

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL APPEAL NO.40 OF 2003

BETWEEN:

[1] CLYDON OSBOURNE
[2] DILLON ARCHIBALD

Appellants

and

COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mr. Albert Redhead
The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Michael Gordon, QC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Ronald Marks for the Appellants
Mr. Colin Williams, Director of Public Prosecutions [Ag.] for the Respondent

2003: November 27;
2004: January 26.

JUDGMENT

[1] **ALLEYNE, J.A.:** The Appellants Clydon Osborne and Dillon Archibald appealed against their respective convictions and sentence in the Third Magisterial District Court in St. Vincent and the Grenadines on the charge of having in their possession 3,457 grammes of cannabis with intent to supply to another. The Appellant Osborne was fined \$10,000.00 to be paid forthwith or 2 years in prison in default, and the Appellant Archibald was fined \$8,000.00 to be paid forthwith or 18 months imprisonment in default.

- [2] At the hearing of the appeal learned Counsel for the Appellants did not pursue the appeals against conviction, but argued the appeals against sentence in each case. The ground of appeal in each case was that the sentence was excessive. The Appellants were tried together, and the appeals were consolidated and argued together.
- [3] In the case of Osborne, the learned Magistrate in her reasons indicated that she took into account the street value of the drugs, in the vicinity of \$6,500.00, and the fact that a speedboat was used in the transportation of the drugs. In the case of the Appellant Alexander, the learned Magistrate said that she took into account the street value of the drugs and the fact that the Appellant was the captain of the boat used in transporting the drugs.
- [4] Learned Counsel for the Appellants informed the Court that a third defendant had pleaded guilty to the charge and had been fined \$7,000.00. Counsel said that both Appellants are on bail and gainfully employed, Osborne as a fisherman earning \$125.00 per week, and Archibald as a construction labourer earning \$150.00 per week. Counsel had no specific complaint concerning the quantum of the fines, but submitted that there should have been an inquiry as to their means and the Appellants should have been given time to pay the fines.
- [5] Apart from statute, I have been unable to find direct authority for that proposition. In **Archbold Criminal Evidence, Pleading and Practice**, fortieth edition at paragraph 675 I, the learned authors say:
- "Once a court has determined, having taken into account any mitigating features of the case, that it can properly deal with an offender by fining him instead of imposing a term of imprisonment, the amount of the fine should be determined by the gravity of the offence (with particular reference to any profit the offender may have received) and then reduced if necessary to a sum within the defendant's means."
- [6] The cases of **R v Ashmore** [1974] Cr. LR 375 and **R v Thompson** [1974] Cr. LR 720, cited by **Archbold** in support of this proposition, illustrate the principle that

the offender's means is a proper issue for consideration in fixing the level of the fine, and, in the words of the report in **Thompson**, "fines had to be related to ability to pay, otherwise they could bring continuing difficulties in their train, and even be counterproductive by pushing defendants into further crimes to find the money to pay."

[7] The commentary on **Thompson**¹ is in these terms:

"This case provides a neat illustration of two principles affecting the use of fines. First, the fine should be used only where the gravity of the offence does not indicate that a custodial sentence is necessary. It is incorrect to impose a large fine when a sentence of imprisonment is really appropriate, as this will create the impression that the affluent offender can buy his way out of prison. Secondly, where a fine is properly imposed, the amount of the fine must not be excessive in relation to the offender's means, even though the result may be a fine which appears to be less than the facts of the offence warrant."

Although I suspect that the English Courts would probably express the first principle differently today, the essential idea remains that the gravity of the offence is, along with other considerations, to be taken into account in deciding whether a fine or other form of punishment should be imposed. More important for the present purposes is the proposition that the means of the offender is an important element in determining the amount of the fine.

[8] Following this reasoning to its logical conclusion, and on the presumption that in imposing a fine the learned magistrate must be taken to have come to the conclusion that a fine, and not a custodial sentence, was the appropriate punishment in the particular circumstances of this case, it seems to me that, in the circumstances of these particular offenders, the practical effect of the conditions of the sentence was to render nugatory the imposition of the fine and to impose, in reality, a sentence of imprisonment. This would run directly counter to the presumed intention of the learned magistrate, and would seem illogical and contradictory.

¹ [1974] Cr. LR 720,721

- [9] The issue appears to have been addressed by the legislature of New South Wales, Australia, in 1985 by the **Justice (Penalties and Procedures) Amendment Act** which provided a presumption in favour of a minimum of 21 days to pay, and a direction to Courts to take financial circumstances into account. In addition it was made easier for people to apply for further time to pay and for remission of fines.²
- [10] Closer to home, the **Criminal Code of Saint Lucia** sections 1367A and 1367B makes provision for a Court of summary jurisdiction, in fixing the amount of a fine, to take into consideration the means of the person on whom the fine is imposed, and for him or her to be allowed at least 14 days to pay the sum or the first instalment thereof, subject to certain exceptions in special circumstances.
- [11] It seems to me that the imposition of the fines in this case, on the condition that they be paid forthwith, without inquiry as to the means of the Appellants, is tantamount to the imposition of the default prison sentence, which conflicts with the presumed conclusion of the magistrate that in the particular circumstances a fine was the appropriate penalty. This is contradictory, inconsistent, illogical and unjust, and the appeal must be allowed in part.
- [12] The sentences were handed down on 27th June 2002, and the Appellants have been on bail ever since their notices of appeal were filed in July 2002. The Appellant would have had plenty of time since then to marshal resources to pay the fines. They are both employed, and in receipt of incomes.

² Criminal Law by David Brown, David Neal, David Farrier, David Weisbrot, Federation Press 1990.

[13] I would dismiss the appeals against conviction, affirm the conviction and sentence, and vary the condition of the sentence to provide that the respective fines be paid within two months of the date of this judgment.

Brian Alleyne, SC
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]