The Court of Appeal for Bermuda

CRIMINAL APPEAL No 2 of 2012

Between:

DEAN SINCLAIR BURGESS

Appellant

-v-

THE QUEEN

Respondents

Before: **Zacca, President**
Ward, J.A.
Auld, J.A.

Appearances: Ms Shade Subair for the Appellant
Ms Susan Mulligan for the Respondents

JUDGMENT

Date of Hearing: **15 June 2012**

Date of Judgment: **22 June 2012**

AULD JA:

Introduction and the Facts

1. This is an appeal of Dean Sinclair Burgess from a decision of Wade-Miller J in the Supreme Court upholding a sentence of the Senior Magistrate of three years' immediate imprisonment on his plea of guilty to possession in an "increased penalty zone" of a public place of a knife with a cutting edge in excess of 3 inches, contrary to sections 315C and 322A of the Criminal Code.

2. The brief facts of the offence are as follows. On 30th August 2011 at about 10 p.m. he was in a road in Pembroke Parish, a public place and within 300 metres of a primary school, an "increased penalty zone" within the meaning of section 322A of the Code. Police found him there when responding to his report of another's threatening behaviour. They spoke briefly with him, and then saw that he had a knife in his waistband. They stopped him and found it had an 8" blade. On arrest and caution for the offence, he said "You don't understand. They are going to kill me. They are going to fuck me up." When later questioned by the police, he simply denied having committed any offence. In further questioning, he told them that he had been taking the knife to his mother because her knife was broken. When they spoke to his mother, she denied having had a broken knife or having spoken to him about any such thing. Notwithstanding his account to the police, he made an early plea of guilty.

3. At the date of the offence Mr Burgess was aged 49 and a former drug user undergoing methadone treatment. He claimed to have been in employment as a painter. He had a lengthy criminal record for offences of violence, mostly of minor assaults and offensive behaviour on arrest by police officers, the last being in 1993, some 18 years before his commission of this offence. He had no record of any matter similar to this.

4. The Senior Magistrate's notes do not disclose any reason for fixing on a total sentence of three years' imprisonment. Wade-Miller J, on appeal, rightly lamented the absence of any record of his reasons. However, she held, following a review of a number of Magistrates' decisions cited to her of offences said to be comparable that, the sentence was not "manifestly ... excessive" or "wrong in principle".

The Legislation

5. This offence is triable either summarily or on indictment. Section 315C(6) provided for a mandatory range of not less than three and not more than five years' imprisonment on summary trial, and of not less than five years and not more than seven on indictment. The provision was part of a wider response by Parliament in 2004, by way of amendments to the Code, to an alarming increase of crimes of violence involving the use of knives. Parliament clearly intended the offence and its accompanying mandatory minimum sentences to have a strong deterrent effect.

6. Only a year later Parliament clearly considered that the deterrent needed strengthening. By a further amendment to the Code taking effect in 2005, section 322A, it introduced an additional penalty. This took the form of a mandatory uplift on the sentence already required by section 315C(6), where the offence is committed within, or within prescribed distances of, any of a number of places specified in the section as "increased penalty zones". These are, in the main, places to which the young are to be found or attracted, such as schools, sports and youth centres and community events. The uplift applicable on summary conviction is not less than one and not more than three years' imprisonment. This is how Section 322A set out the machinery for what was to be a "two-stage" sentencing process:

> *"(1) Where a person is being sentenced for an offence under section ... 315C(6) ... which was committed ... in an increased penalty zone, the court shall -*
>
> *(a) first determine the sentence ('the basic sentence') in accordance with established principles but without regard to this section; then*
>
> *(b) where the basic sentence includes a term of imprisonment or a fine, increase that sentence by adding an additional element determined in accordance with subsection (2).*
>
> *(2) The additional element shall be –*
>
> *(a) a term of imprisonment of at least one year but not more than three years, where the basic sentence includes a term of imprisonment of less than seven years*
>
> *(b) a term of imprisonment of at least three years but nor more than five years where the basic sentence includes a term of imprisonment of seven years or more; ..."*

7. Thus, the first stage of the two-stage process for which sections 315C(6) and 322A provided is for the sentencer to determine the "basic sentence". He should do so by taking the mandatory minimum required by section 315C(6) as a starting point. If he considers that the offence in the individual circumstances of the case and on conventional sentencing principles would merit less than the minimum or the minimum and no more, the provision requires him to determine the "basic sentence" at the minimum level. If he considers, in his judicial discretion, that the gravity of offence and the circumstances of the offender require more than the minimum sentence – taking account also of the mischief at which section 315C(6) is aimed - he may take that higher figure subject to the Section 315C(6) maximum.

8. The second stage for the sentencer is to add to his "basic sentence" an "additional element" of at least the applicable minimum sentence of imprisonment required by section 322A(2), *e.g.* where the "basic sentence" is one of imprisonment for less than seven years, an additional period of at least one year's imprisonment, but not more than three, *i.e.* an over-all minimum of four years; or (b) where the "basic sentence" is one of imprisonment for seven years or more, an additional period of at least three years' imprisonment, but not more than five, *i.e.* an over-all minimum of ten years. If, in the exercise of his judicial discretion he considers it appropriate, he may impose a sentence up to the prescribed maximum in respect of either stage.

9. In the present case and looking at sections 315C(6)(1) and 322A(2)9a0 on their own, the appropriate total minimum sentence might be thought to be four years' imprisonment, not the three the Senior Magistrate imposed. There is no suggestion in the submissions before us that he did or should have considered going beyond the minimum at either stage.

10. However, sections 315C(6) and 322A must be looked at in the context of other potentially relevant provisions of the Code and general principles of sentencing. The two provisions followed a wholesale reformulation and gathering together four or so years earlier in 2001 of a new Part 1V of provisions under the heading "Purpose and Principles of Sentencing". One was section 54, under the side-heading "Fundamental Principle". It provided that:

> *"[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".*

11. As a matter of construction, mandatory minimum penalties applicable to particular offences, such as those required in sections 315C(6) and 322A, are clearly capable of requiring disproportionately high sentences, where, but for them, sentencers would impose lesser sentences in the proper exercise of their judicial discretion. That was clearly the understanding of Parliament when introducing them in 2004 and 2005. It did so with deterrence in mind and in clear knowledge of its earlier general affirmation in section 54 of the principle of proportionality.

12. Other relevant earlier and generally applicable provisions in the 200**1** and current version of the Code include sections 55, 56 and 57(1), which, respectively:

> permit imposition of a sentence of imprisonment only after consideration of "all other sanctions other than imprisonment ... authorised by law";
>
> "[e]xcept where otherwise provided" permit the imprisonment for a shorter term than that for which the law provides; and
>
> "subject to the limitations" in an enactment prescribing a punishment, leaves the court with a discretion as to the punishment to be imposed.

The Jurisprudence

13. Each of the familiar expressions of sentencing principle in sections 55, 56 and 57(1), contains its own "built-in exclusion", as Ground CJ put it in *Cox v The Queen* (SC No. 36 of 2006) in his helpful analysis at paragraphs 8 – 13 of his judgment, upholding an Acting Magistrate's sentence of the section 315C(6) minimum of three years' imprisonment.[1] And each, as a matter of construction, is capable of intruding on the general principle of proportionality affirmed in section 54. That principle - fixing as it does the sentence in any individual case "to the gravity of the offence and the degree of responsibility of the offender" - is inherent in the exercise of all judicial sentencing discretion, at which sections 55, 56 and 57(1), subject to their respective specific exclusions, are all, also directed. Ground CJ recognised as a matter of statutory construction a clear conflict between, on the one hand, section 54 and on the other, the

[1] Not yet encumbered by section 322A requirements

exclusions in those three provisions. He held, in paragraph 14 of his judgment, that the mandatory minimum provision of section 315C(6), being later in time, was clearly intended by Parliament to prevail.

14. Ground CJ went on to consider the constitutionality of the mandatory three year minimum in section 315C(6), in particular as to the protection given by section 3(1) of the Constitution from "inhuman treatment". He concluded in paragraph 27 of his judgment, that, given section 315C(6)'s "legitimate legislative aim" of combating the increasing and pressing social problem of knife-crime in Bermuda, it could not be said to be "so out of proportion as to offend the Constitution". In the result, he upheld the mandatory minimum sentence of three years imposed in that case. He suggested as a possible alternative that, in exceptional circumstances - not present in the case before him, a sentencer could mitigate the rigour of the mandatory minimum period of imprisonment for which section 315C(6) provided by substituting a suspended sentence of imprisonment for the same period.

15. On appeal from Ground CJ's decision, (*Cox & Dillas v The Queen* (No. 22 of 2007), the Crown conceded and the Court - in a judgment we take to be binding on us - took a different course. The Court held that, notwithstanding the mandatory minimum penalty for which section 315C(6) provided, a sentencer "must apply both section 54 and section 315C(6) in the sense that he should take the minimum as the starting point", but could impose a lesser sentence on the ground of disproportionality. As to the meaning of disproportionality in this context, the Court suggested "exceptionality", by reference to similar provisions in England & Wales which expressly so provide (see paras 11, 12, 13 and 16). However, the Court rejected recourse to a suspended sentence as the appropriate form of an exceptionality "safety-valve" mooted by Ground CJ.

16. This is how the Court left the matter in paragraphs 22 and 24 of its judgment:

> *"22. ... Having regard to the concession made by the ... [Crown] 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 (section5). ...*

...

24. ... 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 [of] the statutory guidelines 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 ..."

17. Ground CJ returned to the test of exceptionality in *Mallory v DPP* [2011] Bda LR 30, in the light of the Court of Appeal's treatment of a statutory minimum as "a starting point" when proportionality is in issue.[2] This is how he put the matter in paragraphs 16 and 17 of his judgment:

"16. ... the mandatory minimum is the starting point. If the judge is going to go below it he can only do so on the grounds of disproportionality, and ... good practice requires that he should state on the record why he considers that the specified term would produce a disproportionate result in the particular case. And, it is only going to be an exceptional case where that will apply, as the Court of Appeal has itself said ...."

17. ... the concepts of proportionality and exceptionality are intimately linked.[3]

The Relevant Issue

18. The issue as put by counsel to this Court does not engage the true issue indicated by the Court in *Cox & Dillas* as to the tension between proportionality and mandatory minimum sentences exemplified in sections 54 and 315C(6). It was whether the sentence of three years' imprisonment imposed by the Senior Magistrate on Mr Burgess was disproportionate in the sense of being "manifestly excessive" or "wrong in principle" or "outside the tariff".

19. The conflict between proportionality and mandatory minimum sentences now has the added ingredient of the mandatory additional sentence introduced to the Code in

[2] a case involving a purported constitutional issue as to compliance of a mandatory minimum sentence under the *Firearms Act 1973* with section 54 of the Code.
[3] Citing the decision of the English Court of Appeal in *R v Rehman & Wood* [2005} EWCA 2056

2005 by section 322A. It is common ground between the parties that the Court's approach in *Cox & Dillas* is as applicable to the two-stage process introduced by the latter provision, as it was to the one-stage provision of section 315C(6); the test is whether the make-up and total of the sentence are "disproportionately high". The Senior Magistrate's sentence consisted of two years for the "basic sentence", purportedly pursuant to section 315C(6) and one year for the "additional element" pursuant to 322A(2). In his sentencing remarks, he is publicly recorded as having referred to the need for exceptional circumstances for going below the limit, but expressed the view that, on the facts before him, there ... [were] no exceptional circumstances. He did not explain, having regard to that finding, why he did not impose the minimum sentence of three years as the "basic sentence", which, with his sentence of one year for the "additional element" would and should have produced an over-all minimum of four years.

20. No point was taken before us by counsel for the Crown, Ms. Susan Mulligan, that the total sentence is unlawfully low in that, putting aside any question of disproportionality; it should have been four, not three, years' imprisonment. She and counsel for Mr Burgess, Ms. Shade Subair, are at one in submitting that both the "basic sentence" and the "additional element" are subject to the proportionality test in section 54. They are also at one, whether or not sentences are below or above their respective statutory minimum levels, that the statutory minima are simply to be taken as "starting points", as the Court held in *Cox & Dillas*

21. Both counsel, in touching on the meaning of disproportionality in this statutory context and as to the role of "exceptionality" as a permissible "escape-clause" from it, treated the latter as if it encapsulated the conventional thresholds for appeal where no statutory minimum applies, such as "manifestly excessive", "wrong in principle" or "outside the tariff". But, in our view, if "exceptionality" is the only way to resolve conflicting provisions in the same statutory context for proportionality as a generality and for a minimum sentence for certain offences, it must mean more than would be necessary to upset on appeal a sentence not subject to any mandatory minimum. To equate it with circumstances that would render a sentence "manifestly excessive" or "wrong in principle" because it is "outside a tariff" regardless of such minimum, would enable the courts to disregard or flout all statutory limitations of this sort.

22. The question remains, if, as this Court and Ground CJ have indicated respectively in *Cox & Dillas,* and in *Mallory,* the "escape clause" or "safety-value" against an unjust application of a mandatory minimum sentence is exceptionality, how much more exceptional do the circumstances of the offender and the offence have to be than those already relevant to quashing or varying a sentence not trammelled by a statutory minimum? We do not purport in this judgment to essay a finite or formulaic answer to this question – say by an attempt to define some form of "super-exceptionability". However, a judicial value-judgment as to "exceptionability" in the circumstances of an individual case concerning a mandatory minimum sentence should at least take account of the "the legitimate legislative aim" of Parliament strongly to deter the specific form of serious crime in question (*cf* per Ground CJ in *Cox* (*supra,* para. 12)

23. Counsel on either side, whilst alluding to the problem, have not grappled with the difficult questions of construction in this important legislation. They have confined themselves to the familiar appellate issue whether the sentence under appeal was "manifestly excessive" by reference to a tariff suggested by Ms Subair. We have some sympathy with counsel, since the legislation is not as clearly or simply drawn as it might be to encourage and assist its practical application by the courts.

The Submissions on Appeal

24. The submissions of Ms Subair, for Mr. Burgess were, in essence, that, on the facts, the three years' sentence imposed by the Senior Magistrate was "manifestly excessive" or "wrong in principle". Her argument consisted of:

> *(i) a detailed factual comparison of his offence and its circumstances with four unreasoned and disparate magisterial disposals;*
>
> *(ii) an attempt to establish a "tariff" from those cases, without showing that they are representative of summary disposals generally in section 315C cases or that they have been recognised by the Supreme Court or this Court as such; and*
>
> *(iii) a contention, that, on the facts and other circumstances of his case, the basic sentence imposed under section 322A(1) of two years' imprisonment – already below the statutory minimum – and the over-all sentence of three*

years - were disproportionate in the sense of being "manifestly excessive" or "wrong in principle".

25. Ms Subair elaborated on the last of those submissions by maintaining, in the terminology of section 54, that the sentence was disproportionate to the gravity of Mr. Burgess's offence and the degree of his criminal responsibility. She drew particular attention to his early plea of guilty, the absence of any previous conviction of a similar nature, the long period since his last conviction of any sort and the fact that, although within close range of a primary school, he was not so close to it or acting in a way that could be taken as a threat to others nearby.

26. Ms Mulligan pinned her submissions to the lack of exceptionality on the facts of this case for the Senior Magistrate to derogate from the basic section 315C(6) sentence of three years on the ground of exceptionality, but did not seek correction of that sentence. She also disputed strongly Ms Subair's entitlement to construct out of the few Magistrates' disposals a "tariff" as a yardstick by which to measure the Senior Magistrate's less than minimum disposal as "manifestly excessive" or "wrong in principle".

Conclusion

27. As the Court has indicated, the Senior Magistrate left no formal record of the reasons for his decision to settle on three years' imprisonment. However, it is apparent from his publicly reported sentencing remarks that he accepted that Parliament intended the penalties for the offence to be "severe if not draconian". And he expressly found that there were "no exceptional circumstances", a clear reference to this Court's ruling i*n Cox & Dillas*. Nevertheless, from his sentencing notes, he appears to have calculated it by going below the minimum three, to two, years for the basic offence and then adding one year for the "additional element".

28. Wade-Miller J, after a full and detailed consideration of submissions on the facts and the law, upheld the over-all sentence of three years' imprisonment, holding, true to the confines of the argument put to her, that it was not "manifestly excessive". However, from other passages in her sentencing remarks, it is clear that she was alert to the object of the mandatory minimum sentence provisions in sections 315C(6) and 322A.

29. The Court has looked for any "exceptional circumstances" in this case that would justify further reduction of the Senior Magistrate's sentence. Ms Subair's so-called "tariff" of four Magisrates' decisions on the same or comparable provisions is no basis for concluding that the sentence of three years' imprisonment was disproportionate in the sense of being manifestly excessive or otherwise wrong in principle. The four decisions show:

> i) that the facts and seriousness of each of the cases – to the extent that they were discernible from the material put before the Court - varied considerably - two arguably more serious than that of Burgess, the other two of similar or less seriousness;
>
> ii) a surprising disregard by all the Magistrates for the statutory over-all minimum of four years' imprisonment to be imposed in the interests of public safety, namely sentences of: i) 18 months imprisonment; 2) one year's imprisonment, suspended for 2 years, to be followed by 2 years' probation; 3) probation; and iv) 1 year's imprisonment, suspended for 2 years; and
>
> iii) that none of the cases - all since *Cox & Dillas* - indicates any application of an "exceptionality" test, and in none is there any recorded statement of the Magistrate's reasoning, or indeed any indication as to the basis on which he considered himself not bound by the statutory minimum.

30. Even if those four summary cases had been of such similarity on their facts and circumstances as to be capable of forming a basis for a sentencing pattern, there is no such pattern in the disposals or individual reasoning as to the effect of the statutory minima that would enable the Court to identify a "tariff" as a yard-stick for determination of proportionality. If, nevertheless, some deduction for proportionality had been possible under section 54, we heard no other argument from Ms Subair against the propriety of the actual sentence on Mr. Burgess, - already falling short by one year of the over-all required minimum.

31. The Court must, therefore, reach its conclusion in accordance with the construction of the legislation that it gave in *Cox & Dillas.* A sentencing Magistrate or Judge, in giving effect to the statutory provisions the subject of this Appeal, should:

i) take account of the fact that Parliament has introduced a minimum statutory sentence because it considers the need for a margin of protection for the public is so great that sentencers, save in exceptional circumstances, should be required to impose as a sentence one that may not be proportionate – a "draconian sentence" as the Senior Magistrate put it - that is the main point of a mandatory minimum sentence;

ii) the degree of "exceptionality entitling disregard of that minimum is a matter for the sentencer on the facts of the individual case and also having regard to the tension between the competing provisions of proportionality and for the legitimate legislative intention discernible for the introduction of the minimum sentence;

iii) in that special context, "exceptionality" should be of a higher degree than, say, strong mitigating circumstances of the offence and the offender, for those common-place pleas would fall to be taken into account and given their appropriate weight independently of the application of the mandatory minimum penalty;

iv) determination of the degree of mitigating circumstances sufficient to amount exceptional circumstances sufficient to override the statutory minimum penalty, and by how much, is a value-judgement for the judge, for which, as in any other sentencing exercise, he should be given a wide ambit of discretion – in short, exceptionality should be very rare, if the mandatory statutory provision is to be given the operation intended by Parliament;

v) it follows that, save where a sentencer may, in his judicial discretion, determine on a permitted sentence above one of the mandatory minima (as is possible under section 315C(6) and 322A(2), the proportionality of his application of the minimum cannot logically be challengeable just on the ground that it is "manifestly excessive" or "outside the tariff" as if no such statutory minimum applied; and

vii) in the circumstances a sentencer, if intent on relying on "exceptionality" as a justification for putting aside the statutory minima, should set out clearly his reasons for doing so – as Wade-Miller J observed in her sentencing observations in this case, it need not take long, even for a busy Magistrate – it is sufficient to

identify shortly the point or points for determination and the reason or reasons for its or their determination.

32. For the reasons we have given, Mr Burgess has not at any stage of these proceedings come near to establishing that circumstances of and giving rise to his offence or his personal circumstances were so exceptional as to entitle further disregard than already given by the Senior Magistrate of the mandatory minimum sentence for which sections 315C(6) and 322A(2) provided. Nor was the sentence otherwise manifestly excessive or wrong, in principle in this statutory context.

33. For all those reasons, the Court dismisses the appeal.

Signed

Auld, JA

Signed

Zacca, P

Signed

Ward, JA