BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

D.P.P.'s References Nos. 1 and 3 of 2002
IN THE MATTER OF REFERENCES by the Director of Public Prosecutions under Section 36(B) of the Criminal Appeal Act, Chapter 113A

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Errol Chase C.H.B., Justice of Appeal, and the Hon. Colin Williams, Justice of Appeal

2002: September 20, October 29 and December 12

Mr. C. Leacock Q.C., Director of Public Prosecutions and Mrs. W. Blair on behalf of the Crown

Mr. Andrew Pilgrim, Ms. Anika Jackson and Ms. Alicia Archer for the Respondents

JUDGMENT

SIMMONS CJ: These References are brought to the Court of Appeal under the provisions of the Criminal Appeal (Amendment) Act, 2000-5 (the Act of 2000) which came into operation on July 15, 2002. They are the first such references. They raise important questions of law. We therefore considered it right to grant Legal Aid Certificates to the respondents and we invited full argument on the issues.

[2] The Act of 2000 amends the principal Act, the Criminal Appeal Act, Cap. 113A, by inserting into the principal legislation a new Part 1A. The amendment is short and its main sections bear reproduction.

[3] It enacts as follows:

PART 1A

Review of Sentencing

36A (1) A case to which this Part applies may be referred to the Court for the sentencing to be reviewed under section 36B.[1]

1. This Part applies to any case in which sentence is passed on a person convicted of an offence in the High Court or a magistrate's court.

36B (1) Without prejudice to anything in Part 1 relating to appeals in, or references of, criminal cases or matters to the Court, the Director of Public Prosecutions, if it appears to him that the sentencing of a person in a case to which this Part applies has been unduly lenient, may refer the case to the Court for the Court to review the sentencing; and on such a reference the Court may –

1. quash the sentence passed on that person by the court of trial; and

2. in place of that sentence pass such sentence as the Court thinks appropriate and as the court of trial had power to pass when dealing with him.

1. The condition specified in subsection (1) may be satisfied if it appears to the Director of Public Prosecutions that the Judge or, as the case may be, the magistrate erred in law as to his powers of sentencing.

2. The time during which a person is in custody pending the review of his case pursuant to a reference under this Part shall be reckoned as part of the term of any sentence to which he is for the time being subject.

3. The term of any sentence passed by the Court under subsection (1) shall, unless the Court orders otherwise, begin to run from the time when that term would have begun to run if it had been passed by the court of trial.

[4] Part 1A of the Act is drafted along the lines of section 36 of the Criminal Justice Act 1988 of England which gave the Attorney General the discretionary power to seek leave to refer to the Court of Appeal a sentence which he thinks to be unduly lenient. For that reason some reference to and guidance from English cases will be useful in the determination of these references.

[5] The Director of Public Prosecutions brings these references because, in his opinion, the sentences imposed by the trial judge were unduly lenient. It is for us to review the sentences and come to our own conclusion as to whether they were indeed unduly lenient. The two [2] respondents, David Ricardo Gilkes (Reference No.1) and Reo Seth Graham (Reference No.3) each pleaded Guilty at the July Assizes 2002 before Garvey Husbands J and a jury to offences under the Firearms Act, 1998-32. The charges were not connected to each other and each of

the respondents had been indicted at the April Assizes but, for some reason not made known to this Court, their cases were traversed to the July Assizes. Each was charged with illegal possession of a firearm contrary to section 3(1)(b)(A) of the Firearms Act (the Act) and illegal possession of ammunition contrary to section 3(1)(b)(D) of the said Act. Each respondent was fined by the trial judge.

[6] On July 17, 2002, Gilkes was fined $10, 000 payable in 18 months or, in default, he is to serve 5 years' imprisonment for the firearm charge. On the ammunition charge, the fine imposed was $3, 000 payable in 18 months or, in default, 3 years' imprisonment. Graham was fined on July 24, 2002. For the firearm offence he was given the same penalty as Gilkes but his fine for the ammunition offence was $2, 500 payable as in the case of Graham. We shall deal with the facts of the two references next.

The Facts

[7] (i) David Ricardo Gilkes

He is 29 years of age. On August 22, 1999, the police carried out a search at his home and found an unlicensed .25 Beretta pistol and four .25 Beretta cartridges in a bedroom. Gilkes admitted ownership of the firearm and ammunition and told the police that he kept them for his own protection. He had one previous conviction for possession of a small amount of cannabis.

[8] At the trial his Counsel argued for a non-custodial sentence on the ground, inter alia, that he was gainfully employed and ran his own business "Plastics Specialists" which employed 6 to 8 persons. He is in an union other than marriage with a woman from whom he has a small child aged 4. Counsel canvassed for a suspended sentence, submitting that Gilkes is a useful and hardworking member of society and is "capable of salvage." Such a sentence could not be imposed by the Court because section 6(2) of the Penal System Reform Act, 1998-50 expressly provides that a suspended sentence cannot be [3] imposed for illegal possession of a firearm. During the hearing of these references we were told that, since his convictions in July, Gilkes has lost his uninsured house to the ravages of fire.

[9] (ii) Reo Seth Graham

This respondent is 21 years old. On November 19, 2001, the police searched premises where he lived and found a firearm wrapped in a blue shirt in a shed in the backyard and 2 rounds of ammunition. It was a .22 long rifle for which Graham had no licence. Graham had one previous conviction for assault occasioning actual bodily harm. He was fined for that offence. Representing himself at the trial, Graham sought a non-custodial sentence and said that he was sorry for what he had done. He was not in regular employment but used to cut grass from time to time.

Judge's Reasons for the Sentences

[10] The trial judge's reasons for the imposition of monetary penalties instead of imprisonment are of great significance in these references. This is what he said prior to sentencing Gilkes:

"THE COURT: Section one deals with possession. It says: Any person who contravenes that section is guilty of an offence and is liable on conviction on indictment to a fine of one hundred thousand dollars or to imprisonment for a term of twenty years; or to both such fine and imprisonment. (You understand what I am saying?) It is a tough law – it's a tough law. You have – apart from one blemish on your character for something which it seems as if all young people get involved in today – the use of illegal drugs; apart from that you have a clean record. I think that the section on the judgment which Mr. Pilgrim read, seems to contemplate a fine as well. But I think the judgment says the fine should reflect the seriousness of the offence. I don't think that I am going to take you from your business. You are going to have to work hard. Your earning capacity --- How much do you earn per week from your business? How much do you get in your hands?

A: I pay myself seven or eight hundred dollars. When business is slow I pay myself ---

THE COURT: Seven or eight hundred dollars. Look I am not thinking about any hundreds I am thinking about thousands. It is either that or prison.

You said you bought this gun for seventeen hundred dollars. Well you seem to have some money. Because to buy a gun for seventeen hundred dollars from some Guyanese man, you must know that you were doing something wrong because seventeen hundred dollars for a gun is a lot of money.[4]

Anyhow not prison on this occasion, but I hope that this fine will teach you a lesson.

You are fined on the first count ten thousand dollars. You got 18 months to pay, or five years in prison.

You are fined on the second count, three thousand dollars. You have 18 months to pay or three years in prison; and let me say to you that you almost lost your freedom. You understand me?"

[11] As regards Graham, the trial judge said:

"THE COURT: Twenty years of age. Look, they gave your occupation as unemployed. You told the police you are unemployed -- at the time?

A: Yes, sir.

THE COURT: That is even worse -- unemployed but you got a gun. I thought you would look for a job and leave out the gun.

A: Sir, the --

THE COURT: I don't understand it. That would show you how plentiful these things are out there. I don't know where they are coming from. Mr. Graham you know that you shouldn't have a gun in the shed or any place else. You know that?

A: Yes, sir.

THE COURT: Now the question it what to do with you? Look, the Court of Appeal says that when you have guns it is straight to prison. You understand that?

THE COURT: Alright, I will put it the other way: When you cut a lot of grass, how much money you make?

A: Sometimes I could make $200 --

THE COURT: Pardon me

A: I could make $300 for cutting a lot of grass.

THE COURT: $300 for cutting a lot of grass. And how long it takes you to cut a lot of grass now for $300?

A: Sir, about three or four hours.

THE COURT: I am not going to send you to prison, but I am afraid you will have to cut a lot more grass and I hope you cut grass day and night, because you are going to get a stiff fine.

This is a very serious offence and the law states it is a hundred thousand dollars or twenty years, or both. So you understand what you are looking at. You are only twenty. I only hope that you turn your life around.

A: Yes, sir.[5]

THE COURT: But you have one foot in Station Hill. Whether you go forward and go right in and stay in there, or you turn around and come back - it is up to you, but I am going to help you to come out now, but don't come back. Do not come back. As I said I am going against the guidelines set down by the Court of Appeal, but I don't think they see these young people who come before this court – young – 20 years with no job but a gun. I think your priority is wrong. You should look for a job, not a gun. I think your priority is wrong.

You are fined ten thousand dollars in 18 months, or five years imprisonment on the first count.

You are further fined twenty-five hundred dollars in 18 months or three years imprisonment.

Mr. Graham, let me tell you, you went very, very, very near to getting locked up for years. You understand that?

A: Yes, sir.

THE COURT: If I were you, I would really use these words and I quote you. If I were you, from now on, "I will try my best to make a better life for myself".

A: Yes, sir.

THE COURT: I hope you meant that. Very well."

The Applicable Law

[12] (A) "Unduly Lenient"

The Act of 2000 is the starting point. This is new legislation whose effect is to give the prosecution the authority, for the first time, to challenge the imposition of a sentence where the Director of Public Prosecutions thinks that that sentence was unduly lenient. A convicted person has long had the right to appeal a sentence which, in his opinion, was excessive. All that the amending legislation seeks to achieve is to have the balance between the prosecution and defence redressed; to balance the scales more evenly.

[13] What is meant by 'unduly lenient'? There are two views of the true test, the one more nebulous than the other but both are similar in effect.

In Attorney General's Reference (No.4 of 1989)(1990) 90 Cr.App.R.366, the English Court of Appeal, pronounced upon section 36(1) of the Criminal Justice Act, 1988 whose terms are virtually in pari materia with section 36B(1) of The Act of 2000.[6]

Lord Lane CJ stated the test of undue leniency at page 371.

"A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection, regard must of course be had to reported cases, and in particular to the guidance given by this Court from time to time in the so-called guideline cases. However, it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature."

[14] The Court of Appeal made two observations about the relevant section. First, it is implicit in the section that a Court of Appeal "may only increase a sentence where it concludes that the sentence was unduly lenient." It is not the intention of Parliament to expose defendants to the risk of an increase in sentence merely because in the opinion of the Court of Appeal the sentence is less than the Court of Appeal would have imposed. Secondly, "even where the Court of Appeal considers the sentence to be unduly lenient, the Court of Appeal still has a discretion as to whether to exercise its powers."

Most importantly, the Lord Chief Justice was at pains to explain that the Court of Appeal might refuse to increase an unduly lenient sentence "where, in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned."

[15] In 1993 Lord Taylor CJ invoked a slightly different test. He said at p.327 of Attorney General's Reference (No.15 of 1992)(19993) 14 Cr.App.R. (S.) 324:

"We bear in mind that judges have a discretion to pass sentences which they consider appropriate in the circumstances of individual cases and one must not regard the sentences in other cases, even in guideline cases, as being rigidly and unvaryingly bound to be followed.

However, in the present case, bearing that in mind, we ask ourselves whether public confidence in criminal justice could be maintained if the public were aware of [7] the circumstances of this case and the sentence which was passed."

[16] (B) The Firearms Act 1998-32

We do not accept Mr. Pilgrim's submission that none of us is competent to determine the intention of Parliament when it passed the Firearms Act 1998. As judges it is precisely one of our functions to seek to ascertain the intention of Parliament when we are called upon to interpret an Act of Parliament. That is elementary law. Indeed for many years now judges all over the Commonwealth have been applying a purposive rule to the interpretation of statutes. And, for as much as we are authorized by the decision in Pepper v. Hart [1993] 1 All.E.R. 42 to resort to Hansard as an aid in interpretation of statutes, we eschew an embarkation upon such an exercise in this case. We have no doubt whatsoever that the intention of Parliament was plain when it passed the Act in 1998.

[17] We reiterate what we said about the intention of Parliament when it passed the Firearms Act in Jerome Bovell (Criminal Appeal No.23 of 2000) at paragraphs [65] to [70] thereof.

"[65] Parliament, in 1998, repealed the then Firearms Act, Cap. 179 which had been first enacted in 1896. It was a short Act of 14 sections and the maximum penalty for possession of an unlicensed firearm was $5 000 or 12 months' imprisonment on summary conviction. There was no provision for trial on indictment and the penalties mentioned were set in 1978.

The 1998 Act

[66] It was in direct response to an upsurge in violent crime in the decade of the nineties, that a new Firearms Act was enacted in 1998. This Act came into force after an amnesty was offered for persons to hand in illegal firearms. The Royal Barbados Police Force received 104 firearms under the amnesty.

[67] Parliament obviously felt so strongly about the use and abuse of firearms in this society that it legislated very severe penalties. Thus, for example, possession of a firearm with intent to endanger life or cause serious injury, is punishable on conviction on indictment with a maximum fine of $150, 000 or a term of imprisonment of [8]

25 years or both – (section 18). Similar penalties are liable to be imposed for possession of a firearm or imitation firearm with intent to resist arrest – (section 19) and for possession with intent to commit an indictable offence – (section 20). Possession without a valid licence carries a fine on conviction on indictment of $100, 000 or liability to 20 years' imprisonment or both – (section 3(2)). It is significant that the Act makes no provision for any of these offences to be tried summarily.

[68] Moreover, section 30 provides for mandatory imprisonment in respect of conviction on indictment in certain circumstances. It is enacted as follows:

"30(1) A person found guilty of an offence under this Act other than an offence under section 29 or an offence for which a penalty has been provided, shall

1. on conviction on indictment

1. in the case of a first offence, except as provided in sub-paragraph (ii), be sentenced to imprisonment for not less than 5 years and not more than 15 years; and

2. in the case

1. of a second or subsequent offence; or

2. of a first offence committed by a person who, prior to the commencement of this Act was convicted of an indictable offence, or an attempt to commit an indictable offence, in the course of which or during his flight after the commission of the offence, he used a firearm,

be sentenced to imprisonment for not less than 10 years and not more than 20 years.

Reading the Act as a whole, it is clear that Parliament, as a general rule, intended firearm offences to carry custodial sentences."

[69] These heavy penalties reflect Parliament's view of the seriousness of firearm offences and we should add that the Penal System Reform Act 1998-50 which [9] introduced a new penal philosophy in Barbados also enjoins sentencers to pay regard to offence-seriousness as the criterion for the imposition of custodial sentences – See the observations of this Court in Romain Bend and Rodney Murray (Criminal Appeals Nos.19 and 20 of 2001).

[70] During the last two years an increasing number of cases is being prosecuted indictably with the obvious intention of seeking the High Court's superior powers of punishment. However, it has to be said that sentencing practices in the High Court reveal a disconcerting inconsistency to which we referred earlier. We can do no better than adopt the words of Lord Bingham CJ in Tony Avis (cited supra) at p.185. They exemplify the present situation in Barbados. His Lordship noted that:

"Some of the sentences imposed for firearms offences in the recent past have failed to reflect the seriousness of such offences and the justifiable public concern which they arouse."

We have surveyed the firearm cases dealt with in the High Court for the period 2000 to March 2002. The following are the facts."

[18] In paragraphs [74] to [77] and [81] to [82] of Bovell, we also observed:

"[74] There is no right for ordinary citizens of Barbados to bear arms. It has been totally against the culture and social norms of this country for persons to have and use unlicensed firearms indiscriminately or at all. Possession of a firearm is only legal if the holder has a valid licence entitling him to use or carry it. The proliferation of gun use and abuse in this country is a comparatively recent phenomenon. Firearms, even imitation firearms, engender a sense of fear in citizens and their fear of crime is heightened sometimes to the point of hysteria.

[75] The unlawful possession and use of firearms is a grave source of danger to society. They can and are used to take life, cause injury and further the commission of other offences. There is unchallengeable evidence that firearms are the handmaiden of the illicit drugs trade and are used wantonly by rival gangs of youth. Their increased proliferation in Barbados is not a singular experience.

[76] Every Commonwealth Caribbean country is reporting similar experiences. So too is the United Kingdom. Indeed, in Tony Avis, Lord Bingham CJ [10] reviewed the statistics for the period 1991 to 1996 and revealed at p. 180 that:

"Those convicted on indictment of possessing firearms with intent to endanger life have risen from 33 in 1991 to 207 in 1996. Those convicted of possessing or distributing prohibited weapons or ammunition have risen from 202 in 1991 to 1002 in 1996."

[77] His Lordship observed that the sharp increase "accords with the subjective impression formed by a number of judges that cases involving the use of firearms come before them much more frequently than was once the case…." The Barbados experience is identical.

[81] The clear purport and intent of the Firearms Act, 1998-32 is to treat firearm offences as very serious offences and to visit them with severe penalties. We are fortified in this opinion also by the fact that in December 2000, Parliament legislated to deny bail to persons brought before Magistrates on charges under sections 18, 19 and 20 of the Firearms Act 1998 – See The Bail (Amendment) Act, 2000-26.

[82] It seems to us, upon a review of the Acts referred to from paragraph [65] et seq of this judgment, that Parliament was not only marking down its abhorrence to illegal firearms but also sending a clear message that firearm offenders be kept off the streets. A person in possession of an illegal firearm is a potentially violent person and a potential menace to society."

[19] A reading of the judgment of Bingham LCJ in Tony Avis [1998] 2 Cr.App.R.(S) 178 – and which neither side argued in these references – illustrates the process of reasoning by which his Lordship concluded at p.186-187 that:

"Save for minor infringements which may be and are properly dealt with summarily, offences against these provisions (i.e. the English Firearms Act 1968 as amended in 1994), will almost invariably merit terms of custody, even on a plea of guilty and in the case of an offender with no previous record." (Our emphasis)

[20] The Lord Chief Justice pointed out that there was a clear public need to discourage the unlawful possession and use of firearms and the courts should treat any offence against certain provisions of the legislation as serious given that clear public need "and the intention of [11] Parliament expressed in a continuing increase in maximum penalties." (Our emphasis). Thus, in England, the courts were able to interpret Parliament's intention to penalize offenders with custody through an examination and analysis of the magnitude of the penalties imposed by the legislation.

[21] (C) Guideline Cases

At paragraph [80] of Bovell (supra) this Court, in exercise of one of its duties as an appellate Court, took the opportunity on April 23, 2002 to issue guidelines to be followed in firearm cases. We set the ranges of terms of imprisonment applicable to various offences under the Firearms Act but allowed for exceptions. Hence, we were careful to say:

1. "except in very special circumstances and for very compelling reasons, a custodial sentence should be imposed for offences committed contrary to sections 3, 18, 19, 20 and 21 of the Firearms Act".

2. "where it is the court's view that a fine would meet the justice of the case, such fine should be substantial and payable within such short enough period as would bring home to the offender the gravity of the offence and the efficiency of the criminal justice process".

At paragraph [84] we identified the purpose of the guidelines in these words:

"84] [T]he guidelines in this case are designed to establish a sentencing pattern for firearm offences. They aim at setting the general tariff without unduly fettering individual judicial discretion…"

[22] Guidelines are issued to develop more principled sentencing guidance. Professor Martin Wasik in the fourth edition of Emmins on Sentencing (p.373) states that:

"The main function of the guideline judgment is to direct the sentencer towards the correct sentencing bracket or 'starting point', and to identify relevant aggravating and mitigating factors."

And he reminds us that "guideline judgments are of greater significance as precedents than other sentencing appeals, and they [12] form the basis for the sentencing pattern for a particular type of offending."

[23] Similarly, no less an authority on sentencing than Professor Andrew Ashworth, Vinerian Professor of English Law at the University of Oxford, also remarks at pp.30 and 31 of his book Sentencing and Criminal Justice (Third Edition 2000):

"Of particular importance as precedents are guideline judgments…A guideline judgment is a single judgment which sets out parameters for dealing with several variations of a certain type of offence, considering the main aggravating and mitigating factors, and suggesting an appropriate starting point or range of sentences….These judgments acquire authority from the fact that the Lord Chief Justice laid them down: they are intended to bind lower courts, and are treated as doing so….The key is that they are intended and accepted as binding, in a way that most Court of Appeal judgments on sentence are not. Guideline judgments are not, however, to be construed strictly."

[24] As Lord Taylor put it in an extra-judicial speech, "guideline cases merely set the general tariff, but judges are free to tailor the sentence to the facts of the particular case."

[25] Similarly, Lord Bingham in his extra-judicial work The Business of Judging, referred to the usefulness of guideline judgments at p.46. His Lordship said:

"When, twenty years ago, Lord Widgery LJ spoke of the well known duty of the Criminal Division to lay down principles and guidelines to assist sentencers of all grades in the application of the discretion which the imposition of sentence requires, he was speaking no less than the truth….The introduction of principle into this field, will, I think, be seen as the enduring and in many ways personal achievement of the present Chief Justice. This is a development to be wholeheartedly welcomed. Without explicit guidelines there can be no informed public debate on sentencing practice, and the appropriate punishment of offenders against society is a proper matter for consideration by society. Such consideration is no more an encroachment on the judges' independence than the prescription of maximum penalties by statute, which has always of course been accepted. It is absurd to suppose that judges could properly have a sentencing policy of their own independently of the society of which they form a part….The upshot of all these developments is certainly not that the sentencer has lost his discretion. He has not. The guideline cases are only guidelines."[13]

And at p.309, His Lordship issued a timely reminder.

"Since any judicial officer in passing sentence exercises authority conferred by the public the sentencer must always have regard to the public interest. It is important to maintain public confidence in the justice and effectiveness of the sentencing process. If, for instance, informed public opinion perceives that the sentences which are imposed fail to match the gravity of the crimes committed, then the public will be tempted to take the law into their own hands and resort to private vengeance. This is a form of civic breakdown."

[26] In 1994 the English Court of Appeal dealt with a case where a trial judge had flouted guidelines. That was the case of David Angus Johnson (1994) 15 Cr.App.R.(S) 827. Roch LJ stated at p.830:

"The decisions of this Court are no more than guidelines to judges who have the task of sentencing in the Crown Court. Within the guidelines there is a great deal of flexibility. This Court recognizes that a sentencing judge will take into account many factors in arriving at a proper sentence. The judge may have in mind that a particular offence is too prevalent in the area in which the judge sits and stiffer sentences are therefore called for, or that the judge having seen and heard the evidence has concluded that the offence has had a particular distressing effect on the victim or that the perpetrator of the offence has behaved in an especially vicious manner. Nevertheless, a judge when sentencing must pay attention to the guidance given by this Court and sentences should be broadly in line with guideline cases, unless there are factors applicable to the particular case which require or enable the judge to depart from the normal level of sentence. In such special cases the judge should indicate clearly the factor or factors which in his judgment allow departure from the tariff set by this Court. What a judge must not do is to state that he is applying some personal tariff because he considers the accepted range of sentences to be too high or too low." (Our emphasis)

[27] By way of guidance to trial judges we also think it prudent to cite a comment of the English Court of Appeal in Lane v. Willis [1972] 1 WLR 326 admonishing Lawson J who, at first instance refused to follow a principle of law enunciated by the Court of Appeal. Davies LJ was moved to comment at p.332 "F":

"It is unusual, and, I am bound to say, undesirable, in my opinion, for a judge sitting at first instance….to express [14] the opinion, though accepting that he is bound by it, that a decision, and a fairly recent decision, of this court was wrong."

The Respondent's Arguments

[28] Mr. Pilgrim submitted, without much argument and less authority, that the Act of 2000 violates section 18(4) and (5) of the Constitution. In addition, he submits that the Bovell guidelines have a similar effect in respect of persons charged prior to the date of the guidelines (i.e. April 23,

2002). A determination of the constitutionality or otherwise of the Act of 2000 requires an analysis and construction of it. We shall approach that question by considering the two subsections of section 18 and, thereafter, by a consideration of the new legislation itself.

Section 18(4)

[29] Section 18(4) of the Constitution is in these terms:

"No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is more severe in degree or nature than the most severe penalty that might have been imposed for that offence at the time when it was committed." (emphasis supplied)

[30] This provision of the Constitution had its genesis in Article 11(2) of the Universal Declaration of Human Rights adopted and proclaimed by the U.N. General Assembly resolution 217 (A) III of December 10, 1948 where it is provided as follows:

"2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than one that was applicable at the time the penal offence was committed."

[31] Subsequently, the European Convention for the Protection of Human Rights and Fundamental Freedoms imported similar notions in Article 7(1) when that Convention entered into force on December 20, 1971, as did the International Covenant on Civil and Political Rights which entered into force on March 23, 1976. – See Article 15(1).

[32] These provisions all have the objective of preserving the well known presumption of statutory interpretation that a statute should not be so [15] interpreted as to give it retrospective effect. They are directed to invalidating laws passed after an offence has been committed and which retrospectively increase the penalty that may be imposed for that offence. So that where a statute increases the penalty for an existing offence, the increased penalty will not apply to a defendant who committed an offence prior to the date of commencement of the statute – See, for example, R. v. Wright (1972) 18 W.I.R. 302 where the Court of Appeal of Jamaica explained the history and operation of section 20(7) of the Constitution of Jamaica which embodies the general principle, and Baker v. R. (1975) 23 W.I.R. 463.

[33] In the recent decision of the Judicial Committee of the Privy Council, Albert Huntley v. A.G. (1994) 46 W.I.R. 218, Lord Woolf, delivering the unanimous advice of the Board, commented on section 20(7) of the Constitution of Jamaica thus:

"Section 20(7) of the Constitution is designed to protect individuals against retroactive penal laws. A similar provision can be found in the various international declarations of human rights. Their purpose is reflected in a decision of the Supreme Court of the United States, Ex parte Medley, 134 U.S. 835 (1889). In that case in giving the opinion of the court, Justice Miller, after dealing with earlier authorities on an "ex post facto law", said (at p. 840):

"Any law passed after the commission of the offence for which a person accused of crime is being tried which inflicts a greater punishment on the crime than the law annexed to it at the time when it was committed or which alters the situation of the accused to his disadvantage is an ex post facto law."

[34] Counsel's submissions are fallacious and unmeritorious. Gilkes' two offences were committed on August 22, 1999; Graham's were committed on November 19, 2001. The Firearms Act 1998 came into force on November 1, 1998, that is to say, prior to the dates of commission of the offences. Between the dates of commission of the offences and the dates of conviction and sentence, the penalties attributable to breach of section 3 had not changed. They remained as originally passed by Parliament. Those penalties are a maximum fine of $100, 000 or imprisonment for 20 years or both upon conviction on indictment.[16]

[35] We do not believe that there is any adult in Barbados who is unaware of the stiffer penalties enacted in the Act. The Act was given wide publicity and an amnesty was offered to the holders of unlicensed firearms to turn them in to the police. All of that pre-dated the proclamation of the Act. The respondents were sentenced under the authority of a statute which had been in force for nearly 4 years and under which a large number of offenders had already been imprisoned. The simple answer to Mr. Pilgrim's submissions is that at the time of commission of the offences, each of the respondents was liable to be sentenced to a maximum fine of $100, 000 or to a maximum custodial sentence of 20 years or both. The trial judge referred to the penalties and thought that a monetary penalty was appropriate.

[36] With regard to the guidelines, to the extent that they were applicable, they would only have had the effect of assisting the trial judge in determining the proper sentence in the exercise of his sentencing discretion. They would have pointed him to the appropriate tariff or bracket within the range of the minimum and the maximum statutory sentence. Thus, in so far as the guidelines do not call for the imposition of sentences outside the statutory limits, but leave it to the trial judge to use his discretion within the minimum and maximum ranges, it cannot be seriously contended that they offend the principle against retroactivity of penal laws and are unconstitutional. In our judgment, the Criminal Appeal (Amendment) Act 2000-5 does not violate section 18(4) of the Constitution.

Section 18(5)

[37] We turn now to section 18(5) of the Constitution. There it is provided as follows:

"(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal proceedings relating to the conviction or acquittal." (Our emphasis)[17]

Section 15(1) of Cap.113A embodies the exception envisaged by section 18(5) of the Constitution and itself enacts the power of retrial granted

by the Constitution as follows:

“15(1) Where the Court allows an appeal against conviction under section 4 and it appears to the Court that the interests of justice so require, the Court upon quashing the conviction and any sentence passed thereon may order the appellant to be retried.”

The limitations on that power of retrial are provided for in section 15(2).

[38] Historically, this constitutional provision can be shown to exist in the vocabulary of international human rights declarations. Thus Article 14(7) of the International Covenant on Civil and Political Rights states:

“7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

[39] Long before the advent of the international treaties on human rights, the common law had two well settled doctrines which afforded a defendant the right to plead that he had previously been dealt with for the same offence. Those were the doctrines of autrefois convict and autrefois acquit. In a quite brilliant and thorough historical survey in Connelly v. D.P.P. [1964] 2 All.E.R. 401, Lord Morris of Borth-y-Gest traced the origins and development of the two doctrines. He demonstrated their existence at common law from the earliest writings of Coke, Blackstone and Hale in the 18th century and their evolution through a long list of cases in subsequent centuries. Those doctrines rest upon the principle enshrined in the Latin maxim – nemo debet bis vexari pro eadem causa. Ultimately, Lord Morris identified nine “governing principles at p.412 and stated that the first governing principle is that a person may not be tried for a crime in respect of which he has previously been convicted or acquitted.

[40] The constitutional provision therefore enacts what has come to be known as “the rule against double jeopardy”. In this region, the Judicial Committee of the Privy Council considered the operation of this rule in D.P.P. v. Nasralla (1967) 10 W.I.R. 299. That was a case [18] in which the Court of Appeal of Jamaica had ordered a retrial of Nasralla in circumstances which he claimed involved a contravention of section 20(8) of the Constitution of Jamaica. That section is similar to section 18(5) of the Barbados Constitution. The Board had to determine whether Nasralla’s rights were governed by section 20(8) or by the common law rule.

[41] Lord Devlin delivered the advice of the Board and pointed out that section 20(8), (like section 18(5) of the Barbados Constitution), forms part of Chapter III of the Constitution which enshrines the fundamental rights of the individual.

His Lordship said at page 303:

“This chapter proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. (Our emphasis) The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed.”

The Board therefore rejected the argument that the expression “any law in force immediately before the appointed day” was restricted to statute law and did not include the common law doctrine of autrefois acquit because it was not embodied in a statute.

[42] Specifically, section 18 of the Constitution as a whole secures the right of the individual to the protection of the law. The entire section draws upon the various treaty declarations of human rights and incorporates at least nine basic and universal norms for the protection of persons charged with criminal offences.

[43] Lord Wilberforce in Minister of Home Affairs v. Fisher (1979) 44 W.I.R. at 107 recommended “a generous interpretation (of Chapter III) avoiding the austerity of tabulated legalism” in order to provide the individual with the full measure of the fundamental rights and freedoms secured to him. See also, Lord Keith, rendering the advice of the Judicial Committee of the Privy Council in the case of Attorney General v Whiteman (1991) 39 W.I.R. 397, where he said at p.412:

“The language of the Constitution falls to be construed not in a narrow and legalistic way, but broadly and [19] purposively, so as to give effect to its spirit and this is particularly true of those provisions which are concerned with the protection of human rights…..”

So that we are in no doubt that we must accord section 18(5) a generous interpretation.

[44] We are obliged however, to make certain observations on section 18(5). It is to be observed that, in its natural grammatical language and meaning, unlike section 11(h) of the Canadian Charter of Rights – which was the only authority cited to us by Counsel - the Barbados section does not include a reference to punishment. The Canadian section states:

“11. Any person charged with an offence has the right –

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.”

[45] In our opinion the plain language of section 18(5) limits the rule against double jeopardy to conviction or acquittal. It does not refer to a “sentence” or “punishment”. But even if we applied a fair, large and generous interpretation to the section and held that a concept of double “punishment” was implicit in the section, we are still of the view that the Act of 2000 does not infringe that section of the Constitution as we shall go on to explain.

[46] Section 18(5) expressly preserves the power of a superior court in the course of an appeal relating to the conviction or acquittal to order a

retrial. To that extent, section 18(5) as part of the supreme law of Barbados specifically empowers the Court of Appeal to order a retrial, notwithstanding the rule against double jeopardy.

[47] Moreover, it has never been doubted, prior to Independence and subsequent thereto, that in exercising a right of appeal to the Court of Appeal against a sentence, there is always the possibility that the sentence may be decreased or increased. This was a power vested in our courts prior to Independence. Thus, when appeals in criminal cases went to the Federal Supreme Court between 1958 and 1962, Regulation 22(3) of the Federal Supreme Court Regulations, 1958 (S.I. 3 of 1958) provided: [20]

"(3) On an appeal against sentence the Federal Supreme Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

[48] Since Independence we are now governed by the Criminal Appeal Act, Cap.113A. Section 14 of that Act enacts:

"14. On an appeal against conviction or sentence, the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence authorized by law, whether more or less severe, in substitution therefor as it thinks ought to have been passed; but in no case shall any sentence be increased by reason or in consideration of any evidence that was not given at the trial."

Under the Schedule to Cap.113A, a person convicted on a retrial is liable to "any sentence authorized by law to be imposed upon a conviction for that offence." Thus, a retrial carries with it the double jeopardy of liability to both conviction and sentence sanctioned however, by the exception to section 18(5) of the Constitution.

The Act of 2000: Is it constitutional?

[49] In the interpretation of a statute alleged to be in contravention of a Constitution, we begin with the presumption that the statute is valid. According to that presumption of constitutionality, Parliament is presumed to have intended the statute to be in harmony with the Constitution. This presumption is underpinned by the Latin maxim 'ut res magis valeat quam pereat' (the matter ought to be treated as valid rather than destroyed). So we should try to interpret the statute in such a way as would ensure its harmony with the Constitution.

[50] Turning now to an interpretation of the Act of 2000, the first observation we make is that in public law there is usually a distinction between "appeal" and "review". As a general rule, the right of appeal is statute-based whereas a right of review is a supervisory jurisdiction developed by the common law. Of course a statute can expressly create a power of review – See, for instance, section 3 of the Administrative Justice Act, Cap. 109B. The Constitution in section 18(5) speaks of "appeal proceedings". On the other hand, the Act of [21] 2000 empowers the Court of Appeal "to review the sentencing". Does such variation in nomenclature affect the constitutionality of the Act of 2000? The answer is to be found in the content of the statute.

[51] Section 36B(1) of the Act (paragraph 3 supra) does not empower the Court of Appeal to adjudicate the guilt or innocence of the person whose sentence is being reviewed. It merely asks the Court to review the matter of sentence. The conviction is unalterable. The task of the Court of Appeal is no more and no less than is the case where the convicted person appeals on the ground that the sentence is excessive. The Court hears submissions and argument, sometimes supported by the precedent of other cases, contending for the conclusion that a particular sentence is, in all the circumstances, excessive.

[52] We conceive the function of the Court of Appeal under the new powers granted in the Act of 2000 to be entirely similar to an appeal by a convicted person against the severity of a sentence, except of course, that the Court of Appeal asks itself the question: " Is this sentence unduly lenient?" In substance this power of review is in no way different from the hearing of an appeal against sentence.

[53] As we have shown under the Federal Supreme Court Regulations, that Court had the power, if it thought that a different sentence should have been imposed, (a) to quash the original sentence and (b) to pass such other sentence warranted – whether more or less severe - in substitution for the quashed sentence. It is the same under section 14 of the Criminal Appeal Act, Cap. 113A. (See paragraph 48 supra). Under the Act of 2000, the Court of Appeal is now given the same powers to impose a different sentence as were available to the Federal Supreme Court prior to Independence – See section 36(b)(1)(a) and (b).

[54] Thus, it is our considered opinion that the content of the powers invested in the Court of Appeal by the Act of 2000 is not materially different from the powers always vested in the Federal Supreme Court. The only difference between the Act of 2000 and the other legislation to which we have adverted is that the Crown is now given the right to challenge a sentence.[22]

[55] Such a new right given to the Crown can hardly render the Act of 2000 unconstitutional. Indeed, if authority were needed, we would refer to Mistretta v. U.S., 488 US 361 (1989).

In Mistretta, the United States Supreme Court held on January 18, 1989, that the Sentencing Reform Act of 1984 was not unconstitutional. Inter alia, that Act created the U.S. Sentencing Commission with power to promulgate binding sentencing guidelines and it authorized limited appellate review of the sentence. The Supreme Court held as valid and constitutional the provisions in the Act which permitted a defendant to appeal a sentence above the defined range and the Government to appeal a sentence below the defined range – (notions of excessiveness and undue leniency).

[56] Before we leave the constitutionality or otherwise of the Criminal Appeal (Amendment) Act 2000-5, we must cite section 26 of the Constitution. This section preserves the validity of written laws passed prior to Independence to the extent that such laws may be in contravention of sections 12 to 23 (including section 18(5)) of the Constitution. This is what it says:

“26(1) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or

in contravention of any provision of sections 12 to 23 to the extent that the law in question –

(a) is a law (in this section referred to as “an existing law”) that was enacted or made before 30th November 1966 and has continued to be part of the law of Barbados at all times since that day;

(b) repeals and re-enacts an existing law without alteration; or

(c) alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which, or to an extent to which, it was not previously so inconsistent.

(2) In subsection (1) (c) the reference to altering an existing law includes references to repealing it and re-enacting it with modifications or making different provisions in lieu thereof, and to modifying it; and in subsection (1) “written law” includes any instrument having the force of law, and in this subsection and [23] subsection (1) references to the repeal and re-enactment of an existing law shall be construed accordingly.”

[57] On the basis of the foregoing examination of the Constitution, the Criminal Appeal Act and the Regulations of the Federal Supreme Court, and giving them a liberal and purposive construction, it is our judgment that the Act of 2000 does not violate section 18(5) of the Constitution. The laws of Barbados, prior to Independence and subsequent thereto, have always provided for the possibility of an increase in sentence upon appeal and the very Constitution itself enacts an exception to the rule against double jeopardy. The pre-Independence laws have been saved by section 26 of the Constitution and the Criminal Appeal (Amendment) Act 2000-5 does no more than give a statutory right to review a sentence. Liability to a more severe penalty has always been inherent in the powers of the Court of Appeal in Barbados.

[58] Next, Mr. Pilgrim submitted that, under the Act of 2000, the Director of Public Prosecutions is given superior authority to that of a High Court judge. He submits that, without having to apply for leave, the Director determines what is unduly lenient and proceeds to Court without more. This is an empty submission. It is true that in England under the equivalent legislation, it is the Attorney General to whom the authority to commence a reference is given. And, as we construe it, the requirement of leave is provided for in the legislation in England much like a provision for leave to bring judicial review proceedings under Order 53 of the Rules of the Supreme Court. It is incorporated in the statute as a kind of sieve to filter applications and to ensure that only applications of merit are brought. It was a matter entirely within the competence and authority of Parliament to determine whether leave should or should not be a pre-condition to an application for review. By parity of reasoning, we may observe that, likewise, under the Administrative Justice Act, Cap.109B, no leave is required to commence proceedings for judicial review under that Act.

[59] The final submission of Counsel for the respondents is that they are entitled to equal treatment with other offenders similarly charged. In Bovell we cited statistical data to show that, for the period January [24] 2000 to March 2002, forty-eight (48) cases under the Firearms Act were tried at the Assizes, and, there were 42 convictions. Of those convicted 28 were given custodial sentences whereas 14 were given non-custodial punishments. Those figures demonstrate a trend in favour of custodial sentences – a trend which we think properly accords with the intention of the legislature. They do not show a preference for non-custodial punishment. It appears to us that the majority of the judiciary have been leaning in favour of custodial sentences for breaches of the Firearms Act and the trial judge in these references has consistently been “the odd man out”. In 17 firearm cases heard by this trial judge at the Assizes for October 2000, April 2001, January and July 2002, only 4 persons were sentenced to a custodial term. The other 13 were given non-custodial penalties.

[60] It is precisely because of the dichotomy in sentencing for firearm offences that the guidelines were laid down. Inconsistency is itself a form of injustice. We repeat our concerns expressed in Bovell at paragraph 70:

“[70] During the last two years an increasing number of cases is being prosecuted indictably with the obvious intention of seeking the High Court’s superior powers of punishment. However, it has to be said that sentencing practices in the High Court reveal a disconcerting inconsistency to which we referred earlier. We can do no better than adopt the words of Lord Bingham CJ in Tony Avis (cited supra) at p.185. They exemplify the present situation in Barbados. His Lordship noted that:

“Some of the sentences imposed for firearms offences in the recent past have failed to reflect the seriousness of such offences and the justifiable public concern which they arouse.”

[61] But there is an angle to the argument about equality of treatment that must be considered. It was succinctly stated by the Court of Appeal for Bermuda in the recent case of R. v. Gershwyn Smith (Criminal Appeal No.4 of 2002). Smith had pleaded guilty to possession and cultivation of cannabis. In Bermuda, these offences would normally attract immediate custodial sentences. A trial judge “decided to depart from the norm” and imposed substantial fines payable within 2 months. The Court of Appeal of Bermuda allowed the appeal by the [25] Director of Public Prosecutions on the ground that the sentences were manifestly inadequate.

[62] In reversing the trial judge and imposing terms of imprisonment, (in effect 4 years for the two offences), the President of the Court of Appeal Sir James Astwood observed:

“The judge had to have a good reason to depart from what is expected, and he has not demonstrated to our satisfaction that he had such reason. To depart from the norm and make an exception in the respondent’s favour would lead other members of our community to feel a sense of grievance when they consider that the Respondent is treated differently from others who were sentenced for like offences.”

The D.P.P.’s Arguments

[63] Mr. Leacock Q.C. expressed dissatisfaction with the basis upon which the trial judge exercised his sentencing discretion. In particular, he contended that the trial judge was in error in ignoring the Bovell guidelines. It was also submitted that the trial judge had misdirected himself in

law in failing properly to interpret the intention of Parliament as expressed in the Firearms Act. Finally, it was the Director's contention that the non-custodial sentences did not reflect either the gravity of the offences or public concern about offences of their nature.

[64] There is substantial merit in the Director's submissions. It is trite law that a discretion should be exercised judicially. That simply means that the discretion should not be exercised on personal grounds: it should involve an exercise of judgment in accordance with legal principles.

[65] In Gilkes' case, the trial judge showed an awareness of the severity of the penalties in the Firearms Act and noted that the Bovell guidelines did allow for fines. Specifically saying so, the trial judge obviously took into account the fact that Gilkes was running a business and employing persons. Moreover, he seemed to take into account his earning capacity. In the circumstances, he thought that a fine was appropriate.

[66] In Graham's case, the trial judge imposed upon an occasional grass cutter who, to all intents and purposes, was an unemployed youth, [26] virtually the same fines as Gilkes and, one of the bases for the sentence was the judge's refusal to follow the guidelines because, according to him, he did not think that we in the Court of Appeal see unemployed youths with guns.

[67] We believe that the sentence on Graham was colourable by the importation of inappropriate, extraneous and irrelevant considerations which impugned the proper exercise of the discretion.

Conclusions

[68] (a) Re: Gilkes:

In Bovell this Court had anticipated that there would be cases in which the very facts would be such that to impose a custodial sentence would be unjust. Hence our acknowledgement that there might be "exceptional circumstances" and "compelling reasons" which would argue against custody. In regard to fines we expressed the hope that such penalties would be "very substantial and payable within such short enough period as would bring home to the offender the gravity of the offence and the efficacy of the criminal justice process." – paragraph 80.

[69] In light of the maximum statutory penalties enacted and the intention of the legislature, we are of opinion that the penalties imposed were unduly lenient to the extent that the time allowed for payment was excessively generous in respect of the illegal possession of a firearm. Fines of $10,000 payable in 6 months would more nearly have met the objectives of the legislation and ensured public confidence in the administration of justice.

[70] However, we are of opinion that, in the present peculiar post-trial circumstances, Gilkes' case merits a fine. He is a small businessman with a young family. Tragically, since he was sentenced, he has lost his home to fire. He now has to rebuild. He needs to continue in employment to pay the fines and to reconstruct his home for his family. We have to be concerned about the effect of imprisonment on Gilkes' family and domestic arrangements. Lord Lane (cited supra at paragraph 14) advised that "where, in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to[27] others for whose well-being the court ought to be concerned", a Court of Appeal might refuse to increase an unduly lenient sentence.

[71] Even though we think that the sentence in Gilkes was unduly lenient, having regard to the intent of the Firearms Act, the guidelines in Bovell and the trend towards custodial punishment as exemplified by the majority of judges in this Island, nevertheless because of the special unfortunate event that has befallen him since he was sentenced, we shall affirm the sentences as imposed by Garvey Husbands J.

(b) Re: Graham:

[72] There are no special circumstances or compelling reasons why Graham should not have been given a term of imprisonment. He was not obliged to have a gun. Therefore his crime was avoidable. No person in this country has a right to have a gun without a valid licence. He chose to flout the law of the land. Immediate custodial punishment should have been imposed for all the reasons we stated in Bovell. To suggest that he should not have been imprisoned because he is young and unemployed is an encouragement to the lawless that it is all well and good for the young and unemployed to have guns. It is a view from which we wholeheartedly dissent. The reasons proferred by the trial judge for the exercise of his discretion in favour of monetary penalties were altogether unsatisfactory. They were arbitrary and capricious thereby tainting the discretion itself. In our view the sentence was unduly lenient.

[73] Graham's plea of Guilty is a strong mitigating factor. We also take into account the fact that, as a human being, the stress and anxiety necessarily accompanying knowledge of these references must have caused him considerable anguish. We will discount his sentence also by reason of that consideration.

[74] In all the circumstances, the proper sentence which should have been imposed on Graham was at least six years' imprisonment. We now discount it by four years because of the guilty plea and the anxiety and stress factors associated with these references. To each of those factors we ascribe two years. We therefore quash the sentence imposed by the trial judge and, allowing "mercy to season justice",[28] this Court imposes a sentence of two years' imprisonment to run as from today on each charge, the terms to run concurrently.[29]

Chief Justice

Justice of Appeal Justice of Appeal