The Court of Appeal for Bermuda

113 Front Street
Hamilton HM 12
Bermuda

CRIMINAL APPEALS

Between:

DAVID JAHWELL COX – No. 22 of 2007

JAHKI DILLAS –No. 6 of 2008

Appellants

-V-

THE QUEEN

Respondent

Before: **Hon. Justice Zacca, President**
Hon. Justice Nazareth, JA
Hon. Justice Evans, JA

Date of Hearing: **5 November 2008**
Date of Judgment and Reasons: **14 November 2008**

PRESIDENT:

JUDGMENT AND REASONS

1. These two appeals raised an important issue of law – whether the minimum sentence provisions for the criminal offence of having a knife ("any article which has a blade or is sharply pointed, except a folding pocketknife") in a public place are unconstitutional and should be declared void or otherwise held to be of no effect. The two appeals therefore were heard at the same time, with the agreement of all parties.

2. The minimum sentence provisions were introduced in 2005 when the Criminal Code Act 1907 ("the Act") was amended to include section 315C. Sub-section (6) reads as follows –

> "(6) A court which finds a person guilty of an offence under subsection (1) shall –
>
> (a) on summary conviction, impose a term of imprisonment of not less than three years and not more than five years, and may in addition to the prison sentence, impose a fine of $5,000;
>
> (b) on conviction on indictment, impose a term of imprisonment of not less than five years and not more than seven years and may in addition to the prison sentence, impose a fine of $10,000."

3. David Jahwell Cox was convicted of one charge under section 315C of the Act in the Magistrates' Court (Worshipful Shade Subair, Acting Magistrate) on 27 October 2006 and he was sentenced to three years imprisonment for that offence. His appeal to the Supreme Court against both conviction and sentence was dismissed by the learned Chief Justice by a reserved judgment dated 19 October 2007. He now appeals against conviction and sentence to this Court.

4. Jahki Dillas pleaded guilty before the Supreme Court on 26 November 2007 to three offences, which were (Count One) Affray, (Count Two) Attempted Wounding with Intent, and (Count Three) possession of a bladed or pointed article in a public place, contrary to section 315C (1) of the Act. On 6 March 2008 before Her Honour Justice C. Simmons he was sentenced to five years` imprisonment for the section 315C offence. He now appeals against that sentence to this Court.

5. In both cases, the "bladed or pointed article" was a machete. The individual facts of the two cases are not relevant to the issue of law which we have outlined above, and we will consider that issue first.

Minimum sentence provisions – section 315C(6)

6. Mr. John Perry QC submitted on behalf of the appellant Cox that the minimum sentence provided for by section 315C(6) is unconstitutional and should be declared void. Alternatively, the section is inconsistent with the provisions regarding "Purpose and principles of sentencing" given statutory effect in Part IV of the Criminal Code Act 1907 as amended in 2001. Specifically, section 54 (as amended) reads as follows –

> "**Fundamental principle**
>
> 54. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

7. Reference was also made to sections 53 ("The fundamental purpose of sentencing…") and to section 55(2), which lists the circumstances to which the court shall have regard before imposing a sentence of imprisonment.

8. The minimum sentence provisions have Canadian origins, and Miss Clarke in her written submissions for the Respondent DPP referred extensively to Canadian authorities where the constitutionality of corresponding sentencing provisions has been challenged. She contended that the minimum periods prescribed by section 315C(6) could not be regarded as "constitutionally suspect", in the light of those authorities. But she also submitted that "mandatory minimum sentences should not vitiate the other substantive principles of sentencing and must be understood in the full context of our sentencing regime". That submission was prescient, because when Mr. Perry relied upon section 54 in support of his alternative argument (that section 54 requires the Court to consider whether the sentence is proportionate, even when a minimum sentence is required by section 315C(6)),

Miss Clarke accepted that that argument is correct. She conceded that if the minimum sentence requirement was not subject to that overriding requirement, and was required regardless of the circumstances of the offence and of the offender, then it could be regarded as unconstitutional, and she would not seek to defend it from that charge.

9. Mr. Perry, whilst welcoming this concession, maintained his primary submission, that the provision is contrary to the fundamental rights and freedoms of the individual preserved by the Bermuda Constitution Order 1968, and specifically is in breach of section 3, which provides –

> "**Protection from inhuman treatment**
>
> 3. (1) No person shall be subjected to torture or to inhuman or degrading treatment or punishment."

10. The issues for the Court, therefore, are to determine, first, whether Mr. Perry's alternative submission, supported by Miss Clarke, is correct, namely, whether the mandatory minimum sentence provisions of section 315C(6) are subject to the fundamental principle in section 54 that the sentence passed in the individual case shall be proportionate to the gravity of the offence and the degree of responsibility of the offender; and secondly, whether section 315C on its true construction is inconsistent with section 3(1) of the Constitution Order.

11. We hold without hesitation that counsel are correct in submitting that the requirement of a minimum sentence in section 351C (6) is subject to the fundamental principle that the sentence must be proportionate in the circumstances of the particular case, as specified in section 54. This is the correct interpretation, in our view, of these provisions of the Bermudian legislation. Our conclusion is supported, however, by judgments of the Canadian Courts to which we were referred, specifically R. v. Stauffer 2007 BCCA 7, a judgment of the Court of Appeal for British Columbia. The Court approved an earlier judgment which held that "minimum mandatory sentences should not vitiate the other substantive principles of sentencing" (per Arbour J. in R. v. Wust (2000) 143 C.C.C. (3d) 129), and added –

> "Proportionality is considered to be the fundamental governing principle of sentencing. We cannot, therefore, assume that Parliament intended to abridge this longstanding principle without clear and explicit language to that effect" (para.36).

12. Secondly, similar statutory provisions in other countries were referred to, including England and Wales. It appears that in those jurisdictions the provisions for mandatory minimum sentences allow for exceptional cases where the minimum may not apply. If our view of the Bermudian legislation is correct, there is a similar implied safeguard, though it is not expressed.

13. Thirdly, the balance of power between the legislative and judicial branches of the so-called Westminster model constitution has been described in leading authorities, including, Hinds v. The Queen [1976] 1 All E R 353 and more recently Forrester Bowe and Trono Davis v. The Queen [2006] UKPC 10. The power of the legislature to specify what shall constitute a criminal offence and what as a general rule shall be the punishment for it is undoubted. But applying the general rules in an individual case is a judicial function, which cannot be usurped by the executive branch of government (Forrester Bowe) or by the legislature itself. It is consistent with that general principle that the judge retains the power and the duty, in every case, to determine whether the sentence is proportionate, as required by section 54.

14. Power to suspend

    The Chief Justice held, in the present case, that the Courts` power under section 70K of the Criminal Code to suspend the operation of a prison sentence provides a 'safety valve' which protects the offender from having to serve a sentence which would be disproportionate in the particular case. It is well established that the power is only available to the judge in 'exceptional' cases. Therefore, it can be argued, the hardship of an excessively harsh sentence can be prevented in this way.

15. Even in the exceptional case, however, the judge must first consider whether a sentence of imprisonment is justified and inevitable; only when he has decided that it is, may he consider whether the sentence can be suspended in the particular case: The Queen v. Millington Johnson [2004] Bda. L.R.63. We agree with the Chief Justice that this power does allow the judge to avoid an unjust result in such a case, but nevertheless, in our view, there are two reasons why the power to suspend even a minimum term sentence does not meet the proportionality requirements of section 54. The first and narrower reason is that the judge must first consider what sentence is appropriate in the particular case; he cannot do this without determining whether that decision must take account of section 54. Secondly, and more generally, it must be recognised that a sentence of imprisonment remains just that, even when the Court orders that it need not be served, and in certain circumstances the suspension order may be lifted by a further order of the Court. We hold, therefore, that the power to suspend the sentence does not avoid the need to reconcile the minimum term provisions with section 54.

The Judge's decision

16. It does not follow that the Judge may disregard the minimum sentence provided for by section 315C(6) and similar provisions in the Code. The legislature is entitled to prescribe what it regards as the appropriate sentence for a particular offence, not least because its views are taken to reflect those of the society it represents. The law does not permit it to deprive judges of the power to determine

the appropriate sentence in each individual case, but the judges must take account of the view it has expressed in prescribing the general rule. In determining, therefore, whether the appropriate sentence is a shorter term of imprisonment than the minimum period specified in the legislation, the judge should consider whether there are reasons why the specified term would produce a disproportionate result in the particular case. The judge must apply section 54 as well as section 315C(6).

Unconstitutionality

17. Mr. Perry's submissions addressed a preliminary issue which he anticipated might be raised under section 17 (1) of the Court of Appeal Act 1964. This reads –

> "17(1) A person convicted by a court of summary jurisdiction and whose appeal to the Supreme Court…..has not been allowed may appeal to the Court of Appeal –
>
> (a)……
>
> (b)……
>
> (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is fixed by law." (Emphasis added)

18. In fact, the Director of Public Prosecution and Miss Clarke, representing the Respondent in the two appeals, did not suggest that the appeals were barred by this provision, and we consider that they were correct not to do so. Our primary reason is that the sub-section does not prevent the Appellants from raising issues as to the constitutionality of the provision or from asserting their fundamental constitutional rights. Secondly, even on a narrower interpretation of section 17(1)(c), their alternative contention is that the three year minimum sentence is not "fixed by law" for all cases, including their own, and it would beg the question raised by that contention if it were held that the sentence is of that kind.

19. The gravamen of the submissions for the Appellants is that a fixed minimum term sentence, without regard to the circumstances of the individual case, is contrary to the underlying principles "that the punishment should fit the crime" and that "all traditional factors may and so far as appropriate be taken into account" (per Lord Bingham in Anderson v. Secretary of State for the Home Office [2003] 1 Cr.App.32 para 7). The former aphorism has been recognised judicially –

> "The matter was clearly and succinctly put by Saunders JA (Ag) in the Eastern Caribbean Court of Appeal in *Spence v. The Queen.*…..…when he said –
>
> > "It is and always has been considered a vital precept of just penal laws that the punishment should fit the crime."
>
> The Board is of the same opinion, and is not aware that the principle has ever been authoritatively controverted."

(Forrester Bowe and Trono Davis v. The Queen [2006] UKPC 10, para. 30).

Lord Bingham's statement of principle in Anderson (above) reads in full as follows –

> "In determining the appropriate measure of punishment in a particular case all the traditional factors may and shall so far as appropriate be taken into account : pure retribution, expiation, expression of the moral outrage of society, maintenance of public confidence in the administration of justice, deterrence, the interests of the victim, rehabilitation and so on."

We add our respectful comment that the last three words "and so on" recognise that the categories of relevant factors are never closed.

20. It was also submitted that a predetermined tariff, applicable in all cases, is inconsistent with the doctrine of Separation of Powers – essentially, that sentencing in the individual case is an exercise of judicial power, which cannot be usurped by the executive or legislature -, and more specifically, that section 315C(6) by prescribing different minimum periods depending on whether the conviction was summary or on indictment means that the same facts may attract a longer sentence "simply by virtue of the accident of forum".

21. We could accept the above submissions, if section 315C(6) was not subject to the limitation imposed by section 54, which in our judgment it is, for the reasons already given. In his judgment on Cox's appeal to the Supreme Court, the Chief Justice held, first –

> " …..I cannot say that the steps that the legislature has taken are so out of proportion as to offend the Constitution",

and secondly, in the alternative, that the Court's power to suspend the sentence in exceptional circumstances provides a 'safety valve' similar to the "escape clause" provisions found in English legislation, to the effect "except where the court is of opinion that there are particular circumstances which (a) relate to any of the offences or to the offender; and (b) would make it unjust to [impose the minimum sentence] in all the circumstances".

22. The Chief Justice did not approach the constitutionality issue on the basis that section 315C(6) is subject to the proportionality provisions in section 54 (he held that section 315C being later in date must prevail over section 54). Having regard to the concession made by the Respondent before us, which in our view is correct as a matter of law, the constitutionality issue has to be rephrased. We hold that the minimum term sentences in section 315C(6) are subject to the proportionality requirement of section 54, and that this implied limitation provides an 'escape clause' or 'safety valve' which satisfies the defendant's constitutional right to his liberty (section 1 of the Constitution) and not to be deprived of his personal liberty, except by reason of a (valid) sentence or order of the Court (section 5).

We therefore uphold the Chief Justice's alternative approach, though with reference to section 54 rather than the suspended sentence provisions on which he relied.

23. Much of the authority which was cited to us was concerned with section 12 of the Canadian Charter of Rights & Freedoms, which provides "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment". Section 3 of the Bermuda Constitution Order reads "(1) No person shall be subjected to torture or to inhuman or degrading treatment or punishment". We do not find it necessary to decide whether a minimum sentence provision breaches this right.

Conclusion

24. For these reasons, we hold that the minimum term provisions of section 315C(6) are subject to the proportionality requirement of section 54, and to that extent the Appeals against sentence are allowed. It is incumbent on the sentencing judge, in every case, to determine whether the prescribed minimum sentence would infringe the defendant's rights under section 54, taking account both the statutory guidelines set out in section 55 and of the minimum term requirement which, subject to section 54, itself has the force of law. We further hold that the provisions so interpreted are not unconstitutional, and in that respect the Appeals are dismissed.

DILLAS' APPEAL

25. Dillas was sentenced in the Supreme Court (Hon. Justice Charles-Etta Simmons) on 6 March 2008 after pleading guilty to an offence under section 315C(6).The sentence was imprisonment for the minimum term of five years. Concurrent sentences of 18 months and 6 months were passed for offences of attempted wounding and affray, respectively. Against those sentences he has now appealed.

26. His application for leave to appeal against the sentence under section 315C(6) was refused by a single judge on 11April 2008. He appealed against the refusal of leave, but abandoned the appeal by notice dated 22 September 2008. On 20 October 2008, however, he sought leave to withdraw the notice of abandonment, and an extension of time within which to appeal against the sentence. These applications were not opposed by the Respondent, and we gave leave accordingly at the outset of the hearing of the appeal.

27. Having allowed the appeal to the extent stated above, we remit the matter to the Supreme Court for sentence in accordance with the requirements of section 54 as well as of section 315C(6) of the Code.

COX's APPEAL

(1) Against Conviction

28. Cox pleaded not guilty to charges of two offences, both allegedly committed in a public place, namely, the Devonshire Recreation Club, on 8 July 2006. The first was having "a bladed article to wit a 2ft long machete with a pointed edge, contrary to section 315C(1) of the Criminal Code", and the second was that he "wilfully and unlawfully destroyed (or damaged) the property of the Club, to an amount exceeding sixty dollars".

29. He was found guilty of both offences after a hearing before the Acting Magistrate (Wor. Shade Subair) who gave a written judgment dated 27 October 2006. He appealed against both conviction and sentence to the Supreme Court (Chief Justice Ground). The appeals were dismissed on 19 October 2007.

30. The Magistrate found "This court is satisfied and sure that Mr. Cox re-entered the club for the purpose of confronting these men with a machete in his possession". The Chief Justice held *ex tempore* that "the finding was plainly open to the learned Acting Magistrate on the evidence before her…….having rejected [Mr. Cox's] evidence there was then really no other finding left open to her. I see no reason to interfere with these clear findings of fact made by the tribunal of fact that had seen all the people involved and had a chance to assess their evidence and their credibility."

31. Mr. Perry QC submitted for Cox that the Magistrate misdirected herself in basing her conclusion on what she described as circumstantial evidence, when that evidence was contradicted by what Mr. Perry called 'direct' evidence that the defendant did not enter the premises with the machete.

32. The prosecution case was that the Mr. Cox was escorted from the Club premises, then returned with a machete which he wielded inside the Club causing people to "run all over the place" and to run out of the door. He was swinging the machete in mid-air and round one of the tables, then used it to strike one of the glass doors, causing damage which cost $300 to repair. The prosecution witnesses saw him re-enter the club, and with the machete in his possession when he was inside, but they did not say that he had it with him when he re-entered.

33. His defence was that he returned to the Club to look for his brother, and saw the group of men whom he had previously been arguing with. He said that as he approached them he saw that one of them had the machete down by his leg, and that he managed to get it out of his hand because he was "trying to choke me with it". He said that he seized it when acting in self-defence, and whilst he admitted "having it in the air" for a few seconds, he denied that he struck the door or caused any damage with it.

34. On the defendant's account, therefore, he wrested the machete from one of the other men, shortly after he re-entered the Club. The prosecution witnesses, who said that they saw him during the whole period after he re-entered until they saw

him with the machete, were not asked whether they saw him take it from the other man.

35. In this state of the evidence, the Magistrate clearly was entitled to find that he had the machete with him when he re-entered the Club, notwithstanding that neither of the witnesses who saw him re-enter claimed to have seen the machete at that time. At least one of them had him under continuous observation until a short time later when he was wielding it, and neither of them supported the allegation that he seized it in self-defence. The Magistrate's reference to "circumstantial" evidence was strictly unnecessary; she based her finding on the direct evidence that she had heard, coupled with her assessment of the credibility of the witnesses, including the defendant.

36. The appeal against conviction on the charge of possessing the machete is dismissed. Mr. Perry made a written submission that the Magistrate was at fault in failing to give reasons for her finding of guilt on the unlawful damage charge. There was ample evidence that the defendant did strike the door with the machete, causing the damage which the prosecution alleged. This appeal is dismissed also, and both convictions are affirmed.

Sentence

37. Mr. Perry invited the Court, if the appeal against the three-year minimum term sentence was successful, to assess the appropriate sentence ourselves, rather than to remit the matter to the Magistrate's Court. This we are willing to do.

38. We were told that the Mr. Cox has been in custody since July 2006 and that he will shortly be due for release, but this is not relevant to the question of sentence which is now before us.

39. Our task in the light of the judgment we have given is to determine whether the three-year term specified as the minimum sentence by section 315C(6) is proportionate to the gravity of the offence and the degree of responsibility of the offender, as required by section 54. The circumstances of the offence have been described above in connection with the appeal against conviction. The defendant wielded the machete in a crowded club in the early hours of the morning, causing the people nearby to run away in alarm. He had been involved in some sort of altercation with a group of men inside the Club. He struck the door with enough force to cause significant damage. This was a serious offence even though he did not use the machete to cause any personal injury. The machete is a particularly threatening type of 'bladed article' and there was no possible justification for having it at the Club, other than the suggestion of self-defence, which failed Taking account of the legislature's concern than offences of this sort should receive substantial prison sentences, but without accepting that the law's minimum period should necessarily apply, we nevertheless hold that the three-

year sentence was not disproportionate in the circumstances of this case and of this offender.

40. The appeal against the sentence of three years' imprisonment, therefore, is dismissed.

Signed

Zacca, President

Signed

Nazareth, JA

Signed

Evans, JA