IN THE SUPREME COURT OF BERMUDA

APPELLATE JURISDICTION

2006 : No. 11A

BETWEEN:

ANGELA COX

Appellant

AND

DENTON PARRIS

Respondent

Department of Public Prosecutions for the Appellant
Juris Law Chambers for the Respondent

DECISION

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1. The issue before the Court is whether the sentence of 3 years imprisonment suspended for 2 years imposed by the Learned Magistrate rendered the sentence manifestly inadequate.

2. On the 10th October 2005, the Respondent (accused) appeared in the Magistrates' Court to answer to information which charged him with:

   Count 1 - on the 8th of October 2005, in Pembroke Parish, did steal three tubes of Aquafresh Extreme Clean toothpaste, all to the value of $16.29 the property of The Market Place.

   Count 2 - on the 8th of October 2005 in Pembroke Parish, in a public place, namely, the Hamilton Market Place did have in his possession a bladed article, namely a hatchet, contrary to Section 315 (C) of the Criminal Code which provides:

   > "315C (1) Subject to subsections (4) and (5), any person who has an article to which this section applies with him in a public place shall be guilty of an offence.
   > (2) Subject to subsection (3), this section applies to any article which has a blade or is sharply pointed except a folding pocketknife.
   > (3) This section applies to a folding pocketknife if the cutting edge of its blade exceeds 3 inches.
   > (4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place.

(5) Without prejudice to the generality of subsection (4), it shall be a defence for a person charged with an offence under this section to prove that he had the article with him—

(a) for use at work;

(b) for use at organized sporting events;

(c) for religious reasons; or

(d) as part of any national costume.

(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. On the 10th of October 2005, the Respondent elected to be tried in the Magistrates' Court and entered not guilty pleas to both counts. He was remanded in custody until the 18th of October 2005 when he appeared and changed his plea to guilty on both counts. During his explanation for this change, the Respondent indicated that he had the knife because he was a landscaper. In my judgment the Court properly reverted the plea to one of not guilty and scheduled the matter for trial.

4. On the 10th of November 2005, the Respondent informed the Court that he was awaiting a decision from the Legal Aid Board. He was offered bail in the sum of $3,000.00 with one like surety and a trial date was fixed for the 7th of February 2006.

5. On the 7th of February 2006, Counsel for the Respondent was unavailable and the trial was further adjourned for mention on the 14th of February 2006. At this hearing a trial date was fixed for the 23rd of February 2006. On this date, at the commencement of the trial, Counsel for the Respondent indicated that he wished to make submissions for a preliminary indication by the Magistrate as to the sentence he was likely to impose. The matter was further adjourned to the 10th of March for submission to be made.

6. After submissions were heard on the 10th of March 2006, the matter was adjourned for a decision to be given on the 21st of March 2006. There were further adjournments on the 21st of March and on the 28th of March 2006 as the Learned Magistrate's decision was not yet completed.

7. On the 22nd of May 2006, the Learned Magistrate ruled that a sentence pursuant to Section 315 C (6) of the Criminal Code can be suspended. He stated 'inter alia' that he sees no reason why a sentence

> "Imposed under Section 315 C (6) cannot be suspended pursuant to Section 70 K of the Criminal Code if the circumstances of the case meet the legal test for a suspended sentence. The sentencing court must first impose the mandatory term of imprisonment and then, if "satisfied that it is appropriate to do so in the circumstances", suspend it. I should point out at this stage, though, that it would only be the odd case which would seem likely to qualify for a suspension, given the public interest, purpose/mischief, which such a mandatory sentence was aimed at addressing/deterring in the first place".

8. The matter was further adjourned to the 25th of May 2006 for a trial date to be scheduled. On the 25th of May a trial date was scheduled for the 30th of May 2006. On this day the Respondent pleaded guilty to Counts 1 and 2 of the information and was sentenced to 3 years' imprisonment suspended for 2 years in respect of Count 2.

9. There is no complaint in respect of the sentence imposed on Count 1. As regards Count 2, Ms. Clarke submitted that in all the circumstances of this case the sentence imposed by the Learned Magistrate is inadequate and wrong in principle for an offence of this nature. In her view there is no scope in the legislation for this type of sentence.

10. The record of the Learned Magistrate's remarks on sentence reads:

> "The sentence as required by the legislature on a finding of guilt is mandatory minimum of three (3) years imprisonment and I impose the minimum of three (3) years imprisonment on count 2.
> However, having heard the summary of facts and the circumstances in which the article was found, I am satisfied that it is appropriate to suspend the period of imprisonment in this case.
> Accordingly the sentence is suspended for a period of two years."

11. Sections 21 of the Summary Jurisdiction Act require the Learned Magistrate to give reasons for his decision. I understand from Counsel for the parties that the evidence showed that the Offender's explanation for having the bladed weapon was that he is a landscaper and had the weapon with him for those purposes.

12. In my judgment the Learned Magistrate's note constituted no "reasons for his decision" at all. It emerged that the Learned Magistrate had the Respondent's explanation that he was a landscaper and had the hatchet for that purpose. The explanation given by the Respondent to the Court was tantamount to a complete defense pursuant to Section 315C (4) and the Learned Magistrate ought to have scheduled the matter for trial, listened to and assess the Respondent's evidence. If the Learned Magistrate had heard the Respondent's evidence it may well have affected the outcome of the decision. The Learned Magistrate may have concluded, or had a reasonable doubt that such was not the case, that the Respondent had a good reason or lawful authority for having the bladed article in a public place. If this were so the Respondent would have been acquitted; that would have been enough to dispose of matter.

13. However, the main thrust of the application before the Court is to determine if the suspended sentence rendered the sentence manifestly inadequate which Counsel argued fully. At the beginning of her submissions Ms. Clarke for the Appellant expressed the hope that this court could give some guidance as to whether a mandatory period of imprisonment can be suspended.

14. It is well documented that the legislature takes a serious view of the escalation of serious crime caused by the misuse of bladed weapons and took steps to prevent the commission of such offences by passing legislation to prevent the commission of such offences. The mandatory minimum sentence was a direct result of these concerns.

15. Ms. Clarke submitted that at the time the Learned Magistrate sentenced the Respondent there were two conflicting authorities which provide the applicable principles where Parliament has imposed a mandatory minimum sentence.

16. Ms. Clarke said that in Peter Giles v James Conyers, Appeal No. 40 of 1989, in dealing with Section 38 of the Firearms Act 1973 the Court decided that a minimum mandatory period of imprisonment had to be imposed as a matter of law. It is accepted that the Court could not have suspended the mandatory minimum sentence as the threshold for suspending a period of imprisonment prior to 2001 was a custodial sentence for 2 years.

17. Whilst in George H Machay v Peter M Duffy Appeal No. 1 of 1985 the Court took the view that a mandatory sentence may be suspended in a proper case taking into account the intention of Parliament as indicated in the relevant legislation, the public interest and circumstances of the prisoner.

18. Mr. Richardson submitted that in the United Kingdom whenever a minimum mandatory sentence has been prescribed there is a power to suspend the sentence. He added the language of Section 70K of the Criminal Code allows for suspension of a mandatory minimum term of imprisonment. He added if there is no scope for suspension the threshold is crossed and it becomes unconstitutional.

19. This issue was not discussed fully but I will say that in the Supreme Court of Ireland in Deaton v Attorney-General and the Revenue Commissioners [1963] IR 170, 182-183, a case which concerned a law in which the choice of alternative penalties was left to the executive the court said:

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case… The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts… the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive…
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> This was said in relation to the Constitution of the Irish Republic, which is also based upon the separation of powers. In their Lordships' view it applies with even greater force to constitutions on the Westminster model. They would only add that under such constitutions the legislature not only does not, but it *can* not, prescribe the penalty to be imposed in an individual citizen's case: *Liyanage v The Queen* [1967] 1 AC 259."

I reserve any further observation to another time when it may be necessary for the Court to analyse this issue.

20. The Court is empowered by Section 70K of the Criminal Code to suspend a sentence of imprisonment which does not exceed 5 years. Section 70K provides:

> "70K (1) If a court sentences an offender to imprisonment for 5 years or less it may order that the term of imprisonment be suspended in whole or in part during the period specified in the order ("the operational period"), which period shall not exceed 5 years, if the court is satisfied that it is appropriate to do so in the circumstances.
> (2) A court shall not make an order under subsection (1) if it would not have sentenced the offender to imprisonment in the absence of power to make an order suspending the sentence".

21. The Court of Appeal for Bermuda considered the question of suspension of a mandatory sentence and set out the applicable principles in the case of Earl Kirby v Patrick Sinclair Durham Criminal Appeal No. 16 1988 p.120 at p.125 the Court said that the discretion of the Court to suspend a sentence is not fettered in any way. The Court expressed it this way:

> "So far as the statute is concerned, within the parameters of subsection (1) of section 56A, the discretion of the court to suspend a custodial sentence is not fettered in any way. But in practice, it is only in exceptional circumstances that a court should consider suspending such a sentence. On the other hand, we do not think that it would be helpful if we were to attempt to enumerate the circumstances in which courts of law should consider ordering the suspension of a custodial sentence. The defendant's age, the fact that he is a first offender are, of course, factors to be considered. The court may form the view that the offence under consideration is of "a one-off nature", and that it is highly unlikely that the defendant will get involved in further criminal activity. Some extreme emergency in the family of the offender may have occurred, and the court may be disposed to suspend the sentence as a pure act of mercy.

> These and other situations readily come to mind; but, as we have said, courts should not, as a general rule, suspend a custodial sentence otherwise than in exceptional circumstances."

22. Section 70K of the Criminal Code appears to have the same interpretation as Section 56A of the code, that is, Section 70K allows the court to suspend a sentence of imprisonment which does not exceed 5 years, whilst Section 56A empowers the court to suspend a sentence of imprisonment which does not exceed two years.

23. It is clear that where an offence is one which attracts a minimum mandatory sentence the offender must be sentenced to at least the minimum sentence. The Court can intervene if it is satisfied that it is appropriate to suspend the sentence.

24. The Supreme Court will not lightly interfere with the discretion of the Court below merely on the ground that it might have passed a different sentence. In order for this Court to interfere, there must be an error in principle and in the case of a suspended sentence the circumstances must be exceptional to attract a suspended sentence.

25. In the present case the Learned Magistrate, having heard the summary of facts and the circumstances in which the article was found, said that "I am satisfied that it is appropriate to suspend the period of imprisonment." However, this Court can find nothing in the facts before the Court that can be considered extenuating or exceptional that should be allowed to displace the mandatory sentence.

26. This accused is known to the police and has previous convictions of a similar nature. I note with concern that it appears that the antecedents form was not produced. The Learned Magistrate did not indicate the circumstances which led him to suspend the sentence. In my judgment, on the basis of the facts before the Court, there was nothing that ought to have influenced the Learned Magistrate to suspend the sentence. The Learned Magistrate did not state what influenced him. Accordingly the sentence was manifestly inadequate. I would quash the sentence and impose a sentence of 3 years imprisonment. Of course this is purely an academic exercise since as alluded to in paragraph 12 this matter ought to have been tried by the Learned Magistrate.

27. The Court has discretion whether to remit the matter to the Magistrates' Court to be tried. In Reid v the Queen (1980) AC 343, 348, 349 the Court gave guidance as to the matters the court should consider to determine whether to order a new trial:

> "… there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power [to order a new trial]. The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.
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> The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in

> the two extreme cases that have been referred to, the weight to be attached to this may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in …. On the one hand there may well be cases where despite a near certainty that upon a second trial the defendant would be convicted the countervailing reasons are strong enough to justify refraining from that course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction.
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> It is in the interest of the public, the complainant, and the [defendant] himself that the question of guilt or otherwise is determined finally as the verdict of a jury, and not, left as something which must remain undecided by reason of a defect in legal machinery."

28. This was said by the Full Court of Hong Kong when ordering a new trial in Ng Yuk-kin v. The Crown (1955) 39 H.K.L.R. 49, 60. That was a case of rape, but in their Lordships' view it states a consideration that may be of wider application than to that crime alone.

29. Having regard to the principles stated above this appeal is allowed, the conviction is quashed and a verdict of acquittal entered. Taking into account all the circumstances of this case including the length of delay and the public interest I do not propose to remit the matter for a re-trial. It is so ordered.

Dated this 27th day of April 2007.

The Hon. Mrs. Norma Wade-Miller
Puisne Judge