IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM No. 112 of 2014

BETWEEN:

EDWIN BOWEN **Appellant**

AND

PC #440 GEORGE FERGUSON **Respondent**

Before: The Honourable Madam Justice Shona Griffith

Dates of Hearing: 26th November, 2014; 30th December, 2014

Appearances: Mr. Anthony Sylvester, Counsel for the Appellant and Ms. Portia Staine, Crown Counsel for the Respondent.

DECISION

[1] This is an Inferior Court appeal from a decision of the Chief Magistrate, Belize City which saw the Appellant convicted on 17th January, 2014 on the charge of **Possession of a Controlled Drug with Intent to Supply** (namely crack cocaine), **contrary to section 7(4) of the Misuse of Drugs Act, Cap. 103 of the Laws of Belize** ('the Act'). Upon his conviction the Appellant was sentenced to 3 years imprisonment plus a fine of $10,000.00 and in default of such payment, imprisonment of 2 years. A notice of appeal was filed on the 27th January, 2014, the Appellant was granted bail pending the outcome of his appeal, which was heard on 26th November, 2014.

[2] At the hearing, the Court affirmed the conviction but invited Counsel for the Appellant to further develop arguments on his appeal against sentence insofar as Counsel raised the argument of the unconstitutionality of the minimum mandatory sentence prescribed by section 18(1) of the Act. Upon further hearing of the appeal against sentence, the Court once again affirmed the sentence imposed by the learned Chief Magistrate and now offers its reasons in writing.

Appeal against conviction

Facts

[3] The brief facts of the case are that on 17th February, 2013 police officers DC Ferguson, Cpl. Martinez and other officers of the Gang Suppression Unit were conducting a mobile operation on Key Street and Euphrates Avenue, Belize City. As the mobile approached the corner of Lizarraga and Euphrates Avenue, DC Ferguson who was in the front passenger seat of the mobile (driven by Cpl Martinez) noticed a male person sitting on the railing of the upper flat of a two storied concrete building. DC Ferguson exited the vehicle and proceeded up the stairs of the building. Whilst doing so he saw the male person place a transparent plastic bag inside a window next to him and slide the window closed. He also noticed the male person shove some 'off white coloured buff substance' off the railing where he had been seated. A piece of the substance remained on the railing which the officer retrieved and he also retrieved (in the presence of the male person) the same looking substance from the 'over flap' piece of the verandah where it had landed after it was shoved off the railing. The transparent plastic bag was also retrieved, from the window where DC Ferguson had seen the male person place it.

[4] The male person – the Appellant - had been restrained during the time the officer was recovering the substances and on suspicion that the substance was crack cocaine, the Appellant was arrested in relation to the two sets of buff coloured substances – that retrieved firstly from the railing and thereafter from the transparent plastic bag taken

from the window. The Appellant was also searched by DC Ferguson who found a black wallet in his back pocket, containing inter alia, a total of $141 in different denominations. The Appellant was taken to the police station where the suspected drugs were weighed, found to be 0.4 grams (retrieved from the railing) and 1.3 grams (retrieved from the plastic bag in the window). The Appellant was charged for simple possession of the 0.4 grams and with possession with intent to supply in respect of the 1.3 grams (17 pieces) of the buff coloured substance.

[5] The suspected drugs were sealed and labelled in two different envelopes in the presence of the Appellant, as was the currency retrieved from his wallet and DC Ferguson handed the envelopes over to the Exhibit Keeper. The envelopes with the suspected drugs were taken to the National Forensic Science Services ('the lab') for analysis and on 23rd April, 2013 DC Ferguson retrieved the two envelopes and a drug certificate from the lab. At the trial DC Ferguson gave evidence and the white envelopes and drug certificate were admitted into evidence through his testimony. Cpl Martinez also gave evidence at the trial of what through his own eyes transpired, which supported the testimony of DC Ferguson. That was the case for the Prosecution.

[6] The Appellant elected to give sworn testimony and called 1 witness. The Appellant's testimony was to the effect that he went to hail one of his friends at the club (the two storied building is a restaurant and bar) – the friend works there, watching the club, thus he sleeps there. The Appellant went upstairs where he told his friend to buy him something to eat and he went (presumably upstairs) to give his friend the money. He stayed a little while until the friend moved the things off the verandah where he sweeps (sic). The friend started to sweep off the step. Whilst the friend was sweeping off the step, he, the Appellant was sitting on the verandah, the police came in, grabbed him, searched him but they found nothing on him. The police officers told him that they saw him throw away something, he denied to them that he threw anything away.

He denied to them that he knew anything about any drugs – they showed him the drugs, but the Appellant said they weren't his. Nonetheless he was handcuffed and taken away to the police station. Under cross examination the Appellant accepted that he was on the verandah when the police came; that he was alone on the verandah when the police came, but denied knowing anything about any drugs.

[7] The Appellant's witness gave evidence as to being present sweeping the steps of the building where he kept watch when the police came. His cousin (the Appellant) was upstairs on the verandah alone when the police came. When the police came they told him to leave, which he did. So under cross examination the witness accepted that he was unaware as to what transpired with the police and his cousin and was unaware as to whether his cousin did or did not have drugs with him or on his person. The Appellant's witness was therefore not helpful to his case.

[8] The Appellant was found guilty and sentenced as stated before to 3 years imprisonment on conviction of possession of the crack cocaine with intent to supply and also fined the sum of $10,000 in default 2 years in prison. In respect of the simple possession of the 0.4 grams of crack cocaine he was inexplicably cautioned, and discharged. The grounds of appeal are set out as follows:

<u>The Appeal</u>

[9] The appeal was submitted on three grounds as follows:

(i) That the decision was unreasonable and could not be supported having regard to the evidence;

(ii) Inadmissible evidence was wrongly admitted into evidence;

(iii) The sentence was unduly severe.

Ground (i) was subsumed into ground (ii) on the basis that aside from the evidence impugned in the latter, learned Counsel for the Appellant acknowledged that there was no further evidence that was being challenged as having rendered the decision against the weight of the evidence. The appeal was therefore heard and considered only in relation to grounds (ii) and (iii).

Ground (ii) – Inadmissible evidence was wrongly admitted.

[10] The root of the complaint in relation to this ground was the admission into evidence of the envelopes containing the drugs and as a result, the analyst's certificate. The submission of Counsel for the Appellant was that DC Ferguson's evidence was that he gave the exhibits to the Exhibit Keeper who took them to the lab. Therefore it was not DC Ferguson who took the envelopes to the lab and the Exhibit Keeper was not called as a witness to testify that he took the envelopes to the lab. In the circumstances it was submitted, DC Ferguson's evidence that the Exhibit Keeper took the envelopes to the lab was hearsay and therefore inadmissible. As a consequence, given that there was no proper evidence before the Court in relation to the envelopes getting to the lab, the analyst's certificate was also not properly before the Court. The reason for this, submitted Counsel for the Appellant was that there was no way to ascertain whether the drug sample which formed the basis of the report came from the drugs taken from the Appellant and later packaged and sealed by DC Ferguson. It was further submitted by Counsel, that the analyst's certificate is not automatically admissible, there must be laid the appropriate foundation to establish that the subject matter of the report is properly attributable to the person charged. In the absence of evidence as to the fact that the envelopes were taken to the lab, such a foundation was not established in this case.

[11] The effect of the submission urged upon the Court in relation to this ground therefore is that there was a break in the chain of custody in the transmission of the exhibits, which rendered the exhibit inadmissible.

This then had the effect that an essential element of the offence charged (namely that the substance in question was a controlled drug) could not be proven from the evidence before the Court. Learned Counsel relied upon the case of **DPP v Buckley [2007] IEHC 150**, a decision from the High Court of Ireland which concerned a case referred from the District (Magistrate's) Court pertaining to the sufficiency of a defendant's admission as to a substance in his possession being cannabis in the absence of an analyst's certificate confirming such. Reliance on this case it is presumed was based upon the discussion therein as to gaps in the evidence or chain of proof of the offence charged.

[12] In response, Crown Counsel for the Respondent cited several cases on the direct point of the chain of custody – **Damian Hodge v The Queen**, HCRAP 2009/001, (OECS CA from the Virgin Islands) and **R v Larsen 2001 BCSC 597** (Canada). The overall proposition advanced by Counsel for the Respondent was that the authorities cited establish that proof of continuity [of an exhibit] is not a legal requirement in proving the offence charged and that gaps in such continuity are not fatal to the Crown's case. Additionally, on the authorities submitted, it is for a defendant to suggest that a substance taken from him was contaminated or compromised during the chain of custody and the Appellant in this case had made no such assertion. Finally, that the issue raised by the Appellant in relation to the admissibility of the evidence in question went to the weight to be attached to the evidence and not its admissibility. The Chief Magistrate, having had the benefit of observing the testimony of DC Ferguson, chose to rely upon his evidence and properly convicted the Appellant.

<u>The Court's consideration on ground (ii)</u>.

[13] The Court accepted Counsel for the Appellant's submission that for DC Ferguson to say that the Exhibit Keeper took the exhibits to the lab was hearsay and therefore inadmissible.

DC Ferguson could only know that the Exhibit Keeper took the exhibits to the lab if the Keeper or some other person told him of this fact. This however was not the end of this issue. Upon being asked by the Court, Counsel for the Respondent submitted that the hearsay evidence was not the only evidence that was before the Court from which the Chief Magistrate could have come to the conclusion that the drugs retrieved from the Appellant were taken to the lab and formed the basis of the analyst's report. This evidence, Counsel for the Respondent submitted was to the effect, as follows:

(i) DC Ferguson was the person who prepared, sealed and labelled the envelopes and the evidence as to what he did was before the Court;

(ii) DC Ferguson was the person who collected the envelopes from the lab and was able to identify them in Court, as being the envelopes he had prepared, sealed and labelled;

(iii) The descriptions of what was produced by DC Ferguson and what was collected materially corresponded; and

(iv) The analyst's certificate contained sufficient information to establish a nexus between the Appellant and the particulars of the offence charged.

[14] The Court accepted that factually the above evidence as outlined by Counsel for the Respondent was sufficient evidence from which the Chief Magistrate was entitled to be satisfied as to the foundation upon which to admit the envelopes and analyst's certificate into evidence. Notwithstanding this finding, it is nonetheless considered useful to examine the authorities relied upon by both Counsel. In relation to **DPP v Buckley**, submitted by Counsel for the Appellant, the Court was not of the opinion that this case advanced any issue of assistance to the Appellant insofar as it related to any consideration of the issue of a break in the chain of custody.

The High Court (Ireland) was referred a question from a District Court on the question of the sufficiency of an admission by a defendant of having cannabis in his possession, in circumstances where there was no analyst's certificate. In the absence of such a certificate, at the close of the prosecution's case, the defendant's Counsel made a submission of 'no case to answer'.

[15] The High Court restated the well known principles applicable to the consideration of a trial judge at the close of a prosecution's case (as laid down in **R v Galbraith**). In that consideration, the Court made reference to gaps in the evidence or chain of proof of an offence being of such as to cause a defendant to be acquitted at the close of the prosecution's case. In **Buckley**, the drug taken from the defendant was never sent to the lab for analysis. In effect therefore the prosecution were relying upon the admission of the defendant as proof that what was in his possession was cannabis and the question under consideration was the sufficiency of that evidence as it pertained to the element of establishing that the subject matter of the charge was a controlled drug and the exercise of the Court's discretion in assessing that issue. The ratio of this case therefore was of no assistance to Counsel for the Appellant as regards his complaint of a break in the chain of custody.

[16] On the other hand, the two authorities submitted by Counsel for the Respondent, were directly on point in relation to breaks in the chain of custody of evidence admitted or sought to be admitted before the Court. In **Damian Hodge** (OECS Criminal Appeal from Territory of the Virgin Islands), there were a number of grounds of appeal. The ground of appeal involving the chain of custody saw essentially the same question under consideration by the OECS Court of Appeal as is before this Court. In that case, evidence in the form of swabs taken orally from the defendant (on a charge of Aggravated Burglary) was collected by one Constable Mary Phillip, who after collecting the swabs, packaged, labelled and sealed them and thereafter handed them over to the Exhibit Keeper.

The Exhibit Keeper later handed the evidence bag containing the swabs to a third officer who took them to a forensic laboratory in Miami, Florida. The swab box was returned by the lab via Federal Express, handed to the Exhibit Keeper, who then handed it over to the third officer who had transported them to Miami. At the trial, the exhibit containing the swabs was tendered through Constable Phillip who had collected them and packaged them as stated above. Counsel for the Appellant argued that the swab box was inadmissible, as having been tendered through Mary Phillip, there was no evidence as to how it came to be in her possession in light of the fact that she had last handled the swab box when she handed it over to the Exhibit Keeper prior to it being sent away to Florida for testing.

[17] In response to the argument (paragraph 10 of the Judgment of Baptiste J.A), the prosecutor contended that the issue under consideration was whether there was sufficient evidence for the jury to find that the buccal swabs tested by the DNA expert Mr. Noppinger were the same buccal swabs taken from the appellant by Constable Mary Phillips. (The forensic analyst gave oral evidence as to the dna findings from the swabs). The learned Justice of Appeal concluded that on the prosecution's case, there was no break in the chain of custody leading up to the DNA laboratory and the testing of the sample and stated at paragraph 11:-

"*The integrity of the chain of custody was not disturbed, hence, whether there was a gap in the chain of custody thereafter, is not material in this case*".

[18] The learned Justice of Appeal went on to say (emphasis mine):-

"the underlying purpose of testimony relating to the chain of custody is to prove that <u>the evidence which is sought to be tendered has not been altered, compromised, contaminated, substituted or otherwise tampered with, thus ensuring its integrity from collection to its production in court</u>…Proof of continuity is not a legal requirement and <u>gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity</u>"

At paragraph 13 , Baptiste JA made reference to **R v Larsen**, per Romily J, speaking to the chain of custody in a criminal matter, specifically as regards what evidence is to be led or by whom, as it relates to establishing continuity:-

> *"There is also no specific requirement that every person who may have possession during the chain of transfer should himself or herself give evidence. If there is a gap in continuity and the trier of fact is not satisfied beyond a reasonable doubt that substances taken from the accused were substances analyzed, the evidence may still be admissible but the weight given to the exhibit and the evidence would be affected.*

[19] The Court considers the above dicta directly relevant and applicable to the issue in the case at bar. The prosecution could not by oral evidence establish that the Exhibit Keeper carried the envelopes containing the drugs retrieved from the Appellant to the laboratory. However, as detailed at paragraph 13 herein, there existed more than sufficient evidence from which the Chief Magistrate was entitled to find as a fact that the exhibit collected and sealed by DC Ferguson was that which was tested by the lab. That evidence was of the officer identifying the envelopes which he collected from the lab as being those which he prepared, and there being a sufficient nexus between the Appellant and the particulars recorded on the analyst's certificate.

[20] On the application of the authorities provided by Counsel for the Respondent therefore, the Court finds that admission into evidence of the envelopes containing the drugs said to be recovered from the Appellant by DC Ferguson and analyst's certificate was properly done in the circumstances and this ground of appeal accordingly fails. Upon the failure of this ground of appeal that inadmissible evidence was wrongly admitted, there are no additional grounds of appeal against conviction and the conviction of the Appellant is accordingly affirmed. The Court now goes on to consider the appeal against sentence.

Ground (iii) – The sentence was unduly severe.

[21] The Appellant's sentence on conviction of possession of 1.3 grams of crack cocaine with intent to supply, contrary to section 7(3) of the Misuse of Drugs Act, Cap 103, was to both a fine of $10,000 ($5,000 forthwith and balance by 31/12/14) in default 2 years and to a period of imprisonment for 3 years. The Appellant appeals against that sentence on the basis that it was unduly severe given the small quantity of the drug (1.3 grams), which ought in that respect to have led the Chief Magistrate to apply the proviso to section 18(1) regarding the existence of special circumstances. Counsel for the Appellant pointed to the Chief Magistrate's unfortunate acknowledgment in her written decision refusing bail pending appeal, that she had erred in that her sentence was unduly severe and that this was indicative of the fact that the Chief Magistrate did not address her mind to the application of the proviso.

[22] At the hearing, upon the Court's affirmation of the Appellant's conviction, Counsel for the Appellant raised the argument as to the constitutionality of the minimum mandatory sentence imposed by section 18 of the Act and was granted leave to expand upon his submissions in writing (Counsel for the Respondent was given leave to file submissions in response). Additionally, insofar as it was not apparent from the record of the trial as to what if any mitigation was conducted prior to sentencing, the Court also granted leave for such evidence as may be relevant to be submitted on behalf of the Appellant which would be urged upon the Court in order to possibly give effect to the proviso contained in section 18(1) of the Act.

[23] For ease of reference, section 18(1) is set out in its entirety:-

> *18.-(1) A person who is convicted of the offence of drug trafficking, or of being in possession of a controlled drug for the purpose of drug trafficking-*
>
> > *(a) on summary conviction, shall be imprisoned for a term which shall not be less than three years but which may*

> *extend to ten years, and in addition, shall be ordered to pay a fine which shall not be less than ten thousand dollars but which may extend to one hundred thousand dollars or three times the street value of the controlled drug (where there is evidence of such value), whichever is the greater:*
>
> *Provided that where the controlled drug is respect of which the offence is committed is less than-*
>
> *(i) one kilogramme of diacetylmorphine (heroin);*
>
> *(ii) one kilogramme of cocaine;*
>
> *(iii) two kilogrammes of opium;*
>
> *(iv) two kilogrammes of morphine; or*
>
> *(v) five kilogrammes of cannabis or cannabis resin,*
>
> *the court may, for special reasons to be recorded in writing, refrain from imposing a mandatory custodial sentence and, instead, order the convicted person to pay a fine to the extent specified above and in default of such payment, to undergo imprisonment for a term specified above;*

[24] The submission of learned counsel for the Appellant in relation to the unconstitutionality of the minimum mandatory sentence imposed against the Appellant on his conviction for possession with intent was based upon the decision of the CCJ in **Attorney General v Phillip Zuniga et al [2014] CCJ 2 AJ**. This appeal arose out of Belize in relation to two amendments in 2010 to the Supreme Court Act, Cap. 91, specifically Part IX thereof pertaining to contempt of court. The amendments inter alia, introduced what was consistently described by the CCJ as 'stiffer, steeper and harsh' penalties for persons found guilty of 'knowingly disobeying or failing to comply' with an injunction. The impugned legislation was mainly the consolidated effect of section 106(A), introduced by the two 2010 amendments to Cap. 91.

[25] The penalties imposed for disobeying or failure to comply with an injunction included, in relation to a natural person – a fine of not less than $50,000 but which may extend to $250,000 and/or a period of imprisonment of not less than 5 years which may extend to 10 years.

For a continuing offence an additional fine of $100,000 per day for each day the offence continued was also prescribed. The fines in relation to legal persons were even greater. A proviso was in place to relieve the punishment prescribed in relation to a natural person, where a defendant could establish certain extenuating circumstances. These extenuating circumstances were prescribed by the legislation where the convicted person has a clean criminal record and can establish ignorance of the consequences of his or her actions and demonstrate grave hardship on full imposition of the penalty. A reduced penalty of minimum $5000 and maximum $10,000 and imprisonment of not less than 1 or more than 2 years were prescribed on application of the proviso.

[26] In addition to the punitive regime, the impugned section 106A cast a wide net upon the range of persons who could be found guilty of breach of an injunction so much so that it included employees, officers, shareholders of a body corporate just to name a few capacities; its application was retroactive and also extra territorial. The amendment was attacked on a number of grounds (six), one of which was the unconstitutionality of the minimum mandatory sentences prescribed in relation to the offence. Against this very brief reduction of the background of this decision, the Court now considers its applicability as per the submission as urged by Counsel for the Appellant.

[27] The submission of learned counsel for the Appellant was that given the wide range of possible offenders that would be caught by the section creating the offence – from 1 gram (that specified under section 7(4) to be the amount from which the drug trafficking offence of possession with intent to supply is deemed) to 1000 grams (being the ceiling specified in section 18(1) over which the mandatory sentence cannot be relieved by the proviso) – the minimum mandatory sentence of 3 years was grossly disproportionate. Drawing from the dicta of the CCJ in **Zuniga**, the submission was that the Court has to consider any reasonably hypothetical case which could arise in relation to the offence and

assess whether application of the minimum mandatory penalty would result in a disproportionate sentence. Such a reasonable hypothetical case learned counsel submitted was of a teenaged student being convicted of possession of 2 grams of cocaine. This offender would face the same sentence as a person convicted of 100 – 500 grams of cocaine and in this regard, the difference in circumstance of the two offenders renders the minimum mandatory sentence disproportionate to the offence. The disproportionality renders the sentence cruel and inhuman, in violation of section 7 of the Constitution which enshrines the right to protection from cruel, inhuman or degrading punishment.

[28] Counsel for the Respondent's answer to this ground conceded that the Appellant's possession of the drug was not significantly above the deemed statutory amount under section 7(4) and as such the Chief Magistrate should have borne the quantity of drugs in mind when sentencing and thereupon applied the proviso. It was also conceded that the Appellant was not given the opportunity to address the Court on the question of whether special reasons existed such as to give rise to the application of the proviso and as a result the Appellant ought to be given that opportunity. Learned Counsel also referred to several Irish authorities to the effect that in addition to the offence, the sentencing judge should also take into account the particular circumstances of the offender – **DPP v Ingram McGinty [2007] 1 IR 633**.

[29] Additionally, far from being regarded as unjust, Counsel for the Respondent submitted that the minimum mandatory sentence should be considered as reflective of the seriousness with which the legislature regards the offence. The sentence prescribed therefore should be taken as a guide to be used by the sentencing judge. This approach is borrowed from **DPP v Jervis [2014] IECCA 14.**

In this case the Respondent submits that the Appellant in any event had a previous conviction for possession of drugs and that the minimum mandatory sentence reflects the seriousness with which the legislature regards drug related offences.

The Court's Consideration on Ground (iii)

[30] In considering the submission in relation to the unconstitutionality of the minimum mandatory sentence the Court firstly looks at section 18(1) within the scheme of the Misuse of Drugs Act as a whole. Section 18 is a purely penal section, setting out the penalty for offences falling under the umbrella of 'drug trafficking offences' both on summary conviction and on indictment. Such offences are defined in section 2 of the Act and cover 10 offences – seven main offences including supply, possession with intent to supply, cultivation, import, export and the inchoate offences in relation to all of them. Section 18 prescribes the framework within which these drug trafficking offences are treated, including minimum mandatory sentences upon conviction summarily or on indictment; the application of a proviso under which the minimum mandatory custodial sentences can be excepted; and prescribes other circumstances in which a presumption of a drug trafficking offence is raised. The sentences imposed under section 18 can be described as serious or even severe.

[31] By contrast, other offences created under the Act – for example simple possession (section 7(2)) or using controlled drugs (section 12) – are punishable according to a schedule created pursuant to section 28, dependent upon classification of the drugs as class A, B or C drugs. The penalties range according to classification (A, B or C) from maximum periods of imprisonment of 2, 3 or 5 years and/or fines to a maximum of $40,000, $50,000 or $75,000 – there is no minimum punishment imposed in relation to these offences punishable under section 28.

It is therefore evident that the legislature has corralled the offences defined as 'drug trafficking' and evinced an intention that they be regarded more seriously upon sentencing.

[32] Additionally, the classification of drugs into class A, B or C also carries graduated levels of punishment according to such classification – class A drugs carry the most serious punishment of the three and class C, the least serious. In examining section 7(4), four class A drugs (heroin, opium, cocaine and morphine) and one class B (cannabis/cannabis resin) are isolated and treated specially for purposes of establishing possession with intent to supply – a drug trafficking offence. These are the quantities above which a person found in possession is deemed to so possess for the purposes of supply. Correspondingly, the same identified drugs are isolated in section 18(1) as regards setting the ceiling above which there is no possibility of application of the proviso mitigating against imposition of the minimum mandatory sentences prescribed. Once again, the legislation is deliberate in the scheme created in relation to the punishment of this particular offence (section 7(4)) in respect of these specified four class A and 1 class B drugs.

[33] Against this context, the Court examines the argument of unconstitutionality of the minimum mandatory sentence pf section 18(1). It can firstly be acknowledged, that a mandatory sentence is not per se unconstitutional. This has been stated and re-stated on many occasions. The Court refers to the judgment of then Rawlins JA in OECS authority **Thelbert Edwards v The Queen, Criminal Appeal No. 3 of 2006.** Under consideration was a minimum mandatory sentence of causing death by dangerous driving in St. Lucia. At paragraph 21 Rawlins JA stated as follows:-

> *"…In other words, once one concedes that it is within the competence of Parliament to set sentencing policy, it flows ineluctably that Parliament is competent to set mandatory minimum sentences, subject to the duty of the courts to evaluate whether such laws contravene the Constitution. To put it another way, each such law must be examined by the courts to see whether the fundamental rights and freedoms are observed or contravened*".

[34] It is here alleged that the minimum mandatory sentence of section 18 offends against the Constitutionally guaranteed right not to be subjected to torture *or to inhuman or degrading punishment or other treatment* – article 7 of the Constitution. The Court's understanding as to the manner in which this infringement is occasioned, is that in addition to immediately recognizable concepts of the nature of punishment or treatment being inhuman or degrading, there is also an infringement acknowledged for punishment that is grossly disproportionate to offence in a number of ways. Both the CCJ (Zuniga) and the OECS Court of Appeal (Thelbert Edwards) made reference to the Canadian case of **R v Smith (Edward Dewely) [1987] 1 SCR 1045**. The Supreme Court of Canada in this case struck down as invalid, section 5(2) of the Narcotics Control Act of Canada as being inconsistent with various articles of the Canadian Human Rights Charter, in particular that providing protection against cruel, inhuman or degrading punishment or treatment. A highly useful approach was laid down in the majority decision which the Court finds helpful to employ as a guide in the consideration of the case at bar. In particular Lamer J said the following:-

> *« The Charter right to be free from cruel and unusual punishment or treatment is absolute. The concept is a "compendious expression of a norm drawn from evolving standards of decency and has been judicially broadened to encompass not only the quality or nature of punishment but also extent or duration under the heading of proportionality »*

The above statement thus encapsulates the element of proportionality as it relates to an infringement of the right to be free from inhuman or degrading punishment or treatment. The extent or duration of the punishment relative to the crime can render it inhuman or degrading. Lamer J also stated the following:-

> *"The court in assessing whether a sentence is grossly disproportionate must consider the gravity of the offence, the personal characteristics of the offender, and the particular circumstances of the case to determine what range of sentences would have been appropriate to punish, rehabilitate, deter or protect society from this particular offender. The court must also measure the effect of the sentence, which is*

not limited to its quantum or duration but includes also its nature and the conditions under which it is applied. The determination of whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles and whether valid alternative punishments exist, are all guidelines, not determinative of themselves, to help assess whether a sentence is grossly disproportionate »

[35] Additional guidance is also available from the judgment of Wilson J :-

« The arbitrary nature of the mandatory minimum sentence is fundamental to its designation as cruel and unusual under s. 12 of the Charter . The seven-year minimum sentence is not per se cruel and unusual but it becomes so because it must be imposed regardless of the circumstances of the offence or the offender. Its arbitrary imposition will inevitably result in some cases in a legislatively ordained grossly disproportionate sentence »

This approach is evident in ***Zuniga***, where the Court recognized that '*the nature and subject matter of injunctions issued by a judge of the Supreme Court vary widely*' as do the consequences of their (injunctions) breach (@ paragraph 59). Additionally, the Court acknowledged that there were numerous ways in which the offence of 'knowingly violating an injunction' could occur. Such breaches could extend from '*contumelious defiance of the court order…may arise out of civil proceedings, perhaps involving a minor domestic squabble between spouses or between neighbours who have a boundary dispute*.' The Court reckoned that whilst the contumelious conduct could warrant the harsh minimum mandatory penalties described above, an offender caught in the latter extreme who is unable to come within the statutorily defined extenuating circumstances would in no way be deserving of the harsh minimum penalties prescribed by the impugned section 106A. The penalties in **Zuniga** were accordingly struck down as infringing section 7 of the Belize Constitution.

[36] With respect to **Smith** the Supreme Court struck down the minimum mandatory sentence of seven years imprisonment for importation of drugs.

The Appellant in that case pleaded guilty to importing into Canada seven and a half ounces of cocaine and was sentenced to eight years imprisonment, one year above the minimum mandatory sentence of seven years. The Supreme Court found that the sentence was grossly disproportionate when considering proportionality in the manner highlighted above, which required consideration to be done on a general rather than an individual basis. An illustration utilized by the Court in relation to the minimum sentence was that of a first offender - a tourist returning from vacation and having in his possession a small amount of prohibited drug but nonetheless rightly convicted of importing the drug into Canada. There was no distinction in treatment of that offender from the hardened criminal involved in importation for financial gain.

[37] With this broad application of the penalty in mind and considering the following factors –

> *(1) The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;*
> *(2) The punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or*
> *(3) The punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.*

The Court found that the sentence would not offend against paragraph (1), but certainly offended paragraphs (2) and (3) and as such the minimum sentence of 7 years for importation was struck down as being grossly disproportionate and therefore in violation of the Charter.

[38] In considering the approach and measurement of the proportionality of the impugned sentences in both Zuniga and Smith, a number of factors are to be taken into account in the case at bar. As was not evident in the statutory provision in Smith, the framework of the Misuse of Drugs Act, is such that a cadre of offences is identified as more serious drug

offences (definition of drug trafficking offence), for which greater penalties are prescribed. In this instance, the Court finds that the regime prescribed by section 18(1) is not arbitrary and without ascertainable reason.

[39] Additionally, given that the penalty must be assessed against the seriousness of the offence, the aim sought to be achieved and any social outrage that might be engendered by the sentence - the question of proportionality must be considered more broadly than only in relation to the quantitative parameters as put forward by Counsel for the Appellant, -namely, the small quantity of the drug versus the length of the sentence and amount of fine. The legislature has already by its deliberate scheme, expressed the degree of seriousness with which possession with intent to supply even of a relatively small quantity of cocaine is to be regarded.

[40] With respect to any question of social outrage regarding the sentence, the Court considers what is general knowledge and within the awareness of the public, that cocaine is a highly addictive and destructive drug, the harmful effects of which are not restricted to users but extend to families and society at large. More importantly, it cannot be denied, that criminal activity is fueled both by the consumption and supply of the drug and is manifested at all levels whether petty, violent and serious or organised crime. The Court therefore recognises a strong element of deterrence attributed to the punishment prescribed by section 18(1) and also recognizes that the gravamen of the injury of the offence of possession with intent to supply is not the quantity, but given the wider consequences to the public, the injury is that of the intent to supply. There exists sufficient scope within section 18(1) for imposition of appropriate sentences which reflect differences in the circumstances of the commmission of offences which fall to be sentenced under this section.

[41] In the circumstances, the Court is not persuaded that the sentence imposed by section 18(1) is disproportionate to the offence charged by reason only of the harsh punishment prescribed for a relatively small quantity of the drug. It is also the Court's view that any

measure to the contrary would have to be informed by more comprehensive argument and greater analyses of such factors as may be relevant and material to the public interest. The minimum mandatory penalty imposed by section 18(1) is therefore found to be valid.

[42] In addition to the above the Court considers that the proviso to section 18(1) provides sufficient discretion, in an appropriate case, for the Court to deviate from the minimum mandatory sentence. Counsel for the Appellant referred to **Knights v de Cruz (1996) 53 WIR 252**, which examined the meaning of 'special reasons' as it pertained to a firearm offence. The meaning of special reasons was therein regarded as stated in **Whittal v Kirby [1947] KB 194** to the effect that –

> « *the special reasons must be special to the facts constituting the offence and not merely special to the offender – and so does not include consideration of the financial or family hardship of the offender or his being before the court for the first time »*

In light of the scrutiny of the prescribed sentences and in the absence of any statutory restrictions or guidelines as to what amounts to 'special reasons', the Court would tend to the view, that where in an appropriate case, there is some factor that is special to the offender, which unless considered would render the minimum mandatory sentence of 3 years inhuman or degrading, there ought to be a discretion exercisable by the Court which would take such a circumstance into account. Bearing this approach in mind, and given that the Court has declined to find the minimum mandatory sentence of three years grossly disproportionate to the offence and therefore unconstitutional, what consideration does the Court give to the application of the proviso in the case at bar?

<u>The Appellant and special reasons</u>

[43] As stated earlier herein, there is no indication on the record of an exercise in mitigation and whether the learned Chief Magistrate addressed her mind to the question of the existence

of any special reasons put forward by the Appellant or arising from the circumstances of the offence so as to bring into application the proviso to section 18(1). This was probably done, but it does not appear on the record. The Court therefore granted leave for the Appellant to introduce any such evidence which the Court would consider in furtherance of section 119 of the Supreme Court Act, Cap. 91. With regard to the evidence, there is no special reason raised in relation to the commission of the offence (the Court has already expressed its finding that the amount of the drug is not considered a special reason given the legislative scheme found ascertainable).

[44] The appellant has, by affidavit produced evidence in relation to the value of the drugs amounting to less than two hundred Belize dollars ($200). As the fine of $10,000 exceeds the street value of the drugs by more than one hundred per cent, Counsel for the Appellant submits - that ought to be a special circumstance that the Court takes into account and so not impose a custodial sentence. With respect to this contention, the Court considers that on the evidence an intent to supply was supported by the quantity of 'rocks' – seventeen possessed by the Appellant. As indicated above, the Court regards the intent to supply and the consequences of so doing as sufficiently injurious to the public interest, so that the relatively minor financial gain to be derived from the offence does not per se amount to a special reason not to impose the minimum mandatory sentence.

[45] Additionally, the Appellant does have a previous conviction for possession of drugs albeit some fourteen (14) years prior to this offence, thus whilst not a recent conviction, the Court does have some regard to its existence as being a factor properly considered in upholding the sentence imposed.

Conclusion

[46] (i) The appeal against conviction is dismissed.

(ii) The minimum mandatory sentence prescribed in relation to section 18(1) of the Misuse of Drugs Act, Cap. 103 of the Laws of Belize is not found to be in violation of section 7 of the Constitution of Belize.

(ii) The learned Chief Magistrate's sentence of imprisonment of 3 years and fine of $10,000 in default 2 years imprisonment is affirmed. In the event of such default the sentences are to be concurrent.

Dated this 5th day of January, 2015.

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Shona O. Griffith
Justice of the Supreme Court