IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INFERIOR APPEAL (CRIMINAL) NO.: IC20190003

BETWEEN

FELICIANO MORENO

Appellant

and

THE POLICE

Respondent

Appearances:

Ms. Peta-Gay Bradley for the Appellant.

Ms. Cheryl-Lynn Vidal S.C., Director of Public Prosecutions, for the Respondent.

2024: June 20th
July 29th

JUDGMENT

INFERIOR APPEAL-POST-CONVICTION DELAY- RIGHT TO TRIAL WITHIN A REASONABLE TIME-CONSTITUTION OF BELIZE

History

[1] **PILGRIM J**.: Feliciano Moreno, ("the appellant"), was convicted and sentenced to seven (7) years imprisonment by the learned Magistrate ("TLM") in the Orange Walk Judicial District on 18th January 2019 for the offence of burglary. He filed his notice of appeal on 28th January 2019, well within the 21-day limit to lodge his appeal pursuant to **Order LXXIII Inferior Courts (Appeals)**[1] ("the Rules"). The law required that within 1 month[2] of that notice being filed that TLM prepared a statement of her reasons[3]. In this matter there has been no statement of reasons provided by TLM to date nor a formal record of appeal. This matter was docketed to this Court in October 2023 with no explanation for the more than four (4) year gap in listing this appeal to be heard. The Court has tried with all its powers to compel an appropriate record and statement of reasons including issuing subpoenas to two Clerks of Court. Mr. Edgar Chablet, the Clerk of the Courts for Orange Walk, on 17th May 2024 testified on oath that he searched for the statement of TLM's reasons and found none but did provide extracts of the Court Book.

[2] The appellant pleaded guilty to the burglary of a handbasin that was stolen out of the East Sport Centre in Orange Walk sometime after 13th January 2019 when that building was broken into. He was caught walking on 15th January 2019 with the handbasin which still bore an identifiable tag on it. The appellant was 23 years old at the time and had a 2018 previous conviction for theft.

The arguments

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[1] Rule 2(1)(b) made under the **Supreme Court of Judicature Act** Chapter 91 of the Substantive Laws of Belize, Revised Edition 2020 ("SCOJA"): *"2.-(1) The party desiring to appeal shall…(b) within twenty-one days after the pronouncing of the decision, lodge with the clerk a written notice of appeal in Form 1, and serve a copy thereof upon the opposite party.*
(2) Where the appellant is in prison, the keeper shall, on being requested so to do, render all reasonable assistance in the preparation of the notice and shall cause it to be lodged and a copy thereof to be served as above, if the appellant supplies him with the necessary fees and expenses."

[2] Rule 5(2) of the Rules: *"The statement **shall be lodged with the clerk, within one month of compliance by the applicant with Rules 2 and 3 of this order**, and **the clerk shall within fourteen days of the receipt thereof, prepare a copy of the proceedings including the reasons for the decision**, and when the copy is ready he **shall notify the appellant in writing** and, **on payment of the proper fees, deliver the copy to him."** (emphasis added)*

[3] Rule 5(1) of the Rules: " ***On compliance by the appellant with the requirements of Rules 2 and 3 of this order the magistrate shall draw up a formal conviction or order and a statement of his reasons for the decision appealed against**." (emphasis added)* Rule 2 deals with the giving of notice to appeal and Rule 3 deals with the payment of security of due prosecution of an appeal which is not required in criminal matters.

[3] The appellant does not complain about his conviction, which was due to a guilty plea. He has not contended that it was improperly entered or accepted. His issue, in his written submissions, was with the opaqueness of the sentencing process and whether the post-conviction delay in this matter has caused a breach of his constitutional right to trial within a reasonable time and if so, what is the remedy. He said that the absence of a record of the sentencing process, particularly as to how, or if, TLM individualized the sentence as is required both in the general sentencing under the Caribbean Court of Justice decision of **Teerath Persaud v R**[4] or had regard to the proportionality test set out in the Court of Appeal decision of **Bowen v Ferguson**[5] to ensure that it did not offend the constitutional injunction against inhuman and degrading punishment is reversible error giving this Court the power to interfere with sentence. The appellant in oral argument, however, abandoned this argument accepting the contention that sentencing was not at large because burglary has a mandatory minimum sentence with a proviso which was inaccessible to him as he had a previous conviction for a similar offence, and there was no other ground making his case a special one meriting a sentence below the minimum. The appellant accepted that even if the reasons of TLM were available the sentence actually imposed was not unduly severe.

[4] The appellant now argues, solely, that the more than five (5) years of post-conviction delay in the hearing of his appeal that the appellant's right to trial within a reasonable time has been breached and two appropriate remedies which the Court should consider are a stay of further punishment or a reduction in sentence.

[5] The respondent concedes the breach of the appellant's constitutional right to trial within reasonable time. The respondent, however, submits that there is nothing exceptional about this breach that requires the stay of any further punishment.

The legal framework

[6] The offence of burglary, where relevant, is defined as, and has as its punishment, the following:

[4] (2018) 93 WIR 132 at para 46.
[5] Criminal Appeal No. 6 of 2015.

"148 (1) A person is guilty of burglary if–

…

(b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it …

…

(4) A person guilty of burglary shall be punished as follows–

…

(b) on summary conviction, to a term of imprisonment which shall not be less than seven years but which may extend to ten years,

provided that (whether the case is tried summarily or on indictment) the court ***may****, in the case of* ***a first time offender who has no previous conviction for any offence involving dishonesty or violence, refrain from imposing the minimum mandatory sentence prescribed above if there be special extenuating circumstances which the court shall record in writing****, and in lieu thereof, pass such other sentence (whether custodial or non-custodial) as the court shall deem just having regard to the prevalence of the crime and other relevant factors." (emphasis added)*

[7] The power of an appellate court to interfere with the sentence of a lower court was outlined by the CCJ in the Guyanese decision of **Linton Pompey v DPP**[6]. This Court can only interfere if the sentence is manifestly excessive or wrong in principle, per Saunders PCCJ, speaking about appeals from the High Court, but which would apply equally to decisions by magistrates:

"[2] 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.

…

[6] [2020] CCJ 7 (AJ) GY.

[29] 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."

[8] The case of *Persaud*, as the Court referred to earlier, requires a sentencer to individualize sentences by not only punishing the offending but looking at different aspects of the offender and tailoring the sentence to him. However, sentencing is not at large in this matter as there is a mandatory minimum sentence. However, mandatory minimum sentences are subject to the supreme law of Belize.

[9] The **Constitution** of Belize provides at section 7, inter alia, that, "No person shall be subjected to… inhuman or degrading punishment…"

[10] The issue of mandatory minimum sentences and their consistency with the *Constitution* was considered by the Court of Appeal in **R v Zita Shol**[7], 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.

…

[7] Criminal Application No. 2 of 2018.

[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****.*

[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****." (emphasis added)*

[11] Section 6(2) of the *Constitution* provides as follows:

> *"6(2) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."*

[12] The CCJ considered this right in the Belizean decision of **R v Henry**[8]. 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***

[8] [2018] 5 LRC 546.

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

[13] The CCJ also further considered appellate delay in the Belizean case of **Solomon Marin Jr. v R**[9], 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****.*

[9] [2021] CCJ 6 (AJ) BZ.

[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)*

Analysis

[14] In this case the Court believes that the concession by the appellant in oral argument was a wise one. *Shol* has quite clearly stated that the National Assembly may legitimately pass laws mandating a minimum term if it feels that the society is bedeviled by a particular ill. Burglary has been deemed by them to be such an ill, and it is easy for the Court to understand why. It is a sad fact of human experience that a burglar when faced by the surprise appearance of a home or shop owner who "was not supposed to be there" can easily turn into something far worse. The release valve to take the pressure out of a seven-year prison term minimum is that if the prisoner is a first time offender without a conviction for dishonesty or violence he may be sentenced below the minimum, at large. The appellant does not qualify as he has a previous conviction for theft. Counsel for the appellant, Ms. Bradley, in the highest traditions of the bar, conceded that there was nothing in the appellant's profile that merited him engaging the proportionality discretion to be sentenced under the minimum.

[15] 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 Magistracy had an obligation to provide reasons within the timeframe set in the Rules and the Registry of the then Supreme Court, now Senior Courts, has proffered no reason for the listing of this appeal more than 4 years after its filing. As the CCJ said in *Marin* the judicial system is part of the State and must also be held to account. The concession by the learned DPP was also, in the Court's view, right and in the highest traditions of the bar, that there was a breach.

[16] The Court notes the guidance of Barrow JCCJ in *Marin* that the appellant has no right to a particular remedy and 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." This rings loudly in this case where this appellant was convicted of theft in 2018 along with a separate conviction for breach of a protection order, the very next year graduates to burglary. The public interest in protecting it from an apparent recidivist looms large. The Court will in those circumstances grant the appellant a declaration for the breach of his rights but will reject the application for relief either by way of staying further punishment or a reduction in sentence. The Court shares the view posited by the learned DPP that the delay in this case was of minimal impact because owing to the mix of facts in this particular matter whenever this appeal was heard it was almost certain to fail.

[17] The Court wants to record its thanks to both parties for their very helpful submissions, both oral and written, in this case.

[18] The Court would however wish to note again the words of Jamadar JCCJ in *Marin*, so that it resonates with who needs to hear it:

> *"[1] In the delivery of justice, delay is anathema. Delay has a corrupting effect on the purity of justice. It renders its delivery increasingly valueless for parties and all too often even prejudicial. It undermines public trust and confidence in the justice sector. It corrodes the very fabric of society. Delay denies justice. Such is its toxicity. Indeed, it is constitutionally renounced in Belize."*

DISPOSITION

[19] It is declared that the right of the appellant under section 6(2) of the Belize Constitution to a fair hearing within a reasonable time was breached by the excessive delay in the hearing of his appeal to the High Court.

[20] The appeal is dismissed, and the orders of the learned Magistrate affirmed. Both parties are to bear their own costs.

[21] The Court orders each party to bear their own costs.

Nigel C. Pilgrim
High Court Judge
Criminal Division
Central District
Dated 29th April 2024