The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 3A of 2015

B E T W E E N:

THE QUEEN

Appellant

-v-

LE-VECK ROBERTS

Respondent

Before: **Baker, President**
Kay, JA
Bernard, JA

Appearances: Carrington Mahoney and Nicole Smith, Office of the Director for Public Prosecutions, for the Appellant
Mark Pettingill, Chancery Legal Ltd., for the Appellant

Date of Hearing: **3 November 2017**
Date of Judgment: **3 November 2017**

EX TEMPORE RULING

Failure to comply with table 3 of schedule 1 to the Firearms Act 1973 – sentence manifestly inadequate – whether to grant Crown leave to appeal out of time to appeal against sentence.

BAKER, P

1. By a Notice dated the 7th of July 2017, the Crown applies for an extension of time to appeal against a sentence imposed on Le-Veck Roberts on the 10th of June 2015. On that date, following an earlier trial, Roberts was sentenced to life

imprisonment on 2 counts of premeditated murder and 10 years imprisonment for two counts of using a firearm to commit an indictable offence. The sentence is to run concurrently with a tariff of 25 years before consideration for parole. There was a further concurrent sentence of 12 months imprisonment, for taking a motorcycle, but nothing turns on that in this appeal.

2. The basis of the Crown's appeal, is that the sentence of 10 years for the firearms offences, although appropriately concurrent with each other, should have been consecutive to the 25 year tariff. In *Wolde Gardner v The Queen,* on the 8th March 2017, this Court clarified the law and ruled that under table 3 of schedule 1 in the Firearms Act 1973, a sentence imposed for an offence under s. 26A of the Act must be served consecutively to the tariff period for a murder sentence arising out of the same event. The concluding words of table 3 provide:

> *"A sentence of imprisonment imposed on a person convicted of an offence under section 26A shall be served consecutively to any other punishment imposed on him for an offence arising out of the same event or series of events and to any other sentence to which he is subject at the time the sentence is imposed on him for an offence under section 26A."*

3. That has been the law since the 7th July 2010. In the case of *Gardner*, we said this; I read from paragraph 9 of the Court's judgment:

> *"[9] The first point to make about that provision is that it appears mandatory that the sentence of imprisonment in respect of the firearms offence must be consecutive rather than concurrent. But, the question arises: consecutive to what? It is of note, in our judgment, that the provision refers both to punishment and to sentence and that therefore, the draftsman is distinguishing between punishment, on the one hand, and sentence on the other; and the sentence is to be imposed for the firearms offence is to be served consecutively to any other punishment.*
>
> *[10] What in these circumstances does punishment mean? It seems to us that the draftsman in*

> *distinguishing punishment from sentence is looking not at the 4 overall sentence of life imprisonment, in a case such as the present, but to what is sometimes described as the punishment or retribution element of it, namely the minimum period or tariff to be served before there is eligibility for parole.*
>
> *[11] We have thought carefully about the true meaning of this provision, and have come to the conclusion, that there is no other construction that makes sense, and therefore, it is in these circumstances mandatory that the determinate sentence of 10 years be served consecutively to the tariff period of 25 years, which we are going to impose."*

4. Mr. Pettingill who has appeared before us today for the Respondent Roberts, accepts the correctness of the *Gardner* decision, but submits that it would be wrong for this Court now to interfere with the decision of Greaves J that was made as long ago as June 2015. In the first place, it is pointed out that the Crown is long out of time in seeking to appeal, where the provision in the Rules requires an application to be made within 21 days of sentence; and here is Mr. Mahoney applying at two and a half years after the sentence was imposed.

5. Mr. Pettingill relies essentially on the ground that the Crown is out of time. Whilst the Crown, the judge and others were mistaken as to the law in June 2015, when the sentence was passed, the position has been clear since the decision of this Court in *Gardner* on the 8th March 2017. Yet, the Crown took no action until the 7th July, 2017 – that is some 4 months later despite, incidentally, the fact that Roberts' conviction appeal was decided on the 12th May 2017.

6. Mr. Mahoney accepts that there is fault here, but explains that the Crown were primarily concerned with what was an extremely serious and bad double murder, and with the appeal of Roberts and Duerr against conviction, and the subsequent prosecution of two other men for the same offence, namely Ramono Mills and Gariko Benjamin; and that it was after they had been sentenced, and very shortly

after they had been sentenced, that he launched this application for leave to appeal out of time. He points out that that in doing so, one of the grounds for making the Court's application, was that two other individuals convicted in respect of the same murders were not those who actually did the shooting, although they were heavily involved in the offence; one of them Benjamin, ultimately pleaded guilty, and that there was a significant element of disproportionality between their tariff periods and that of Roberts in the event of Roberts' sentence being allowed to stand.

7. I should make it clear that both Benjamin and Mills were sentenced in accordance with the law as then correctly understood, having been stated in *Wolde Gardner*.

8. Rules of Court as to time are to be complied with, and this Court wishes to make it abundantly clear that extensions of time are not going to be granted routinely or without good reason. It is urged by Mr. Mahoney that there are exceptional circumstances in this case. In particular, that the decision in *Gardner* made it clear that the sentence passed on Roberts was, in the circumstances, unlawful. It is true that the Crown's statutory right of appeal, and the only statutory right that they have is on the basis that the sentence imposed was manifestly inadequate. We have come to the conclusion that it is plain that if a sentence that has been passed is unlawful and less than that required by law, it is necessarily manifestly inadequate. It does not however follow that simply because a sentence manifestly inadequate, it will be increased by this Court. The Court retains a discretion and necessarily looks at the whole of the circumstances of the case.

9. Mr. Pettingill also relies on paragraph 6 of the Bermuda Constitution Order 1968. That provides –

> *"6 (1) 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"*

10. He emphasises the words "within a reasonable time", and we think that "reasonable time" applies to sentence, as it does to the hearing of a criminal case, to determine whether or not there should be a conviction. And we emphasise that an individual is entitled not only to be tried but also to be sentenced within a reasonable time.

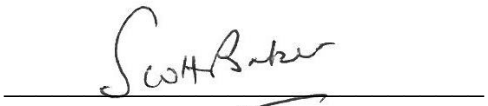
11. In the present case, the Crown are not attacking the legality of the statutory provision. What is being said, and it is plainly correct, is that the statutory provision was not correctly applied. The sentence passed was in the circumstances, shorter than the law requires. We accept that in the light of the delay that has occurred, some exceptional circumstances are required for the Court to increase the sentence in the present case. Inevitably, it is detrimental to a person serving a prison sentence to have that sentence increased during the currency of it. As My Lord Justice of Appeal Kay pointed out in the course of argument, the hardship is the greater, the later in the course of the sentence the increase is imposed. It is also to be observed that the Crown has now been given a statutory right to apply in certain circumstances to the Court to increase a sentence. So the law clearly envisages that some hardship will be permissible in appropriate cases.

12. Mr. Pettingill also argues, that we should not allow an extension of time in the present case, because it will open the floodgates for other appeals. We do not know how many other cases there may be in which an unlawful sentence of imprisonment has been passed. Mr Mahoney suggests that it is possible that it may be around six, or seven or eight, but there is no evidence as to that. It does not, in our judgment, automatically follow that any person who is the subject of an unlawfully lenient sentence will have that sentence increased on an

application by the Crown out of time. It seems to us that each case would have to be considered carefully on its merits.

13. What we are satisfied about, is that the circumstances of the present case are quite exceptional in that, if this sentence is not increased, there will be, and continue to be, unjust disparity with the cases of Romano Mills and Gariko Benjamin in respect of their sentences. We have weighed carefully against that, the injustice to the Respondent of having his sentence increased at this juncture. But, we observe that he is still at a relatively early stage of that sentence, albeit having thus far served two and a half years.

14. The culpable delay, if we can call it that, on the part of the Crown, is the period of March to September 2017. The application should have been made more promptly. But, nevertheless, we have come to the conclusion that in the circumstances, viewing the overall justice of the case, and in particular, the need to remedy an unlawful sentence, we should grant an extension of time, which we now do, and accordingly allow the Crown's appeal making the 10 year sentences for the firearms offences consecutive with the 25 year tariff.



Baker P