In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

Case No. 18 of 2019

BETWEEN:

THE KING

-and-

WINSTON PAYNTER

Before: **The Hon. Mr. Justice Juan P. Wolffe, Puisne Judge**

Appearances: Mr. Alan Richards for the Prosecution
Mr. Marc Daniels for the Defendant

Date(s) of Hearing: 6th April 2023
Date of Sentence: 12th April 2023

SENTENCE

Possession of Controlled Drugs (Diamorphine aka "heroin") with intent to supply – Possession of Ammunition without a license – Mandatory minimum and maximum sentences - Proportionality principle

WOLFFE J.

1. On the 9th March 2023 a jury found the Defendant guilty of one (1) count of Possession of a Controlled Drug contrary to section 6(3) of the Misuse of Drugs Act 197 (the "MDA")(Count 1 on the Indictment), and one (1) count of Possession of Ammunition Without a License contrary to section 3(1) (a) of the Firearms Act 1973 ("FA")(Count 2 on the Indictment).

2. Briefly, in respect of the possession of a controlled drug with intent to supply count the Prosecution's case was that on the 11th April 2019 members of the Bermuda Police Service had cause to stop the Defendant's work van on Middle Road in Warwick Parish and as they were doing so they saw him place a white plastic bag behind the passenger seat and to the rear of the van. Upon a search of the rear of the van the white plastic bag was found to contain a manila coloured envelope which later on the same day was discovered to contain a magazine. This magazine was opened and was seen to contain two (2) heat sealed packages which each had a brown substance/powder inside. An examination by the Central Government Laboratory revealed that one of these packages contained 238.8 grams of the controlled drug diamorphine (also known as "heroin") with 31% purity, and that the other packages contained 138.5 grams of diamorphine (heroin) with 56% purity. Therefore, the total amount of heroin seized was 371.3 grams.

3. An expert in the trafficking of controlled drugs found that on the streets of Bermuda the 371.3 gram of heroin would yield over 49,000 "decks" which translates to an overall total retail price of $998,186.

4. In respect of the possession of ammunition without a licence count, the jury heard that also on the 11th April 2019 police officers conducted a search of the Defendant's residence located in Devonshire Parish and once therein they seized several items (which were entered into evidence at trial). On a shelf in a kitchen closet was a shoebox which contained six (6) 9mm rounds of ammunition which although were in poor condition were, as found by a firearms expert, capable of being fired correctly.

5. It is against this factual backdrop, which must have been accepted by the jury in reaching their unanimous guilty verdicts, that I will sentence the Defendant.

The Law

6. Prosecution and Defence Counsel were *ad idem* in relation to the following and therefore there in no need for any extensive elucidation on my part:

   (a) Pursuant to section 27(1)(a) of the MDA, that the maximum penalty for possession of a controlled drug with the intention to supply is life imprisonment.

   (b) Pursuant to section 27B of the MDA as read with Schedule 5 of the MDA, that where the offence involves diamorphine (heroin) the Court shall have regard to the (i) street value of the controlled drug and (ii) the destructive effect on society of the controlled drug, and then, add an increased sentence of 50% to the basic sentence.

   (c) Pursuant to section 30A of the FA as read with Table 2 of Schedule 1 of the FA, that for a first offence of possession of ammunition that the punishment is imprisonment for not less than 12 years and not more than 17 years.

   (d) Pursuant to section 27F of the MDA, that where a person is convicted of an offence under the MDA and also convicted of an offence under the FA on the same Indictment then the sentences for each offence should run consecutive to each other.

7. Taking the facts of this case, as well as the above sentencing guidance of the MDA and the FA (individually and together), there is no doubt that the Defendant is facing a substantial immediate term of imprisonment. However, before arriving at the eventual sentence which is appropriate in this case it is important that I first deal with matters which were raised by both Counsel and which will ultimately determine the sentence that I do mete out. In particular, the operation of the mandatory minimum sentences set out in Table 2 of

Schedule 1 of the FA and the fundamental principle of proportionality as stipulated in section 54 of the Criminal Code Act 1907 (the "Criminal Code"), and, the interplay between the two.

8. In respect of mandatory minimum sentences, and its overlap with the proportionality principle, I covered such in my sentencing decision in the Supreme Court matter of *R v. James Robert Rumley Case No. 34 of 2019 (21st January 2021)* ("*Rumley*"). The defendant in that case appealed against sentence to the Bermuda Court of Appeal and his appeal was cited as *James Robert Rumley v. R [2021] CA (Bda) 18 Crim*. In dismissing the appellant's appeal against sentence Bell JA noted that I *"covered the relevant law on mandatory minimum sentences"*[1] and he did so, it would appear, without any criticism of my recitation of the law in that regard. I will therefore refer to the comments which I made on mandatory minimum sentences in my Supreme Court sentencing decision.

9. The bare bones facts of *Rumley* were that on the 23rd June 2019 and on further two (2) occasions on the 14th October 2019 that the defendant imported into Bermuda component parts of a firearm from FedEx facilities located in the State of Pennsylvania of the United States of America. To wit: a "Taurus" handgun frame grip with trigger, two (2) top slides and barrels, trigger parts and mechanism, slide parts, a magazine catch, and a locking block assembly. By a unanimous decision a jury found him guilty of the offences and I subsequently sentenced the defendant to fourteen (14) years imprisonment on all counts. In doing so, I was compelled to have regard to the mandatory minimum sentences set out in section 30A of the FA as read with Table 2 of Schedule 1 of the FA i.e. that which I must have regard to when sentencing the Defendant in the case at bar.

10. In *Rumley* I said that:

> *"By virtue of the imposition of these mandatory sentences the Legislature laid down sentencing parameters which the Court should consider when sentencing offenders who have committed offences of the same character as those committed by the Defendant. On the face of it, it appears that the mandatory minimum sentence of*

[1] Paragraph 42 of *James Robert Rumley v. R [2021] CA (Bda) 18 Crim* (the Court of Appeal decision).

12 years imprisonment should only be reserved for those who plead guilty to a relevant firearms offence, have no previous convictions, and who come with reasonable mitigating circumstances. Ergo, that the mandatory maximum sentence of 17 years imprisonment for such offences should only be for those who, whether they pleaded guilty or were found guilty after a trial, are repeat offenders and/or have committed the most egregious variety of the relevant offences. Whether the eventual sentence falls at or somewhere between the mandatory minimum and maximum terms of imprisonment would of course be determined by any mitigating or aggravating features of the case. Any sentencing judge would therefore be cautious to venture outside of those minimum/maximum sentencing guardrails because to do so could reasonably be perceived as acting in a way which is contrary to the Legislature's intent and to standard sentencing guidelines.

But the mandatory minimum/maximum sentences require further qualification. Ms. Greening helpfully referred the Court to the Bermuda Court of Appeal authorities of David Jahwell Cox v. R, No. 22 of 2007 and Jahki Dillas R, No. 6 of 2008 (heard together on appeal) which addressed the constitutionality and application of mandatory minimum sentences of imprisonment for the specific offence of possession of a bladed article under section 315C(6) of the Criminal Code Act 1907 (the "Criminal Code"). Unlike the issue advanced by Mr. John Perry QC (counsel for Appellant Cox) in Cox and Dillas, Ms. Greening in the case at bar did not proffer a strict stand-alone argument that the mandatory minimum sentences set out in Table 2 of Schedule 1 of the Act breached the Defendant's fundamental rights and freedoms under section 3 of the Bermuda Constitution Order 1968 i.e. that "No person shall be subject to torture or to inhumane or degrading treatment or punishment". There is therefore no need for me to directly address the issue as to whether the mandatory minimum sentences under the Act are unconstitutional. However, like Mr. Perry, Ms. Greening did argue that the mandatory minimum sentences under the Act are still subject to section 54 of the Criminal Code which speaks of the application of the fundamental sentencing principle of "proportionality". That is, that the sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender."[2]

11. I then went on to summarize the words of the Court of Appeal President in the matters of David Jahwell Cox v. R, No. 22 of 2007 and Jahki Dillas R, No. 6 of 2008 as follows:

"In Cox and Dillas, the Honourable President Justice Zacca concluded: (i) that mandatory minimum sentences are subject to the principle of proportionality, and (ii) that Bermudian legislation, in exceptional cases, implicitly allows for mandatory minimum sentences not to be applied. Highlighting the "Doctrine of Separation of Powers" which ensures that the legislative and judicial branches of government do not encroach upon the core functions of the other, Justice Zacca stated that despite the Legislature's considered wishes to specific mandatory

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2 Paragraphs 4 and 5 of Rumley.

minimum sentences a sentencing judge should not be deprived of their "power to determine the appropriate sentence in each individual case", and, that "minimum mandatory sentences should not vitiate the other substantive principles of sentencing" (in this regard Justice Zacca referred to R v. West (2000) 143 C.C.C. (3d) 129).

Justice Zacca went on to say that:

> *"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 well as section 315C(6)."*[3]

12. As to the intersection between mandatory minimum sentences and the proportionality principle I said this in *Rumley*:

> *"Therefore, while acknowledging that the Legislature has the power to set mandatory minimum sentences for particular offences Cox and Dillas also asserts that a sentencing judge's discretionary power to mete out a sentence in accordance with entrenched sentencing principles, and one which takes into consideration all of the circumstances of the case, should not be diminished or subjugated by the provisions of an act of Parliament. In other words, mandatory minimum sentences should not be designed to handcuff the sentencing judge or lead them to turning a blind eye to the "Purpose and Principles of Sentencing" which are enunciated in sections 53 to 55 of the Criminal Code. It is therefore permissible for the sentencing judge to eventually land on a sentence which may be less than the mandatory minimum sentence.*
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> *The Legislature's power to set mandatory minimum sentences and the sentencing judge's discretionary power to impose sentences which meets the circumstances of a matter should not be seen as mutually exclusive though. Mandatory minimum sentences could and should still be seen as helpful guidance for the Court to consider because they do, or are supposed to, reflect society's views about a particular offence as channeled through its elected representatives. Therefore, mandatory minimum sentences can be used by the Court as a starting point but with the understanding that they could be adjusted upwards or downwards depending on the circumstances of the case and the application of established sentencing principles (which includes proportionality). Justice Zacca in Cox and Dillas paved such a path to sentencing when he said:*
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> > *"It is incumbent on the sentencing judge, in every case, to determine whether the prescribed minimum sentence would infringe the defendant's*

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[3] Paragraphs 6 and 7 of *Rumley*.

right 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."[4]

13. In the same vein as *Cox and Dillas* and *Rumley*, Mr. Daniels quite rightly relied on a slew of authorities in relation to the application for the proportionality principle. Specifically: *Jaron Roberts v. R [2013] Bda LR* which says that proportionality applies to mandatory minimum sentences; *R v. Damon McRoy Eugene Wellman Morris and Denise Alberta Morris [2017] Bda LR 128*[5] which supports the position that in respect of the mandatory uplift of section 27B of the MDA that the Court, to avoid "double counting", must consider the "totality" of the sentence after applying the uplift[6]; and, *Mallory v. Director of Public Prosecutions [2011] Bda LR 30* which said that *"Proportionality is considered to be the fundamental governing principle in sentencing"*[7] and that in "exceptional cases" the additional mandatory penalty in that case could be reduced *"to accord with the principle of proportionality which is a function of the sentencing tribunal to ensure that the penalty fits the crime"*[8].

14. I would be remiss to not draw reference to other helpful comments made by Ward JA in *Roberts*. Utilizing the Canadian case of *R v. Nasogaluak [2010] 1 SCR 206* and the matter of *R v. Stauferr 2007 BCCA 7* Ward JA said that *"proportionality means that a sentence should not exceed what is just and appropriate"* and that what is required is for the Courts is to ensure *"that consecutive sentences are not unduly long or harsh"*.[9] Out of interest, *Roberts* was a case in which the appellant was sentenced for six (6) robbery offences and he used a firearm in committing them. Pursuant to section 30A of the FA the sentences for the firearm offences were to run consecutive to the robbery offences. The appellant was sentenced by the Court of first instance to 16 years imprisonment which the Court of Appeal deemed to be disproportionate and accordingly reduced the sentence to one of 11 years imprisonment.

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4 Paragraphs 8 and 9 of *Rumley*.
5 The brief facts of *Morris* are set out later in this decision.
6 Paragraph 37 of *Morris*.
7 Ground CJ in *Mallory* quotes Arbour J in *R v. Wust (2000) 143 C.C.C. (3d) 129*
8 Cited in paragraph 12 of *Roberts*.
9 Paragraph 13 of *Roberts*.

15. Recognizing the guidance of the above authorities, I therefore find that both Counsel advanced legitimate arguments as to: the actual term of imprisonment which the Defendant should receive for the possession of the heroin with intent to supply offence after considering the basic sentence and then applying the 50% uplift as prescribed by section 27B of the MDA[10]; the actual term of imprisonment for the ammunition offences after considering the minimum and maximum terms of imprisonment for the ammunition offence under section 30A of the FA as read with Table 2 of Schedule 1 of the FA; and, the extent to which the Court should apply the proportionality principle after consideration of the uplift provision of section 27B of the MDA and the consecutive sentence element of section 27F of the MDA. I will return to these issues in a few paragraphs.

Counsels' Submissions

16. Referring the Court primarily to the fairly recent authorities of *Omar Davy v. R [2012] CA (Bda) 5 Crim* and *Josef Vlcek [2022] CA (Bda) Crim 5* Mr. Richards submitted that the appropriate sentence for the Defendant should be: (i) 18 to 20 years imprisonment for the offence of possession of heroin with intent to supply (12 year basic sentence with a 50% uplift); and (ii) 12 years imprisonment for the possession of ammunition offence. With the application of section 27F of the MDA the Prosecution says that the overall sentence for the Defendant should be between 30 to 32 years imprisonment.

17. On behalf of the Defendant, Mr. Daniels submits that the appropriate sentenced should be (i) 15 to 16 years imprisonment for the possession of heroin with intent to supply offence (10 to 11 basic sentence with a 50% uplift), and (ii) 4 years imprisonment for the possession of ammunition offence. With the application of section 27F of the MDA, and with recognition of the proportionality principle of section 54 of the Criminal Code (which was

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[10] Zacca P. in *R v. Tucker and Simons [2010] Bda LR 39* (cited in *Morris* and affirmed in *Tyrone Brown v. R [2017] Bda LR 50*) stated that the procedure to be adopted is for the Judge to first fix the basic sentence after consideration of all the mitigating and aggravating features and then apply the 50% uplift to that basic sentence. *Morris* also mentioned the Court of Appeal cases of *Rahman v. r [2009] Bda LR 17* and *Richards et al v R [1991] Bda LR 15* to show the sentencing route of establishing the basis sentence first and then applying the uplift.

applied by the Court of Appeal in *Cox and Dillas*, *Roberts*, *Morris* and *Mallory*, and by myself in *Rumley*), Mr. Daniels states that the total sentence should be one of 19 to 20 years imprisonment. In doing so, in his oral and/or written submissions Mr. Daniels referred to the authorities of *Davy*, *Vlcek*, *Cox and Dillas*, *Morris*, *Mallory*, *Roberts*, *Zegelis v. R [2014] Bda LR 28*, *Lottimore and Hatherley v. R [2015] Bda LR 5*, and *Tyrone Brown v. R [2017] Bda LR 50*.[11]

18. Mr. Daniels also highlighted the following mitigating features of the case at bar:

- The Social Inquiry Report dated the 6th April 2023 (the "SIR") states that pursuant to the Rehabilitation of Offenders Act 1977 that the Defendant has no previous convictions.

- The Defendant is a youth coach and has been a positive influence on many young men in Bermuda.

- The Defendant is a provider for his children who will suffer emotionally, financially, and spiritually as a result of any incarceration which he may receive.

- The SIR concludes that the Defendant is at a low risk of reoffending and that he has a low need for rehabilitative services.

- There are no aggravating circumstances.

Sentencing Decision

19. I should say from the outset that there should be no dispute about the public's and the legislature's grim views of the offences for which the Defendant has been convicted of. The harsh sentencing tariffs for each offence are no doubt a reflection of society's revulsion

[11] *Zegelis*, *Lottimore and Hatherley*, *Brown* and *Morris* were cited in *Davy*.

for these offences particularly in an environment which has been comprehensively devastated by the disturbing rise and prevalence of drug addiction and gun violence in Bermuda over the past 10 to 15 years. Such devastation lies firmly at the feet of those who not only tear at the moral, social and physical health of our community for financial benefit through their trafficking in drugs but who are also poised to exact violence and fear on members of the public in order to secure and/or maintain their ill-gotten gains.

20. The facts of this case are however doubly troubling. The separate offences of possession of a large amount of heroin with intent to supply and the possession of ammunition would have each, on their own, netted substantial periods of incarceration for the Defendant even if the other offence was not committed. However, the Defendant, after a jury trial, has been convicted of a combination of offences which must send tremors through the minds of right thinking members of society and which shatters community held objectives of providing protection and safety for one's family and friends. By itself, the possession of almost $1,000,000 worth of heroin with the intent to supply it (a drug which has done untold damage and injury to the residents of Bermuda) is reprehensible but when coupled with a possession of ammunition offence the seriousness of the unlawful conduct of the Defendant is ratcheted up considerably. An inescapable inference that can be reasonably drawn when one has both copious amounts of drugs and ammunition in their possession is that they, or someone else, are prepared to go to extreme lengths to protect their nefarious product. Surely this inference, and probably others, were operating on the minds of the legislature when they deemed it necessary to put into force section 27F of the MDA which compels the Court to run sentences for related drug and ammunition offences consecutively. It must also have been within the legislature's contemplation to send an unequivocal message to person's like the Defendant who possess drugs and ammunition, or even think about doing such, that they would be treated to the fullest extent of the law if convicted.

21. To be clear, the Defendant was found in possession of ammunition. He was not found to be in possession of a firearm and there was no evidence or suggestion at trial that he had access to a firearm. However, this does not diminish my point as there is no real difference

legislatively between having a firearm (whether loaded or not) and having in one's possession ammunition which is live and can be fired from a firearm (as the ammunition in this case was)[12]. In terms of sentencing, and therefore in terms of gravity, Table 2 of Schedule 1 of the FA treats the possession of ammunition with the same level of harshness as the possession of a firearm. This may be because of the intimate connectivity between ammunition and a firearm i.e. one does not work without the other.

22. Having heard from both Counsel I am at pains to find any circumstances in this case from which much mitigation can be gleaned other than the Defendant not having committed any offences prior to the commission of these offences (I accept that by virtue of the Rehabilitation of Offenders Act 1977 that the Defendant has "spent" convictions). Of all of the possible mitigating circumstances listed in section 55(2)(g) of the Criminal Code (which I accept is not an exhaustive list) the only one applicable to the Defendant is his previous good character.

23. Firstly, the Defendant was found guilty of both offences by a unanimous verdict thereby showing the jury's outright and unambiguous rejection of his defence that he knew nothing about the heroin that was in the rear of his van or about the ammunition that was found in his residence on the same day. The fact that the Defendant sought to implicate his cousin Tre Jarrett in the commission of these offences, which was clearly an attempt to divert attention away from his own criminality, was even more egregious. By all indications Mr. Jarrett is a real person (this was confirmed by the Defendant's witness Ms. Anna Lambert) and so one can deduce that his reputation has been tarnished by the Defendant alluding to him [Mr. Jarrett] bearing ownership of the heroin and the ammunition which were respectively seized from the Defendant's work van and from the Defendant's residence.

24. Secondly, I find that the Defendant being a provider for his children and that they may suffer as a result of any incarceration that he may receive are mitigating factors which amount to very little (even if the Defendant was a good father). All too often persons are

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[12] In the Court of Appeal decision in *James Robert Rumley v. R [2021] CA (Bda) 18 Crim* Bell JA commented that there was no difference in the FA between a firearm and the component parts of a firearm.

convicted of serious and even heinous offences and on sentencing they refer to their duties as parents as a reason why their sentence should be reduced. The other side of that coin is that offenders, prior to and whilst engaging in criminal conduct, should not only think about the effects which any conviction and subsequent imprisonment may have on their loved ones but also about the consequences (which may be of a violent nature) which may befall their children whilst they are committing the offences. If they do so then maybe, just maybe, they would be deterred from committing the offences in the first place. I have no reason to believe that the Defendant was not a good father to his children but a part of being a good father means not putting the welfare of his children or his ability to father them at risk. By the commission of these offences he has singlehandedly deprived them of having a father in their lives for what may be a considerable amount of time and he should not be given credit by way of much discount in his sentence for this predicament which he has placed his children in.

25. Thirdly, the Defendant expressed no regret or remorse for the commission of these offences in the SIR or in his allocutus at the sentencing hearing. I accept that the Defendant did not wish to say anything so as not to jeopardize the gravamen of any appeal which he may have but he must understand that by not genuinely expressing responsibility for the offences, even after a fully ventilated trial, the Defendant cannot enjoy any discount in sentencing which he may have received had he accepted responsibility for the heroin and ammunition.

26. Fourthly, from the facts of the case which unfolded at trial it is clear that the Defendant was not a bit player in what appeared to be a criminal enterprise. It was he who had the almost $1,000,000 worth of heroin in his sole possession, it was his residence in which items used for the packaging of controlled drugs were found as well as other envelopes which were similar in description to the one in which the subject heroin was found, and, it was his residence in which the ammunition was found. I therefore agree with Mr. Richards that the Defendant was not simply a courier of the heroin but that he played a much more extensive role in the movement, carriage, processing, and packaging of the heroin.

27. Indeed, the circumstances of this case checks all of the boxes which the Court should have regard to under section 55(2)(a) to (e) of the Criminal Code. Specifically: the offences are very serious; the Defendant is wholly to blame for the offence as indicated by the jury's unanimous guilty verdict; the potential destructive harm which almost $1,000,000 worth of heroin would have caused to the public; the concerning prevalence of drug and firearm offences in Bermuda and the dire need to deter others from committing such offences; and, the need for the community to be protected from those like the Defendant who traffic drugs and possess ammunition.

28. In respect of the cited authorities I find it surprisingly that there is a dearth of authorities in respect of sentences for the possession of large amounts of controlled drugs with intent to supply offences. Most of the authorities involve the "importation" of large quantities of drugs (heroin and/or cocaine), however they do offer some useful assistance in respect of sentencing for the possession of large amounts of controlled drugs with intent to supply offences. Mostly because pursuant to section 27 of the MDA the sentencing regime for the offence of possession with intent to supply (section 6(3) of the MDA) is as equally severe as for the offence of importation of controlled drugs (section 4 of the MDA). Further, the case of *Julio Antonio Rosado and Peter Duffy (Police Inspector), Criminal Appeal No. 13 of 1990* which was relied on by Mr. Richards demonstrates that the importation of drugs and the possession of drugs with intent to supply can be equated and that *"sentences which are appropriate for possession should also be applied to the offences of importing the drug"*.[13]

29. I therefore summarize the cited authorities as follows:

> *Zegelis*: The appellant imported 164.13 kilograms of cocaine with an estimated street value of between $17 million and $48 million depending on how the drugs were marketed. After trial he was sentenced to 25 years imprisonment which was not disturbed on appeal.

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[13] See page 10 of *Rosado*.

Lottimore and Hatherley: The appellants were convicted of conspiracy to import 388 grams of heroin and the appellants were solely responsible for the planning and execution of the importation. Appellant Hatherley was sentenced to 12 years imprisonment and Appellant Lottimore to 15 years by the trial judge and there was no appeal as to sentence.

Morris: The appellant was convicted of importing 86 grams of heroin with a street value of $253,000 and various quanties of cocaine at his residence. The trial judge sentenced the appellant to 12 years imprisonment but on appeal the Court of Appeal increased it to 18 years imprisonment (basic sentence of 12 years imprisonment plus a 6 year uplift).

Brown: The appellant was convicted following a trial of importing 894 grams of cocaine with a street value of between $95,000 and $132,000 and he was sentenced to 15 years imprisonment (basic sentence of 10 years imprisonment uplifted to 15 years imprisonment).

Davy: The appellant was unanimously convicted by a jury of importing 220.88 grams of heroin with an estimated street value of $765,700. The trial judge sentenced the appellant to 18 years imprisonment and the Court of Appeal dismissed the appellant's appeal against sentence.

Vlcek: After a trial the appellant was convicted of importing 2,964.8 grams of heroin with a 50% purity and a street value of $9,550,200. The trial judge sentenced him to 30 years imprisonment but on appeal the sentenced was reduced to 25 years imprisonment. Bell JA stated that it did not "seem right" to him that the appellant received a sentence higher than that which was received by the offender in *Zegelis* (mentioned earlier).

30. I should deal with Mr. Daniels' invitation in paragraph 17 of his written submissions that because it was the Prosecution's case that the "Dormin" sleeping pills found in the

Defendant's residence could be used as a cutting agent that the Court should "balance the fact that the product that was likely to be sold on the streets of Bermuda, based on the Crown's case, would be even less potent than what was found in the Defendant's van and analyzed". I find this submission interesting because during the trial it appeared that the Defence, quite rightly, questioned Detective Inspector David Bhagwan's evidence that the sleeping pills could be used as a cutting agent. But now, the Defendant seeks to use such evidence to his favour in order to obtain the least amount of sentence possible for the offences committed. This appears to be rather contradictory positions taken by the Defendant but even if I am wrong on this I am compelled to sentence the Defendant on the actual weight, purity or potency, and street value of the heroin that was actually found in his possession and that which was evidenced by the Central Government Laboratory and Inspector Bhagwan. To sentence the Defendant as to what may have been the purity of the heroin after the introduction of a cutting agent would require me to venture down the road of speculation which would not be useful to my task of sentencing the Defendant. Primarily because speculation could go to the benefit of the Defendant but also to his detriment. I will accordingly resist Mr. Daniels' invitation.

31. I therefore sentence the Defendant for the Possession of Diamorphine (heroin) With Intent to Supply offence (Count 1) as follows:

Basic Sentence

Of the authorities referred to by both the Prosecution and the Defence the ones which resonate with me the most are *Zegelis*, *Davy* and *Vlcek*. The eventual sentence for the Defendant should be more than the one imposed in *Davy* because the heroin in this case was more than in *Davy* (although not much more), but the heroin in this case was much less than the heroin in *Zegelis* and *Vlcek*. I therefore do not agree with Mr. Richards that the basic sentence should be one of 12 years (as it appears to have been in *Davy*) and I agree with Mr. Daniels that the basic sentence should not be more than 17 years (as it appears to have been in *Zegelis* and *Vleck*).

In the circumstances of the case at bar, including the aforementioned mitigating features, I therefore find that the Defendant should receive a basic sentence of **13 years imprisonment**.

Application of 50% uplift pursuant to section 27B of the MDA

Considering that the heroin in this matter had a street value of $998,186, which is a substantial amount, and because it is indisputable that heroin has a destructive effect on society, then I am satisfied that I should add an increased sentence of 50% to the basis sentence which by my calculation would be **6.5 years imprisonment**.

Total Sentence for Possession of Diamorphine (heroin) With Intent to Supply

Therefore, with the basic sentence and the 50% uplift I sentence the Defendant to a period of **19.5 years imprisonment** for the possession of a controlled drug with intent to supply. I find that this sentence is proportionate to the circumstances of this case and does involve any "double counting" as warned by *Morris*.

32. In respect of the Possession of Ammunition offence (Count 2) I sentence the Defendant as follows:

Section 30A of the FA

As covered earlier, section 30A of the FA imposes a statutory minimum period of 12 years imprisonment and a maximum period of 17 years imprisonment for a first offence of possession of ammunition. Mr. Richards, in his oral and written submissions, stated that the Prosecution does not seek a sentence in excess of the statutory minimum of 12 years imprisonment. I entirely disagree with this approach by Mr. Richards especially in light of the fact that the Defendant went through a full trial, was unanimously found guilty by a jury, and expressed no regret or remorse after conviction. The Defendant should not therefore enjoy a minimum sentence which should really only be reserved for those who

have pleaded guilty thereby avoided the expense and time of a trial, have shown some contrition when sentenced, and presented reasonable mitigating circumstances (a point which I made in *Rumley*). Other than having no previous convictions the Defendant does not fit any of this criteria.

Nor am I persuaded by Mr. Daniels' argument that a sentence of 4 years imprisonment is appropriate. For me to impose such a sentence would mean that I would have seen something in the circumstances of this case, or in the mitigation advanced, that would persuade me to substantially adjust the statutory minimum of 12 years imprisonment downwards by 8 years. I have not seen or heard anything about this case that would lead me to be moved by any such persuasion. At the risk of sounding repetitious, the Defendant had a trial and was convicted, and in my view the only compelling mitigating element is that he has no previous conviction.

As for proportionality, to sentence the Defendant to only 4 years imprisonment would in fact be woefully disproportionate to the offence committed and would surely be terribly contrary to the spirit and intent of section 30A of the FA to treat offences under the FA with firmness and severity.

Sentence for the Possession of Ammunition

In consideration of the above I see no reason why the Defendant in this case should receive a different sentence from the defendant in *Rumley*. Accordingly, I sentence the Defendant to **14 years imprisonment** for possession of ammunition.

Operation of Section 27F of the MDA

33. Under section 27F of the MDA I am obliged to run the just stated 14 year imprisonment sentence for the ammunition offence consecutive to the 19.5 year sentence for the drug offence. This would calculate to be 33.5 years imprisonment for the Defendant which on

the face of it is very substantial and hence irresistibly pulls me to consider the proportionality of such a sentence.

Proportionality

34. I am guided by the eminent words of Ward JA in *Roberts* and the instructive comments of the Courts in *Morris* and *Mallory* which collectively espouse that overall sentences should be "just", "appropriate" and "not unduly long or harsh". A total sentence of 33.5 years imprisonment would in the circumstances of this case be unjust, particularly because it would be substantially more than the sentences passed in *Zegelis* and *Vlcek* which both involved significantly more heroin. Granted, *Zegelis* and *Vlcek* did not have any ammunition offences attached to them, but still, even with the ammunition offence, a sentence imposed on the Defendant which exceeds that of *Zegelis* and *Vlcek* should not sit right with any fair minded observer. Indeed, such a sentence may even be inconsistent with the purpose and objectives of sentencing that are set out in section 53(a) to (g) of the Criminal Code.

35. Therefore, and with full recognition of the fundamental principle in section 54 of the Criminal Code that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, I find that there is scope to sentence the Defendant to less than the cumulative 33.5 years imprisonment which was calculated above (i.e. by virtue of sections 27B and 27F of the MDA and section 30A of the FA).

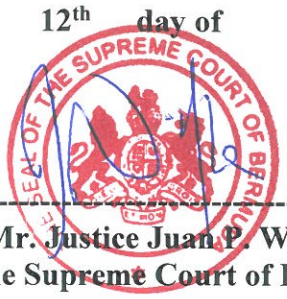
Conclusion

36. Taking all of the above paragraphs into consideration I hereby sentence the Defendant to the following:

(i) 25 years imprisonment

(ii) Time in custody shall be taken into consideration

Dated the 12th day of April 2023



The Hon. Mr. Justice Juan P. Wolffe
Judge of the Supreme Court of Bermuda