

BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

Case No. 09 of 2007

BETWEEN:

THE QUEEN

and

MALCOLM MADURO

Appearances:

Mr Terrence F. Williams, DPP and Ms Tiffany Scatliffe, Crown Counsel for the Crown
Dr Joseph S. Archibald QC, Mr Hayden St. Clair Douglas and Mr Thomas Theobalds for
the Defendant

2007: June 28

2007: July 03, August 17

JUDGMENT ON SENTENCING

(Criminal law – blackmail –possession of a controlled drug – convicted by unanimous jury - sentence – matters to be considered)

- [1] **HARIPRASHAD-CHARLES J:** On 15 June 2007, the Defendant, Malcolm Maduro was convicted by a unanimous jury of blackmail pursuant to section 225 of the Criminal Code, 1997, as amended and possession of a controlled drug namely 174 kilogrammes of cocaine pursuant to section 7 (1) of the Drugs (Prevention of Misuse) Act, 1995, as amended. A sentencing hearing was held on 28 June 2007 and a few days later, I delivered a lengthy oral judgment which I have now reduced to writing.

The facts

- [2] The facts as outlined by the Crown and which the Jury accepted are as follows. In the morning of 28 October 2006, Messrs Thomas Wise Fone and Ian Jenkins, diving

instructors at Sail Caribbean Divers, left Hodge's Creek Marina on a boat along with other persons destined to Cooper Island, a popular port of call for cruising yachtsmen. The island is practically deserted except for a beach bar and hotel, one or two other related facilities located on Manchioneel Bay on the island's north shore and a handful of local inhabitants. About three-quarters of the way to Cooper Island, Messrs Wise Fone and Jenkins spotted a dinghy floating in the Sir Francis Drake Channel. They thought that someone might be in trouble so they manoeuvred their boat towards the dinghy to assist only to find several sport bags in it. It occurred to them that someone might have lost their luggage so they secured the dinghy to their boat and towed it to Cooper Island. Upon their arrival at Cooper Island, one of the bags was opened and inside it were black trash bags and inside of those trash bags were silver blocks. The men became circumspect. Mr Jenkins called VISAR (Virgin Islands Search & Rescue) who instructed him to call the police. Inspector (Ag) St. Clair Amory along with other police personnel and HM Customs Officers arrived at Cooper Island on a Customs vessel. Upon his arrival, Inspector Amory introduced himself to Mr Jenkins who pointed out the dinghy to him. The dinghy, seven sports bags and the silver blocks were placed in the Customs vessel and transported to the Marine Base. Photographs were taken of the bags and their contents. One silver kilo block was taken from each of the seven bags and taken into evidence by the Police.

- [3] In the morning of 3 November 2006, Mr Wise Fone was at Sun Caribbean Divers Dive Shop on Cooper Island when he was approached by Mr Maduro and another unknown man. The men came to Cooper Island in a white 25-foot fishing boat. They spoke to Mr Wise Fone about the dinghy that he (Wise Fone) found on 28 October 2006. Mr Wise Fone recognised Mr Maduro as someone he had seen a few times before. Mr Maduro and the unknown man told Mr Wise Fone that he had taken two bags of their drugs which they wanted back. Mr Wise Fone denied any knowledge of these two bags. Mr Maduro and the unknown man told Mr Wise Fone in a menacing manner that they must give them back their two bags or pay for them. Mr Maduro and the unknown man wanted to know the whereabouts of Mr Jenkins and at what time he was returning to Cooper Island. Mr Wise Fone told them that Mr Jenkins would return at about 12.30 to

1.00 p.m. The men waited. Mr Wise Fone telephoned Mr Jenkins who was out on a dive around The Dogs and who had not intended to return to Cooper Island. As a result of the phone call, Mr Jenkins changed plans and returned to Cooper Island at about 1.30 p.m. Mr Maduro and the unknown man spoke to Messrs Wise Fone and Jenkins regarding the bags of drugs that they found on 28 October 2006. The men demanded that Messrs Wise Fone and Jenkins come with them in their boat to show them where they put the two bags of drugs. Messrs Wise Fone and Jenkins told the men that they did not have the drugs and they could not pay for them. This went on for approximately 30 minutes. Mr Maduro told Messrs Wise Fone and Jenkins that they can do it the easy way or the hard way. He was very agitated and jumpy when he uttered these words. Mr Maduro and the unknown man proceeded to walk towards their boat when the Customs boat came in the area. They left as soon as the Customs boat departed the area. Messrs Wise Fone and Jenkins immediately closed up the Dive Shop and returned to Hodge's Creek Marina as they felt concerned for their personal safety.

- [4] About a week after, on 4 November 2006, Messrs Wise Fone and Jenkins were at work at Hodge's Creek. After work, they went to the Calamari Bar which is upstairs their work place for a drink (as they normally do). Mr Maduro was seated at the bar drinking a beer. He was wearing dark sun glasses as he always does. Mr Maduro did not say anything to either Messrs Wise Fone or Jenkins. Mr Wise Fone remained at the Bar with his friends but Mr Jenkins immediately went downstairs and called the police. After about 15 minutes, Mr Maduro left the bar but before the police got there.
- [5] Subsequently, Mr Maduro was taken into custody for questioning. He was interviewed by Detective Constable Vincent John. The drugs were tested by a Gazetted Analyst who confirmed that it was cocaine.
- [6] Mr Maduro was subsequently arrested and charged for blackmail and possession of a controlled drug namely 174 kilogrammes of cocaine.

Plea in mitigation

[7] Learned Queen's Counsel, Dr. Archibald intimated that it is very difficult for a defendant to answer to the allocutus when his defence is that he was not there. He submitted nonetheless, that in light of the verdict, he seeks clemency of the Court on behalf of his client. Dr. Archibald added that Mr Maduro is a relatively young and successful entrepreneur involved in one of the most enterprising businesses in Tortola and any lengthy incarceration would not only deprive him but the entire BVI of his economic contribution. Mr Maduro is a family man with two young sons, ages 3 ½ and 2 ½ years.

[8] Learned Queen's Counsel called Mrs. Rosemarie Flax, a well-known personality in the BVI Community as a character witness. Besides being a businesswoman and the managing director of one of the most reputable trust company in the BVI, she is also a lay preacher at the Methodist Church. Mrs. Flax is the wife of a former Speaker of the House. She knows Mr Maduro for 34 years – almost all of his life. She knows his mother and grandmother, "Miss Baby", a household name in her family. Mrs. Flax described Mr Maduro as a decent, respectable, quiet and self-effacing individual with a wealth of capabilities. She said that it is borne out from the fact that Mr Maduro became a very successful businessman at a young age. She also seeks leniency on his behalf.

[9] Mr Maduro was given an opportunity to speak and he concurred with what was said.

Submissions by the Crown

[10] The Crown identified the aggravating as well as the mitigating factors in this case and also provided some sentencing guidelines for the two offences. Some of the aggravating factors are:

1. The witnesses were in fear for their personal safety.
2. The threats were made in public.
3. The amount of drugs found was 174 kilogrammes with an estimated street value of 16 million dollars.

4. The demands made were unwarranted and unlawful means would be used to enforce them.

[11] The only mitigating feature in this case is that Mr Maduro has no prior convictions. He has been convicted of very minor offences, none of which he received any custodial sentence. Pursuant to section 50 (1) of the Criminal Justice (Alternative Sentencing) Act 2005¹ in conjunction with Schedule 4 of the said Act ², the prior convictions listed on the Criminal Record for Mr Maduro are deemed to be spent convictions.

Court's considerations

[12] The term "blackmail" was originally used for the tribute levied under the 18th century upon the inhabitants of the Scottish border to provide immunity from raids by Scottish bands. Statutes often treat blackmail as a form of extortion. Under section 225 (4) of the Criminal Code 1997 as amended, the maximum penalty for the offence is 14 years. This in itself reflects the gravity of the offence.

[13] There appears to be no case law in the English-speaking Commonwealth Caribbean on the offence of blackmail much less sentencing guidelines. This is also borne out from the fact that the Crown was unable to unearth any judicial authority. As such, we must look to English Law for guidance on sentencing.

¹ Section 50 (1) states "Subject to the provisions of this section, where a person has been convicted of or sentenced for an offence or offences of which he was convicted, if the relevant period in Schedule 4 applicable to the sentence has elapsed, the conviction of that person is spent and that person, in respect of such conviction, shall be treated for all purposes in law as a person who has not committed or been charged with or the subject of that conviction."

² Schedule 4 (1) states "If the sentence was one of more than six months but not more than thirty months imprisonment, detention in a youth custody or training centre the relevant period is seven years from the date of conviction; if the sentence was six months or less imprisonment, detention in a youth custody or training centre, or a fine the period is five years from the date of conviction; if the sentence was suspended, the period is the same as if it had been immediate."

Subsection (2) states: "If the offender was conditionally discharged, placed on probation, or made the subject of a care order, or an attendance centre order, the relevant period is two years from the date of conviction or that for which the order remains in force, whichever is longer."

- [14] Sentences of 6 years and 5 years were reduced to 4 years and 3 years in **Cox**³ where the offenders removed discs and tapes from their employer and demanded £275,000 as the price for returning them. Three years was said to be appropriate in **Stone**⁴ where the offender took part in homosexual activities with the victim and then demanded sums of money under the threat of disclosing the victim's behaviour to the police.
- [15] In **R v Harvey**⁵, the appellant and others entered into a transaction with a man named Scott for cannabis worth £20,000, the cannabis that turned out to be a load of rubbish. Scott was kidnapped and subjected to threats that harm would have been done to his wife and child, who were also kidnapped if he did not give back the £20,000. The appellant and others were sentenced to 6 years imprisonment for the count of blackmail. The Court of Appeal reduced that sentence to 4 years.
- [16] In the recent case of **R v Craig Greer & David John Greer**⁶, a father and a son threatened a man that had borrowed money from the son. The son threatened the borrower with violence and as a result, the borrower was anxious. It was a matter of an imminent threat where the borrower was told if he did not pay back £170, harm would be done to him and his family. The Court of Appeal gave the son a sentence of 4 years (reduced from 5 years) for actually giving the threat and the father was sentenced to 2 ½ years (reduced from 3 years).
- [17] In **R v Darren Havell and Gordon Miller**⁷, the defendants clamped the vehicles which stopped on their land and demanded monies up to £95 from the owner of the vehicle to have the clamp removed. The Court of Appeal did not agree with the judge that the defendants knew what they were doing and acted in an arrogant, bullying and abhorrent manner. The Court reduced a 6-year sentence to 4 years.

³ (1979) 1 Cr. App R (S) 190.

⁴ (1989) 11 Cr. App. R (S) 176.

⁵ (1981) 72 Cr. App. R. 139.

⁶ [2006] 1 Cr. App. R. (S) 93.

⁷ [2006] 2 Cr. App. R. (S) 97.

- [18] All of the above cited cases are distinguishable from the present case as the monetary value being demanded is significantly higher. In the present case, there is also the added threat to personal safety when the words “we can do it the easy way or hard way” were uttered by Mr Maduro. True, there were no physical injuries.
- [19] Indubitably, blackmail is an ugly, dreadful offence and certainly deserves a custodial sentence. In **R v Hadjou**⁸, Lord Lane CJ in giving the judgment of the Court of Appeal said: “in the calendar of criminal offences, blackmail was one of the ugliest and most vicious because it involved what one found so often, attempted murder of the soul.”
- [20] Having considered all matters, the sentence of this Court is that Malcolm Maduro is sentenced to 3 years imprisonment for blackmail.

Unlawful Possession of controlled drugs

- [21] Mr Maduro was found guilty of unlawful possession of a controlled class A drug, namely 174 kg of cocaine. The Third Schedule to the Drugs (Prevention of Misuse) Act, Cap. 178 provides for the Prosecution and Punishment of Offences. Section 7 (1) as amended stipulates that upon conviction on indictment where the conviction involves a class A Drug, the punishment prescribed by the Third Schedule is 7 years and US\$200,000.
- [22] Part 1 of the Second Schedule to the Drugs (Prevention of Misuse) Act as amended lists Cocaine as a class A Drug.
- [23] The Crown provided some authorities to assist the Court with sentencing. As Dr. Archibald correctly pointed out, they all dealt with drug trafficking and possession of drug with intent to supply offences. This is not so in the instant case where Mr Maduro was simply charged for possession of cocaine to which the jury returned a verdict of guilty. In passing, I state that given the quantity of drugs, Mr Maduro should have been

⁸ 11 Cr. App. R (S) 29.

charged with more serious drug offences. Having said that, I must consider what is before me.

[24] In the case of **Jose de Jesus Aranguren et al**⁹, the Court laid down revised guidelines for offences involving class A prohibited drugs stating that the new yardstick for measuring the relative significance of any seizure of class A drugs is by weight rather than by street value. Lord Taylor CJ at page 349 continued:

"Accordingly, in our judgment, for the guidelines laid down in *Bilinski (1988)86 Cr. App. R. 146* in respect of class A drug importations, there should be substituted the following. Where the weight of the drugs at 100 per cent purity is of the order of 500 grammes or more, sentences of 10 years and upwards are appropriate. And where the weight at 100 per cent purity is of the order of five kilogrammes or more, sentences of 14 years and upwards are appropriate."

[25] The weight of cocaine which was found in the bags aggregates 174 kilogrammes. It goes without saying that it is a huge amount. However, the above guidelines are not entirely helpful as Mr Maduro was charged with unlawful possession of cocaine which attracts a maximum penalty of 7 years imprisonment and \$200,000.

[26] There is no doubt that given the significant amount of cocaine, the sentence should be a severe one. Balancing all the factors in this case including the matters which were urged in mitigation, I sentence you, Malcolm Maduro to 3 years + a fine of \$200,000 to be paid by 3 January 2008 or in default, 2 years imprisonment.

The sentence

[27] In determining the appropriateness of sentence, I bear in mind the four classical principles of retribution, deterrence, prevention and rehabilitation. These principles are well-known and need no further narration.

[28] I have regard to all that was said on behalf of Mr Maduro including his antecedent history of no prior convictions. I have also considered that the aggravating features in

⁹ (1994) 99 Cr.App. R. 347.

this case far outweigh the mitigating factors and the concern of Messrs Wise Fone and Jenkins for their personal safety.

[29] To sum up, the sentence of this Court is that Malcolm Maduro is sentenced to 3 years imprisonment for blackmail. With respect to possession of a controlled drug, he is sentenced to 3 years + a fine of \$200,000 to be paid by 3 January 2008 or in default, 2 years imprisonment. The sentence of 3 years for possession of drugs is to run concurrent with the blackmail sentence. Time spent on remand was taken into consideration in computing the sentence of the Court.

[30] For the avoidance of any doubt, the total sentence of the Court is 3 years + a fine of \$200,000 to be paid by 3 January 2008 or 2 years imprisonment consecutively.

Indra Hariprashad-Charles
High Court Judge