IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INFERIOR APPEAL (CRIMINAL) NO.: IC20190039

BETWEEN:

ALBERTO JUAN ARREAZA

Appellant

and

FLOYD R. PETERS DC #1409

Respondent

Appearances:

Mr. Oswald Twist for the Appellant

Ms. Portia Ferguson Crown Counsel for the Respondent.

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2024: April 11

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JUDGMENT

INFERIOR APPEAL-APPEAL AGAINST SENTENCE

[1] **NANTON, J.**.: Alberto Arreaza, ("the appellant"), plead guilty to the offences of keeping a firearm without a gun license and keeping ammunition without a gun license contrary to **Section 3 of the Firearms Act**[1]. The Appellant pleaded guilty to both offences.

[2] He was sentenced by the Learned Magistrate (TLM) at the San Ignacio Magistrate's Court on 14th November, 2019. He filed his notice of appeal against conviction and sentence on 2nd December, 2019 within the 21-day limit to lodge his appeal pursuant to **Order LXXIII Inferior Courts (Appeals)**[2] ("the Rules").

[3] On 4th December, 2019 he requested, and was granted a stay of the execution of his sentence pending the outcome of this appeal.

[4] This matter was assigned to this Court in October 2023, and was first called on 11th January, 2024 after efforts were made to notify the Appellant of the hearing.

The Appeal

[5] The appeal against conviction was originally based on the ground that the Appellant pleaded guilty due to pressure from his family members. However, during case management Counsel for the Appellant wisely sought leave to withdraw his appeal against conviction which was granted.

[6] His appeal against sentence was that the sentence of 5 years for the firearm charge, and 1 year for the ammunition charge was excessive, since the Appellant had no previous convictions.[3]

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[1] Chapter 143 of the Laws of Belize

[2] Rule 2(1)(b) made under the **Supreme Court of Judicature Act** Chapter 91 of the Substantive Laws of Belize, Revised Edition 2020 ("SCOJA").

[3] S. 116(l) SCA.

[7] The law requires that within 1 month[4] of notice of appeal being filed that TLM must prepare a statement of his/her reasons.[5] Since the Appellant pleaded guilty to both offences, there would have been no decision made by TLM in relation to the Appellant's conviction. However, in relation to his appeal against sentence, TLM would have been required to provide a statement of reasons for her sentence. To date there has been no record provided for TLM's sentence despite requests for same by this Court.

[8] The Respondent has not replied to the Appellant's ground although given the opportunity to do so.

Summary of Facts

[9] This Court is not in possession of the facts of this offence.

The Sentence of the TLM

[10] TLM sentenced the Appellant to 5 years for the firearm offence, and to 1 year on the ammunition offence and ordered the sentences to run concurrently.

[11] Section **32(1) (a) of the Firearms Act** prescribes the sentence for this offence:

> *32.–(1) A person who commits an offence under this Act shall, unless otherwise specially provided, be sentenced to imprisonment on summary conviction as follows–*
>
> > *(a) for a first offence, to imprisonment for a term which shall not be less than five years but which may extend to ten years;*

[12] Since there is no record of the reasons for the sentencing procedure adopted by TLM.

[4] Rule 5(2) of the Rules.
[5] Rule 5(1) of the Rules.

Analysis

[13] The Court notes the guidance of the apex court, the Caribbean Court of Justice ("the CCJ") on the proper approach of an appellate court to reviewing sentencing in a lower court in the Guyanese case, **Linton Pompey v DPP**[6] , per Saunders PCCJ:

> *"Appellate courts reviewing sentences must steer a steady course between two extremes. On the one hand, courts of appeal must permit trial judges adequate flexibility to individualise their sentences. The trial judge is in the best position to fit the sentence to the criminal as well as to the crime and its impact on the victim. But a reviewing court must step in to correct discrepancies, reverse excesses or aberrations, secure consistency and promote observance of the rule of law…*
>
> *The principles which must guide an appellate court in reviewing a sentence are well known. An appellate court will not alter a sentence merely because the members of the court might have passed a different sentence…. the court will not interfere with a sentence unless it is manifestly excessive or wrong in principle."*

[14] The Court also notes the guidance on the sentencing process given by the CCJ in the Barbadian case of **Teerath Persaud v R**[7] , per Anderson JCCJ:

> *"[46] Fixing the starting point is not a mathematical exercise; it is rather an exercise aimed at seeking consistency in sentencing and avoidance of the imposition of arbitrary sentences. Arbitrary sentences undermine the integrity of the justice system. In striving for consistency, there is much merit in determining the starting point with reference to the particular offence which is under consideration, bearing in mind the comparison with other types of offending, taking into account the mitigating and aggravating factors that are relevant to the offence but excluding the mitigating and aggravating factors that relate to the offender. Instead of considering all possible aggravating and mitigating factors only those concerned with the objective seriousness and characteristics of the offence are factored into calculating the starting point. Once the starting point has been so identified the principle of individualized sentencing and proportionality as reflected in the Penal System Reform Act is upheld by taking into account the aggravating and mitigating circumstances particular (or peculiar) to the offender and the appropriate adjustment upwards or downwards can thus be made to the starting point. Where appropriate there should then be a discount for a guilty plea. In accordance with the decision of this court in R v da Costa Hall full credit for the period spent in pre-trial custody is then to be made and the resulting sentenced imposed."*

[6] [2020] CCJ 7 (AJ) GY.
[7] (2018) 93 WIR 132

[15] The Court is also guided by the decision of the CCJ in **Calvin Ramcharran v DPP** [8] on this issue, per Barrow JCCJ:

> *"[15] In affirming the deference an appellate court must give to sentencing judges, Jamadar JCCJ observed that sentencing is quintessentially contextual, geographic, cultural, empirical, and pragmatic. Caribbean courts should therefore be wary about importing sentencing outcomes from other jurisdictions whose socio-legal and penal systems and cultures are quite distinct and differently developed and organised from those in the Caribbean.*

[16] In the instant case it appears that the sentencing process as contemplated by the CCJ was not followed, in that TLM did not provide any reasons to indicate how he/she arrived at a starting point and whether consideration was given to the aggravating and mitigating factors relevant to the offence – which would have guided the starting point and the aggravating and mitigating factors relative to the offender, which could have resulted in an upward or downward adjustment to that starting point. It is also not apparent whether the usual 1/3 discount or any credit was applied for the Appellant's guilty plea or whether any account was taken of time spent in pre-trial custody (if any).

[17] In the Court's respectful view that was not the transparency in sentencing anticipated by the authorities set out above. However, failure to apply the correct sentencing methodology does not necessarily mean that the sentence imposed was too severe, which is the test that this Court in its appellate jurisdiction must apply.

[18] The Court notes that the offences for which the Appellant was convicted attract a minimum sentence of five years on a first offence. In relation to the firearm charge the Court sentenced the Appellant to 5 years and in the case of the ammunition to 1 year.

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[8] [2022] CCJ 4 (AJ) GY

[19] The Court notes that TLM was free to depart from the prescribed minimum term if she considered that to impose the mandatory minimum was inappropriate. The decision of our Court of Appeal in **R v Zita Shol**[9] is instructive, per Bulkan JA:

> *"[12] Mandatory sentences have always created some tension and are justifiably viewed with caution. Sentencing is a quintessential judicial function, so the tension results from the fact that a fixed penalty forecloses judicial discretion. Nonetheless, it is conceded that every branch of government has a role to play in the criminal justice process, including that of punishments: the executive sets policy, the legislature implements that policy by enacting crimes with attendant penalties, and the judiciary administers justice in individual cases, including through the sentencing of offenders. Where a particular activity becomes a persistent or grave societal problem, as in the case of drug trafficking or gang activity, policy-makers and legislatures have resorted to mandatory penalties as one means of ensuring consistency in judicial approaches and ultimately eradicating the problem. For this reason, mandatory sentences have traditionally not been regarded as a usurpation of the judicial function or contrary to the principle of separation of powers, including by this Court.…*
> *[14]… In **Aubeeluck v the State** [2011] 1 LRC 627, another decision of the Privy Council on appeal from Mauritius, the issue for determination concerned the constitutionality of a mandatory minimum sentence for trafficking in narcotics. The Board noted that the effect of the constitutional prohibition on inhuman and degrading punishments (also contained in s. 7 of the Mauritius Constitution) is to outlaw "wholly disproportionate penalties". **The Board then held that when confronted with a mandatory minimum sentence fixed by statute, there are three courses open to a court to ensure there is no violation of the constitutional protection – to invalidate the law providing for the mandatory sentence; to read it down and confine the mandatory penalty to a particular class of case only; or simply to quash the sentence in the case under consideration if to impose the full mandatory period of imprisonment would be disproportionate in those specific circumstances.** In this case, the Board rejected the more expansive routes and opted for the third one. In striking down the sentence of 3 years' imprisonment that had been imposed on the appellant for trafficking in narcotics, their Lordships factored in that he was dealing with only a small quantity just barely over the limit that raises the presumption of trafficking and that he hitherto had a clean record. The significance of this approach is that it attempts to accommodate the legislative intention as far as possible, in that mandatory sentences are not automatically invalidated in all cases. Not only is there the possibility of reading them down, but also a court can depart from them on an individual basis where the circumstances demand.*

[9] Criminal Application No. 2 of 2018.

*[15] This 'proportionality' approach was followed by this Court in **Bowen v Ferguson** (Cr App 6/2015, decision dated 24 March 2017), where the sole issue for determination was the constitutionality of a sentence of 3 years' imprisonment and a fine of $10,000.00 for possession of 1.3 grams of cocaine with intent to supply. This was a mandatory sentence required for possession of more than 1 gram of cocaine, so the appellant became subject to it because he had .3 grams over the threshold. In a majority judgment, this court held that the mandatory sentence was grossly disproportionate, given the small amount of cocaine in the appellant's possession alongside his previously unblemished record. The majority reasoned that if a mandatory sentence is found to be grossly disproportionate or such as to outrage the standards of decency, it would violate the constitutional prohibition on inhuman and degrading punishments. Relying on Aubeeluck, the court held that the three courses identified by the Privy Council in that case were likewise available to it and opted merely to quash the sentence of 3 years' imprisonment. In other words, instead of invalidating the entire section providing for the mandatory sentence, the majority accepted the Aubeeluck approach that it could simply quash the specific sentence in the appeal before it, thereby leaving the mandatory sentence intact for possible future application.…*
[18] The upshot of all this is that the trial judge was clearly entitled to follow the Aubeeluck approach of departing from the mandatory sentence in the specific case before him, as it had most recently been adopted by this court in Bowen v Ferguson."

[20] In this case based on the absence of previous convictions and the Appellant's guilty plea it would have been appropriate for TLM to depart from the minimum term for both offences. The absence of reasons precludes this Court from understanding the reasons of TLM in imposing the mandatory minimum sentence for the firearm offence notwithstanding, that to so do may have resulted in a disproportionate sentence.

[21] In the appellate authority of **Andre Egbert Lewis** the sentence of 5 years was reduced to 2 years for the Appellant's guilty plea.

[22] Furthermore TLM ought to have clearly outlined as part of the sentencing process what measure of discount had in fact applied so as to provide transparency.

[23] In **Du Plooy v HM Advocate (No. 1)**[10], Lord Justice General Cullen emphasized the importance of the Accused being able to clearly ascertain what discount was applied.

> *[25] In our view it is desirable that, where a plea of guilty and related matters call for some allowance, the sentencer should use a distinct discount in the process of arriving at the appropriate sentence, and should state in court the extent to which he or she has discounted the sentence. ... [I]t is in the interests of the public as well as that of the accused that the extent to which sentences are discounted should be known. Those who represent accused persons should know, at least in general terms, the extent to which a sentence is likely to be reduced in the event of a early plea of guilty, so that they can advise the accused accordingly. Stating the discount which has been applied will also serve the purpose of providing victims and the public with a clear explanation as to how the sentences on a plea of guilty have been arrived at. In indicating that this practice should be adopted, we do not mean to suggest that, as from this time, there should necessarily be a reduction in sentences, but rather that there should be greater transparency in the process by which sentencers explain what has led them to the sentences which they impose."*

[24] A one-third discount is nothing but a suggested appropriate discount. It is this Court's view that transparency requires that sentencers set out in their reasons the methodology of the discount and explain in arithmetical terms how he has dealt with the discount for the guilty plea. Indeed, this call for transparency has already been made by the Caribbean Court of Justice in the case of **Da Costa Hall v The Queen**[11], which requires the Courts to expressly indicate how they dealt with time spent on remand in the sentencing process. At paragraph 26, the Court indicated that:

> *"The judge should state with emphasis and clarity what he or she considers to be the appropriate sentence taking into account the gravity of the offence and all mitigating and aggravating factors, that being the sentence he would have passed but for the time spent by the prisoner on remand. The primary rule is that the judge should grant substantially full credit for time spent on remand in terms of years or months and must state his or her reasons for not granting a full deduction or no deduction at all."*

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[10] 2003 S.L.T 1237
[11] [2011] CCJ 6

[25] While the one third discount acts as a general rule, undoubtedly there are cases where the guilty plea was strategically timed, *or* where the circumstances are so grievous that even on a guilty plea this disentitles the convict to a one third discount or to any discount at all. This Court in the absence of reasons is unable to discern TLM's rationale.

[26] It may be true that, but for his guilty plea the circumstances surrounding the commission of this offence probably would have attracted a minimum sentence of 5 years on each offence as stipulated by statute. However, the guilty plea ought to have been taken into account.

[27] The Court reminds itself that it is not engaged in a re-sentencing process, but rather a determination of whether the sentence imposed by TLM was unduly severe. In this case bearing in mind the Appellant's guilty plea and his prior good character, the Court finds that the sentence imposed was unduly severe.

Delay

[28] The CCJ adopted *Gibson* for this jurisdiction in the Belizean decision of **R v Henry**[12]. There the CCJ considered the position of the constitutional right to trial within a reasonable time in the appellate process, per Anderson JCCJ:

> *"[37]…The delay of five years in the hearing of the appeal was entirely unsatisfactory. It must be unsatisfactory for a convict to serve his entire sentence before his appeal is heard and decided. Such delay renders the right of appeal more an illusion than a right. As the appellate process is undoubtedly part of the trial, such a delay constitutes an infringement of the constitutional right to a fair trial within a reasonable time.*
> *…*
> *[41] …**not all infringements of the constitutional right to a fair trial within a reasonable time must necessarily result in the allowing of the appeal and the quashing of the conviction. Indeed, this remedy is, as we have said, 'exceptional'; the emphasis is on fashioning a remedy, 'that is effective given the unique features of the particular case'. Remedies for breach may be a declaration, an award of damages, stay***

[12] [2018] 5 LRC 546.

***of prosecution, quashing of conviction, or a combination of these or some other or others. Everything depends upon the circumstances**." (emphasis added)*

[29] The CCJ also further considered appellate delay in the Belizean case of **Solomon Marin Jr. v R**[13], per Barrow JCCJ:

> *"[104] The grant of a remedy for breach of the right to a fair hearing within a reasonable time is very much a matter of discretion. This is established in the language of s 20(2) of the Belize Constitution, which provides that the Supreme Court, among other things, may make such declarations and orders "as it may consider appropriate" for the purpose of enforcing or securing the enforcement of any of the fundamental rights provisions of the Constitution. There is no right to any particular remedy.*
> *…*
> *[110] The element of discretion as to what is the appropriate remedy for a breach of the right to a fair trial within a reasonable time that was discussed in Gibson requires courts to consider the matter on a case-by-case basis, taking account of all the circumstances of the case. This was reflected in the judgment of this Court delivered by Byron PCCJ and Anderson JCCJ in Singh v Harrychan when they stated:*
> *… In some cases, the consequence of the delay may result in a reduction of the sentence, whereas this may not be an appropriate remedy in others.*
> *[111] The discussion in Gibson provides a helpful indication of relevant circumstances to consider in deciding what is an appropriate remedy. Thus, an accused person may have contributed substantially to delay and there may have been other factors contributing to delay including lack of legal representation or access to critical resources, such as a highly specialised expert. Wider considerations may also be included in the circumstances a court must consider, such as the nature of the crime and the impact on the society's sense of justice, when deciding on what is appropriate.*
> *[112] **It is clear, therefore, that it is not the normal course that a convicted person whose constitutional right to a fair hearing has been breached will have their sentence reduced or suspended. When that happens, it is done on a principled basis of vindicating the right that has been breached. It is done to uphold the rule of law; to mark the value of the constitutional right; to meaningfully affirm that the administration of the legal and judicial system is as much subject to the law as everyone else. It is done for the good of the community and in the public interest**." (emphasis added)*

[30] In this case the Court has no statement of reasons or notes of evidence to make a determination of what sentence should be substituted. There has been a delay of

[13] [2021] CCJ 6 (AJ) BZ.

over 4 years at the appellate level alone, which is considerably greater in terms of the date of charge. The Court is prepared to treat that delay as predominantly the fault of the State, to wit, the magistracy, as even though there was the ability of the Appellant to assert his rights and he could have applied to a judge on affidavit to force TLM to produce her statement of reasons[14], the primary responsibility is on the magistracy to follow the law and meet its demands. There has been no justification for the delay, and the Court notes that in **Gibson** the CCJ held that a 5-year delay was unsatisfactory.

[31] The Court is prepared to hold that the delay in this case is a breach of the Appellant's rights under **Section 6(2) of the Constitution**. The Court also finds that in the absence of any information by which an appropriate sentence can be substituted, with the file being lost is an exceptional case in which the Court should exercise its discretion to provide the remedy of permanently suspending the sentence pursuant to **Section 20(2) of the Constitution**.

Disposition

[32] The Appeal against sentence is upheld and based on the passage of time and absence of facts no sentence is substituted.

[33] The Court orders that the Respondent bear the costs of this appeal.

[34] The Court further orders that a copy of this Judgment be sent to the learned Chief Magistrate and the Registrar of the Senior Courts, the Office of the Director of Public Prosecutions and the Appellant.

Candace Nanton
High Court Judge
Senior Courts Belize
Dated 11th April 2024

[14] Rule 5(2A) of the Rules.