



3. Pursuant to section 26A and 30A of the Firearms Act 1973, the penalty for the use of a firearm or imitation firearm when committing an indictable offence is a mandatory minimum of an additional ten (10) years imprisonment. Such penalty is to follow the penalty for the substantive offence and expresses the will of the legislature that the use of firearms or imitation firearms should not be tolerated in Bermuda.
4. It is a harsh penalty, but is the will of those whose duty and power it is to frame the type of society they wish to create in Bermuda and to meet “a serious and growing societal danger.” The sentence imposed for the six (6) firearm offences was an additional ten (10) years imprisonment.
5. The question which arises is whether the sentence of imprisonment for sixteen (16) years is proportionate to the gravity of the offences.
6. As indicated above the penalty of imprisonment for six years for the series of street muggings, for robbery and attempted robbery, is not unusual and entirely deserved.
7. Whether the firearms offences require a penalty of an additional term of imprisonment for ten (10) years is a matter for further consideration.
8. The Firearms Amendment Act 1985 provided in section 30 (3) that section 54 of the Criminal Code shall not have effect in relation to any offence under the Firearms Act. At that time section 54 did not speak of proportionality of sentence.
9. The Code was subsequently amended and in the Criminal Code Amendment Act 2001 a new section 54 provided for proportionality of sentence. It is clear that when the Firearms Act declared that section 54 of the Code was excluded from consideration it was not referring to the issue of proportionality of sentencing.
10. The Crown has conceded that the imposition of a mandatory minimum sentence is subject to the principle of proportionality.
11. In *R v Cox and Dillas* [2008] Bermuda Criminal Appeal, BDA LR 65, the Court of Appeal held that the judge must apply section 54 of the Criminal Code as

well as the section which prescribes a mandatory minimum. Section 54 of the Criminal Code Amendment Act 2001 sets out a fundamental principle of sentencing namely that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

12. In *Mallory v R*, Bermuda Civil Jurisdiction No. 136 of 2011 Ground, C.J held that in exceptional cases the additional mandatory penalty of at least ten (10) years could be reduced to accord with the principle of proportionality which is a function of the sentencing tribunal to ensure that the penalty fits the crime.
13. Ultimately therefore, sentencing is a function of the judiciary and the principle of proportionality should apply. As stated in the Canadian case of *R v Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R 206 proportionality means that a sentence should not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence, and that this is to be counterbalanced with the “just deserts” philosophy of sentencing – holding offenders responsible for their actions. A similar view was expressed in *R v Stauffer* 2007 BCCA 7 in paragraph 33 where it was stated that what is required is that courts strike a balance between the goal of controlling firearms-related crime through mandatory sentences and the goal of ensuring that consecutive sentences are not unduly long or harsh.
14. The appellant was twenty (20) years old at the time and was never in trouble with the law before. An imitation firearm was used although the victims would have been unaware of this. Unfortunately his refusal to testify against his friend, Whiting, leads to the conclusion that his loyalty to and protection of his friend is of greater concern to him than the harm caused to the victims – tourists, guest workers and visitors to the island who could be classified as the most vulnerable and the least skillful in negotiating the hazards likely to be encountered on Bermuda’s narrow roads.
15. We have concluded that in the circumstances of this case in applying the principle of proportionality a sentence of imprisonment for sixteen (16) years is disproportionate and we reduce it to a term of imprisonment for eleven (11) years – six (6) years imprisonment for the robberies and attempted robberies

and a consecutive sentence of five (5) years imprisonment for the firearm offences.



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Ward, JA



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Zacca, P

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Baker, JA

