IN THE SUPREME COURT OF BERMUDA
APPELLATE JURISDICTION
2006 No. 36

BETWEEN:

DAVID JAHWELL COX

Appellant

- and -

ANGELA COX
(Police Constable)

Respondent

Craig Attridge for the Appellant; and
Carrington Mahoney for the Respondent.

JUDGMENT

INTRODUCTION

1. This is an appeal against the appellant's conviction and sentence by an acting Magistrate on 27th October 2006 on two charges, being (i) having a bladed article contrary to section 315C(1)[1] of the Criminal Code Act 1907 as amended; (ii) criminal damage contrary to *ibid*. section 448(1). In respect of conviction, the grounds of appeal were that the learned acting Magistrate erred in fact and law when she concluded that there was "strong circumstantial evidence" from which she could reasonably infer that the Appellant had re-entered the premises concerned in possession of a machete, and that the conviction was contrary to the evidence, and ought not to be supported. In respect of sentence, the grounds were that the mandatory minimum sentence of three years imprisonment on the bladed article charge was unconstitutional, as it ousted the discretion of the sentencing court, and that in all the circumstances a sentence of three years immediate imprisonment was harsh and excessive.

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[1] Section 315C provides:

> **"Offence of having article with blade or point in public place**
> "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."

2. The facts were that in the early hours of Saturday 8th July 2006 the appellant was at a social function on the top floor of the Devonshire Recreation Club, having paid to enter. At some point shortly before 2 a.m. he was involved in an altercation at the Bar with two other men as a result of which one of the Club security guards escorted him out. A short while later the appellant returned, and when the security guard tried to stop him entering, pushed the guard aside, causing him to fall downstairs[2]. By the time the guard got back up the stairs he saw the appellant with a machete in his hand, holding it up in the air, and people running for the door. He then saw the appellant run towards the door, holding the machete down by his side with people running in front of him, including the two people with whom he had argued earlier. The crush was such that the two security guards were carried back down the steps. The appellant then got onto a bike with one of his companions from earlier in the evening and they rode off. When stopped later by the police they did not have a machete.

3. Nobody actually saw the appellant carry the machete into the Club. The Security Guard had not seen how the disturbance started after the appellant re-entered the Club. A club official also gave evidence. She was at the bar. She had called the security guard to intervene in the first altercation. She had been at the doorway when the appellant returned. She tried to lock it to prevent his re-entry but failed. She did not see the machete at that time, but saw it when he "started out ten feet in the hall". She said he was swinging it in the air and did so for a minute or two. He then struck a table and then a glass door, which broke and was the subject of the criminal damage charge. She was cross-examined on her account and on discrepancies between it and her original statement to the police. In that statement she was recorded as saying she had not seen, but had only heard, the glass breaking; she had not mentioned the table; and she had said that, after the appellant re-entered, she had looked away before seeing him with the machete. However, the witness was insistent in her evidence that she had not looked away before seeing the appellant with the machete, and in re-examination said "I did keep my eyes on him till he turned around with machete in hand."

4. The appellant gave evidence, accepting that he had had the machete. However, it was his case that he had not brought it into the Club with him when he returned. His explanation for having it was that, having returned to the Club, he approached the same men he had just had an argument with, and as he got close to them he saw that one of them had a machete down by his leg, so he went for it, wrested it from him with "a quick little tug" , waived it in the air for 5 – 10 seconds as he was "a little bit vexed" and then ran out of the door with it with everyone else and, when he got to the bottom of the stairs, he threw it away. He said that his intention throughout had been to disarm the person with the machete.

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[2] In respect of that it seems that the appellant pled guilty to a charge of common assault on 29th September 2006.

THE APPEAL AGAINST CONVICTION

5. In a written judgment the learned acting Magistrate noted that there was no direct evidence that the defendant re-entered the premises with the machete, as no one saw it until the confrontation with the other men. She then noted the defendant's explanation. She then expressed the view that, while there was no direct evidence there was "strong circumstantial evidence to suggest that he [reentered with the machete]". She then recounted the circumstances of his forcible re-entry.

6. Against that background, I ruled extempore at the close of argument dismissing the appeal against conviction. In doing so, I said as follows –

> "Well, I don't think it is right to construe the Magistrate's brief reasons in a case like this as if they were a statute. The Magistrate says –
>
> > ". . . this court feels sure that Mr. Cox was not in possession of the said machete due to circumstances requiring him to defend himself. Mr. Cox's evidence does not place any reasonable doubt on this issue. This court is satisfied and sure that Mr. Cox reentered the club for the purpose of confronting these men with a machete in his possession."
>
> In my judgment that finding was plainly open to the learned Acting Magistrate on the evidence before her and it was indeed, as Mr. Mahoney says, a matter of credibility as to whether she believed Mr. Cox. Having rejected Mr. Cox's evidence on this matter – and she had seen him and she had a chance to evaluate him and so on – having rejected his 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."

THE APPEAL AGAINST SENTENCE

7. The appellant was sentenced to three years imprisonment on the charge of having a bladed article, the machete, in a public place. Section 315C of the Criminal Code Act 1907, as amended ('the Code') imposes a mandatory minimum sentence of three years imprisonment for such an offence:

> "(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."

The appellant was, therefore, sentenced to the minimum permitted by law. It was argued, however, that the provision of that mandatory minimum was itself unlawful. In essence the argument, as fully developed at the hearing, has two limbs:

1. that section 315C(6) could not override sections 53 to 57 of the Code; and
2. to the extent that it does override those provisions, it is unconstitutional.

1. THE APPLICATION OF SECTIONS 53 TO 57

8. Sections 53 to 57 are in Part IV of the Code, which is divided up into sub-parts or divisions, each with its own title. Part IV was inserted into the Code by the Criminal Code Amendment Act 2001, which repealed and replaced the pre-existing provisions. Section 53 to 55 occur in the division headed "Purpose and Principles of Sentencing". Sections 56 and 57 come under the heading "Punishment – General Principles". I will deal with each section in turn.

9. Section 53 simply lists the purposes of sentencing. These include protection of the community and deterrence. In my judgment, there is nothing in section 53 which is inconsistent with a mandatory minimum sentence in general or section 315C(6) in particular.

10. Section 54 is headed "Fundamental Principles", and it states –

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

The appellant places great weight on the principle of proportionality, arguing that a mandatory minimum sentence must infringe this, because the offence covers an enormous range of possible circumstances, in respect of some of which the statutory minimum will inevitably prove disproportionate. In this regard Mr. Attridge relies upon the Canadian case of R v Smith (Edward Dewey) 1987 Can LII 64 (S.C.C.), in which a mandatory minimum of seven years imprisonment for drug offences was held to offend sections 1 and 12 of the Canadian Charter of Rights & Freedoms. I will return to that authority when I consider the constitutional argument. However, at this stage in the argument, I am only dealing with the application of section 54 of the Code, which is a non-constitutional document, capable of amendment and modification by Parliament. Section 315C was added to the Criminal Code by amendment in 2005. It is, therefore, the later in time and it seems to me that, to the extent that section 315C(6) is inconsistent with any of the earlier provisions, and in particular with section 54, it overrides and modifies the earlier provision to the extent of any such inconsistency.

11. Section 55 requires the court to "apply the principle that a sentence of imprisonment should only be imposed after consideration of all sanctions other than imprisonment that are authorized by law". It then goes on to list a variety factors to which the court must have regard when sentencing. I think that the short answer to the appellant's argument on that is that section 55 contains its own exclusion: the requirement is "after consideration of all sanctions other than imprisonment ***that are authorized by law***." In the case of a mandatory minimum sentence of imprisonment there are no other sanctions "authorized by law". If I was wrong on that, I would nevertheless have held that to the extent that the

section requires the court to consider the alternatives to imprisonment it is, like section 54, modified by the provisions of section 315C.

12. Section 56 states, *inter alia*, that:

> "Except where otherwise expressly provided, in the construction of this Act or any other enactment –
>
> (a) a person liable to imprisonment for any term may be sentenced to imprisonment for any shorter term;".

The appellant places great store on this, but it is, with respect, misconceived. The section is plainly concerned with the common form provision that a person who commits an offence "is liable to imprisonment for" a penalty which is expressed as a single figure rather than a range. For example, section 305 of the Code provides that a person who wounds another with intent to do grievous bodily harm "is liable to imprisonment for ten years". The application of section 56 to that provision means that such a person can be sentenced to any term up to ten years. In any event, section 56 has its own in-built exclusion – "except where otherwise expressly provided" – and it seems to me that the provision of a mandatory minimum is just such an express provision as is contemplated by that proviso. I do not think, as was argued by the appellant, that the penalty provision needs to identify section 56 in terms in order to exclude its operation, and the fact that that may have been done in some other enactments, does not mean that it is in fact necessary.

13. Section 57(1) provides –

> "(1) Where an enactment prescribes a punishment in respect of an offence, the sentence to be imposed is, subject to the limitations provided in the enactment, in the discretion of the court that convicts a person who commits the offence."

It will be noted that this provision also contains its own in-built exclusion – "subject to the limitations provided in the enactment" – which again seems on the face of it to permit mandatory minimums if provided in the enactment.

14. In summary, therefore, on the relationship between the provisions of section 315C(6) and Part IV of the Code, it seems to me that the only possible conflict could be with the proportionality provisions in section 54, all the other sections being either not inconsistent with a mandatory minimum or framed in such a way as to allow them to be excluded or overridden by specific penal provisions. In respect of section 54, to the extent that there is a conflict, the later provision must prevail, and section 315C is the later provision.

2. THE CONSTITUTIONAL ARGUMENT

15. The Constitutional argument is two-fold: (i) that mandatory sentences contravene the principle that only the judiciary should exercise the power to determine an individual's sentence; and (ii) that, because such sentences may be disproportionate in individual cases, they contravene section 3(1) of the Constitution, which contains a prohibition on inhuman treatment. I will deal with each in turn.

(i) The Separation of Powers

16. Dealing with the first argument, the traditional view is that there is no objection to mandatory sentences, provided they are of general application. The classic statement of this is Lord Diplock's speech in the Privy Council in Hinds v The Queen [1977] AC 195; [1976] 1 All ER 353, on appeal from the Court of Appeal of Jamaica. The issue in that case was a mandatory sentence of detention 'at hard labour during the Governor's pleasure'. That was further qualified by a provision that the Governor must act in accordance with the recommendations of a Review Board, the majority of whose members were not "appointed in the manner laid down in Chapter VII of the Constitution for persons entitled to exercise judicial powers". The transfer of the discretion as to the length of sentence from the judiciary to the executive was held to be unconstitutional, but the imposition of a mandatory sentence *per se* was not. Lord Diplock said:

> "In the field of punishment for criminal offences, the application of the basic principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restrictions on the personal liberty of the offenders is distributed under these three heads of power.
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> The power conferred on Parliament to make laws for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law (see Constitution, Chapter III, s 20(I)). The carrying out of the punishment where it involves a deprivation of personal liberty is a function of the executive power; and, subject to any restrictions imposed by a law, it lies within the power of the executive to regulate the conditions under which the punishment is carried out.
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> In the exercise of it legislative power, *Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted on all offenders found guilty of the defined offences*, as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.
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> *Thus Parliament, in the exercise of its legislative power, may make a law imposing limits on the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case.* What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under

> Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted on an individual member of a class of offenders." [My emphasis]

17. The case of Hinds has subsequently been distinguished by the Privy Council when considering a mandatory death penalty: see Forrester Bowe and Trono Davis v The Queen [2006] UKPC 10. However, Lord Bingham, in delivering the judgment of the Board, did not dismiss the whole principle. What he said (at paragraph 41) was simply:

> "In *Hinds v The Queen* [1977] AC 195, 226, Lord Diplock, giving the majority judgment of the Board, made observations not critical of the mandatory death penalty for murder. But the case did not involve a mandatory death sentence for murder, and no argument was addressed to the constitutionality of such a sentence."

It seems to me, therefore, that the general statement of principle by Lord Diplock still survives, and I am bound by it. I therefore hold that mandatory penalties of the sort in section 315C do not offend the separation of powers.

(ii) Inhuman Treatment

18. I turn to deal with the argument based upon section 3 of the Constitution, which provides:

> **"Protection from inhuman treatment**
> 3 (1) No person shall be subjected to torture or to inhuman or degrading treatment or punishment.
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Bermuda immediately before the coming into operation of this Constitution."

19. The argument is that, because a mandatory minimum can take no real account of the actual culpability of the offender, it could in certain cases work an injustice by inflicting a disproportionate penalty upon an offender. As noted above, Mr. Attridge relies upon the Canadian case of R v Smith (Edward Dewey) 1987 Can LII 64 (S.C.C.), in which it was held that a mandatory minimum of seven years imprisonment for drug offences contravened sections 1 and 12 of the Canadian Charter of Rights & Freedoms.

20. Section 12 of the Canadian Charter of Rights & Freedoms provides –

> **"**12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

Although that provision is no doubt similar in intent to section 3 of the Bermudian Constitution (see above), it is framed in quite different terms, which renders much of the specifics of the argument in Smith inapplicable, but not, perhaps, the underlying principles. The word in the Bermuda provisions which comes closest to "cruel and unusual" seems to me to be "inhuman". While I have no doubt that that incorporates the

concept of proportionality, not every disproportionate sentence will be "inhuman". To be "inhuman" it seems to me that a sentence of imprisonment would have to be grossly disproportionate, and in that regard I would respectfully adopt the reasoning of McIntyre J[3] in Smith (*supra*) at paragraph 85 (replacing "cruel and unusual" with "inhuman"):

> "However, when considerations of proportionality arise in an inquiry under s.12 of the *Charter*, great care must be exercised in applying the standard of cruel and unusual treatment or punishment. Punishment not *per se* cruel and unusual, may become cruel and unusual due to excess or lack or proportionality only where it is so excessive that it is an outrage to standards of decency. Not every departure by a court or legislature from what might be called the 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 s.12 of the *Charter*. In other words, there is a vast gray area between the truly appropriate sentence and a cruel and unusual sentence under the *Charter*. Entry into that gray area will not alone justify the application of the absolute constitutional prohibition voiced in s.12 of the *Charter*."

21. The appellant also relies upon the English case of Regina v Offen & Ors. [2000] EWCA Crim 96[4] , which concerned the application of a mandatory life sentence for a second "serious offence" under section 2 of the English Crime (Sentences) Act 1997[5]. In that case the court commented on the danger of disproportionality inherent in a mandatory life sentence:

> "107. In his speech in The Governor of Brockhill Prison ex parte Evans (No.2) [2000] 3 WLR 843 at p.858, Lord Hope considered the relationship between Article 5 of the Convention and our domestic law. In the course of doing so, he recognised that the question would arise as to whether, "assuming that the detention is lawful under domestic law", it is nevertheless open to criticism on the ground that it is arbitrary because, for example, it was resorted to in bad faith or was not proportionate". Here no question of bad faith arises. In addition, we recognise that there have been, and will be, cases where section 2 of the 1997 Act has, and will, operate in a proportionate manner. However, as the section has hitherto been interpreted, it can clearly operate in a disproportionate manner. It is easy to find examples of situations where two offences could be committed which were categorised as serious by the section but where it would be wholly disproportionate to impose a life sentence to protect the public. Whenever a person is convicted of an offence, there is always some risk that he or she may offend again. Equally, there are a significant number of cases in which two serious offences will have been committed where the risk is not of a degree which can justify a life sentence. We refer again to the very wide span of manslaughter, which is a serious offence within the Act. An unjustified push can result in someone falling, hitting his head and suffering fatal injuries. The offence is manslaughter. The offender may have committed another serious offence when a young man. A life sentence in such circumstances may well be arbitrary and disproportionate and contravene Article 5. It could also be a punishment which contravenes Article 3."

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[3] Although McIntyre J's was a dissenting opinion, his brother judges did not dissent from his formulation of the test, only from his application of it.

[4] The version provided to me was a "Lawtel" version. Where counsel are unable to access a traditional Law Report they should give the uniform citation of the case and provide the approved BAILII version. As it is, in this instance the paragraphing is the same in each version.

[5] A provision which has now been repealed: see Archbold paragraph 5-251i and the Criminal Justice Act 2003, section 332.

22. As noted in that paragraph, the concern about disproportionality in Offen was largely derived from Article 5[6] of the European Convention on Human Rights ('ECHR'), which is now applied as part of the domestic law of the United Kingdom by the Human Rights Act 1998. Article 5 is in similar (although not identical) terms to Section 5 of the Bermuda Constitution[7], which (as the headnote says) guarantees "protection from arbitrary arrest or detention". The reference to Lord Hope's speech in the Brockhill Prison case, is to the following passage:

> "The jurisprudence of the European Court of Human Rights indicates that there are various aspects to article 5(1) which must be satisfied in order to show that the detention is lawful for the purposes of that article. The first question is whether the detention is lawful under domestic law. Any detention which is unlawful in domestic law will automatically be unlawful under article 5(1). It will thus give rise to an enforceable right to compensation under article 5(5), the provisions of which are not discretionary but mandatory. The second question is whether, assuming that the detention is lawful under domestic law, it nevertheless complies with the general requirements of the Convention. These are based upon the principle that any restriction on human rights and fundamental freedoms must be prescribed by law: see articles 8 to 11 of the Convention. They include the requirements that the domestic law must be sufficiently accessible to the individual and that it must be sufficiently precise to enable the individual to foresee the consequences of the restriction: *Sunday Times v. United Kingdom* (1979-80) 2 E.H.R.R. 245; *Zamir v. United Kingdom* (1985) 40 D.R. 42, paras. 90-91. The third question is whether, again assuming that the detention is lawful under domestic law, it is nevertheless open to criticism on the ground that it is arbitrary because, for example, it was resorted to in bad faith or was not proportionate: *Engel v. Netherlands* [1976] 1 E.H.R.R. 647, para. 58; *Tsirlis and Kouloumpas v. Greece* [1997] 25 E.H.R.R. 198, para. 56."

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[6] Insofar as it is relevant Article 5 provides:

"**ARTICLE 5**

Everyone has the right to liberty and security of person.

1. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;"

[7] Section 5 of the Bermuda Constitution provides:

"Protection from arbitrary arrest or detention

5 (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases:

(a) in execution of the sentence or order of a court, whether established for Bermuda or some other country, in respect of a criminal offence of which he has been convicted or in consequence of his unfitness to plead to a criminal charge;

(b) in execution of the order of a court punishing him for contempt of that court or of another court or tribunal;

(c) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed upon him by law;

(d) for the purpose of bringing him before a court in execution of the order of a court;

(e) upon reasonable suspicion that he has committed, is committing, or is about to commit, a criminal offence;"

23. At this point I have to say that I have not been taken through the European cases on which Lord Hope's third question is based. I have some difficulty, despite the heading of section, in seeing how a prohibition on arbitrariness (and hence a requirement of proportionality) can be derived from the provisions of section 5 of the Bermuda Constitution. It may be that in the European jurisprudence it derives from the more general right to "liberty and security of person" which forms part of Article 5 of the ECHR, but which in the Bermuda equivalent is to be found in section 1 of the Constitution[8]. If that is so it leads into a difficult, and possibly rather sterile, argument about the separate enforceability of section 1 of the Constitution. I do not think that I need get into that because it seems to me, whether you base the argument upon section 3 or section 5 of the Constitution, there is strong authority that the constitutional safeguards import a requirement of proportionality into sentencing.

24. In Offen (*supra*) the English Court of Criminal Appeal accepted the principle of proportionality, and plainly proceeded on the basis that a mandatory life sentence could fall foul of it. However, they considered that there was an escape clause, which saved the legislation. The statutory provisions required the imposition of a life sentence "unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so." The Court of Appeal pointed to that and said:

> "108. The problem arises because of the restrictive approach which has so far been adopted to the interpretation of exceptional circumstances in section 2. If exceptional circumstances are construed in a manner which accords with the policy of Parliament in passing section 2, the problem disappears."

25. It seems that all English legislation which imposes a minimum fixed term sentence now contains similar provisions, although the expression now favoured seems to be "except where the court is of the 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 do so in all the circumstances." See generally Archbold paras. 5-252 et seq.

Conclusions on the Constitutional Argument

26. As indicated above, I do not think that mandatory minimum sentences are unconstitutional *per se*. This was indeed recognized in the Canadian case of Smith (*supra*), upon which Mr. Attridge relied, at para. 64 per Lamer J, giving the majority decision:

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[8] Section 1 of the Bermuda Constitution says –

> **"Fundamental rights and freedoms of the individual**
> 1 Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:
>
> (a) life, liberty, security of the person and the protection of the law;"

> "A minimum mandatory term of imprisonment is obviously not in and of itself cruel and usual. The legislature may, in my view, provide for a compulsory term of imprisonment upon conviction for certain offences without infringing rights protected by s. 12 of the *Charter*."

The finding in Offen (*supra*), that a mandatory life sentence for a second serious offence was capable of offending various human rights norms enshrined in the ECHR, does not necessarily mean that all mandatory sentences will do so. As noted above, not all disproportionate sentences will be "inhuman", nor in my judgment will they necessarily be arbitrary. It does not necessarily follow from the reasoning in Offen that s. 315C (6) of our Code is bad. It has to be looked at in all the circumstances, including the length of sentence concerned, the nature of the offence and the presumed purpose of the legislation.

27. Viewed in that light, I do not think that a mandatory three year minimum for the possession of a bladed article is so disproportionate as to contravene either section 3 or 5 of the Constitution. In coming to that conclusion I have had regard to the fact that there is a defence of "good reason", which includes but is not limited to having the article for use at work; for use at organized sporting events; for religious reasons; or as part of a national costume. It seems to me that, if applied properly, that should remove the risk of a truly 'innocent' person being subject to mandatory imprisonment. On the other hand, anyone who sits in the Courts of Bermuda on a regular basis will know only too well that the possession and use of knives and other bladed weapons is a real and pressing social problem in this country, which shows every sign of being on the increase. In my judgment the legislature is entitled to take steps to combat it. Indeed, in the context of the reversed burden of proof in the English equivalent of our section 315C(4), this has been characterized by the English Court of Criminal Appeal as "the general interest of the community in the realization of a legitimate legislative aim"[9]. Against that background, I cannot say that the steps that the legislature has taken are so out of proportion as to offend the Constitution.

28. If I were wrong on that, and the provision in section 315C of the Code of a mandatory sentence does risk subjecting some individuals to a penalty which is so disproportionate that it is either inhuman or arbitrary, then I think that there is a remedy in the provisions of section 70K of the Code, which allow for the suspension of sentences of imprisonment:

> **"Suspended sentence of imprisonment**
> 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."

[9] See R -v- Matthews [2003] 2 Cr App R 19 at 313.

It appears to me that there is nothing to inhibit or exclude the application of that provision to an otherwise mandatory prison sentences. Indeed, they fit well together, because the court can only consider whether to suspend a sentence after it has first determined that a prison sentence is otherwise appropriate: see section 70K(2)[10].

29. Moreover, a power to suspend does not necessarily subvert the intention of the legislature in requiring imprisonment, because there is an important limitation on the power which, although it is not contained in the statutory provisions, is well known and understood. The Court of Appeal has repeatedly stated that a court may only suspend a sentence in exceptional circumstances: see Earl Kirby v Kevin McDonald Rogers Crim App 32/1991 (22nd November 1991); and Kenrick James v Grant Russell Forbes Crim App 9/1994 (7 June 1995). For a recent reassertion of this principle see The Queen v Gregory Millington Johnson [2004] Bda L. R. 63, at p. 4:

> "The power to suspend a sentence of imprisonment was considered by the Court in *Earl Kirby v Kevin McDonald Rogers* Crim App 32/1991 (22nd November 1991) and in *Kenrick James v Grant Russell Forbes* Crim App 9/1994 (7 June 1995). In the earlier judgment, reference was made to *Giles v Outerbridge* Crim App 12/1991 where a sentence of 2 years was not regarded as "manifestly inadequate" upon the Crown's appeal. In *Earl Kirby v Kevin McDonald Rogers*, however, the Court held that the power to suspend should be exercised only in "exceptional" circumstances, and it allowed the Crown's appeal against a sentence of 12 months' imprisonment suspended for 12 months, and substituted a sentence of immediate imprisonment for 3½ years. In *Kenrick James v Grant Russell Forbes* (above) a sentence of 6 months' imprisonment was increased to 18 months, and the Court observed:
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> > "There are no such exceptional circumstances as would warrant suspension. As was also said in *Kirby v Gibson*: "A suspended sentence will hardly be a deterrent to others"."
>
> It cannot be said that "exceptional circumstances" exist in the present case. The judge erred, in this Court's view, in holding that certain mitigating factors which undoubtedly are present enabled him to suspend the sentence of three years' imprisonment which, absent those factors, he regarded as appropriate for this offence. Rather, having determined that a sentence of imprisonment was inevitable, following the guidance given by sections 53-55 of the 2001 Act, he should have fixed the period of imprisonment, taking all the circumstances both of the offence and of the offender, into account. Only then was it necessary to consider whether the sentence should be suspended, and it was immediately apparent that there were no special or exceptional circumstances which could justify that course."

30. Against that background, I consider that the power to suspend a sentence *in exceptional circumstances* is similar to the 'safety valve' provisions in the UK legislation referred to above. Given that, I also think that the reasoning of the English Court of Criminal Appeal in Offen (*supra*) applies, so that the existence of the power to suspend would save this provision, even if it were otherwise doomed to run foul of sections 3 and 5 of the Constitution.

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[10] Section 70K (2) provides – "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."

31. In the circumstances of this case there was absolutely nothing which might amount to exceptional circumstances, warranting the suspension of the sentence. The appellant had a poor record, and the act of taking a machete into a crowded bar in the context of a prior altercation is precisely the sort of conduct at which the legislation is aimed. I therefore uphold the sentence of three years immediate imprisonment and dismiss the appeal against sentence as well as that against conviction.

Dated this 19th day of October 2007

Richard Ground
Chief Justice