IN THE DISTRICT COURT
AT MANUKAU

CRI-2017-092-012033
[2018] NZDC 2528

THE QUEEN

v

HELDER VALTER SOARES GOMEZ

Hearing: 14 February 2018

Appearances: S Norrie for the Crown
S Tait for the Defendant

Judgment: 14 February 2018

NOTES OF JUDGE J BERGSENG ON SENTENCING

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[1] Mr Soares Gomez, you appear for sentence today having pleaded guilty to one charge of importation of the Class A controlled drug cocaine. The maximum penalty available on this charge is life imprisonment.

[2] On 13 October 2017 you flew into Auckland from Chile. Your bags were subject to a search by New Zealand Customs. In the course of the search different screws were noted in the interior of your suitcase. When further investigation was undertaken a white powder weighing 2661 grams was located. An ESR certificate today confirms that the substance was 86 percent cocaine. The amount of pure cocaine is 2.2 kilograms.

[3] When questioned by Customs you explained that you had overheard a conversation some four to five months ago regarding drugs being imported. You negotiated a fee of $60,000. You then spent the next four to five months getting to

know the supplier before departing to New Zealand. The drugs have been valued at between $750,000 to $1,197,000.

[4] Enquiries made indicate that to the best of the Crown's knowledge you have no previous convictions.

[5] You are 47 years of age. A provision of advice report has been prepared which provides some assistance in terms of your personal circumstances. You took responsibility when you were interviewed for your actions. You explained the reason behind your offending was due to financial issues that you were facing in Brazil and that the money that you hoped to make out of this operation would be used to repay your debts. You are assessed as someone who poses a high risk of further offending should the need arise to resolve your personal issues. The recommendation is one of a term of imprisonment.

[6] You have two adult children from a former relationship. You plan when you are deported from New Zealand to resume your role within the family real estate business.

[7] One of the comments which causes me some concern is that when you were spoken to by the report writer it is noted you did not demonstrate any remorse and when you were challenged about this you essentially justified your actions as a necessary response to the problem that you were facing.

[8] Mr Tait has focused on that particular issue and explains that you have very limited English while the interview was conducted in English. His submission is to the effect that that is not a true representation of your feelings and today you have provided a letter of apology to the New Zealand public, the police and the Courts; basically to anyone who has been affected by your poor choices. You indicate that you have made a grave mistake for which you are sorry.

[9] In sentencing today I will adopt a three stage process. I will set a starting point based on the features of your offending, taking guidance from other cases. I will then adjust the starting point based on any aggravating or mitigating features in your

personal circumstances and then I will consider any discount for a guilty plea. In sentencing I need to consider the purposes and principles of sentencing which I will do. I will consider the need to hold you accountable for your offending, denunciation and deterrence. I will also take into account the principle of consistency with appropriate sentencing levels for similar offending.

[10] The Crown submission is that the starting point should be 12 years' imprisonment, that you should be entitled to a modest discount for personal factors and credit for your guilty plea of 25 percent. The Crown are not seeking a minimum period of imprisonment. In terms of setting the starting point the Crown rely principally on the quantity of the drugs, its inherent commerciality and the level of premeditation that was involved in the offending. They accept that your role is not that of a mastermind, more that of a drug mule.

[11] On your behalf Mr Tait also submits that a starting point of 12 years' imprisonment is appropriate. He seeks a reduction of five percent for personal factors, your previous good character, five percent for your offer of assistance and full credit for your plea of guilty.

[12] In setting the starting point, there is no tariff case in terms of importation of cocaine. In the recent decision out of the Christchurch High Court of *R v Dixon*[1] Davidson J, in dealing with the importation of cocaine, while noting there was no tariff case, was of the view that the sentencing bands in *R v Fatu*,[2] which is primarily used for sentencing in cases of offending involving methamphetamine, saw the sentencing bands as instructive.

[13] In the decision of *R v Cook*[3] Katz J undertook an analysis of sentencing levels involving large scale cocaine importation and supply. She referred to a number of cases including *R v da Silveria*[4] which involved the defendant acting as a courier for 2.35 kilograms of cocaine; the starting point was 12 years' imprisonment, and in the

[1] *R v Dixon* [2017] NZHC 920
[2] *R v Fatu* [2006] 2 NZLR 72 (CA)
[3] *R v Cook* [2017] NZHC 2034
[4] *R v da Silveria* [2014] NZHC 791

decision of *R v Nevarez*,[5] 2.9 kg of cocaine was imported where the defendant had a limited involvement, acting as a courier and again the starting point was 12 years' imprisonment.

[14] A number of the other cases were identified which have amounts comparable to the amount you imported but having higher starting points. They can be distinguished on the basis that the defendants' involvement in those cases was somewhat more than that of a courier. By reference to those cases, the amount of cocaine involved in this case and the degree of premeditation, the starting point I adopt is 12 years' imprisonment.

[15] There are no personal aggravating factors. There are personal mitigating factors which can reduce that starting point. The reduction, however, by necessity is a modest one as the Supreme Court in *Jarden v R*[6] noted:

> As the Courts have repeatedly said, and as we emphasise again, in sentencing those convicted of dealing commercially in controlled drugs the personal circumstances of the offender must be subordinated to the importance of deterrence. But this does not mean that personal circumstances can never be relevant.

[16] You are being treated as a first offender. There is no information to suggest that you have ever been in trouble before the Courts before. From the starting point of 12 years I reduce your sentence by six months to take into account your previous good character.

[17] Mr Tait submits that there should be a further reduction for your offer of assistance. The Crown challenge this. The background to this submission is that on your arrest and having sought legal assistance you offered to partake in a controlled delivery. That was an offer made at a very early point in time but because of delays that had occurred at the airport the decision of Customs was not to take up the offer of a controlled delivery. I am satisfied that there should be a discrete reduction for that offer of assistance and there will be a further six month reduction.

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[5] *R v Nevarez* [2012] NZHC 1566
[6] *Jarden v R* [2008] NZSC 69, [2008] 3 NZLR 612, (2008) 24 CRNZ 46

[18] You are then entitled to full credit for your plea of guilty so from a starting point of 12 years I have reduced the sentence by one year for those two factors that I have identified. The reduction for your guilty plea is of 33 months. That gets me to an end sentence of eight years and three months' imprisonment.

[19] In this case the Crown have not sought a minimum period of imprisonment. There are a number of differing views by the higher Courts. One view is that minimum periods of imprisonment should be imposed so as to deter others from being involved in this type of offending. The other view is that when a person accepts responsibility at an early stage, they enter a plea of guilty at an early stage and will be deported, then in some of those cases no minimum period of imprisonment has been imposed. Given the Crown approach, supported by your counsel, I have decided not to impose a minimum period of imprisonment.

[20] I have not given any reduction for the fact that you will be a foreign national serving a sentence of imprisonment in a New Zealand jail. As the Court of Appeal recently noted in the case of *Machado-Pereira v R*:[7]

> Care is needed before too much weight is attributed in these situations to the impact of jail in a foreign country. It is undoubtedly an increased hardship, but in an area where deterrence is paramount, it must be recalled that the offender has chosen to run this very risk.

[21] The end sentence therefore is one of eight years and three months' imprisonment with no minimum period of imprisonment. There will be an order for destruction of the drugs pursuant to s 32 Misuse of Drugs Act 1975.

J Bergseng
District Court Judge

[7] *Machado-Pereira v R* [2015] NZCA 423