IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
Civ. 2011 No. 136

IN THE MATTER OF SECTION 15 OF THE BERMUDA CONSTITUTION ORDER 1968

BETWEEN:

CURTIS MALLORY

Plaintiff

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

Mr. C. Richardson for the Plaintiff;
Ms. C. Clarke for the Defendant.

JUDGMENT

INTRODUCTION

1. This is a Constitutional application, and it comes before me on the plaintiff's Originating Summons of 27th April 2011. I heard the matter on 3rd May, and at the close of the hearing I gave a short oral ruling and promised to give full written reasons, which I now do.

2. The plaintiff ('Mr. Mallory') is the defendant in a criminal matter, Case No. 10 of 2011. On 1st April 2011 he was convicted on his own plea of one count of robbery contrary to section 338 of the Criminal Code, and one count of using a firearm to commit

an indictable offence contrary to section 26A of the Firearms Act 1973 ('the Act'). He is awaiting sentencing on those matters[1].

3. The issue raised by this application is whether the sentencing provisions for "an offence under section 26A of the Act are contrary to the defendant's constitutional right to ask for and potentially receive a sentence which is proportionate to the crime committed"[2]. It is the plaintiff's contention that the sentencing regime in the Act imposes mandatory minimum sentences which are and can be disproportionate to the crime committed, and he prays in aid the reasoning of the Court of Appeal for Bermuda in the conjoined appeals of Cox & Dillas v the Queen [2008] CA (Bda) 7 Crim (14 November 2008)[3]. That case concerned mandatory minimum sentences for bladed weapons.

4. The Originating Summons does not identify the fundamental right which it is sought to enforce. It cites section 15 of the Constitution, but that is the procedural section concerned with the enforcement of the preceding fundamental rights. Otherwise the relief sought is as follows:

> "1. A Declaration that the statutory provisions which mandate that anyone convicted of an offence under section 26A of the Firearms Act 1973 (as read with section 30A and table 3 to the first schedule) must be sentenced to a term of imprisonment of at least 10 years is contrary to the Bermuda Constitution and the European Convention on Human Rights:
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> 2. A Declaration that section 54 of the Criminal Code does and should on a proper constitutional interpretation apply to offences under the Firearms Act 1973;"

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[1] I should record that I had some reservations about deciding this application separate and apart from the actual sentencing. However, in the event, that difficulty was resolved when it was accepted by all that the sentencing could proceed later in the week before me. In the event I dealt with it on Friday 6th May, when I sentenced Mr. Mallory to 2 years imprisonment on the robbery count (Count 1), and 6 years consecutive on the firearms charge (Count 2), for a total of 8 years immediate imprisonment.

[2] See the plaintiff's statement of the grounds on which the relief is sought.

[3] The full judgment can be found at - http://www.gov.bm/portal/server.pt/gateway/PTARGS_0_2_10809_204_226633_43/http%3B/ptpublisher.gov.bm%3B7087/publishedcontent/publish/non_ministerial/judiciary/appeals_judgments_2008/judgment__david_cox_and_jahki_dillas_v_the_queen_nov_08.pdf

5. In Cox & Dillas the Constitutional point was argued on the basis that a mandatory minimum sentence offended section 3(1) of the Constitution ('Protection from inhuman treatment'). However, the Court of Appeal did not find it necessary to decide that point: see paragraph [23] of the judgment. Instead, the Court of Appeal held that the Constitution was not engaged because on a true construction of the sentencing provisions they were, independently of the Constitution, subject to the proportionality requirements of section 54 of the Criminal Code. Thus, in paragraph [24] of the judgment the Court said:

> "**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*." [My emphasis]

6. It follows that if the proportionality provisions of section 54 of the Code apply, then there is no Constitutional issue. However, at first glance it may appear as if the provisions of section 54 cannot apply, because subsection 30(3) of the Act seems to say so. That subsection says:

> "(3) Section 54 of the Criminal Code shall not have effect in relation to any offence under this Act."

7. That provision was not a knee-jerk reaction to the decision in Cox & Dillas, because it was inserted into the legislation by amendment in 1985 (and I have dealt with that further below). In 1985, section 54 of the Code was completely different from its current manifestation, and contained no reference to proportionality. The old section 54 was headed "Construction of statutory provisions relating to punishments", and it provided that a person liable to imprisonment for any term may sentenced to a shorter term; that a person liable to pay a fine of any amount, may be sentenced to pay a fine of a lesser

amount; and that a person liable to imprisonment may also be sentenced to pay a fine. In addition, the old section 54 also contained a power to bind over to keep the peace; and savings for costs and compensation.

8. Section 54 of the Code only achieved its present form by amendment by the Criminal Code Amendment Act 2001, which repealed and replaced sections 53 – 71 of the Code, and in effect completely overhauled the sentencing provisions of that legislation. The old 54 essentially became the current section 56 ('Construction of statutory provisions relating to punishments'), although that section omits the power to bind over. The new section 54 was entirely novel, and was headed "Fundamental principle". It introduced proportionality as an express concept for the first time, although it had of course always been implicit in the judicial approach to sentencing.

9. How then to construe the exclusion of section 54 of the Code by section 30(3) of the Act? In my judgment, the answer is provided by the section 15 of the Interpretation Act 1951:

> **"Repeal and re-enactment**
> 15 (1) Where any Act repeals and re-enacts, without substantial modification, any provision of a former Act, then references in any other Act to the provision so repealed shall, if the context of that other Act so requires and unless the contrary intention appears in that other Act, be construed as references to the provision so re-enacted."

Section 56 of the current version of the Code is substantially the same as paragraphs (a), (b) and (c) of the old section 54 (although the sequence has been changed), and so the cross-reference must be taken to be to the current section 56 and not to the current section 54.

10. That does not entirely resolve the issue, because paragraphs (a), (b) and (c) of either the old section 54 or the new section 56 were concerned with the ability of the courts to impose a sentence which was less than that prescribed for the offence. Thus paragraphs (a), (b) and (c), in their modern form provide:

> "56. Except where otherwise expressly provided, in the construction of this Act or any other enactment—
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> (a) a person liable to imprisonment for any term may be sentenced to imprisonment for any shorter term;
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> (b) a person liable to a fine of any amount may be sentenced to pay a fine of any lesser amount;
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> (c) a person liable to imprisonment may in addition to, or instead of, imprisonment be sentenced to pay—
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> (i) a fine of $1500 where the term of imprisonment does not exceed 12 months,
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> (ii) a fine of $3000 where the term of imprisonment exceeds 12 months but does not exceed 2 years,
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> (iii) a fine of $7,500 where the term of imprisonment exceeds 2 years."

11. In my judgment those provisions have their genesis in the fact that the Code habitually expresses the penalty for an offence in terms of the maximum. Thus, by way of random example, the penalty for doing Grievous Bodily Harm in section 306 of the Code was expressed as follows –

> ". . . is liable on conviction by a court of summary jurisdiction to imprisonment for three years and on conviction on indictment to imprisonment for seven years."

It was, therefore, necessary for the Code to contain an express provision to allow the sentencing Court to go below the maximum term set out in the penal provision for each offence.

12. Coming back to the Firearms Act, it would seem that the intent of the exclusion of the old section 54 (now 56) of the Code was to preclude those provisions undercutting the mandatory minimum penalties fixed by the Act. I base that upon the legislative history. Although the original Firearms Act did contain an exclusion of section 54 of the Code,

that was only in respect of the limit on fines: the original section 30(3) said that nothing in section 54 of the Code should limit the fine imposed for an offence under the Act. At that point there were no mandatory minimum prison sentences. They were introduced by the Firearms Amendment Act 1985, and at that point the modern section 30(3) was substituted. So it is clear that the modern version of section 30(3) was part of a package with mandatory minimum sentences.

13. The question then is whether the exclusion of the modern section 56 of the Code prohibits the Court going below the mandatory minimum? I do not think it does. The Court of Appeal in Cox & Dillas did not rely upon section 56 at all, and their reasoning proceeds independently of it. In any event, the new section 54 is described in the headnote as a 'fundamental principle', and it was so treated and recognized by the Court of Appeal in Cox & Dillas. I think that, therefore, their reasoning continues to apply with full effect to the mandatory sentences in the Firearms Act.

14. It is worth setting out that reasoning:

> "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 –
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> > "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).
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> 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."

15. None of this means that the courts are entitled to ignore the mandatory minimum, as the Court of Appeal in Cox & Dillas explained:

"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)."

16. I take that to mean that 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 in my judgment 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 itself said:

"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." [My emphasis]

17. In this respect the discussion in Archbold at para. 5-260a, on the equivalent English provisions in section 51A of the Firearms Act 1968, is helpful, as is the decision in R v Rehman and Wood [2005] EWCA Crim 2056 which makes it clear that the concepts of proportionality and exceptionality are intimately linked:

> "It is clear in our judgment that, read in the context to which we have referred, the circumstances are exceptional for the purposes of section 51A(2) if it would mean that to impose five years' imprisonment would result in an arbitrary and disproportionate sentence."

18. I therefore hold that section 54 of the Criminal Code should and does apply to offences under the Firearms Act 1973, and I also hold that the decision in Cox & Dillas v the Queen [2008] CA (Bda) 7 Crim., applies by parity of reasoning and with equal force to the mandatory minimum sentences in that Act. In view of that I do not need to decide the Constitutional issues raised by paragraph 1 of the Originating Summons, and decline to do so.

Dated this 6th day of May 2011.

Richard Ground
Chief Justice