was that the offences committed under counts 1 and 3 arose out of substantially the same act, circumstances, or series of occurrences, and should therefore have been dealt with by concurrent sentences. The principles, which govern whether sentences of imprisonment should be ordered to run concurrently or consecutively, are well established. The power to order sentences to run consecutively was said by D A Thomas, in his classic work *Principles of Sentencing*, to be subject to two major limiting principles. He described them as the "one-transaction rule" and the "totality principle".

The "one-transaction rule" can be stated simply. Where two or more offences are committed in the course of a "single transaction", all sentences in respect of these offences should, as a general rule, be concurrent rather than consecutive. The underlying principle is that all the offences taken together constitute a single invasion of the same legally protected interests. The difficulty lies in arriving at a satisfactory definition of a "single transaction".

Thomas provides some helpful examples of the operation of the relevant principle. When the one attack upon another constitutes both malicious wounding and indecent assault, concurrent sentences should generally be imposed. However, the fact that two or more offences are committed simultaneously, or close together in time, does not necessarily mean that they amount to a single transaction. Thus, consecutive sentences may be appropriate for theft of a motor vehicle, and driving it dangerously. Rape following a burglary has been held not to fall within the "single-transaction" principle. Nor does resisting arrest form part of the same transaction as the offence for which the arrest is being made.

Fox and Freiberg, the learned authors of *Sentencing: State and Federal Law in Victoria*, 2nd ed, Oxford University Press, 1999 comment that the so called "continuing episode", or "one transaction" rule provides no simple guide. They say that for every case that can be cited to illustrate the rule, another can be found

that provides an exception, or effectively negates it. None the less, there are some principles of general application which can be distilled from the authorities.

The existence of an identical motive for different crimes committed on separate occasions will not be sufficient to connect the offences as one transaction, or episode. In *R v Spiero* (1981) 26 SASR 577, it was contended that because armed robbery and heroin trafficking offences committed on different occasions were linked by the prisoner's desperate necessity to obtain drugs to support his addiction, the sentences imposed on the various counts should be served concurrently. That contention was rejected, and in our view, correctly so.

In the present case, the Petitioner fell to be sentenced for his role in the importation and possession of the entire quantity of heroin contained within the two containers. His offences were of a continuing nature, and the sentencing judge recognised that the one-transaction rule applied to counts 1 and 2, those of importation and possession. However, the Petitioner's conduct in separating out the heroin for the purpose of exporting it to Australia, though part of an ongoing criminal enterprise was, in our view, a separate and distinct act of criminality. As the Victorian Court of Appeal observed in *R v Henderson* [1999] 1 VR 830; [1998] VSCA 83 at [21] "there is a logical glide from 'single criminal enterprise' to 'single crime'". There were two distinct components in this criminal enterprise — the act of importation, and the attempt to export the heroin. As such the imposition of a cumulative sentence on count 3 was, in our view, warranted. No error of principle on the part of the primary judge, or the Court of Appeal, has been demonstrated.

The other contention advanced on behalf of the Petitioner was that he would never have pleaded guilty had it not been for the agreement reached with the prosecution that it would concede that the sentences imposed on all three counts should be concurrent, and that a total sentence of 7 years' imprisonment would be appropriate. The Court of Appeal dealt with that contention correctly. The State lived up to its end of the bargain. The concessions to which it had agreed were made. It is clear, however, at least in this country, that a sentencing judge is not bound by any bargain of this type. The submissions made on behalf of the prosecution, including any concessions on its part, must be taken into account. However, they do not operate as a fetter upon the sentencing discretion, and may be rejected in the sound exercise of that discretion. In our view, the sentencing judge was entitled to impose consecutive sentences on counts 1 and 3. Indeed, he would have fallen into error had he not done so.

We should add that, in our view, the overall sentence of 12 years' imprisonment does not offend the "totality principle". The offences in question were close to being the worst cases of their type, at least in any practical, or realistic, sense. Had the legislature heeded the repeated calls by the judiciary for the maximum penalty for this type of offence to be substantially increased, the Petitioner would undoubtedly be facing a far heavier sentence than 12 years.

The Petitioner has not established any basis for the grant of special leave. Accordingly, special leave is refused. The application is dismissed.

Special leave disallowed.