IN THE COURT OF APPEAL OF BELIZE AD 2017

CRIMINAL APPEAL NO 6 OF 2015

EDWIN BOWEN Appellant

v

PC 440 GEORGE FERGUSON Respondent

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BEFORE

The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Mr Justice Christopher Blackman	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

A Sylvester for the appellant.
C Vidal SC for the respondent.

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15 June 2016 and 24 March 2017.

BLACKMAN JA

[1] The primary issue for determination in this appeal is that of proportionality in relation to the sentence of three years and a fine of $10,000.00 for possession of 1.3 grams of crack cocaine with intent to supply, imposed on the appellant Edwin Bowen by the Chief Magistrate and affirmed by **Griffith J** sitting as a Judge on an inferior appeal.

Background

[2] The appellant was arrested on February 17, 2013 for the offences of possession of a controlled drug, to wit, .4 grams of crack cocaine and possession of 1.3 grams of

cocaine with intent to supply contrary to section 7(4) of the Misuse of Drugs Act, Cap 103 of the Laws of Belize **(The Act).**

[3] Following his trial before Court No. 1, Belize Judicial District, Belize the appellant was convicted on January 17, 2014 of the offence of possession of the 1.3 grams of cocaine with intent to supply and sentenced to both a fine of $10,000.00 ($5000.00 forthwith and the balance by 31st December, 2014) and in default, 2 years imprisonment, and three years' imprisonment, being the minimum mandatory sentences provided for in section 18 of **The Act.** In light of the significance of section 18 to the matter, its provisions are set out below:

> "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 –
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> *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 greater:

Provided that where the controlled drug is respect of which the offence is committed is less then -

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;"

[4] The appellant having appealed his conviction and sentence, applied for a stay of execution of the decision of the Chief Magistrate and was granted bail by the Supreme Court in May, 2014, having spent four months in prison prior to being granted bail.

[5] On November 27, 2014, **Griffith J** having dismissed the appellant's appeal against conviction, directed that the $5,000.00 ordered by the learned Chief Magistrate be paid forthwith. The learned judge adjourned her decision with respect to the custodial sentence, and on January 5, 2015 in a written decision, affirmed the sentence of the learned Chief Magistrate. The Appellant was then remanded to prison to serve his sentence.

[6] On June 5, 2015 the appellant appealed to this Court on the ground that **Griffith J** erred in affirming the sentence of the Chief Magistrate, as the imposition of the mandatory minimum sentence of three years in the circumstances of the case, was grossly disproportionate and therefore cruel and inhuman and consequentially, in violation of section 7 of the Constitution of Belize.

[7] Pending the determination of the appeal, the appellant applied to the Court by way of Summons dated June 11, 2015 for bail. On June 23, 2015 **Hafiz-Bertram JA** granted the appellant bail on the basis of the appellant's reasonable prospect of success on the appeal in having his sentence reduced.

The Appeal

[8] Mr. Anthony Sylvester Counsel for the appellant in his written and oral submissions to the Court having abandoned his previous stance that a minimum mandatory sentence was unconstitutional, urged the Court to hold that the mandatory sentence of three years which had been imposed, was disproportionate having regard to the quantity of drugs and the appellant's clean record of over 16 years. In support of his contention that the sentence was grossly disproportionate, Mr. Sylvester has cited the Supreme Court of Canada decision of ***R. v. Smith*** (1987) 1 SCR 1045. He also placed reliance on the Bahamas Court of Appeal decision of ***Davis and Armbrister v. Commissioner of Police*** [2013] 1 LRC 213, the authorities relied therein on the principle of proportionality and the finding that the minimum sentence provisions of the

Dangerous Drugs Act of the Bahamas (almost analogous to those of the **Misuse of Drugs Act** of Belize) are subject to the proportionality requirements of article 17 of the Bahamas Constitution, the provisions of which are identical to section 7 of the Constitution of Belize, which provides that "***No person shall be subjected to torture or to inhuman or degrading punishment or other punishment.***"

[9] Counsel for the appellant concluded his submissions with the prayer that the appeal be allowed, that the sentence of 3 years be set aside and that the period of 9 months incarceration spent after conviction, be treated as time spent.

[10] Mrs. Cheryl- Lynn Vidal SC, Director of Public Prosecutions, Counsel for the respondent in her written submissions, countered that a sentence of 3 years imprisonment was not grossly out of proportion having regard to crime of drug trafficking and in the context of the well-known destructive effects of cocaine. The learned Director of Public Prosecutions further submitted that none of the descriptions of a grossly disproportionate sentence referred to in ***Smith*** above or in the Namibia case of ***State v. Vries*** [1997] 4 LRC 1 applied in the circumstances of the instant case. As a consequence the Director urged that the appeal be dismissed and the sentences affirmed.

Discussion

[11] The facts in ***Davis and Armbrister*** (see paragraph 8 above) are very similar to the instant case involving very small quantities of dangerous drugs, and merit recital. Davis was charged with possession with intent to supply of 6 ounces of marijuana and sentenced to the minimum sentence of 4 years provided for in the Dangerous Drugs Act of the Bahamas. In the matter of Armbrister, he had been found in possession of a small amount of cocaine, albeit enough to put it within the offence of trafficking (see paragraph 41 of ***Davis***) and had also been sentenced to 4 years imprisonment.

[12] The considerations and opinions expressed by **Allen P** and **Blackman JA** at paragraphs 20 to 38 in ***Davis,*** are in our respectful view, relevant to the instant case and we accordingly adopt them and reproduce them in this decision. For avoidance of doubt, we will juxtapose where appropriate, references to the Belize Constitution when references to the Bahamas Constitution appear.

> **"20**. Under article 52 of the Constitution **(article 67 of the Belize Constitution)** Parliament has power to make laws for the peace, order and good government of The Bahamas (Belize).
>
> **21.** Hence, Parliament may outlaw conduct which is inimical to the values of the Bahamian (Belizean) society, and determine the punishment for such conduct.
>
> **22.** The court, on the other hand, is charged with the responsibility of determining guilt or innocence of persons charged with such unlawful conduct and on conviction, to impose sentences which fit the crime.
>
> **23.** In enacting penal provisions, Parliament cannot impose penalties which infringe article 17 of the Constitution, (see paragraph 8 above) and the question whether such penalties do or not, is for the court to decide.
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> **24.** This demarcation of roles is illustrated in the following passage in ***R v Smith (Edward Dewey)*** [1988] LRC (Const) 361 at 378 per **Dickson CJ** and **Lamer J** (quoting Borins Dist Ct J in R v. Guiller (23 Sept 1985, unreported), Ont Dist Ct)):
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> > *"It is not for the court to pass judgment on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function, the courts are empowered, indeed required to measure the content of legislation against the guarantees of the Constitution".*

25. Given the constitutional roles of Parliament and the courts, we agree that the enactment of a mandatory minimum sentence is not unconstitutional per se, notwithstanding that it may purport to fetter the court's discretion in sentencing. See also ***The State v Vries (***CR 32 /96) [1996] NAHC 53 (19 June 1996) (the Namibia High Court).

26. A more important, but related matter to be considered in these appeals, is the principle of proportionality. This principle has been considered in a wide range of decisions and opinions, including the Bermuda Court of Appeal in ***Cox and Dillas v The Queen*** BM 2008 CA 21, the Privy Council in ***Aubeeluck v. The State*** [2011 1 LRC 627, and the Supreme Court of Canada in ***R. v. Fergusson*** [2008] S.C.R. 96, affirming the earlier decision of ***R v Smith*** [1987] 1 S.C.R. 1045.

27. Section 185 of the Criminal Procedure Code Act provides: "The Court may before passing sentence, receive such evidence as it thinks fit, in order to inform itself as to the sentence proper to be passed." Moreover, Article 17 (1) of the Constitution of The Bahamas provides: "No person shall be subjected to torture or to inhuman or degrading treatment or punishment."

28. In Aubeeluck, the Privy Council had to consider whether a minimum sentence of three years' imprisonment for possession of dangerous drugs as a trafficker infringed section 7 of the Mauritius Constitution, a provision identical to article 17 of the Constitution of The Bahamas.

29. The Privy Council, after a review and discussion of the various provisions of Constitutions and Charters, affirmed the test for determining whether a minimum mandatory sentence amounts to inhuman or degrading punishment as that laid down by **Lamer J** in ***R v Smith*** (above), namely, that: "*a sentence must not be grossly disproportionate to what the offender deserves."*

30. When is a sentence grossly disproportionate such that it constitutes inhuman or degrading punishment? In ***R. v. Fergusson*** (above), **Chief Justice McLachlin**, at paragraph 14, adopted the statement in **R v Smith** (above) and said that for a sentence to be considered grossly disproportionate, it must be more than excessive, she further commented: "*the sentence must be so excessive as to outrage standards of decency" and disproportionate to such an extent that "Canadians would find the punishment abhorrent or intolerable*".

31. In ***The State v Vries*** (above), the Namibian High Court emphasized the point made by **McIntyre** J. in his dissent in ***Smith v The Queen*** 1987 (34) CCC 97 (GeorgeTown Journal Vol. 794 April 1991): "*Not every departure by a court or legislature from what might be called a truly appropriate degree of punishment will constitute cruel and unusual punishment. Sentencing, at the best of times, is an imprecise and imperfect procedure and there will always be a substantial range of appropriate sentences. Further, there will be a range of sentences which may be considered excessive, but not so excessive or so disproportionate as to outrage standards of decency and thereby justify judicial interference under section 12 of the Charter. In other words there is a vast grey area between the truly appropriate sentence and a cruel and unusual sentence under the Charter."*

32. When sentencing an accused, it is suggested by the court in ***Vries,*** that one must look at the facts and circumstances of the case and determine what a proper sentence would have been, and measure that sentence against the statutory minimum, and if it induces a sense of shock, then the Constitution has been infringed.

33. That court further explained that the word 'shock' was used in a constitutional sense as applying to a sentence "so excessive that no reasonable man would have imposed it." However in ***Aubeeluck,*** the Privy Council adopted the test as applied by the Supreme Court of Mauritius in ***Bhinkah v The State*** 2009 SCJ 102, namely, that a sentence must be *'so excessive as to outrage standards of decency'* applying the test stated by the Canadian Court in ***Miller***

and Cockriell v The State [1977] 2 SCR 680 and followed in ***R v Fergusson*** (above). It seems to us that there is no real difference between the two and that it matters not which is applied.

34. If, after applying the test, the court finds an infringement, then the question is what is the remedy? Should the statutory provision be set aside, or only the sentence imposed?

35. To answer the question, the court in ***Vries***, relied on the principle derived from the Canadian case of ***Smith v The Queen*** (above) and other Canadian authorities, and at paragraphs 11 and 12, the court noted: "*The Canadians have evolved a set of principles which in my view is the only sensible approach once it is accepted that a sentence may in general be acceptable and constitutional but in a particular case unconstitutional. ...The section 12 test for gross proportionality is to be applied first with respect to the offence and offender before the court, and then with respect to hypothetical cases which, can be forseen as likely to arise commonly. Where a statutory minimum sentence is found to be grossly disproportionate, there are three possible avenues open to the court, namely:*

> *(a) to declare the provision of no force or effect for all purposes;*
>
> *(b) to declare the provision to be of force and effect only in a particular class of case i.e. to read it down;*
>
> *(c) to declare the provision to be of no force or effect in respect to the particular case before the court.*

Although not totally clear it seems the options mentioned in (a) and (b) are followed when "cases can be forseen as likely to arise commonly and option (c) is followed when what was described in the Goltz case at 497 as far-fetched and marginally imaginable cases which suddenly become reality.. .Thus if the sentence legislated is not shocking in reasonable hypothetical cases it will not be impugned. If in an individual case it turns out to be shocking that individual's right in terms of Art. 8(2)(b) will be protected...".

36. Notably, the Privy Council in ***Aubeeluck***, in paragraph 37 of its judgment, accepted that the three courses of action open to the Supreme Court or to the Board if it concluded that the minimum sentence was grossly disproportionate on the facts of the case, were as indicated in the above passage from Vries.

37. The Board determined that the appropriate course was not to declare the provision of no force or effect, for all purposes, nor to declare it to be of force and effect in particular classes of case and to read the provision down, but to quash the sentence and remit the matter to the sentencing court, namely, the Supreme Court of Mauritius.

38. In this regard, the Board said at paragraph 38: "*The Board has concluded that a sentence of three years imprisonment would be wholly disproportionate to the offences committed by the appellant. Although convicted as a drug trafficker, he was dealing in a small way in small quantities of gandia (cannabis). He was a person of good character and it is noteworthy that he would not now be charged as a trafficker under the DDA 2000. Having full regard to the fact that the legislature regarded trafficking in drugs, including gandia, as a serious matter, the Board has nevertheless concluded that to disregard all mitigation, including the fact that these were first offences by the appellant and to impose a minimum sentence of 3 years' penal servitude would be grossly disproportionate****."***

Disposition and Conclusion.

[13] In the circumstances of the instant appeal, we hold that the mandatory minimum sentence of three years imprisonment created by **The Act** is subject to the proportionality provisions of article 7 of the Belize Constitution. As a consequence we find the sentence by the Chief Magistrate and which was affirmed by **Griffith J** to be grossly disproportionate in the circumstances of the case, and so justify judicial interference pursuant to article 7 of the Constitution.

[14] **Conteh JA** in his concurring decision in ***Davis*** observed that '*sentencing is essentially a judicial function and, in the exercise of this function, courts must ensure that in any particular case the sentence should fit the crime and must be in keeping with the principle of proportionality.'* In agreeing with the foregoing observation, we are constrained to observe, as also did **Griffith J** at paragraph 42 of her decision that the proviso to section 18(1) of **The Act** provides sufficient discretion, in an appropriate case, for the sentencing court to deviate from the minimum mandatory sentence and to consider the 'special reasons' peculiar to the accused appearing before the court, prior to the imposition of sentence. In this regard, the observation in ***Davis*** at paragraph 46 that "*even if magistrates are of the view that the mandatory minimum sentence … would be unconstitutional, they must impose it"* has no relevance to Belize in the circumstance of the existence of the discretionary proviso.

[15] While the Court in ***Davis*** adopted the course of action taken by the Judicial Committee of the Privy Council in ***Aubeeluck*** in remitting the matter to the sentencing court, we are satisfied that in the circumstances of the instant case and pursuant to the provisions of section 30 (3) of the Court of Appeal Act, Chapter 90 of the Laws of Belize, a different process should be followed. Section 30 (3) of the above Act provides that "*On an appeal against sentence the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed…."*

[16] In the instant case the appellant has already served a sentence of 9 months imprisonment being the periods of incarceration following conviction and the grant of bail, pending hearing of this appeal.

[17] Accordingly, pursuant to the provisions of section 30 (3) of the Court of Appeal Act, Chapter 90 of the Laws of Belize, we quash the sentence of 3 years and fine of $10,000.00 imposed on the appellant by the courts below. In substitution therefor, the appellant is sentenced to a term of 9 months imprisonment being the periods of incarceration following conviction and the grant of bail, pending hearing of this appeal. For the avoidance of any doubt or ambiguity as to the period of sentence, the sentence

should be deemed to cease and be completed upon the rise of the Court which hands down this decision. We further order that the sum of $5000.00 paid on account of the fine of $10,000.00 (also a part of the minimum mandatory sentence) be remitted to the appellant within 28 days of this decision.

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BLACKMAN JA

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DUCILLE JA