BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 14 of 2007

BETWEEN

ELVIS ERWIN ALEXANDER *Appellant*

AND

THE QUEEN *Respondent*

BEFORE: The Honourable Marston C.D. Gibson, Chief Justice, The Honourable Peter D.H. Williams and the Honourable Sandra P. Mason, Justices of Appeal

2011: 26 and 27 September; 2012: 7 March; 2014: 13 June

Mr. Ralph Thorne Q.C., Mrs. Sally Comissiong and Miss Michelle Forde for the Appellant
Mrs. Donna Babb-Agard Q.C., Deputy Director of Public Prosecutions for the Respondent
Miss Donna Brathwaite and Miss Roslind Jordan for the Attorney-General
Mr. Charles Leacock Q.C., Director of Public Prosecutions as amicus curiae

PETER WILLIAMS JA:

I. INTRODUCTION

[1] A determination is long overdue of the constitutional validity of the mandatory minimum sentences for firearm offences. It is the function of the courts to protect the fundamental rights and freedoms of the individual against legislation that requires sentences to be imposed which constitute inhumane or degrading punishment for the offence committed. The Constitution is the supreme law of Barbados and the judges should be the supreme guardians of the Constitution.

II. INDICTMENT

[2] The accused was indicted for two offences under the ***Firearms Act, Cap. 179*** (the ***Act***) as follows: first count, having in his possession a firearm, contrary to ***section 3(1)(b)(A)*** of the ***Act*** and second count, having in his possession ammunition, contrary to ***section 3(1)(b)(D)*** of the ***Act***. The particulars of the offences were that on the 12 January 2003 the accused had in his possession a .22 calibre rifle and two .22 calibre cartridges without a valid licence.

III. FIREARMS ACT

[3] The ***Act*** commenced on 1 November 1998 and was an act to revise the law relating to firearms. On 15 August 2003, it was amended by

the ***Firearms (Amendment) Act, 2002-12*** which commenced on that date. The ***Amendment Act*** increased the punishment for some offences and made a term of imprisonment mandatory for others. All references are to the ***Act*** as amended unless otherwise stated.

[4] The ***Act*** contains complicated sentencing provisions:

(1) Mandatory minimum sentences are provided in ***section 30*** in respect of convictions on indictment of three offences in relation to (i) prohibited weapons and ammunition (***section 3(9)***); (ii) a dealer's licence (***section 7(3)***); and (iii) the use of a firearm while committing an indictable offence (***section 29(1)***). There is also a fourth mandatory minimum sentence in respect of a conviction on indictment in relation to endangering life or safety (***section 21A***).

(2) Maximum fines and/or maximum terms of imprisonment are provided for in respect of convictions on indictment of four offences in relation to (i) possession of a firearm with intent to injure (***section 18***); (ii) use of a firearm to resist arrest (***section 19***); (iii) possession of a firearm with criminal intent (***section 20***); and (iv) the transfer or disposal of a licensed firearm (***section 24***).

(3) Maximum fines and/or maximum terms of imprisonment are provided in respect of summary convictions of five offences in relation

to (i) carrying a firearm in a public place (***section 21***); (ii) trespassing with a firearm (***section 22***); (iii) supplying a firearm to an incapacitated person (***section 25***); (iv) obstructing a police officer in search of a firearm (***section 26***); and (v) failing to produce a firearm licence or permit (***section 27***).

[5] In relation to the indictments in this case, ***section 3(1)*** provides that no person shall have in his possession any firearm or any ammunition unless he holds a valid licence to do so. "Firearm" and "ammunition" are defined in the ***Act***. It is not disputed that the police found a firearm and ammunition and that the accused did not hold a licence. ***Section 3(9)*** provides that a person who contravenes ***section 3(1)*** is guilty of an offence.

[6] ***Section 30*** provides for punishment of the offences charged as follows:

> "30.(1) A person who is guilty of an offence **under section 3(9)**, 7(3), or 29(1) **shall on conviction on indictment**
>
> *(a)* in the case of a first offence, except as provided in paragraph (*b*)(ii), **be sentenced to imprisonment for not less than 7 years** and not more than 15 years;
>
> *(b)* in the case of
>
> (i) **a second** or subsequent **offence**; or

> (ii) a first offence committed by a person who prior to the commencement of the *Firearms (Amendment) Act, 2002* was convicted of an indictable offence in the course of which or during his flight after the commission of which he used a firearm,
>
> **be sentenced to imprisonment for not less than 15 years** and not more than 25 years." (Emphasis added.)

[7] Prior to coming into force of the ***Amendment Act***, a person who had in his possession a firearm or ammunition was liable on conviction on indictment to a fine of $100,000 or to imprisonment for a term of 20 years or to both. However, the ***Amendment Act*** removed the option to impose a fine and the discretion to impose a term of imprisonment of less than 7 years for a first offence and 15 years for a second offence. ***Section 30*** of the ***Act*** as amended therefore provided mandatory minimum sentences of 7 or 15 years for possession of a firearm or ammunition. Further, the ***Act*** as amended does not, as in some jurisdictions, provide for an escape from the minimum sentence by an "exceptional circumstances" proviso, thereby permitting the court to take into account exceptional circumstances relating to the offence or the offender which would justify the court not imposing the mandatory sentence.

[8] An appeal to this Court is with leave of this Court when it is an appeal against sentence, not being a sentence specifically fixed by law (***section 3(3)(c)*** of the ***Criminal Appeal Act, Cap. 113A***). Although the ***Firearms Amendment Act*** stipulates a fixed sentence for this case, by ***section 3(3)(b)*** of the said ***Criminal Appeal Act*** an appeal to this Court is with leave also when it is an appeal on any other ground that appears to the Court to be a sufficient ground of appeal. A sufficient ground is the important constitutional point on the mandatory fixed sentence. Leave was therefore granted.

[9] On 12 September 2007, ***Blackman J*** sentenced the appellant to ten years' imprisonment for possession of the rifle and three years' imprisonment for possession of the ammunition, the sentences to run concurrently from 18 May 2007, the date of conviction. The sentences purported to comply with the ***Firearms Act*** before the ***Amendment Act***. The sentencing court was not made aware of the ***Amendment Act*** which was applicable at the time of sentence and which required the judge to impose a minimum sentence of 15 years' imprisonment for both offences because the appellant was being sentenced in respect of a second offence on indictment. Prior to the ***Amendment Act*** there was no mandatory minimum sentence for

possession; the court had power to impose a sentence or a fine or both. The court therefore did not take account of the applicable ***Amendment Act*** and in any event misapplied the ***Firearms Act*** prior to its amendment because there was no mandatory minimum sentence for possession prior to the amendment.

IV. APPEAL AGAINST SENTENCES

[10] The appeal against the sentences was argued "on the basis of the amended grounds filed on 26 March 2010". This judgment addresses Ground 6 which was as follows:

> "That the sentence imposed by the Court pursuant to Section 30 of the Firearms Act is invalid on the ground that the said Section 30 of the Firearms Act is inconsistent with the Constitution of Barbados, thereby rendering the sentence and the trial a nullity".

V. MANDATORY MINIMUM SENTENCES

(a) Separation of powers not determinative of issue

[11] The Constitution prohibits a person being subjected to inhuman or degrading punishment or other treatment. The prohibition has been interpreted widely as encompassing the principle that no one should be subjected to a grossly disproportionate sentence. This is a huge topic with a vast and varied jurisprudence in many jurisdictions. The discussion in this judgment must therefore inevitably be limited to the

simple facts of the offences and the applicability of mandatory minimum sentences to them.

[12] The doctrine of the separation of powers is a convenient starting point of the discussion. The structure of the Barbados Constitution is based on the separation of the functions of government between the legislature, the executive and the judiciary. The concept was explained by the Privy Council in the Jamaican Gun Court case of ***Hinds v. R. [1977] AC 195***. However, in practice there is frequently no rigid demarcation of functions and the three powers overlap and encroach upon each other. The demarcation of functions was recently discussed by ***Mendes JA*** in the Belize Court of Appeal decision of ***Zuniga and Others v. Attorney General of Belize (2012) 81 WIR 87*** at ***paragraphs [76]*** and ***[77]***.

[13] There is in our Constitution no absolute separation of powers in relation to punishment. The role of the three powers in relation to sentencing was neatly explained under the South African Constitution in ***Dodo v. State [2001] 4 LRC 318*** by the Constitutional Court. ***Ackermann J*** delivering the judgment of a panel of eleven judges stated as follows:

> "***[22]*** When the nature and process of punishment is considered in its totality, it is apparent that all three

> branches of the state play a functional role and must necessarily do so. No judicial punishment can take place unless the person to be punished has been convicted of an offence which either under the common law or statute carries with it a punishment. It is pre-eminently the function of the legislature to determine what conduct should be criminalised and punished. Even here the separation is not complete, because this function of the legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks are enforced through the courts.
>
> ***[41]*** **In modern constitutionalism a most important check on the legislature in this regard is an entrenched Bill of Rights enforceable through an independent judiciary. A Bill of Rights protects individual rights by limiting the power of the legislature**." (Emphasis added.)

The above statements are similarly applicable to the Barbados Constitution, which contains its own Bill of Rights in Chapter III headed Protection of Fundamental Rights and Freedoms of the Individual. Chapter III of the Constitution is part of the supreme law of Barbados. The rights which it protects take priority over all other laws.

[14] In summary, adopting the conclusion stated at **paragraph *[33]*** of ***Dodo***, the Constitution recognises the separation of powers but such separation does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed. Both

the legislature and the executive have a legitimate interest, role and duty in relation to the imposition and subsequent administration of penal sentences. However, the legislature or the executive must not infringe the authority of the courts to do justice or seek to compel the courts to pass a sentence which is inconsistent with the Constitution. It follows that a mandatory sentence does not necessarily infringe the principle of the separation of powers between the judiciary and the legislature though a particular mandatory sentence might be held to be disproportionate. The separation of powers doctrine is not decisive in determining the constitutionality of a mandatory minimum sentence legislated by Parliament.

[15] ***Section 48(1)*** of the Constitution provides generally for Parliament to make laws for the peace, order and good government of Barbados. This judgment has taken proper account of Parliament's constitutional function and has exercised due restraint in judicially scrutinising the legislation. It also considered the parliamentary debate on the ***Amendment Act*** which sought to justify the mandatory minimum sentences. The Government, in recognition of the threat of illegal firearms to the maintenance of law and order and to the preservation of security, intended to be "firm and harsh". The Opposition saw "no

fundamental reason" why it should oppose the legislation. It is fully appreciated that the legislation was a response to the concern and danger posed by the proliferation of illegal firearms and the increase in gun violence and other related criminal activity. The legislation was meant to denounce and deter gun-related crime by the certainty of the imposition of long mandatory minimum sentences thereby incapacitating offenders.

[16] However, legislative power is specifically made subject to the provisions of the Constitution. The power must not therefore be exercised so as to violate fundamental constitutional rights. ***Lord Diplock*** stated in ***Hinds*** (at ***page 213***) that the provisions in the Constitution dealing with fundamental rights and freedoms "impose a fetter upon the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers".

(b) Inhuman or degrading punishment

[17] The matter for determination therefore becomes whether the mandatory minimum sentences in ***section 30*** of the ***Act*** for possession of a firearm and ammunition violate the right of a person to be protected from inhuman or degrading punishment under ***section 15(1)*** of the Constitution, which provides as follows:

> "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment".

The dictionary meaning of inhuman is brutal, unfeeling and barbarous. Degrading is defined as lowering the estimation or self-respect of someone. In this case we are not concerned with the type of punishment but with the quantity of punishment. The constitutional prohibition against inhuman or degrading punishment has been held to incorporate the principle that the sentence must be proportionate to the seriousness of the offence. The principle of proportionality requires that there must be a reasonable relationship between the objective which is sought to be achieved and the means sought to achieve that end; a helpful exposition on the principle is to be found in ***"The Law of Human Rights"***, Edited by ***Clayton and Tomlinson***, ***Second Edition (2009)*** from ***page 323*** to ***354***.

[18] The principle is regarded as the main source of the prohibition against disproportionate sentences. The European Court of Human Rights has held that the infliction of arbitrary and disproportionate punishment can be regarded as inhuman or degrading and that such punishment will constitute a breach of Article 3 of the European Convention on Human Rights: see ***R. v. Lichniak, R. v. Pyrah [2003]***

1 AC 903 at ***paragraph 25***. The Privy Council stated in ***Aubeeluck v. State of Mauritius [2010] UKPC 13 (21 July 2010)*** that the purpose of the constitutional provision "is to outlaw wholly disproportionate penalties". Privy Council authority continues to be binding on this Court notwithstanding its replacement by the Caribbean Court of Justice (CCJ), until and unless the authority is overruled by the CCJ: ***Attorney-General v. Joseph and Boyce (2006) 69 WIR 104*** at ***paragraph [18]***.

[19] The other constitutional prohibition invoked in support of proportionate sentences is ***section 13(1)*** of the Constitution which states that:

> "No person shall be deprived of his personal liberty save as may be authorised by law".

This provision has been interpreted as a prohibition against deprivation of liberty in an arbitrary fashion. It has been stated that predetermination by Parliament of the sentence pays no attention to the individual offender or the circumstances of the offence. There is a view that a punishment may be inhuman or degrading because it is arbitrary.

(c) Proportionality is the test

[20] It has been stated that inhuman treatment involves the impairment of human dignity in some form and to some degree (***Dodo*** at ***[36]***). Punishment, especially imprisonment, constitutes a violation of an individual's right to liberty. In the instant case the right not to be subjected to inhuman or degrading punishment relates not to the imprisonment itself but only to the minimum prescribed term of imprisonment and therefore to freedom. As ***Ackermann J*** said in ***Dodo***:

> "***[26]*** In the field of sentencing, it can be stated as a matter of principle that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime."

[21] ***Ackermann J*** also explained in ***Dodo*** why a sentence that is disproportionate in relation to the offence and the offender is contrary to the offender's fundamental human rights, as follows:

> "***[37]*** The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue...The 'cause' justifying penal incarceration, and thus the deprivation of the offender's freedom, is the offence committed. 'Offence', as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a

> bearing on the seriousness of the offence and the culpability of the offender. **In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence**. (Emphasis added.)
>
> ***[38]*** To attempt to justify any period of incarceration ...without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity...Where the length of sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence...the offender is being used essentially as a means to another end and the offender's dignity assailed."

[22] It is important to distinguish between a sentence that is severe and one that is significantly out of proportion to the seriousness of the offence: see ***Human Rights and Criminal Justice, Third Edition (2012),*** Edited by ***Emmerson, Ashworth and Macdonald*** at ***paragraph 20-19***. The sentence must not be disproportionate; in most of the cases it is said that the sentence should not be "grossly" disproportionate and in others not "wholly" disproportionate. In ***Aubeeluck*** reference is made in ***paragraph 38*** to imprisonment that would be "wholly disproportionate" and to penal servitude that would be "grossly disproportionate". However, it does seem that the particular adjective used (if any) need not be material provided that

the circumstances of the case render the prescribed sentence unjust and one which the court should not impose. The sentence must constitute a just and proportionate punishment.

[23] The importance and significance of the principle of proportionality in imposing sentences is explained by ***Professor Andrew Ashworth*** in his book ***"Principles of Criminal Law", Sixth Edition (2009)*** at ***page 20***:

> "The aims of sentencing are not simply part of the background of the criminal law: they have implications for the shape of the criminal law itself. Thus proportionality should be a key element in the structure of the criminal law. It is a major function of the criminal law not only to divide the criminal from the non-criminal, but also to grade offences and to label them proportionately…Thus proportionality should have a central role, not only at the legislative stage of grading offences in the criminal law, but also at the judicial stage of passing sentence in individual cases."

[24] The Caribbean Court of Justice (CCJ) recently discussed and rejected the constitutionality of mandatory minimum fines in the appeal of the ***Attorney General of Belize v. Zuniga and Others CCJ Appeal No. CV8 of 2012***, ***unreported decision of 24 January 2014*** at ***paragraph [56]*** to ***[62]***. ***Saunders J*** in delivering the judgment of the Court stated at ***paragraph [61]***:

> "It is a vital precept of just penal laws that the punishment should fit the crime. The courts, which have their own

> responsibility to protect human rights and uphold the rule of law will always examine mandatory or mandatory minimum penalties with a wary eye. If by objective standards the mandatory penalty is grossly disproportionate in reasonable hypothetical circumstances, it opens itself to being held inhumane and degrading because it compels the imposition of a harsh sentence even as it deprives the court of an opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime."

[25] The general principle of proportionality, albeit in the context of public law, was the subject of detailed judicial consideration by the United Kingdom Supreme Court in the recent decision of ***Bank Mellat v. Her Majesty's Treasury (No. 2) [2013] 3 WLR 179***. The decision also highlights the importance of procedural fairness whereby a party to litigation is given the opportunity to make representation against the imposition of an order adverse to him. A convicted person who is subject to a mandatory minimum sentence has no effective means of making representation to have a sentence imposed below the statutory minimum.

[26] There are a number of cases from Commonwealth jurisdictions which inform the approach that should be taken to determine whether a mandatory minimum sentence is disproportionate. It has been held that it is necessary to consider first the facts of the particular case under review to determine whether there is great disparity between

the appropriate sentence and the mandatory sentence. It is thereafter necessary to consider hypothetical cases where the facts and circumstances may render the sentence grossly disproportionate.

[27] In this context, the case of ***State v. Vries [1997] 4 LRC 1*** was applied in ***State v. Lukuwa [2000] 1 LRC 600*** and referred to with approval in ***Dodo*** (at ***paragraph [32]***) and in ***Aubeeluck*** (at ***paragraphs 33*** and ***36***). The defendant in ***Vries*** was convicted of the theft of a goat. He had a previous conviction for the theft of a sheep. In the Magistrates' Court he was sentenced to a suspended period of 18 months' imprisonment. On review of his sentence by three judges of the High Court of Namibia, attention was drawn to the Stock Theft Act which provided for a mandatory minimum sentence of three years' imprisonment for a second offence and that such a sentence could not be suspended. The Court held that a sentence of three years would be grossly disproportionate. The sentencing section of the ***Act*** should therefore be "read down" and a sentence of six months should be imposed, which would be appropriate on the facts of the case.

[28] The headnote of ***Vries*** set out the test to be applied as follows:

> "Whether the minimum sentence imposed infringed the protection against cruel, inhuman or degrading treatment

guaranteed by the Constitution required a value judgment which could vary from time to time but which was one not arbitrarily but judicially arrived at by reference to prevailing norms. Parliament was empowered by the Constitution to pass legislation and was undoubtedly entitled to proscribe conduct as criminal and to determine punishment for conduct so proscribed. Legislative provision for a minimum sentence was not unconstitutional per se or in violation of the constitutional guarantee against cruel and unusual punishment. However, although judicial policy was generally opposed to mandatory sentences because they could bring harsh and inequitable results, none the less mandatory minimum sentences were not unconstitutional provided that they were considered to be appropriate sentences in all the circumstances. **In respect of mandatory minimum sentences, a test based on proportionality had evolved**, the same test that was originally used to determine whether a sentence was 'shocking', 'startlingly' or 'disturbingly inappropriate'. **The appellate court had to look at the facts of each case before it and determine what a proper sentence would have been. The appropriate sentence so determined had then to be measured against the mandatory one**. That the sentence was excessive in the view of the court hearing the matter was not sufficient to declare it unconstitutional. **If the comparison revealed disparity between the appropriate sentence and the mandatory sentence so great that it would warrant interference on appeal but for the statutory provision, then the constitutional guarantee would have been infringed. It then fell to be determined whether it was only the sentence imposed on the individual accused which needed to be struck down as unconstitutional, or whether the statutory provision itself was to be struck down. That involved an inquiry as to whether the imposition of a mandatory minimum sentence would be startlingly or disturbingly inappropriate with respect to hypothetical cases which could be foreseen as likely to arise commonly. If the latter was answered in the**

> **affirmative then the provision was unconstitutional**; if the sentence legislated was not shocking in reasonable hypothetical cases it would not be impugned." (Emphasis added.)

[29] ***Lukuwa*** was sentenced to a compulsory minimum sentence of 10 years' imprisonment for possession of an AK 47 automatic firearm. He was a 21 year old first offender who made a living by ploughing fields; there was nothing on record to suggest that he intended to use the firearm to commit crimes. The High Court of Namibia held that the relevant section of the ***Arms and Ammunition Act, 1996*** should be "read down" by striking out the words "not less than ten years" so as not to violate the constitutional provision against "cruel, inhuman or degrading treatment or punishment". The sentence imposed was set aside and substituted with one of two years' imprisonment.

[30] The leading Canadian case on mandatory minimum sentences is ***R v. Smith [1987] 1 S.C.R. 1045***, a decision of the Supreme Court of Canada. The Court had to consider whether the mandatory minimum sentence of 7 years' imprisonment for the importation (of 7½ ounces) of cocaine prescribed by the ***Narcotics Control Act*** was contrary to section 12 of the ***Canadian Charter of Rights and Freedoms***, which provides that:

> "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." .

The Court adopted the "most innocent offender principle" and held that the minimum sentence for the importation of narcotics was "cruel and unusual" because, if it were imposed on a young person returning to Canada from a vacation with his or her "first joint of grass", it would be grossly out of proportion to the offence committed. The Court therefore declared that the minimum term must be of no force and effect. The appeal was allowed and the matter remitted to the British Columbia Court of Appeal for a reconsideration of the appropriate sentence.

[31] The Supreme Court set out the criteria to be adopted in determining whether the minimum term sentence violated the constitutional provision against cruel and unusual treatment or punishment at ***paragraph 45*** of the judgment as follows: .

> "(i) Is the punishment such that it goes beyond what is necessary to achieve a legitimate penal aim?
>
> (ii) Is it unnecessary because there are adequate alternatives?
>
> (iii) Is it unacceptable to a large segment of the population?

> (iv) Is it such that it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards?
>
> (v) Is it arbitrarily imposed?
>
> (vi) Is it that it has no value in the sense of some social purpose such as reformation, rehabilitation, deterrence or retribution?
>
> (vii) Is it in accord with public standards of decency or propriety?
>
> (viii) Is the punishment of such a character as to shock general conscience or as to be intolerable in fundamental fairness?
>
> (ix) Is it unusually severe and hence degrading to human dignity and worth?"

[32] A decision of the Supreme Court of Canada stressed the importance of applying principles of statutory interpretation to determine sentencing issues: ***R. v. Wust [2000] 1 SCR 455*** at ***paragraphs 23*** and ***34***. ***Arbour J*** also stated at ***paragraph 22***:

> "[I]t is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system."

A recent decision of the Court of Appeal for Ontario (five judges sitting) held that a mandatory three year minimum sentence for

possession of a loaded restricted or prohibited weapon was unconstitutional and of no force or effect because the sentence was grossly disproportionate to reasonable hypothetical fact situations: ***R. v. Nur, 2013 ONCA 677 (12 November 2013)***. A more recent decision of the Court of Appeal of Trinidad and Tobago (five judges sitting) held that for the crime of possession of a dangerous drug for the purposes of trafficking, a mandatory minimum penalty of a fine of one hundred thousand dollars ($100,000.00) and twenty-five years' imprisonment was a breach of the Constitution by permitting the imposition of a penalty "which is grossly disproportionate and inordinately excessive and which bears little or no relation to the crime committed": ***Barry Francis*** and ***Roger Hinds*** and ***The State, Criminal Appeal Nos. 5 & 6 of 2010 (14 February 2014)***.

[33] The Supreme Court of Canada has also given guidance on the burden and standard of proof to be applied under the ***Charter***. The authors of the book, ***"The Charter of Rights and Freedoms", Third Edition (2005),*** by the ***Hon. Robert Sharpe*** of the Court of Appeal for Ontario and ***Kent Roach*** of the Faculty of Law, University of Toronto, summarise the position in Chapter 4 D as follows:

> "The initial burden of proving a violation of rights rests with the individual asserting a *Charter* violation…Once a

> *prima facie* violation is proved, the burden shifts to the party attempting to justify the infringement as a reasonable limit. This means that the government has the burden of proof of establishing that limits on *Charter* rights are reasonable…The standard of proof is the standard used in a civil trial: proof on a balance of probabilities or preponderance of evidence."

[34] The commencement of the ***Penal System Reform Act, Cap. 139*** (15 May 2000) predated the ***Amendment Act*** (15 August 2003). The ***Penal System Reform Act*** set out the principles of judicial sentencing in relation to custodial sentences. However, the principles apply to custodial sentences other than those fixed by law (***sections 35(1)*** and ***36(1)***). Nevertheless, there are three key provisions in relation to custodial sentences: (i) restrictions on the imposition of custodial sentences unless (a) the offence was so serious to justify the sentence or (b) the offence was a violent or sexual offence requiring the public to be protected from the offender (***section 35***); (ii) the length of the sentence must be commensurate with [proportionate to] the seriousness of the offence (***section 36***); and (iii) procedural requirements to arrive at a fair sentence (***section 37***). It follows that mandatory minimum sentences of imprisonment will generally be inimical to the principles laid down in the ***Penal System Reform Act***.

[35] It has been held that the imposition of a minimum mandatory sentence breaches the offender's constitutional right to be afforded a fair hearing. The offender has no opportunity to present mitigating factors against the sentence and the judge has no discretion to impose a lesser sentence that may be appropriate to the circumstances of the offence and the offender. A mandatory sentence therefore negates the cardinal principle of individualised sentencing.

[36] It can safely be stated at this stage prior to the further discussion below that the 10 year sentence imposed in this case was arbitrary and grossly disproportionate to what a proper sentence should have been. It is not necessary to consider reasonable hypothetical fact situations as is done in the Canadian cases because in this jurisdiction there are actual cases in which judges have not imposed the mandatory minimum sentence which would have been disproportionate to the offence. Sentences were imposed of considerably less severity than the mandatory minimum in circumstances, for example, involving the possession of a small quantity of ammunition, possession of an antique firearm by an

elderly offender and where a woman with a clean record had fired shots in the air after a dispute with another woman about money.

(d) State's international human rights obligations

[37] Apart from the protection of fundamental rights and freedoms of the individual guaranteed by Chapter III of the Constitution, Barbados acceded to international human rights treaties as set out by the Privy Council in ***Boyce and Joseph v. R. (2004) 64 WIR 37*** at ***[16]*** to ***[20]*** and ***[81]***. Barbados also accepted the terms and principles set forth in international declarations to which it acceded. These instruments bind the Government as a matter of international law and impose on it international obligations.

[38] On becoming a member of the United Nations on 9 December 1966, Barbados accepted the Universal Declaration of Human Rights (1948). *Article 5* of the Declaration states:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

[39] On 5 January 1973, Barbados acceded to the International Covenant on Civil and Political Rights (1966) and to the (first) Optional Protocol to the International Covenant on Civil and Political Rights (1966). The Covenant entered into force on 23 March 1976 and the Optional

Protocol entered into force simultaneously with the Covenant. *Article 7* of the Convention states:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment..."

However, Barbados is not a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (which came into force in 1987). Barbados has failed to ratify an important international human rights treaty in spite of the recommendations of the United Nations Human Rights Council.

[40] On 15 November 1967 Barbados became a member of the Organization of American States (OAS) and in so doing accepted the American Declaration of the Rights and Duties of Man (1948). *Article XXVI* provides:

> "Every person accused of an offence has the right...not to receive cruel, infamous or unusual punishment."

The Declaration has been held by both the Inter-American Court and the Inter-American Commission of Human Rights to be binding on Members of the OAS.

[41] As a member of the OAS Barbados signed and ratified on 5 November 1981 the American Convention on Human Rights (1969)

which entered into force on 27 November 1982. Article 5 of the Convention entitled, *"Right to Humane Treatment"* provides that:

> "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment."

In June 2000 Barbados accepted the compulsory jurisdiction of the Inter-American Court of Human Rights.

VI. REDRESS

[42] ***Section 24*** of the Constitution provides for the enforcement of the fundamental rights and freedoms of the individual and for "redress" of the contravention of those provisions. The High Court (and this Court) by way of relief to an aggrieved party may "make such orders" and "give such directions" for the purpose of enforcing or securing the enforcement of the provisions as it may consider appropriate. The ***Act*** is not "an existing law" within the meaning of the ***Barbados Independence Order 1966*** and therefore the Court has no power to modify and adapt the statutory provisions to bring them into conformity with the Constitution: see ***Boyce and Joseph v. R. (2004) 64 WIR 37 PC***.

[43] The decision of ***Aubeeluck*** provides some guidance on the manner in which this appeal should be disposed. The appellant was

convicted in Mauritius of "dealing in a small way in small quantities of cannabis". The Privy Council "concluded that to impose a minimum sentence of three years penal servitude would be grossly disproportionate" (***paragraph 38***). The appeal was therefore allowed to the extent that the sentence of three years penal servitude was quashed and the case remitted to the Supreme Court or other sentencing court for consideration of the appropriate sentence in all the circumstances (***paragraphs 39*** and ***48***). However, before arriving at its decision the Privy Council considered whether it should: (i) "strike down the statutory provisions which provided for a minimum period of penal servitude of three years", or (ii) "declare that the provision was of no force or effect for all purposes or declare it to be of force and effect in particular classes of case and to read it down accordingly", or (iii) "to hold (as it did) that such a sentence was not compatible with the Constitution, to quash the sentence and to remit it to the Supreme Court" (***paragraphs 36*** and ***37***).

[44] ***Lord Clarke*** in giving the judgment in ***Aubeeluck*** referred to a number of decisions of the Supreme Court of Mauritius which held that the minimum mandatory penalty for a number of offences such as larceny while wearing a mask, failing to pay tax, driving with

excess alcohol, possession of heroin as a trafficker and possession of a firearm without a licence would be "wholly inappropriate"; the sentences should be "disapplied" and "set aside" (***paragraph 20***). They should be "read down" to mean that only the maximum sentence would apply (at ***paragraphs 27, 28, 29*** and ***33***).

[45] A provision in a statute that contravenes some superior law is read down or disapplied or excluded without affecting the whole statute. The concept of reading down a statutory provision has gained acceptance as a practical remedy for dealing with legislation that is in order except for some offending provision which is contrary to overriding constitutional fundamental rights provisions which govern the legislation. Instead of the legislation being invalid, the offending part is excised or read down so as to save the whole from invalidity. The practice of reading down a statute in relation to minimum sentences has found favour not only in the Privy Council but with Canadian and Southern African courts.

[46] The authors ***Sharpe*** and ***Roach*** discuss in Chapter 17 D of their book, ***"The Charter of Rights and Freedoms"***, the remedial techniques employed by the Canadian courts to deal with unconstitutional legislation that contravenes the supremacy clause

(***section 52(1)***) of the Canadian ***Constitution Act, 1982***. ***Section 52(1)*** provides that:

> "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect."

[47] The courts have evolved a variety of techniques to carry out the mandate conferred by the supremacy clause. They are: (i) striking down, or nullifying, the law in its entirety, (ii) severance "where a court excises a discreet and identifiable measure of a challenged law without altering the overall structure or operation of the law in which it is contained" (Glossary at ***page 368***) and a declaration of partial invalidity, (iii) reading down, (iv) reading in "where a court adds something to a statute to make it conform to the constitution" (Glossary at ***page 367***) and extension of benefits, (v) constitutional exemption where "the law remains valid for all purposes, save that the court exempts a particular individual or situation from its application" (Glossary at ***page 364***), and (vi) temporary suspension of invalidity.

[48] Reading down is defined as "where a court gives an over-inclusive statute a sufficiently narrow interpretation to bring it into line with the

demands of the constitution" (Glossary at ***page 367***). The authors state at ***page 349***:

> "An 'over-inclusive' law is one that has, at its core, a constitutional purpose and application but that, as drafted, casts too wide a net and infringes constitutional rights in some situations. In such cases the Canadian Courts have frequently resorted to the technique known as 'reading down' or giving the law a sufficiently narrow interpretation to bring it into line with the demands of the constitution."

[49] The Canadian authority on the appropriate remedy where a mandatory sentence constitutes cruel and unusual treatment or punishment contrary to the Charter is a decision of the Supreme Court of Canada in ***R. v. Ferguson [2008] 1 S.C.R. 96***. The brief facts of that case were that during an altercation with a detainee, a police officer shot and killed the detainee. The police officer was convicted of manslaughter for which the minimum mandatory sentence with a firearm was four years under the Criminal Code. The trial judge imposed a conditional sentence of two years but the majority of the Alberta Court of Appeal held that the mandatory minimum sentence must be imposed and that there was no basis for concluding that the four year minimum sentence prescribed by

Parliament amounted to cruel and unusual punishment on the facts of the case.

[50] The Supreme Court agreed but nevertheless went on to consider the appropriate remedy if the sentence had been in breach of the Constitution in view of the fact that the law on the appropriate constitutional remedy was not settled in Canada as there were divergent judicial opinions. The Supreme Court (nine judges sitting) was of the unanimous opinion that where a mandatory sentence is found to constitute cruel and unusual punishment contrary to the Charter, the appropriate remedy is a finding of invalidity under the Constitution.

[51] ***McLachlin CJ*** explained the intention of Parliament in passing mandatory minimum sentences:

> "[54] The intention of Parliament in passing mandatory sentence laws is to remove judicial discretion to impose a sentence below the stipulated minimum. Parliament must be taken to have specifically chosen to exclude judicial discretion in imposing mandatory minimum sentences. Parliament made no provision for the exercise of judicial discretion...nor did it authorize any exceptions to the mandatory minimum. There is no provision permitting judges to depart from the mandatory minimum, even in exceptional cases where it would result in grossly disproportionate punishment. Parliament has cast the prescription for the minimum four-year prison sentence here at issue in clear unambiguous terms. Parliament must be taken to have intended what it stated: that all

> convictions for manslaughter with a firearm would be subject to a mandatory minimum sentence of four years' imprisonment. The law mandates a floor below which judges cannot go. To permit judges to go below this floor on **a case-by-case basis runs counter to the clear wording of the section and the intent that it evinces**." (Emphasis added.)

[52] ***McLachlin CJ*** dealt with the court's power of intrusion on the role of Parliament thus:

> "[49] Section 52(1) grants courts the jurisdiction to declare laws of no force and effect only "to the extent of the inconsistency" with the Constitution. It follows that if the constitutional defect of a law can be remedied **without striking down the law as a whole**, then a court must consider **alternatives to striking down**. **Examples of alternative remedies *under s.52* include** severance, reading in and **reading down**." (Emphasis added.)

[53] ***McLachlin CJ*** then held that:

> "[34] The imposition of cruel and unusual punishment contrary to the *Charter* cannot be countenanced. A court which has found a violation of a *Charter* right has a duty to provide an effective remedy.
>
> [36] The usual remedy for a mandatory sentencing provision that imposes cruel and unusual punishment contrary to s.12 of the *Charter* is a declaration that the law is of no force and effect under s.52 of the *Constitution Act, 1982*.
>
> [65] The presence of s.52(1) with its **mandatory wording suggests an intention of the framers of the *Charter* that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case**

> **remedies** ... The ball is thrown back into Parliament's court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects...The remedy is a s.52 remedy that renders the unconstitutional provision of no force or effect to the extent of its inconsistency. To the extent that the law is unconstitutional, it is not merely inapplicable for the purposes of the case at hand. It is null and void, and is effectively removed from the statute books." (Emphasis added.)

[54] The constitutional provisions in this jurisdiction though not exactly worded as those in Canada are similar in import. ***Section 1*** of the Constitution declares as follows:

> "This Constitution is the supreme law of Barbados and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law **shall, to the extent of the inconsistency, be void**." (Emphasis added.)

In so far as a law is inconsistent with the Constitution the inconsistency shall be void.

[55] It is not the imprisonment itself which is unconstitutional but the mandatory minimum sentences of 7 and 15 years prescribed in ***section 30*** of the ***Act*** which are inconsistent with the fundamental rights against inhuman or degrading punishment prescribed in ***section 15*** of the Constitution. The said mandatory minimum sentences are therefore declared in terms of ***section 1*** of the

Constitution to be null and void. The other provisions of the ***section*** are of full force and effect, including the provisions for maximum sentences.

VII. SENTENCE

(a) The appropriate sentence but for time spent on remand

[56] In view of the fact that sentencing is quintessentially a judicial function we have no reservation in proceeding to fix the appropriate sentence. The normal procedure in the circumstances of this appeal would be to remit the matter of sentencing to the High Court, which should generally obtain up to date information on the appellant: see ***Aubeeluck*** at ***paragraph 39***. However, the case needs to be disposed of without any further delay. Moreover, the appellant will not be prejudiced in view of the manner in which we propose to dispose of the appeal.

[57] A detailed discussion is unnecessary to determine whether the 10 year sentence imposed on the appellant was so disproportionate to the circumstances of the offence as to warrant interference on appeal. From the narrative of the circumstances it is manifest that the 10 year sentence was grossly disproportionate to the offence. It follows that a 15 year statutory minimum sentence which should have

been imposed in compliance with the ***Amendment Act*** for a second offence would have been even more disproportionate.

[58] The fact that the length of the minimum sentence is inconsistent with the prohibition against inhuman and degrading punishment and therefore void to the extent of the inconsistency does not absolve the appellant from punishment. We therefore have to address the appropriate sentence to impose. The ***Act*** mandates lengthy custodial sentences but in arriving at a proper sentence the ***Penal System Reform Act, Cap 139***, which requires restraint in the imposition of custodial sentences, must be taken into account.

[59] The guideline judgment on sentences for firearm offences is ***Jerome Bovell v. R., Criminal Appeal No. 23 of 2000, unreported decision of 23 April 2002***. The decision in ***Bovell*** was given before the commencement of the ***Amendment Act***. The appellant in that case was convicted of possession of a .9mm caliber pistol and of 17 rounds of ammunition. He was sentenced to 7 years' imprisonment on each count, the sentences were ordered to run concurrently. The appeal against the sentences was not pursued. The guidance although given "entirely obiter" is nevertheless of assistance in arriving at an appropriate sentence at the time when there was no

mandatory minimum sentence for possession. ***Sir David Simmons CJ*** (with ***Chase*** and ***(Colin) Williams JJA***) suggested at ***paragraph [80]*** that:

> "**The range of sentences for offences involving possession should be between 8 and 10 years**. Where a firearm has been used, the range should be between 12 and 15 years. Armed robbery of a bank, commercial business or government agency such as a post office should attract a minimum sentence of 15 years. A plea of guilty is always a strong mitigating factor and should be taken into account by way of a discount on the sentence." (Emphasis added.)

[60] The ***Chief Justice*** at ***paragraph [83]*** set out the considerations that should inform the sentence, as follows:

> "In determining an appropriate sentence within the ranges mentioned, we agree that sentencers should ask themselves the four questions recommended by Lord Bingham CJ in ***Tony Avis [1998] 2 Cr.App.R.(S.) 178***. These are:
>
> (i) What sort of weapon was involved?
>
> (ii) What use had been made of the firearm?
>
> (iii) With what intention did the defendant possess or use the firearm?
>
> (iv) What was the defendant's record?"

[61] ***Tony Avis*** is the sentencing guideline case in England for firearm offences. However, the broad guidance given in that case has been amplified recently by the Court of Appeal in ***Attorney General's Reference No. 43 of 2009 (Craig Joseph Bennett) [2010] 1 Cr.App.R.(S.) 100***. The introductory words at ***paragraph 2*** of the judgment given by ***Lord Judge CJ*** warrant quotation:

> "The gravity of gun crime cannot be exaggerated. Guns kill and maim, terrorise and intimidate. That is why criminals want them: that is why they use them: and that is why they organise their importation and manufacture, supply and distribution. Sentencing courts must address the fact that too many lethal weapons are too readily available: too many are carried: too many are used, always with devastating effect on individual victims and with insidious corrosive impact on the wellbeing of the local community."

[62] Station Sergeant Graham Husbands gave evidence on the firearm and ammunition. The firearm was "a .22 long rifle with a telescopic site fitted on top of the receiver". That type of weapon, according to research, is used for sports shooting, for plinking and for inexpensive training. The telescopic site would make the firearm more accurate over a longer distance. The two cartridges were "Dominion .22 long rifle caliber Lubaloy lead round nose cartridges". The .22 long rifle bullet is described as less powerful than larger cartridges, but its

danger is often underestimated. It would be accurate to state that the firearm and ammunition were highly dangerous and could have caused death or serious injury if misused.

[63] The appellant had one previous conviction. On 13 September 1999, he was convicted in the District "E" Magistrate's Court of unlawful possession of a firearm (a pipegun) and was placed on probation for 18 months. At the time the appellant was 17 years old. Two points are relevant. First, no details of the circumstances of the offence were before the court. The effect of previous convictions is governed by ***section 40*** of the ***Penal System Reform Act, Cap. 139*** which was discussed in ***R. v. Hurley, DPP's Reference No. 2 of 2010, unreported decision*** of ***8 July 2011*** at ***paragraph [73]*** to ***[76]***. The previous conviction in this case could properly be taken into account only if aggravating factors were disclosed by the previous conviction, and none were. Secondly, the previous conviction could have been "spent" under the ***Criminal Records (Rehabilitation of Offenders) Act, Cap. 127A*** as discussed also in ***Hurley*** at ***paragraph [80]***.

[64] The appellant did not plead guilty (perhaps this was understandable in view of the severe mandatory minimum sentence). It was held by the English Court of Appeal in ***R. v. Jordan [2005] 2 Cr.App.R.(S.)***

44 that where an offender is convicted of an offence in respect of which the Firearms Act 1968 requires a minimum sentence to be imposed, the court may not impose a sentence less than the required minimum to reflect the fact that the offender has pleaded guilty.

[65] In the instant case there were strong mitigating circumstances. There was no evidence that any use had been made of the loaded firearm and ammunition or that there was any intended criminal use associated with their possession. The appellant's statement to the police was that he had found the firearm and ammunition and was in the process of selling them. There was no evidence that the appellant had a history of violence or that he was a danger to society. Moreover, without going into the details, the probation report was favourable to the appellant.

[66] The guideline in ***Jerome Bovell*** that the range of sentence for offences involving possession of firearms should generally be between 8 and 10 years (where there is no guilty plea) is applied. This Court would not wish in any way to minimise the seriousness of the unlawful possession of firearms and ammunition. Such possession even without any aggravating features is regarded in itself as a grave crime and therefore cannot escape being dealt with

accordingly. The seriousness lies in the fact that guns are lethal weapons and it is for this reason that criminals use them. They are used to further the commission of other serious crimes and they provoke an escalating spiral of violence.

[67] ***Jerome Bovell*** did not provide any kind of guidance on the appropriate sentence for possession of ammunition. The ***Act*** makes no distinction in punishment between possession of a firearm and possession of ammunition. There is a dearth of authority on the principles applicable to sentencing for possession of ammunition. However, it is suggested that similar considerations should inform the sentence for possession of ammunition as for possession of a firearm: the sort of ammunition involved, the use made of it and with what intention the defendant possessed the ammunition. In the recent English Court of Appeal decision of ***R. v. Rudups [2011] EWCA Crim 61 (13 January 2011)***, the appellant was a Latvian national who drove to England unaware that it was unlawful to be in possession of a pistol and cartridges designed to discharge noxious substances as they were not prohibited items in Latvia, Germany or Poland. He informed the police that he had a gun for his personal protection as he intended to sleep in his car. The prosecution offered

no evidence on the count of the prohibited weapon and the appellant pleaded guilty to possession of the ammunition. The judge held that he should depart from the statutory 5 year minimum sentence as required by the Firearms Act 1968 because of exceptional circumstances and imposed a sentence of 12 months, which the Court of Appeal reduced to 6 months because of the appellant's excellent previous good character.

[68] In the instant case, I would confirm the 3 year sentence imposed by the judge for possession of ammunition and I would impose an 8 year sentence for possession of the firearm "but for" the time spent by the appellant on remand prior to being sentenced. The sentences are to run concurrently from the date of the original sentences imposed on 12 September 2007. It is not permissible to ante-date the sentences to the date of conviction as the judge did: see ***R. v. da Costa Hall, (2011) 77 WIR 66*** at ***[25]*** and ***Jermaine Hazell v. R., Criminal Appeal No. 24 of 2008, unreported decision of 16 September 2011*** at ***paragraph [14]***.

(b) Credit for time spent on remand

[69] The CCJ decision was given on 15 April 2011 in ***da Costa Hall*** and set out at ***paragraphs [26]*** and ***[27]*** what is required of the

sentencing judge in pronouncing sentence and giving credit for pre-sentence custody, as follows:

> "The judge should state with emphasis and clarity what he or she considers to be the **appropriate sentence** taking into account the gravity of the offence and all mitigating and aggravating factors, that being the sentence he would have passed **but for the time spent by the prisoner on remand**...
> In the interest of transparency in sentencing and in keeping with the principles relating to the imposition of custodial sentences in the Penal System Reform Act, Cap 139, a sentencing judge should explain how he or she has dealt with time spent on remand in the sentencing process." (Emphasis added.)

[70] However, the courts should not regard the fact that time spent on remand in custody is taken into account in sentencing to countenance long periods of pre-trial detention and unacceptable delays in hearing and deciding appeals.

[71] Although the decision in ***da Costa Hall*** was given three years after the appellant was sentenced, it is nevertheless legally in order for this Court to take into account that decision in arriving at the appropriate punishment for the appellant. ***Archbold 2011*** at ***7-140*** states:

> "The Court of Appeal is entitled to have regard to material which was not available at the time sentence was passed and also to have regard to what has happened since sentence was passed."

This Court in ***Arrundell Padmore v. R., Criminal Appeal No. 18 of 2005, unreported decision of 30 March 2007*** at ***[13], [29], [31]*** and ***[32]*** considered the case law decisions that were available at the time of sentence and those that were available at the time of appeal. The Court considered the decisions given between the sentence and the appeal as applicable in arriving at the proper sentence. The objective of the Court is to arrive at a fair sentence in the light of the most recent case law available to it.

[72] In ***da Costa Hall*** the CCJ made its own computation of the sentence and gave the appellant full credit for the time spent on remand. In subsequent cases this Court applied ***da Costa Hall*** and gave the convicted person full credit for the time spent on remand: see ***R. v. Richard Hurley, DPP's Reference No. 2 of 2010, unreported decision of 8 July 2011*** at ***[46], [96]*** and ***[105]; Oliver Archer v. R., Criminal Appeal No. 26 of 2005, unreported decision of 8 July 2011*** at ***[42]*** and ***Jermaine Hazell v. R., Criminal Appeal No. 24 of 2008, unreported decision of 16 September 2011*** at ***[13]***.

[73] The CCJ affirmed the principle that full credit must generally be given by this Court for the time spent on remand even though the decision in ***da Costa Hall*** was not available to the judge when the sentence

was imposed: ***Jeffrey Burton*** and ***Kemar Nurse v. R., CCJ Application BBCR 2013/002 and BB Criminal Appeal No. 1 of 2011, unreported decision of 26 March 2014.*** The CCJ held at ***paragraph [23]*** that this Court "ought to have applied the principle of full credit for time served on remand". It follows that decisions that seek to challenge this basic principle are erroneous in law. Every day wrongfully or unnecessarily spent by a person on remand in prison is a serious breach of that person's constitutional right, a violation of the State's human rights obligations under international instruments and an injustice to the person. The CCJ appreciated the importance of the constitutional right and stated at ***paragraph [35]*** of the judgment:

> "The constitutional right to individual liberty must be respected…and we consider that it was wrong to have given no credit for "at least" two years spent on remand. It is a wrong which the Court of Appeal ought to have corrected following the ruling in *Romeo [da Costa] Hall* of which it had full knowledge and cognizance at the time of the appeal."

[74] The Canadian Supreme Court held that in cases where a mandatory sentence is imposed, the court may deduct from that sentence the time spent by the accused in pre-sentencing custody even if this has the effect of reducing the sentence passed by the court to less than the minimum provided by the law. The point does not arise in this

case because the mandatory sentence is not being imposed but the said Court decided in ***R. v. Wust [2000] 1 SCR 455*** that a credit for pre-sentence custody and a guilty plea can properly reduce the sentence below the mandatory minimum.

[75] "Credit" in the sense in which the word is used in ***da Costa Hall*** must be given for the time that the appellant has spent on remand prior to the date of sentence. Based on information from HM Prison Dodds the appellant was remanded in custody from 13 January to 20 February 2003 (39 days) when he was released on bail. He was again remanded between conviction on 18 May and sentence on 12 September 2007 (118 days). The appellant must therefore be given credit for the total period of 157 days spent in custody prior to sentence. The Court then "deducts" (***paragraph [29]*** of ***da Costa Hall***) the said credit from the appropriate sentence in order to arrive at the term of imprisonment of the appellant.

[76] The judgments in ***da Costa Hall*** make reference to remission of sentence: at ***paragraphs [25], [28], [45], [48], [52], [53]*** and ***[55]***. A prisoner serving a sentence of imprisonment may be granted remission of part of that sentence not exceeding one-fourth of the sentence on the ground of his industry and good conduct as set out in

section 52(1) of the ***Prisons Act, Cap. 168*** and ***Rule 41(1)*** of the ***Prisons Rules, 1974***. However, an "untried prisoner" or an "appellant prisoner" is not a prisoner serving a sentence and therefore not eligible for remission as explained by ***Alleyne J*** in ***Jeffrey Gittens v. The Superintendant of Prisons and The Attorney General, High Court case No. 479 of 2013, unreported decision of 5 July 2013.*** Indeed, ***Rules 99*** and ***115*** of the ***Prisons Rules*** stipulate that untried and appellant prisoners "shall as far as possible be kept apart from convicted prisoners". Article 10 of the International Covenant on Civil and Political Rights requires that "accused persons shall be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons". Such persons are kept separate from untried or appellant prisoners in a remand centre in the prison. The opportunities offered in prison to persons on remand for education, work and rehabilitation are limited.

[77] Further, in cases such as the instant one where the appellant has been on remand in custody as an untried and then as an appellant prisoner for a long period he may suffer substantial prejudice in not being eligible for remission of sentence. ***Wit J*** in ***da Costa Hall***

noted "the sometimes exorbitant periods of pre-trial detention in Barbados": ***paragraph [44]***. In the circumstances, he was of the view that "the courts cannot completely ignore the realities of remission and the less so if that would lead to apparent injustice": ***paragraph [48]***.

[78] A prisoner does not become eligible for remission until he is technically serving a sentence. Nevertheless, consideration needs to be given to whether the notional loss of remission should be a factor to be taken into account in sentencing. The circumstances and the manner in which it would be appropriate to do so are matters on which this Court should formulate guidelines when the issue arises for decision.

VIII. DELAY

(a) Breach of the reasonable time guarantee

[79] Separate and apart from the credit to which the appellant is entitled for the time spent in custody, he has a constitutional right to a trial within a reasonable time. We have a duty to consider the possible breach of this right. The factual circumstances of this case demonstrate the prejudice an appellant may suffer because of delay, which is a huge topic that warrants separate discussion. We

therefore cannot properly dispose of this case without examining a feature of it which affects the appellant's constitutional right. The offence took place on 12 January 2003. The appellant was convicted on 18 May 2007 (4 years and 4 months after the offence) and sentenced on 12 September 2007. The appeal was filed on 12 September 2007 and set down for hearing on 23 (and 24) March 2009 but adjourned *sine die.* Although the appeal raises an important constitutional point affecting other cases, it was not finally heard until 26 November 2011, 2 years and 8 months after it was adjourned *sine die*. Eleven years have therefore elapsed between the date of the offence and this decision.

[80] In the High Court the judge generally has the sole responsibility after the conclusion of the hearing for the timely delivery of a decision without undue delay. However, in this Court where three judges hear an appeal the practice has been for the presiding judge to write the leading judgment or to assign the judge who is to write the same. There is a shared obligation with the presiding judge bearing the ultimate responsibility to ensure that the decision is given within the reasonable time guarantee. It is especially important for this Court to

establish and maintain a culture of timely delivery of judgments that can be emulated by the lower courts.

[81] Unfortunately, it has taken this Court over 6 years to process, hear and determine the appeal. It is a matter of personal regret that it has taken the Court two years to give its decision. The High Court judges have been deprived of guidance from this Court on an important constitutional issue. The result has been inconsistency in the application of the mandatory provisions; some judges have applied them and others have not.

[82] It is helpful to interject that adjournments *sine die* (without a day) should generally not be granted. The spirit of modern litigation is for cases to be actively judicially managed and disposed of in a timely manner. Adjournments with no appointed date for resumption are inimical to that spirit. They may also constitute a breach of the litigant's constitutional right to have his case heard and processed in an efficient and orderly manner. The result of such adjournments is often a loss of judicial control of the proceedings and unacceptable delay as happened in this case. It will be appropriate to adjourn a case *sine die* with liberty to apply in a limited number of circumstances, for example, pending the outcome of other

proceedings or events that would be determinative of the adjourned case.

[83] We have a special obligation as an appellate court to consider the delay in the context of ***section 18(1)*** of the ***Constitution*** which provides that:

> "If a 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." (Emphasis added.)

The right to (i) a fair hearing (ii) within a reasonable time (iii) by an independent and impartial court contains three separate free-standing constitutional guarantees of the fundamental rights and freedoms of the individual. These guarantees with other fundamental rights in ***section 13(3)*** of the ***Constitution*** such as the right of a person arrested or detained to "be brought before a court as soon as is reasonably practicable" and the right of a person arrested or detained upon suspicion to be released if "not tried within a reasonable time" are intended to ensure due process and justice without delay.

[84] It is well known that the fundamental rights provisions in the Barbados ***Constitution*** and in most Commonwealth Caribbean Constitutions as well in other Commonwealth Constitutions were

greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), which itself was inspired by the United Nations Universal Declaration of Human Rights (1948): see ***Joseph and Boyce v. Attorney-General and Others (2005) 68 WIR 123 CA*** at ***[71]***. The highest courts in Commonwealth countries over the past fifty years have developed an extensive jurisprudence on fundamental rights. Similarly, the European Court of Human Rights (established on 21 January 1959) has produced a wealth of learning on the European Convention. It is from this extensive scholarship that we can derive guidance on the interpretation and application of the ***Constitution*** in relation to infringements of basic human rights.

(b) The leading cases

[85] For the purpose of this judgment it is necessary to identify only the leading cases. A convenient starting point is the CCJ decision on an appeal from this Court in ***Gibson v. Attorney General of Barbados (2010) 76 WIR 137*** which drew the attention of the authorities to the urgent need to address the delays in the criminal justice system. The CCJ stated at ***paragraph [46]*** that:

> "[U]nreasonable delay must be taken to include any undue lapse of time throughout the proceedings for which any of the emanations of the State, including a court, is responsible and, as the Inter-American Court makes clear, the duration of the proceedings runs from the arrest of the accused to the exhaustion of all appellate processes."

[86] The CCJ continued at ***paragraphs [48], [50]*** and ***[52]*** as follows:

> "The public have a profound interest in criminal trials being heard within a reasonable time. Delay creates and increases the backlog of cases clogging and tarnishing the image of the criminal justice system. Further, the more time it takes to bring a case to trial the more difficult it may be to convict a guilty person…The longer an accused is free awaiting trial, the more tempting becomes the opportunity to skip bail and avoid being tried. On the other hand, keeping remanded persons in custody for excessive periods increases prison populations and aggravates the evils associated with overcrowded jails. Moreover, there is a financial cost to the public in maintain a person on remand.
>
> [M]embers of the Barbadian public have every right to be concerned about what may be considered as blots on the criminal justice system.
>
> It is not of course for this court to prescribe for Barbados the specific measures that it must take adequately to overcome the problem of delays in its criminal justice system. But we feel in duty bound to draw to the attention of **the relevant authorities** the urgent **need to address it in a thorough and comprehensive manner** if it is not already being addressed. **As the apex court** responsible for interpreting and applying the rights set out in the Barbados Constitution, **this court cannot remain oblivious of well-founded concerns that breaches of**

the right to trial within a reasonable time are systemic in nature." (Emphasis added.)

[87] The Privy Council authority is ***Boolell v. State of Mauritius [2006] UKPC 46 (16 October 2006); (Note) [2012] 1 WLR 3718***. The appellant in that case was a Mauritius barrister convicted of swindling and sentenced to imprisonment. Twelve years elapsed between 1991 when he gave statements under caution and 2003 when he was convicted. The Privy Council had to consider the complexity of the case, the conduct of the defendant and the manner in which the case has been dealt with by the State's authorities. The Board held that though the appellant was responsible for dislocating the course of the trial, his rights under the ***Constitution*** to a trial within a reasonable time had nevertheless been infringed. It imposed a fine in substitution for the sentence of imprisonment imposed by the Mauritius Court.

[88] ***Boolell*** followed the House of Lords judgment in ***Attorney General's Reference (No. 2 of 2001) [2004] 2 AC 72***, which resolved inconsistencies in earlier Privy Council decisions. ***Lord Bingham of Cornhill*** in ***Attorney General's Reference*** explained that the

threshold of proving a breach of the reasonable time requirement is a high one and stated the appropriate remedies for a breach.

[89] ***Lord Carswell*** in ***Boolell*** set out the following propositions that the Privy Council regarded as correct according to the law of Mauritius and would also be correct according to the law of Barbados, which has a similar reasonable time constitutional guarantee as Mauritius. It is worth quoting the guideline propositions stated at ***paragraph 32*** of the judgment:

> "(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay. [The equivalent section of the Barbados Constitution is 18(1).]
>
> (ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all."

[90] A number of Privy Council cases followed ***Boolell***. In ***Elaheebocus v. The State of Mauritius [2009] UKPC 7 (25 February 2009)***, the appellant was convicted of conspiracy to issue counterfeit banknotes and sentenced to four years' imprisonment. A total of 12 years elapsed between the date of the offence and the disposal of the appeal. ***Lord Brown of Eaton-under-Heywood*** at ***paragraph 19***

stated that it was "necessary for the state to explain and justify" the excessive lapse of time. He found particularly "quite impossible to justify the final nineteen months delay between the actual hearing of the appeal and its ultimate dismissal by the comparatively brief and straightforward judgment eventually given". The Board held that the reasonable time guarantee had been breached but the serious nature of the offences warranted only a modest reduction of six months in the sentence to be served.

[91] In ***Tapper v. Director of Public Prosecutions of Jamaica [2012] 1 WLR 2712*** there was almost a 12 year delay extending over the whole course of the proceedings between charge and disposal of the appeal by the Jamaica Court of Appeal. The reasonable time guarantee in the Jamaican Constitution is in all material respects identical to that in the Barbados Constitution. ***Lord Carnwath of Notting Hill*** at ***paragraph 28*** of the decision affirmed that the law as stated in ***Attorney General's Reference*** and as summarised in ***Boolell*** represents also the law of Jamaica (and therefore also that of Barbados). The Privy Council held that the post-conviction delay of nearly five years pending the hearing of the appeal by the Jamaica Court of Appeal was inordinate and constituted a breach of the

defendant's constitutional right to a fair hearing within a reasonable time. The Privy Council agreed that the remedy granted by the Court of Appeal which reduced the appellant's sentence on conviction for fraud from l8 months' imprisonment with hard labour to 12 months' imprisonment suspended for 12 months was the appropriate remedy.

[92] Similarly, the Privy Council in ***Celine v. State of Mauritius [2012] 1 WLR 3707*** reduced the appellant's sentence for forgery from 18 months' to 9 months' imprisonment in circumstances where the "delay was grossly excessive". There was 15 years' delay between the charge and the final disposal of the appeal. ***Lord Kerr of Tonaghmore*** at ***paragraph 24*** of the decision stated that the reduction in sentence was also "to reflect the serious failure of the State to fulfill the important constitutional guarantee of trial within a reasonable time".

[93] The most recent Privy Council decision on the constitutional reasonable time guarantee is also from Mauritius. In ***Rummun v. State of Mauritius [2013] 1 WLR 598*** the appellant was charged with larceny while armed with an offensive weapon on 30 December 1999 but was not sentenced by the Magistrate until nearly ten years after on 5 November 2009. On the hearing of the first appeal before

the Supreme Court in Mauritius counsel for the appellant raised the issue of delay but no submission "was made about the impact which the delay had on the appellant's rights under section 10(1) of Constitution which, among other things, guarantees a fair trial within a reasonable time to all those charged with criminal offences" and the Supreme Court did not address the issue.

[94] ***Lord Kerr of Tonaghmore*** delivering the judgment of the Privy Council in relation to the failure of the Supreme Court of Mauritius to address the issue of the impact of the delay on the possible breach of the appellant's constitutional rights stated at ***paragraphs 7, 9*** and ***13*** as follows:

> "In the Board's view, this is unfortunate. In cases such as the present involving substantial delay, the Board considers that **it is the duty of the sentencing court, whether or not the matter has been raised on behalf of the defendant or appellant, to examine the possibility of a breach of that person's constitutional rights** in order to decide whether any such breach should have an effect on the disposal of the case…**Section 10(1) of the Constitution is a fundamentally important constitutional guarantee**…the duty of the courts is clear. Magistrates and judges should be astute to detect delay in the conduct of criminal trials and should be pro-active in seeking to eliminate it…A breach of that right will always be a factor to be considered in deciding upon the appropriate disposal." (Emphasis added.)

The Privy Council remitted the appellant's four year's sentence to the Supreme Court for the Court to consider the sentence to be passed on the appellant in the light of the Privy Council guidance given on the breach of the appellant's constitutional right.

[95] The United Kingdom Supreme Court stated in ***O'Neill v. HM Advocate (No 2) Lauchlan v. Same [2013] 1 WLR 1992*** at ***paragraph 25*** that:

> "Delay is to be seen as affording an independent ground of relief, whether or not there was prejudice or any threat to the fairness of the trial".

Lord Hope of Craighead continued at ***paragraph 34*** and endorsed the rationale of the reasonable time guarantee:

> "[A] person who is facing conviction and punishment should not have to undergo the additional punishment of protracted delay, with all the implications that it may have for his health and family life".

(c) Other authority

[96] The reasonable time guarantee provided for in ***section 11(b)*** of the ***Canadian Charter of Rights and Freedoms 1982*** was considered by the ***Supreme Court of Canada*** in ***R. v. Morin [1992] 1 S.C.R. 771***, which held that a delay of fourteen and a half months between

the date of the appellant's arrest and trial which was caused solely by limits on institutional resources was not unreasonable in the circumstances. The Supreme Court suggested to trial courts guidelines for institutional delay and stated that the Court of Appeal in each province "will play a supervisory role in seeking to achieve uniformity" (at ***page 774***).

[97] The reasonable time guarantee provided for in ***section 25(b)*** of the ***New Zealand Bill of Rights Act 1990*** was considered by the ***Supreme Court of New Zealand*** in ***R. v. Williams [2009] 2 NZLR 750*** which held that a delay of fifteen months between the hearing of the appeal and the start of the fourth trial was not justifiable when the previous delays were taken into account. The delay in its totality of nearly five years between arrest and conviction was undue. The public acknowledgment of the constitutional breach and the reduction of sentence constituted the appropriate remedy.

[98] Finally, mention should be made of the Sixth Amendment (1791) of the Constitution of the United States of America which states that "the accused shall enjoy the right to a speedy trial". The Supreme Court of America considered the provision in the frequently cited case of ***Barker v. Wingo (1972) 407 US 514***. However, that case "has

resulted in only the most egregious delays being proscribed": see ***Sopinka J*** in ***Morin*** at ***page 784***.

[99] Apart from the constitutional guarantee, the State must also fulfill its international obligations. The reasonable time guarantee is to be found in the following instruments to which Barbados has subscribed: Article 3*(c)* of the International Covenant on Civil and Political Rights, Article XXV of the American Declaration of the Rights and Duties of Man and Article 8 of the American Convention on Human Rights,

[100] The jurisprudence of the European Court of Human Rights is instructive. In ***Yetkinsekerci v. United Kingdom (2006) 43 E.H.R.R. 4 page 67*** the Court held in a drug trafficking case that a total delay of "a little over three-and-a-half years" of which the appeal lasted just under three years was excessive and failed to meet the reasonable time requirement of Article 6(1) of the European Convention on Human Rights and was therefore a breach of the Convention. In the more recent case of ***Minshall v. United Kingdom [2011] ECHR 2243 (20 December 2011)*** the Court, comprised of nine judges, unanimously held that the United Kingdom had been in breach of the reasonable time requirement. The applicant brought proceedings against the United Kingdom in respect of the UK's unreasonably long

delay of four years and seven months between the grant of leave to appeal and the determination of the appeal against a confiscation order following a conviction for conspiracy.

(d) What is a reasonable time

[101] Authoritative guidance is available on the time within which it is reasonable to deliver judgment after conclusion of the hearing and on the procedure that should be followed when it is not possible to comply within the time.

[102] The "Guide to Judicial Conduct" was approved by the Judicial Council of Barbados on 6 June 2006 and published. Chapter VI of the Guide is headed "Competence and Diligence" and states the principle that:

> "Competence and diligence are prerequisites to the due performance of judicial office."

The Guidelines at paragraph 6.1 and 6.5 state:

> "The judicial duties of the judge take precedence over all other activities.
>
> A judge shall perform all judicial duties efficiently. These duties extend to the delivery of reserved decisions fairly and with reasonable promptness. Save in exceptional cases and for good reasons, a judge shall endeavour to deliver a reserved judgment within 8 months. Where a judge reasonably believes that he is likely to reserve judgment for more than 8 months, the judge shall inform the Chief Justice of the circumstances contributing to delay."

[103] The CCJ adopted on 25 July 2013 a "Code of Judicial Conduct" with similar provisions to those quoted above. The Code provides that reserved decisions should be delivered "with reasonable promptness as far as is humanly possible".

[104] The CCJ in an appeal from this Court, ***Reid v. Reid (2008) 73 WIR 56, Saunders J*** stated at ***paragraph [22]*** of the judgment:

> "The effectiveness of a judiciary is seriously compromised if it fails to monitor itself in respect of the time taken to deliver judgments and to arrest promptly any tendency to lapse in this respect of its performance…What is a reasonable time? In our view, as a general rule no judgment should be outstanding for more than six months and unless a case is one of unusual difficulty or complexity, judgment should normally be delivered within three months at most."

The CCJ commented adversely again on the excessive delay in the delivery of reserved judgments in another appeal from this Court, ***Colby v. Felix Enterprises Ltd. (2011) 79 WIR 113, Hayton J*** stated in the judgment at ***paragraph [3]*** that:

> "The outcome of the hearing is clearly a key part of the hearing process."

He endorsed the time frame suggested by the CCJ in ***Reid***.

[105] The Privy Council in an appeal from Mauritius has also given guidance on what is a reasonable time within which to reserve judgment. In ***Patel v. Beenessreesingh [2012] UKPC 18 (23 May 2012), Lord Sumption*** stated at ***paragraph 38***:

> "[J]udgment was not delivered until twenty months after the completion of the argument…this is very unfortunate…In the Board's opinion it is only in the most complex cases that judgment on an appeal should be reserved for more than three months, and intervals of more than six months should be altogether exceptional."

Delay was again dealt with in an appeal to the Privy Council from Trinidad and Tobago in which over 16 years elapsed between the application for financial relief by the ex-wife against her ex-husband and the final determination: ***Ramnarine v. Ramnarine [2013] UKPC 27 (31 July 2013)***.

[106] The Privy Council has also given guidance in an appeal from Antigua and Barbuda on the appropriate procedure for the Court to adopt where there was a delay in the delivery of the judgment. Twenty-two months elapsed between the argument concluding in the Court of Appeal and the handing down of the judgment in ***Antigua Power Company Ltd. v. The Attorney General of Antigua and Barbuda & Others [2013] UKPC 24 (23 July 2013)***. ***Lord Neuberger***

suggested at ***paragraph 62*** of the judgment a good practice for the Court to follow:

> "There may have been a reason for the delay in this case, but, if there was, it should have been promptly and voluntarily communicated to the parties. Indeed, after six months, and certainly nine months, one would have expected a letter from the Court of Appeal to the parties, acknowledging, explaining and apologising for the delay."

[107] Each case will depend on its own circumstances but a good practice worthy of consideration would be for the judge at the conclusion of the hearing to indicate to the parties the time frame within which a judgment can be expected. If the judge fails to meet the indicated time, (s)he should then provide the parties with an explanation for the failure and indicate a new time frame. This Court should take the lead in implementing such a culture.

(e) Reduction of sentence

[108] ***Archbold 2011*** at ***7-143a*** states that where there is delay in the hearing of the appeal for which the appellant is blameless and the delay is such as to amount to a violation of the right to determination of the criminal charge within a reasonable time, the appropriate redress will generally take the form of a reduction of sentence.

[109] The CCJ has held that following a conviction the remedy for delay will

require consideration of a reduction of sentence. In ***Gibson*** the Court stated at ***paragraph [64]***:

> "If at the trial there is a conviction then **the trial judge should always consider a reduction in the severity of the sentence in light of the delay**. In this context the question may arise as to whether the severity of a mandatory sentence can be reduced on this ground but this is a matter that is far too important for us to comment upon without receiving specific submissions on it from counsel." (Emphasis added.)

However, it needs to be emphasised that a reduction in sentence cannot absolve the court from its constitutional obligation to hear and dispose of cases within a reasonable time. Further, it is undesirable that an offender should have a reduced sentence because of systemic delay; this palliative is inimical to the rights of victims and to the general public interest.

[110] There is precedent in this Court for taking into account the reasonable time guarantee and for granting redress by way of reduction of sentence where the case has taken too long to be disposed of. In ***Randolph Howard v. R., Criminal Appeal No. 6 of 2003, unreported decision*** of ***16 January 2004***, an appeal against sentence following a conviction of causing death by dangerous driving, the Court (***Sir David Simmons CJ***, ***Colin Williams*** and

Peter Williams JJA) reduced the sentence from 6 to 4 years' imprisonment. The ***Chief Justice*** stated at ***paragraph [25]***:

> "Another important consideration in this case is that almost 5 years elapsed between the date of the collision and the trial. For all those years the appellant must have been brooding over the consequences of his driving and the prospect of imprisonment indelibly stamped on his conscience. It was a heavy burden to carry…we are of the opinion that, in the particular circumstances of this case, justice demands that we take it into account in determining an appropriate sentence."

[111] The Court (***Sir David Simmons CJ***, ***Peter Williams*** and ***Moore JJA***) in ***Walter Prescod v. R., Criminal Appeal No. 32 of 2001, unreported decision of 10 March 2006,*** also reduced the sentence of 12 years' imprisonment to 10 years. The case took 6 years to be disposed of and the ***Chief Justice*** said at ***paragraph [24]***:

> "[A] term of 12 years could not be said to be wrong in principle... However, this case took 4½ years to reach the Court of Appeal. We take that unexplained systemic failure into consideration. In all the circumstances, we reduce the sentence to 10 years."

[112] In the case of ***Mark Jack v. R., Criminal Appeal No. 9 of 2008, unreported decision of 30 January 2009, Sir David Simmons CJ*** (with ***Peter Williams*** and ***Moore JJA***) observed at ***paragraph [19]***:

> "[I]t is quite unacceptable that the appellant should have been on remand for 6 calendar years before trial. A

person who is charged for a crime may have done wrong; he nevertheless has constitutional rights."

[113] This Court also in the recent appeal of ***R. v. Doyle (2010) 79 WIR 59*** at ***[86]*** took into account the seven year delay between the date of the offence and the date of conviction as a factor in reduction of sentence. The CCJ refused an application for special leave to appeal against conviction and sentence: ***R. v. Doyle (2011) 79 WIR 91***.

[114] It is desirable not only to take the delay into account but to state specifically the manner in which it should be taken into account. The European Court of Justice in ***Yetkinsekerci v. United Kingdom (2005) 43 E.H.R.R. 67*** stated that where the English Court of Appeal made a reduction of sentence, it should have stated clearly the extent to which the reduction was intended as compensation for a breach of the reasonable time guarantee. It took just under three years for the applicants appeal to be heard; the Court of Appeal acknowledged the failure to hear the appeal within a reasonable time and also stated that greater allowance should have been made for the fact that the offence was only an **attempt** to import a controlled drug. The Court of Appeal reduced the sentence from 14 to 12 years' imprisonment taking into account both factors. The European Court held that it was

not able "to ascertain to what extent the applicant's sentence was reduced [due to the time taken to hear the appeal]". In commenting on the case, ***Emmerson, Ashworth and Macdonald*** in ***Human Rights and Criminal Justice*** at ***9-62*** state that the case "suggests that a court (trial or appellate) that reduces a sentence in order to compensate for delay ought to declare the magnitude of that reduction".

[115] The cases have established that only delays attributable to the State will justify a finding that there has been a breach of the reasonable time guarantee. There is in the instant case undoubted excessive systemic delay. It is reasonable to conclude that a delay of over ten years gives grounds for real concern and is *prima facie* a breach of the reasonable time guarantee. Taking into consideration the factors referred to in ***paragraph [58]*** of ***Gibson*** this Court can make a finding that there has been undue delay. It cannot be overstated that excessive delays in the administration of justice constitute a significant danger, particularly of a loss of respect for the rule of law and ultimately of a dilution of the democratic system.

(d) State's obligation to ensure reasonable time guarantee

[116] It is important to state explicitly that modern case law is emphatic in imposing a direct and positive obligation on the State to ensure that courts comply with the reasonable time guarantee. The ultimate obligation is a State responsibility notwithstanding the separation of powers doctrine. ***Sopinka J*** in ***Morin*** described what in this jurisdiction is referred to as "systemic delay" at ***pages 791*** and ***795*** of the judgment as follows:

> "When a case is ready for trial a judge, courtroom, or essential court staff may not be available and so the case cannot go on. This type of delay is referred to as institutional or systemic delay.
>
> **The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice.**" (Emphasis added.)

[117] ***Lord Bingham of Cornhill*** in ***Dyer v. Watson [2004] 1 AC 379 (PC)*** set out three considerations to determine the reasonableness of the time taken to complete the hearing of a criminal case: first, the complexity of the case; second, the conduct of the defendant; and third, the manner in which the case has been dealt with by the administrative and judicial authorities. He stated at ***paragraph 55***:

> "It is plain that contracting states [to the European Convention] cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. **It is**, generally speaking, **incumbent on** contracting **states so to organise their legal systems as to ensure that the reasonable time requirement is honoured**." (Emphasis added.)

There is nothing in the Barbados Constitution or in its international arrangements to suggest that the State's obligation is any different from that quoted above.

[118] Finally, it is also clear that the State's obligation is not confined to rich states or states that are well endowed with judicial resources. It extends to all states to manage and organise their judicial systems so that they comply with and do not infringe the constitutional and human rights obligation to complete criminal hearings within a reasonable time. The highest court left no doubt about the obligation of the Barbados State to ensure the reasonable time guarantee. The CCJ stated in ***Gibson's*** case at ***paragraph [60]***:

> "One starts with the premise that the Executive Branch of Government has a constitutional responsibility to allocate sufficient resources to ensure that the reasonable time guarantee has real and not just symbolic meaning. **A governmental failure to allocate adequate resources, or for that matter inefficiencies within the justice sector, could not excuse clear breaches of the guarantee**." (Emphasis added.)

[119] The Supreme Court of Zimbabwe, comprised of five judges, in ***Re Mlambo [1993] 2 LRC 28*** held that ***section 18(2)*** of the ***Constitution*** requiring a criminal offence to be afforded a fair hearing within a reasonable time had been breached and ordered the proceedings in which the appellant was charged with fraud to be permanently stayed where the overall length of the systemic delay was four years and seven months. ***Gubby CJ*** said at ***page 35*** of the judgment:

> "The system is not perfect and resources are limited, and one has to accept as normal and inevitable a period of delay...**But this is not to accept that the State can justify abnormal periods of systemic delay on such grounds**. The fact that it might have been the practice to tolerate such delays in the past does not immunise them from scrutiny under s 18(2)." (Emphasis added.)

A relaxed attitude to delay is no longer acceptable.

[120] The current case law establishes a more rigorous standard than previously and does not countenance the lack of resources, systematic delays or existing court backlogs as exculpating the State from its constitutional and human rights obligations. By way of example, a responsible State could not claim that it was too poor to feed its prisoners on a daily basis. The Executive authority of Barbados therefore has an inescapable duty to organise and

supervise its judicial system so that the fundamental constitutional right of the individual to a hearing (which involves the delivery of a judgment) within a reasonable time is not infringed. It follows that the State in pursuance of its duty has first, to appoint officials who have the ability to discharge the functions of their office and secondly, to ensure that the said officials do so efficiently and expeditiously.

IX. DISPOSAL

[121] Based on information from the prison the appellant would have already served the 3 year sentence for possession of ammunition. The appellant's expected date of release (not taking into account any remission of sentence) on the 8 year sentence for possession of a firearm would be 12 September 2015 (8 years after the sentence was imposed) less the credit of 157 days or approximately on 5 April 2015. The appellant would therefore have to serve from the date of this judgment approximately a further 10 months. The appellant is entitled to some constitutional redress for breach of the reasonable time guarantee. The usual form of redress is by way of a modest reduction in the term of imprisonment. I would therefore further reduce the appellant's term of imprisonment by the said ten months

with the result that the appellant will be required to serve no more time in prison.

[122] In summary, I would dismiss the appeal against the convictions and confirm the same. I would also dismiss the appeal against the sentence of three years' imprisonment for possession of the ammunition (which would have already been served). However, I would allow the appeal against the sentence of ten years' imprisonment for possession of the firearm and reduce the sentence to 8 years' imprisonment. I would declare that the appellant be deemed to have already served his term of imprisonment by the conclusion of today's hearing when the term shall expire and he shall be released from prison.

Peter D.H. Williams

Justice of Appeal

CONCURRING JUDGMENT

Introduction

GIBSON CJ: In this appeal against both conviction and sentence for offences contrary to the ***Firearms Act, Cap. 179*** **("the Act")**, the Court has been asked to consider the broad issue whether **section 30** of **the Act**, which prescribes mandatory minimum sentences for, *inter alia,* the possession of firearms and ammunition, is unconstitutional for violation of the separation of powers and/or **s. 15 (1)** of the **Constitution**.

Factual and Procedural Background

[1] On 12 January 2003 the Appellant, Elvis Erwin Alexander, was the subject of a police stop and search. In his possession was a rifle described as a Model 6C .22 long calibre rifle, with a telescopic sight fitted on top of the receiver of the rifle. He also possessed two rounds of .22 calibre ammunition, one of which was in the rifle and the other in his jacket pocket. He was charged on indictment with one count of possession of a firearm without a valid licence and one count of possession of ammunition without a valid licence contrary to **sections 30(1)(b)(A)** and **30(1)(b)(D)** of the **Act, Cap. 179** respectively.

[2] On 17 May 2007 the Appellant pleaded not guilty to both charges and was tried before a jury. He was convicted on both counts and, on 12 September 2007, was sentenced by **Blackman J** to 10 years imprisonment for

possession of the firearm and to three years for possession of the ammunition, the sentences to run concurrently.

[3] The Appellant appealed on the following grounds:

1. The Learned Trial judge erred in law when he directed the jury that they had to determine the voluntariness of the written statement made by the accused;
2. The Learned Trial Judge failed to adequately deal with the discrepancies and inconsistencies in the prosecution's case;
3. The Learned Trial Judge, in presenting the summation, misstated the Appellant's case and failed to fairly present the same to the jury;
4. The Learned Trial Judge prejudiced the Appellant's case when he proceeded to inquire about the reasons for the *voir dire* in the presence of the jury;
5. The Learned Trial Judge erred in law when he failed to deliver a ruling on the voluntariness of the written statement of the Appellant at the end of the *voir dire*;
6. The sentence imposed by the Court pursuant to section 30 of the Firearms Act is invalid on the ground that the said section is inconsistent with the Constitution of Barbados and thereby renders the sentence and trial a nullity; and
7. In the circumstances the verdict is unsafe and unsatisfactory.

[4] For the sake of convenience, I group the grounds under the headings "The Constitutional Ground" (Ground 6), which I examine first, and "The Procedural Grounds" (Grounds 1 to 7) which I then consider.

The Constitutional Ground

The Legislative Background

[5] Before I delve into the contentions on the constitutionality of **s. 30** of **the Act**, I take a brief excursus into the legislative origins of that provision.

The Firearms Act 1896

[6] The **Firearms Act 1896** ("the 1896 Act") was established to provide for the licensing of firearms. The penalty for possession of a firearm without a licence was prescribed in **s. 3(1)** which provided that "any person who infringes the provisions of this section shall be liable on summary conviction to a penalty of $500.00. There was no provision for trial on indictment, neither was there a mandatory minimum sentence.

The Firearms Act 1998

[7] The preamble to the 1998 Act describes it as "An Act to revise the law relating to firearms." It repealed the **Ammunition Act Cap. 158** and the **1896 Act** and, by **ss. 3(1)(b)(A)** and **3(1)(b)(D)**, the Act criminalised, respectively, the possession of a firearm and the possession of ammunition without a valid licence. The punishment for those offences was prescribed in **s. 3(2)** which read:

> Any person who contravenes subsection (1) is guilty of an offence and is liable on conviction on indictment to a fine of $100,000.00 or to imprisonment for a term of 20 years or to both such fine and imprisonment.

[8] **S. 30** of the **1998 Act** provided:

> **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
>
> (a) on conviction on indictment

(i) 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

(ii) in the case

(A) of a second or subsequent offence; or

(B) of a first offence committed by a person who, prior to 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.
(Emphasis added)

[9] These legislative provisions prompt two observations namely, (1) **s. 30** of the **1998 Act** introduced the regime of mandatory minima for firearms offences in Barbados; but (2) notwithstanding the mandatory minima prescribed in **s. 30**, the cumulative effect of **ss. 3** and **30** was to provide judges with a range of sentencing options.

The Firearms Act (Amendment) 2002

[10] In 2002 an amendment to the 1998 Act was debated in Parliament. In light of the importance of understanding the *raison d'etre* of the amendment, and in accordance with the authority of ***Pepper v Hart*** **[1993] A.C 593**, I refer to the language of the then Attorney General and Minister of Home Affairs ("AG") during the debate on the Bill in the House of Assembly on 16 July 2002 debate (see ***The House of Assembly Debates (Hansard-***

***Official Report)* First Session 1999-2004 Tuesday 16 July 2002).** The AG stated that the amendment was to:

> [p]rovide for a more rigid and comprehensive framework governing the use of and possession of firearms in Barbados. . . [T]he amendment (sought) to bring a more complete framework to bear in respect of the Government's strategies to deal with the management of firearms as well as the removal of illegal firearms from circulation in this country.

[11] Referring specifically to public outcry following the increased use of firearms in the commission of crime, she said:

> We feel that the presence of firearms is so inimical to the maintenance of security in this island that we are prepared to require a minimum period of imprisonment where a person uses or discharges a firearm without lawful authority or excuse or recklessly in public so as to render a person in danger of his life or safety.

The maintenance of security and the welfare of the society by the imposition of stiffer penalties for the use or discharge of a firearm in a public place was, therefore, the underpinning factor behind the Amendment.

[12] Following the debate, the **Firearms Act (Amendment) 2002 ("the Amendment")** was enacted. For the purposes of this appeal, the most important change was the repeal of **ss. 3(2)** and **30** of the 1998 Act, the penal provision, and their replacement with new **ss. 3** and **30** as well as amended **ss. 7** and **29**. The sections provide:

1. (1) Subject to this section, no person shall
   (a) Use;
   (b) Have in his possession;

(c) Import or export;
(d) Carry;
(e) Manufacture;
(f) Supply or offer to supply to another; or
(g) Be concerned in the supplying or another of any of the following:
    (A) a firearm;
    (B) a weapon designed to fire any rocket projectile or any other projectile;
    (C) an explosive except a hand grenade manufactured for the purpose of extinguishing fires;
    (D) ammunition.

S. 3(9) provides that a person who contravenes **s. 3(1)** is guilty of an offence.

[13] **S. 7** as amended reads:

7. (1) No person shall
(a) sell;
(b) acquire;
(c) transfer;
(d) arrange for or in any way be concerned in the sale, transfer or acquisition of; or
(e) permit the sale, transfer or acquisition of any firearm or ammunition unless he holds a valid firearms dealer's licence or a gunsmith's licence or, in any other case, he has obtained the written prior approval of the Commissioner in respect of the sale, transfer or other acquisition.

(2) Any person who is desirous of carrying on business or conducting trade as a dealer in guns or ammunition or as a gunsmith shall apply to the Commissioner for a firearms dealer's licence or a gunsmith's licence, as the case may be.

(3) A person who contravenes subsection (1) is guilty of an offence.

[14] The amended **s. 29** provides:

29. (1) Any person who uses a firearm

(a) while committing or attempting to commit an indictable offence; or

(b) during flight after committing or attempting to commit an indictable offence, whether or not he causes or means to cause bodily harm to any person as a result thereof, is guilty of an offence.

(2) Notwithstanding any provision of any other Act, a person who attempts to commit an offence under this Act, or who solicits, incites, procures or conspires with another to commit an offence under this Act, is guilty of an offence and is liable to the same punishment as is provided for that offence.

[15] **S. 30** provides:

(1) A person who is guilty of an offence under section 3(9), 7(3), or 29(1) shall on conviction on indictment

(a) in the case of a first offence, except as provided in paragraph *(b)* (ii), be sentenced to imprisonment for **not less than 7 years** and not more than 15 years:

(b) In the case of

(i) a second or subsequent offence; or

(ii) a first offence committed by a person who prior to the commencement of the *Firearms (Amendment) Act 2002* was convicted of an indictable offence in the course of which or during his flight after the commission of which he used a firearm

be sentenced to imprisonment for **not less than 15 years** and not more than 25 years.
(Emphasis added).

[16] The net effect of **s. 30** was that possession of a firearm or ammunition carried a mandatory minimum sentence of seven years imprisonment for a first offence and 15 years imprisonment for a second or subsequent

offence. The new mandatory minima were not limited to the actual use or discharge of a firearm in public, the mischief sought to be abated, but also applied to simple possession of such firearms and/or ammunition.

[17] It was thought by many that this amendment fettered the exercise of judicial discretion in sentencing as enacted in the **Penal System Reform Act, Cap. 139 ("the PSRA")**. Indeed, such sentiments were echoed by the trial judge during the sentencing of the appellant. Hence, the extensive review of these issues is also predicated on the need to provide guidance to sentencing judges in future firearms cases. Of equal concern are the manpower obligations imposed on the Department of Public Prosecutions which must now conduct trials in all firearms cases because no accused will likely accept a proffered plea of guilty when exposed to seven years incarceration for possession of even a single bullet.

The Penal System Reform Act (PSRA)

[18] The most relevant provisions for these purposes are **ss. 35** and **36** which provide:

> 35(1) This section applies where a person is convicted of an offence punishable with a custodial sentence other than one fixed by law.
>
> (2) Subject to subsection (3), the court shall not pass a custodial sentence on the offender unless it is of opinion
>
> *(a)* that the offence, or the combination of the offence and one other offence associated with the offence, was so serious that only such a sentence can be justified for the offence; or

(b) where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from the offender.

36(1) This section applies where a court passes a custodial sentence other than one fixed by law.

(2) The custodial sentence shall be

(a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with the offence; or

(b) where the offence is a violent or sexual offence, for such longer term (not exceeding the maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender.

The Sentencing Guidelines Prior to the Act

[19] In April 2002, just four months prior to the debate of the Amendment, this Court had laid down guidelines for sentencing in firearms matters in ***Bovell v The Queen,*** **Criminal Appeal No. 23 of 2000** (decided 23 April 2002) ***("Bovell")*** a case in which the accused was charged with possession of a firearm and possession of ammunition pursuant to the terms of **s. 3** of the **1998 Act**. **Simmons CJ** stated, at paragraph [80]:

> [80] Therefore, in future, 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. In the majority of cases, such a sentence of reasonable length will satisfy the test of proportionality inherent in the Penal System Reform Act. The range of sentence for offences involving possession should be between 8 and 10 years. Where a firearm has been used, the range should be between 12 and 15 years. Armed robbery of a bank, commercial business or government agency such as a Post Office should attract a minimum sentence of 15 years. A

> plea of Guilty is always a strong mitigating factor and should be taken into account by way of a discount on the sentence. *Where it is the Court's view that a fine would meet the justice of the case, such fine should 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. We do not suggest any rigid formula but we remind sentencers that in interpreting an Act of Parliament, the Court's function is to seek to ascertain the intention of Parliament.* (Emphasis added)

[20] **Simmons CJ** stated that the guidelines were "aimed at setting a general tariff without unduly fettering individual judicial discretion." Notably, four months prior to the debate, his Lordship was still speaking of the possibility of a fine, albeit substantial, for possession *simpliciter*. Since then, this Court has revised those guidelines in ***Bend and Murray v The Queen*, Criminal Appeals. Nos. 19 and 20 of 2001 (decision 27 March 2002) *("Bend and Murray")*** and ***Pierre Lorde v The Queen*, Criminal Appeal No. 11 of 2003 (decision 26 February 2006)**.

The Constitution and Other Relevant Law

[21] Counsel for the Appellant based his contentions on the infringement of the Constitution. For this reason, I set out here all the provisions cited by counsel or referred to by me in relation to those contentions. **Ss. 1, 15(1), 18(1)** and **48(1)** of the **Constitution** provide:

> 1 This Constitution is the supreme law of Barbados and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, *to the extent of the inconsistency*, be void.

> 15(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
>
> 18(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.
>
> 48(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Barbados.
>
> (Emphasis added)

[22] Ms. Brathwaite and Mr. Leacock Q.C. also argued for the application of **s. 11(2)** of the **Criminal Procedure Act, Cap. 127** which reads:

> (2) Every person convicted of any offence not punishable by death shall be punished in the manner prescribed by the statute specially relating to such offence or by such fine or such other manner as the High Court may determine in addition to or in substitution for the punishment prescribed by the statute.

Ground 6

The Appellant's Submissions

[23] Mr. Thorne QC for the Appellant urged on this Court that the sentence imposed by the trial judge was invalid on the ground that **s. 30** of the **Act** was inconsistent with the Constitution of Barbados and, therefore, the sentence and trial were a nullity. He cited in support the observations of **Lord Diplock** in the *locus classicus* ***Hinds v R* (1975) 24 WIR 326, 331** ***("Hinds")*** that implicit in a Westminster Model constitution is the idea that "judicial power. . .is to continue to be vested in persons appointed to hold

judicial office in the manner and on the terms laid down in the Chapter dealing with the Judicature" (citing ***Liyanage v R*** **([1967] 1 AC 259, 287-288**).

[24] Mr. Thorne QC also contended that **s. 30** fettered a judge's discretion to consider and impose a non-custodial sentence or a sentence shorter than the mandatory minima imposed in s. 30. He referred to ***Bovell*** and ***Bend and Murray***, noting the need for discretion to afford judges the flexibility to impose a sentence commensurate with the offence. He argued that sentencing is the exclusive province of the judiciary and that there should be no trespass on that province by the legislature or the executive. **S. 30** infringed the separation of powers that underlay the philosophy, structure and organisation of Barbados' constitutional arrangements which permitted Parliament to set a maximum penalty for imprisonment but proscribed the setting of a minimum sentence or tariff. He urged the severance of **s. 30** from the **Act**.

[25] Mr. Thorne QC urged a second argument founded on **section 15(1) of the Constitution** which proscribes inhuman and degrading treatment. He conceded that, as a general principle, the punishment imposed by **s. 30** did not fit the mould of a traditional argument for inhuman punishment. However, he contended that the argument may still be made and he referred to the South African case ***Dodo v State (2001) 4 LRC 318 ("Dodo")***. In ***Dodo***, under section 51(1) of the Criminal Law Amendment Act 1997 the

court was obliged to sentence the appellant to life imprisonment for rape and murder unless it was satisfied under section 51(3)(a) of the same act that there were "substantial and compelling circumstances" justifying a lesser sentence. The accused's counsel argued that an application of section 51(1) subjected the accused to cruel, inhuman and degrading treatment in violation of the constitution.

[26] Mr. Thorne QC candidly conceded that this argument had been unavailing in ***Dodo*** because of the provision permitting the judge to impose a lesser sentence in "substantial and compelling circumstances". Since there was no such provision here, the sentence of the Appellant violated **s. 15(1)** of the **Constitution**, he stated.

The Respondents' Submissions

The Solicitor General

[27] Ms. Brathwaite, for the Attorney-General, refuted the charge that **s. 30** was unconstitutional. She referred to Parliament's legislative powers under **s. 48** of the **Constitution**. In support of her argument, she cited the *dicta* of **Simmons CJ** in ***Bovell*** where his Lordship observed that "[i]t 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."

[28] Ms. Brathwaite further submitted that **s. 30** of the Amendment did not automatically make the sentence unconstitutional and/or invalid and, referring to the Mauritian Supreme Court case ***Gunputh v The State*** **(2007)**

SCJ 128, she contended that, in determining whether there has been a breach of **s. 15** of the **Constitution**, the Court must look at each case and then make a determination as to whether the imposition of the minimum sentence would be grossly disproportionate to the seriousness of the offence.

[29] Moreover she contended that such action may not necessarily infringe the principle of separation of powers, citing the decisions in ***Silver v The State* (2006) MR 323** and ***Philbert v The State* (2007) SCJ 274**. She argued that, rather than striking down the section in its entirety, the Court could declare it valid and read it down accordingly.

[30] Ms. Brathwaite then referred us to **section 11(2) of the Criminal Procedure Act, Cap. 127** which provides that the High Court can vary a punishment prescribed by statute (see para. [22] above). Therefore, she argued, if this Court determines that the principle of proportionate sentencing has been breached, it may quash the sentence imposed by the trial judge or remit the sentencing to the Chief Justice who may act in his capacity as a single judge. On this point, Ms. Brathwaite invited us to consider the Privy Council case ***Gangasing Aubeeluck v The State of Mauritius* [2010] UKPC 13 *("Gangasing")*** where the principal question raised was whether, and in what circumstances was a court entitled to pass a lesser sentence than the minimum provided by law. She drew several similarities between that case and this matter, including: (1) the imposition

of a minimum sentence at first instance; (2) the supreme law clauses of the **Constitution** and the **Mauritian Constitution** and (3) the constitutional protections from inhuman treatment.

[31] In that case, the Board held that a literal reading of **s. 7** of the **Mauritian Constitution**, which provides for protection from inhuman treatment, "does not immediately suggest that that is the correct approach to it. The prohibition...might be read to infer something much more severe that the three years penal servitude in the present case." The Board ruled that the imposition of three years imprisonment was wholly disproportionate to the offences committed by the appellant, but was of the view that striking down the offending provisions was inappropriate. The appropriate course of action would be for the Supreme Court to sentence to appellant itself or remit sentencing to the lower court.

[32] Counsel submitted that the use of mandatory and/or minimum sentencing is not a novel concept and that the determination of the imposition of such sentences rests with Parliament. She relied on the Canadian case ***Wust v The Queen, Attorney General of Ontario, Intervenor*** **(cited as *R v Wust 2000 SCC 18*) (*"Wust"*)** where the Supreme Court provided an analysis of mandatory minimum sentences and general sentencing principles. Paragraphs 18 to 20 read:

> 18. Mandatory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing [page139] expressed in the Code, in the case

> law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the Code: the principle of proportionality. Several mandatory minimum sentences have been challenged under s. 12 of the Charter, as constituting cruel and unusual punishment: see, for example, R. v. Smith, [1987] 1 S.C.R. 1045, 34 C.C.C. (3d) 97...
>
> 19. On some occasions, a mandatory minimum sentence has been struck down under s. 12, on the basis that the minimum prescribed by law was, or could be, on a reasonable hypothetical basis, grossly disproportionate to what the circumstances called for...
>
> 20. In other cases, courts have fashioned the remedy of a constitutional exemption from a mandatory minimum sentence, thereby upholding the enactment as valid while exempting the accused from its application...

[33] Ms. Brathwaite submitted that **s. 30** should not automatically be deemed unconstitutional since the Court had to consider the particular facts of the Appellant's case, the principle of proportionality and the powers of **s. 11** of the **Criminal Procedure Act** in order to arrive at a decision whether the mandatory minimum sentence was disproportionate or not.

The DPP's Submissions

[34] The DPP, Mr. Charles Leacock QC, appearing as *amicus curiae*, advanced arguments on the constitutionality of **s. 30**. He referred to the judgment of **Ackerman J** in ***Dodo*** and argued that the principle of proportionality must be at the heart of this matter and this Court's ruling. Inasmuch as Parliament was entitled to pass laws for the peace, order and good governance, it still could not pass laws which violated the **Constitution**.

Parliament's ambit includes prescribing penalties for criminal activity but those penalties had to be proportionate. He argued that the test was whether the punishment imposed by the legislation was grossly disproportionate to the offence in question.

[35] He noted the similarities between **s. 30** and **s. 5(1)** of the **UK Firearms Act 1968**. The difference was that Parliament failed to retain judicial discretion as the UK has done with **Schedule 21** of the **Criminal Justice Act 1951**. This retention of discretion, he said, is consistent with the ruling in ***Dodo***, however the current status of **s. 30** was that it prescribed mandatory punishment with no discretion.

[36] The DPP also cited the decision in ***Pope v The Queen*, Criminal Appeal No. 11 of 2007 (date of decision 25 February 2010)**, where the appellant was also charged under **s. 3** of **the Amendment**. He acknowledged that the Court's discussions on the relevant provisions were *obiter* and referred us to paragraph 10:

> 10. Having made those general observations, it seems to us that we must first take note of the provisions of the Act and the Penal System Reform Act, Cap.139. Parliament first modernised firearms legislation in 1998. The Act commenced on 1 November 1998. It enacted very heavy penalties for, inter alia, possession and use of a firearm without being the holder of valid licence. Thus, for example, illegal possession of a firearm carried a fine on conviction on indictment of $100,000 or liability to 20 years' imprisonment or both - s. 3(2).

The Court continued at paragraph 12:

> 12. Reifer, J. did not apply the provisions of the 2002 amendment under which Pope should have received a minimum mandatory sentence of 7 years. The amendment was not drawn to the attention of the judge. In the circumstances, it would not be appropriate for us to grant the applicant leave to appeal, which might expose him to a longer sentence of at least 7 years.

[37] Mr. Leacock QC argued that **s. 30** was unconstitutional in its current form as it criminalised acts from the benign to the venal, and was grossly disproportionate.

[38] The DPP also made reference to **s. 80 of the Supreme Court of Judicature Act, Cap. 117A**, which established a Supreme Court of Barbados and allowed the court to exercise jurisdiction and powers as vested in it, and to **s. 11 of the Criminal Procedure Act**. He contended that **s. 30** usurped a significant portion of the court's discretion, including the discretion to apply individualised sentencing and the presumption in favour against custodial sentences in s. 35 of the PSRA. The punishment prescribed in section 30 placed it out of touch with other serious offences such as manslaughter, armed robbery and serious wounding.

[39] Mr. Leacock QC proposed the appropriate remedy of striking down the provision or, alternatively as in ***Gangasing***, to read down the provisions by removing from **s. 30(1)(a)** the words "for not less than 7 years" and from **s. 30(1)(b)** and the words "be sentenced to imprisonment for not less than 15 years" leaving the maxima of 15 and 25 years respectively.

Discussion

I. Separation of Powers

[40] It is only fitting that the discourse begins on the application of the principle of separation of powers by referring to the case of ***Hinds***, the first case to recognise the concept of separation of powers in a Commonwealth Caribbean constitution. The facts and principles therein are well known and, for that reason, are not repeated here.

[41] Notwithstanding, the following quotation taken from the judgment of **Lord Diplock** at page 341 remains of the utmost importance in understanding the principle and, for this reason, is reproduced here:

> Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. ***What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders...A breach of a constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law.*** If, consistently with the Constitution, it is permissible for the Parliament to confer the discretion to determine the length of custodial sentences for criminal offences upon a body composed as the Review Board is, it would be equally permissible to a less well-intentioned Parliament to confer the same discretion upon any other person or body of persons not qualified to exercise judicial powers, and in this way, without any amendment of the Constitution, to open the door to the exercise of arbitrary power by the Executive in the whole field of criminal law.

> In this connection their Lordships would not seek to improve on what was said by the Supreme Court of Ireland in ***Deaton v Attorney-General and the Revenue Commissioners*** **([1963] IR 170)**, ([1963] IR at pp 182, 183), a case which concerned a law in which the choice of alternative penalties was left to the Executive
>
> > 'There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case...***The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts...The selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive...***
>
> (Emphasis added)

[42] Professor Albert Fidajoe, in his book ***Commonwealth Caribbean Public Law, Third Edition 2008***, summarised the separation of powers doctrine insofar as it relates to the relationship between the legislature and the judiciary at page 175:

> Admittedly, the power to prescribe a fixed or mandatory punishment or range of discretionary punishments for a criminal offence is a legislative power constitutionally vested in the legislature. But, the power or discretion to select and inflict a punishment which is subjectively considered to be appropriate to the circumstances of a particular case is a judicial power or discretion which is constitutionally vested in the judicature and which cannot legislatively be vested in, usurped or transferred to the legislature of executive.

[43] **Lord Diplock** was, of course, speaking to a fact situation where the imposition of the individual sentence had been committed to an Executive

body which is not the situation here. But the exercise of this individuated sentencing power by Parliament itself was broached squarely by the **Caribbean Court of Justice** ("the **CCJ**") in the recent decision ***The Attorney General v Philip Zuniga et al*** **[2014] CCJ 2 (AJ)** where the **CCJ** was called upon to determine, *inter alia*, the constitutionality of legislation providing for a mandatory minimum sentence for civil contempt.

[44] In their judgement, their Honours reaffirmed the principle that the doctrine of separation of powers will be deemed infringed in circumstances where the legislature (or indeed the executive) compromises the independence of the judiciary. At paragraph [41], they said:

> To offend the doctrine it must be shown that the legislature is undermining the decisional authority or independence of the judicial branch by compromising judicial discretion. The court's ability to address legal principles in a pending case, i.e. *its adjudicative process*, must be negatively impacted so that it can truly be said that the legislature, in order to guarantee a particular outcome, is prescribing or directing or constraining the court in its application or interpretation of those principles. The litigant must be protected from a situation where he/she has to contend in court with both the opposing side and the interference of the legislature seeking, in the midst of proceedings, to direct the judge as to the outcome of the contest.

[45] It is not disputed that Parliament may, as confirmed in ***Hinds***, prescribe a range of punishments, including a maximum term of imprisonment. Hence there is no dispute as to the constitutionality of the imposition of the 15 and 25 year penalties prescribed in **s. 30**. In my view, however, what Parliament cannot do, as made clear in ***Zuniga***, is use its legislative power

to prescribe a mandatory minimum sentence in individual cases and so encroach upon the preserve of the judiciary.

[46] In this regard, I respectfully adopt the observations of **Sir Dennis Byron CJ**, as he then was, ***Newton Spence and Peter Hughes v The Queen*, Criminal Appeals Nos. 20 of 1998 and 14 of 1997 (date of decision 2 April 2001)** at paras [12] and [13]:

> 12 Thus, Parliament and not the Courts has the power to provide for the discretionary or mandatory sentences..., unless the Court is satisfied that the mandatory sentence...infringes the doctrine of the separation of powers set out in the Constitution or contravenes or is inconsistent with other express provisions of the Constitution...
>
> 13 I think that the answer is that whereas it is for Parliament to set sentencing policy, it is the duty of the courts to evaluate whether the laws passed by Parliament contravene the Constitution, without fear or favour. It is trite that the Constitution is the supreme law, and legislation must conform with it. In this case it is the duty of the court to consider whether the mandatory imposition of ... contravenes the Constitution."

[47] I note that in the very recent decision of the **Court of Appeal** of **Trinidad and Tobago** in **Barry Francis and Roger Hinds v The State (Cr. App. Nos 5 and 6 of 2010)**, it was determined that legislation imposing a mandatory minimum sentence for drug trafficking did not violate the principle of separation of powers. (*per* **Bereaux JA** at paras [39] to [42]. His Lordship, however, went on to hold that the statute violated the constitutional proscription of arbitrary detention and cruel and unusual

treatment or punishment (see, ss. 4 and 5 of the Constitution of Trinidad and Tobago).

[48] Nonetheless, it is clear that the **Act** has reduced the range of sentencing options afforded under the 1998 Act and, ultimately, has fettered judicial discretion including the ability to impose a tailored sentence befitting of the crime (see ***Liyanage v R* [1967] 1 AC 259**). While this Court must acknowledge that both the legislature and the executive have legitimate interests as regards the imposition and administration of penal sentences, those interests must not infringe the courts' authority or jurisdiction to administer individual justice.

[49] In my view, therefore, that **s. 30** has effected an infringement of the principle of separation of powers, in particular, the usurpation of judicial powers. In the circumstances, I conclude that the mandatory minima in **s. 30** of the **2002 Amendment** are unconstitutional as Parliament has exceeded its remit and has breached the principle separation of powers through its encroachment of the independence of the judiciary.

II. Proportionality, and Inhumane or Degrading Punishment

[50] Mr. Thorne QC advanced argument on the principle of proportionality and the infringement of **s. 15(1)** of the **Constitution** which proscribes inhuman or degrading punishment. These arguments are intrinsically linked and for that reason, shall be addressed simultaneously.

[51] The principle of proportionality exists to restrain excessive, capricious and arbitrary punishment by requiring that the sentence imposed not exceed the gravity of the offence. In ***Hoare v R* [1989] HCA 33 (date of decision 30 June 1989)**, the **High Court of Australia** said at page 354:

> A basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.

This translates to the principle that Parliament can define what constitutes criminal conduct and can accordingly prescribe penalties, but it cannot impose penalties that are wholly disproportionate to the offence.

[52] Mr. Thorne QC referred us to ***Gangasing Aubeeluck*** already referred to above where the **Privy Council** took into consideration that the appellant was dealing in small quantities of gandia (cannabis) and was a person of good character. They concluded that, while the legislature regarded drug trafficking as a serious matter, nevertheless to disregard all mitigation, including the fact that these were first offences by the appellant and to impose a minimum sentence of three years penal servitude would be grossly disproportionate.

[53] A similar conclusion was reached in the Canadian case of ***Wust*** where the accused used a firearm during the commission of a robbery. Taking into account time spent in pre-sentence custody and the statutory minimum period of four years imprisonment, the judge arrived at a sentence of three

and one half years. The Crown appealed on the basis that it was not possible to reduce a sentence to account for time served if that discount resulted in a sentence of less than the required minimum of four years.

[54] The Supreme Court of Canada, in upholding the appeal, noted that in some cases mandatory minimum sentences could result in demonstrably unfit or harsh sentences. The Court referred to the opinion of **Lamer J** in ***Latimer*** who stated the test for determining proportionality as "whether the punishment prescribed was so excessive as to outrage standards of decency...the effect of the punishment must not be grossly disproportionate to what would have been appropriate". **Lamer J** continued (para. [74]):

> In assessing whether a punishment is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender...The resulting sentence should not be grossly disproportionate to what the offender deserves.

[55] I have also considered ***R v Smickle*** **2012 ONSC 602** in which Smickle, was apprehended by the Toronto Police Emergency Task Force whilst posing for a picture with a loaded handgun. He was charged and convicted for the possession of a loaded firearm. The relevant legislation provided for a mandatory minimum sentence of three years imprisonment for a first offence. Smickle challenged the constitutionality of that minimum requirement.

[56] At para. [121], **Molloy J** observed:

> The most obvious deleterious effect, the imposition of a three year penitentiary term on someone who does not deserve it, is a significant deprivation of liberty and a severe deleterious effect...this deleterious effect is sufficiently strong that it outweighs any salutary effect there might be...there are other deleterious effects of a mandatory minimum regime; including (1) sentence inflation for persons who, although deserving of a sentence less than one year must now receive at least three years; (2) the dangers of increased recidivism by incarcerating youthful first offenders for extended periods of time with hardened criminals; (3) contributing to over-crowded conditions in our correctional facilities; (4) the systematic disincentive for guilty pleas and early resolutions if the minimum sentence will be three years in prison for any offender charged with the indictable offence; and (5)...the unfair advantage given to the Crown as an accused will be under pressure to plead guilty to a lesser included offence in order to avoid the risk of the mandatory minimum.

[57] The statements of **Molloy J** are of particular relevance in our local context where, as we already noted above, there is an unwillingness to plead guilty to a minor **s. 3** infraction when the minimum punishment prescribed is seven **or 15** years imprisonment, resulting in an increased burden on the DPP, as well as judges, court staff and the public at large in their capacity of jurors, who have to conduct a full trial on lesser offences where the imposition of a fine or a sentence of less than seven years is more appropriate.

[58] I also note the recently decided Bahamian case of ***Andrew Davis v Commissioner of Police, and Anthony Armbrister v Commissioner of Police,*** **MC Cr Apps 190 of 2011 and 191 of 2011 respectively (date of decision 4 May 2012)** ***("Armbrister")***. These appeals concerned the mandatory imposition of a sentence of four years imprisonment on each

appellant after conviction of possession of dangerous drugs with intent to supply contrary to section 22 (1) of the Dangerous Drugs Act. The issues for determination were:

a. Whether the mandatory minimum sentence imposed by section 22(1) of the Act on conviction of the offence of possession of dangerous drugs with intent to supply, was unconstitutional on the basis that it fettered the exercise of the court's discretion to sentence;
b. Whether the imposition of the said mandatory minimum constituted inhuman or degrading punishment contrary to article 17 of the Constitution; and
c. Whether a court can, and if so, in what circumstances, impose a lesser sentence than the mandatory minimum imposed by the Act.

[59] Davis had pleaded not guilty and, on appeal, his Counsel argued that: (1) the magistrate erred when she said she had no discretion and could only impose the mandatory minimum of four years; (2) Parliament could not fetter the discretion of a magistrate; (3) the sentence imposed was disproportionate to the offence and was made with disregard to the principle of proportionally as enshrined in article 17 of the constitution.

[60] Armbrister, who had pleaded guilty, submitted that: (1) the sentence imposed was unduly harsh and severe; (2) the magistrate failed to take into account the relevant mitigating factors; and (3) the sentence violated the doctrine of proportionality.

[61] In their ruling, the Court of Appeal cited the **Namibian High Court** decision ***The State v Vries*** **(CR 32 /96) [1996] NAHC 53 (19 June 1996)** where **O'Linn J** stated at page 12:

> Where a statutory minimum sentence is found to be grossly disproportionate, there are three possible avenues open to the court, namely:
> (a) to declare the provision of no force or effect for all purposes;
> (b) to declare the provision to be of force and effect only in a particular class of case i.e. to read it down; and
> (c) to declare the provision to be of no force or effect in respect to the particular case before the court.
>
> Although not totally clear it seems the options mentioned in (a) and (b) are followed when "cases can be foreseen as likely to arise commonly and option (c) is followed when "far-fetched and marginally imaginable cases" suddenly becomes reality…

The Bahamian court found that the sentences were so excessive as to justify reading down the offending provisions of the statute and the sentences were quashed.

[62] As the legislation currently stands, all **s. 3** offences are subject to the penalties prescribed in **s. 30**. This could be manifestly unjust and at odds with the non-custodial presumption contained in the PSRA. Moreover, the application of a mandatory minimum sentence prevents the sentencing judge from giving due regard to any mitigating factors which, under other circumstances, may have resulted in the imposition of a lesser sentence. In this regard, the sentiments of **Arbour J** in ***Wust*** ring true:

> Even if it can be argued that harsh, unfit sentences may prove to be a powerful deterrent, and therefore still serve a valid purpose, ***it seems to me that sentences that are unjustly severe are more likely to inspire contempt and resentment than to foster compliance with the law.*** It is a well-established principle of the criminal justice system that judges must strive to impose a sentence tailored to the individual case...
>
> [para. 21; emphasis added]

[63] The above rulings offer much guidance. But what is at issue here is whether the disproportionate nature of the sentence is to be determined by consideration of generalised proportionality, or whether that determination must be based on the individual sentence imposed. For, despite the single bullet *cri de coeur* of Mr. Thorne QC and Mr. Leacock QC notwithstanding, the Appellant possessed not one bullet, but two, and a .22 rifle with a telescopic sight.

[64] In my view, both Mr. Thorne QC and Mr. Leacock QC based their position on generalised proportionality. The recent decision of the CCJ in ***Philip Zuniga*** provides some support on that principle. The Court said at [57] and [58]:

> One of the unusual circumstances of the inquiry under this point is that this is not a case where the party challenging the validity of the penalty has already been tried and is now arguing the unconstitutionality of a particular sentence that has been handed down. The court is not here dealing with the application of particular punishment to a specific offender. ***In a case like that a court is well positioned to consider all the relevant factors that contribute to an assessment of proportionality. The court could, for example, weigh the sentence imposed against the facts of the specific case, taking account of the gravity of the offence, the manner in which it was committed, the degree of participation and motivation of the accused and all the personal characteristics and antecedents of the particular offender before the court.***
>
> Here, there is no accused person. This is a case of a pre-emptive challenge to the mandatory minimum penalty prescribed by a new law even before there has been a conviction under this law. It follows that to determine this challenge the court must look at the penalty regime in the round and make a generalised value

> judgment as to its validity. The court must assess whether the mandatory minimum punishment set out in the law would be grossly disproportionate in its application to likely offenders. [Emphasis added].

[65] Unlike the situation in ***Zuniga***, this Court, in reviewing the **s. 30** sentencing regime for proportionality against the backdrop of the Constitution, is duty-bound to consider the application of the mandatory minimum sentence on *this Appellant*. As **Lamer J** opined in ***R v Smith*** **[1987] 1 S.C.R. 1045, 1072**:

> The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is, to use the words of Laskin C.J. in *Miller and Cockriell*, *supra*, at p. 688, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate…
>
> . . .
>
> In assessing whether a sentence is grossly disproportionate the court must first consider ***the gravity of the offence, the personal characteristics of the offender and particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender.***

[Emphasis added]

[66] Even though, I ultimately agree with **Peter Williams** and **Mason JJA** that we should vary the sentence imposed on the Appellant because of the delay in delivering this decision, I do not find that the sentence violated **s. 15 (1)** of **the Constitution**. I have taken into account the trial judge's comments, where he stated:

> The Court: So it is a responsible thing to wish to dispose of a firearm to anyone, particularly a rifle with a telescopic lens. You remember 4 or 5 years ago, when some people with a telescopic lens and rifle in the States went shooting in Virginia and Washington DC?
>
> ...
>
> The evidence was, from the firearms expert that this firearm, a rifle, was fitted with a telescopic lens. It wasn't just an ordinary pipe-gun, it was a thing that people use for assassinations. Usually out there, quite free and walking around, somebody line you up and have you in their sight and you are out, taken out like blowing out a light bulb...
>
> [Trial Record at pages 150-155]

The trial judge related the section to *this individual accused* who also had a prior conviction for firearm possession. I, therefore, conclude that the 10-year sentence which he imposed as required by **s. 30** was not "so excessive as to outrage accepted standards of decency." Every excessive sentence cannot be considered as a violation of **s. 15 (1)** of the **Constitution**. For this same reason, I reject the contention that the Appellant was deprived of a fair and impartial trial.

VII. The Appropriate Remedy

[67] In light of the ruling that **s. 30** is unconstitutional, the question arises as to the appropriate remedy. The duty of this Court was succinctly outlined by **Lord Hobhouse** in the Privy Council case ***Green Browne v The Queen* (2000) 1 A.C. 45, 50**:

> In their Lordships' judgment the answer to this part of the case is to identify the element of unconstitutionality in the relevant statutory provision and then to consider what change is necessary to give effect to the requirements of the Constitution and the appellant's constitutional rights. So far as the first part of this exercise is concerned, the relevant decision on the length of the sentence is entrusted to the executive not to the judiciary. It follows from this that what is required to make the provision comply with the Constitution is that the decision should be made by a court. If this is done the only objectionable part of the sentencing process is removed.

[68] Both Mr. Thorne QC and Mr. Leacock QC argued that, in the event that this Court found the mandatory minimum unconstitutional, the provisions relating to the minima must be severed. Mr. Leacock QC also advanced argument that, in the event this Court did not find the section void, the provision could be read down although his suggested reading down was, as is clear also from the judgment of my brother **Peter Williams JA**, tantamount to severance.

Reading Down

[69] The reading down remedy has been described as "a technique used by courts to give effect to the presumption of compliance with constitutional norms." (See ***Driedger on the Construction of Statutes*, 3rd Ed. by Ruth Sullivan,** at page 327). In its application, the concept requires that legislation is given a narrow interpretation in order to rectify or avoid constitutional improprieties. As ***Driedger*** notes, the principle may be used:

(a) as an interpretative tool to show respect for constitutional values; and

(b) as a constitutional remedy to invalid applications of the statute.

[70] It has been widely used in Canada where a legislative provision has been determined to contravene the Canadian Charter of Rights and Freedoms. In ***Baron v Canada*** **(1993) 99 DLR (4th) 350**, **Sopkina J** said:

> "Reading down" by amending the clear intent of a statutory provision may be appropriate in some cases. The decision to do so requires a determination that this remedy will constitute the lesser intrusion into the role of the legislature consistent with the upholding of values and objectives of the Charter.

[71] Notably, it has been also used to preserve the constitutionality of statutory provisions in ***Philibert***, ***Gangasing Aubeeluck*** and ***Davis and Armbrister***. In each case, the Court felt duty bound to read down a statute the application of which led to a disproportionate result, albeit a result intended by the legislature.

[72] In ***Western Bank v Schindler*** **[1977] Ch 1, 18**, cited in Cross **Statutory Interpretation, 3rd Ed.**, (Bell and Engle), at page 95, **Scarman LJ** observed:

> Judicial legislation is not an option open to an English judge. Our courts are not required, as are, for instance, the Swiss courts (see, the Swiss Civil Code, articles 1 and 2), to declare and insert into legislation rules which the judge would have put there, had he been the legislator. But our courts do have the duty of giving effect to the intention of Parliament, if it be possible, even though the process requires a strained construction of the language used or the insertion of words in order to do so. . .The line between judicial legislation, which our law does not permit, and judicial interpretation in a way best designed to give effect to the intention of Parliament is not an easy one to draw. Suffice it to say that before our courts can imply words into a statute, the statutory intention must be plain and the insertion not too big, or too much at variance with the language used by the legislature.

> The courts will strain against. . .leaving unfilled the 'casus omissus'.

[73] In my considered view, the remedy of reading down, to the extent that it involves anything more than interpreting a statute to give effect to the intention of Parliament, amounts to "judicial legislation" and nothing less than an intrusion on Parliament's power to make laws. **S. 1 of the Constitution** covers the interpretational universe in stipulating that legislation falling afoul of the constitution is, *to the extent of its violation*, void. The power has existed in the Supreme Court from at least as early as ***Marbury v Madison* 5 U.S. 137 (1803)** to declare legislation void if it infringes a constitutional provision.

[74] There is no remit in our constitutional jurisprudence for the remedy of reading down involving, as it does, rewriting legislation with the object of saving it from invalidity. Parliament possesses the power to make laws and to rewrite them when necessary. The Courts do not possess this power except in the narrow circumstance where statutory construction permits. Indeed, pushed to its logical conclusion, if reading down is always an available remedy, then **s. 1** of **the Constitution** would be entirely nugatory since no piece of legislation, however offensive it may be to the **Constitution**, need ever be declared void.

[75] Moreover, it is not at all clear just *how* this Court would go about reading down the mandatory minima in **s. 30**. What acceptable tariff or time period

should we insert as alternative minima to the seven-year and the 10-year terms? In those circumstances, the Barbadian courts are required to declare the offending legislation valid or void, and not merely voidable like a contract, as the reading down remedy suggests. Anything further is judicial legislation of the sort frowned on by **Lord Scarman**. The available remedy is severance to which I now turn.

Severing the Void Mandatory Minima

[76] The starting point here must be **s. 1** of the **Constitution** which states, peremptorily, that in the event of conflict between a law and the Constitution, "this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void." The Court has declared void the mandatory minima contained in **s. 30** albeit the majority has based their decision on different grounds to me. In ***Philip Zuniga***, the **CCJ** observed at para [88] that, where legislation is void for inconsistency with the Constitution, a court should strive to remove the repugnancy:

> As long as the constitutional defect can be remedied without striking down the entire law, the court is obliged to engage in severance. In some cases it is not difficult to do this. But in other cases it is necessary to invalidate an entire Act so that, if it wishes, Parliament can have another go at the legislation. The court will do this because, broadly speaking, what remains after judicial surgery is incoherent or so impairs the legislative object that the constitutionally valid part cannot be said to reflect what Parliament originally intended.

[77] Their Honours referred to the test of severability established by the Privy Council in ***Attorney-General for Alberta v Attorney-General for Canada*** **[1947] AC 503, 518**, where the Board said:

> The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all.

[78] Applying this principle, the issue then is whether the intended purpose of **s. 30** can survive without the mandatory minima. Would the provisions remaining after surgical excision by the judicial scalpel represent a "sensible, practical and comprehensive scheme for meeting the fundamental purpose of the Act which it can be assumed that Parliament would have intended"? I find that it can. Should the mandatory minima be severed, the balance of the provision will still provide for maximum term of 15 years and 25 years respectively, leaving it to the sentencing judges to determine the tariff on an individuated basis in each case.

[79] **Wit and Anderson JCCJJ**, in delivering the minority decision in ***Philip Zuniga,*** cautioned against the application of severance, observing at paras [115] and [116]:

> If the legislative provisions which remain are of a fundamentally different kind then it cannot be said with any confidence that Parliament would have enacted it on its own, and it should, accordingly, be struck in its entirety because to leave what remains on the statute books in these circumstances would be to intrude upon the legislative function. It is only if the judicial

> conscience is clear that Parliament would have enacted the remainder of the legislation independently of that declared unconstitutional that severance is permissible.

[80] However, my "judicial conscience is clear" that severance of the mandatory minima would not be at odds with the intention of Parliament. As suggested by the majority in ***Philip Zuniga***, I have made an objective assessment of the history and the purpose of the Amendment. From the legislative background set out at paras [5] to [15] above, it is clear that the Amendment was enacted to provide for "a more rigid and comprehensive framework governing the use of and possession of firearms in Barbados". The retention of the 15- and 25-year maxima within **s. 30** carries out Parliament's true intention without the unconstitutional baggage of mandatory minima.

[81] Accordingly, I hold that the words "not less than 7 years" should be severed from **s. 30(1)(a)**, and the words "not less than 15 years" should be severed from **s. 30(1)(b)**. What then remains comports with the penological purposes in the **PSRA** and restores judicial discretion to impose a sentence less than the maximum term on an individuated basis. In this regard, I suggest that sentencing judges should return to utilise the guidelines laid down by **Simmons CJ** in ***Bovell***.

THE EVIDENTIARY GROUNDS

Ground 1 – Admissibility of the Written Statement

[82] At trial, the appellant through his counsel asserted that the written statement attributed to him was not the statement he had given to the two investigating officers, Constables Augustine Jacobs and CCharles Layne, on the night of his arrest. He alleged that while being interviewed by Officer Jacobs, another police officer whom he knew only as "Leon" passed by and said something to the effect of "[i]f he does not cooperate, I would deal with him." His original written statement was, he said, "balled up and thrown away" after which the officer wrote another statement which he was directed him to sign [Trial Record, pp. 18-19]. The trial judge conducted a *voir dire* which I now set out.

The *Voir Dire*

[83] Just prior to the objection to admissibility of the statement at trial, Constable Jacobs stated that he was on duty in a police vehicle at about 8:25 in the evening of 12 January 2003, as part of the Anti-gun Enforcement Unit of the Central Investigation Department ("CID"), when he saw the appellant and another man walking along Foster Road, St. Lucy. After a brief conversation, he (Jacobs) and Constable Layne got out of the vehicle and identified themselves as police officers. While Jacobs spoke with the appellant, the other officers spoke with the other man who turned out to be Christopher Harvey, the appellant's brother.

[84] Jacobs told the appellant that he had information that he was in possession of a firearm and that he (Jacobs) wished to search the bag which the appellant was carrying. On examining the bag, he discovered that it contained a rifle which was loaded with one round of .22 ammunition. A further search of the appellant's clothing revealed another .22 bullet in his left jacket pocket. Jacobs cautioned the appellant in accordance with the Judges' Rules. When asked to give an account of the firearm and the ammunition, Jacobs stated that the appellant replied, "Officer, I find the rifle and the bullets," which Jacobs wrote in his notebook.

[85] Jacobs asked the appellant whether he had a licence to possess the rifle and ammunition and, on his answering no, Jacobs arrested him and they proceeded to Central Police Station. At the station, Jacobs, in the presence of Constable Layne, indicated to the appellant that he intended to interview him, cautioned him and informed him that he had the right to consult with an attorney. The appellant, according to Jacobs, replied, "Officer, I don't want no lawyer." At this point in the trial, the *prosecutor*, and not the appellant's counsel as might have been expected, asked that the jury be excused. The *voir dire* then commenced.

[86] Jacobs testified, on the *voir dire*, that he asked the appellant if he wished to give a written statement, to which he replied "Yes." When told by Jacobs that he could write the statement himself or have someone write it for him, the appellant replied, "Officer, you write it for me." Jacobs stated

that he took a black official statement form and filled out the headings. After writing a caption containing extracts from the Judges' Rules, he read it over to the appellant who read it and, thereafter, signed it. The appellant also read and signed the statement after Jacobs wrote instructions informing the appellant of his right to counsel.

[87] The appellant gave a statement which Jacobs recorded on the statement form. On completion, he told the appellant that he could correct, alter or add anything. The appellant made two corrections to the statement and signed it. Constable Jacobs testified that "[n]o threats were made, no violence used, neither were any promises or inducements held out to the [appellant] in order to obtain this statement. It was given free and voluntary. The statement was kept in police custody." Jacobs described the appellant's manner during the recording of the statement as "[c]alm and collective" and he answered, when asked whether the appellant was cooperative, that he was "[v]ery much so." [Trial Record pp. 14-22].

[88] On cross-examination, Constable Jacobs noted that he had seen the appellant and his brother at 8:25 p.m. and they had arrived at the CID just before 9:00 p.m. The appellant was kept in the interview room at the CID and he began taking the statement from the appellant at about 10:20 p.m. During the interview, the door to the interview room was closed. Asked about an officer named "Leon", Constable Jacobs replied that "[t]here is no person in the CID by that name." He agreed that there would have been

other officers at the CID during the interview, although he was not aware how many.

[89] In response to the question whether he "balled up" and threw away a prior statement of the appellant, Jacobs replied: "I recorded only one statement from the [appellant], and whilst I was doing that, no one else was present in the room other than Constable 1450 Layne, and the door to the CID Interview Room was closed." Jacobs denied that he had told the appellant that, if he confessed, he would only get three years. Jacobs stated that he was the chief investigating officer in this matter but he had had no dealings with Christopher Harvey, the appellant's brother. Jacobs' stated that the appellant had been in custody an hour and 20 minutes before he made the statement. He also testified that the appellant had not been allowed a phone call before giving the statement but, on re-examination, clarified this to state that the appellant never requested a telephone call.

[90] The testimony of Constable Charles Layne in chief on the *voir dire* was in similar terms to, and corroborated, that of Constable Jacobs. On cross-examination, he stated that he was aware that they had picked up the appellant's brother but that Jacobs never said to the appellant that they could not charge two people with the same offence and did not offer that, if he confessed, he would only get three years. The door to the interview room was closed and he knew no CID police officer named "Leon."

[91] At this point, the prosecution closed its case.

[92] The appellant did not testify on the *voir dire*, neither did he call any witnesses. The trial judge subsequently admitted the statement into evidence.

Discussion

[93] Before launching into the discussion of the issues relating to the confession and *voir dire*, it behoves us to comment on an apparent obliviousness to the existence of **the Evidence Act, Cap 121** of the Laws of Barbados, enacted almost 20 years ago "to reform the law relating to evidence in proceedings in courts in Barbados and to provide for related matters." Neither at trial nor on appeal before us did the appellant's counsel refer to the relevant provisions of the **Act.** Counsel on both sides contented themselves with referring us, for example, to ***Ajodha v The State*** **[1981] 2 All ER 193** ***("Ajodha")***, a case in which the Privy Council examined the admissibility of a signed confession statement when "the accused denies that he is the author of the statement but admits that the signature or signatures on the document are his and claims that they were obtained from him by threat or inducement."

[94] It is not the first time that a Barbadian Court has felt compelled to lament this ignoring of the statute. In ***Gill v R*****, Criminal Appeal No. 18 of 1998 (date of decision 30 January 2003) ("*Gill v R*")**, involving the admissibility of a confession, **Simmons CJ** noted in this Court at para [71] that "we ha[d] to research this matter on our own." Very recently, in

***Callendar v Pile and Springer*, No. 1681 of 2012** (date of decision 16 January 2014), a case concerning the admissibility of "without prejudice" communications, **Cornelius J** observed at para [29] that "[s]adly, in their oral submissions to the Court both Counsel in this matter. . .failed to direct any attention towards the provisions of the Act."

[95] Because the **Evidence Act** was based on a draft bill appended to the recommendations of the Australian Law Reform Commission, "[i]t is to Australian jurisprudence that the Court turns to obtain guidance on the interpretation of [the Act] and its relationship to English common law principles" (*per* **Cornelius J**, *op cit.*, at para [33]; see, also, *per* **Simmons CJ** in ***Gill v R*** at para [68]).

[96] Indeed, one of the discussions still taking place in Australia is whether the Evidence Act is a code, in the sense that "it covers the entire field of the subject legislated upon, so that it is an exclusive and self-contained source of the relevant law." (**Cross on Evidence, Ninth Australian Edn, 2013, J. D. Heydon**, at para [1720]). **Justice J. Dyson Heydon** (of the **High Court of Australia**) observes that "the history of the legislation points against a desire to codify." (Id., at para. [1735]). He cites the observation of **Basten JA** in **Meteyard v Love, (2005) 65 NSWLR 36** that "it is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law,

without expressing its intention with irresistible clearness." (cited in **Cross on Evidence**, op. cit., at para [1744]).

[97] As we shall see, while the common law decisions in the English Courts and Privy Council continue to be relevant, there is a continuing necessity to consider the modifications to the common law contained in the Act since the statutory provisions obviously override the common law where they differ (see, **Optus Networks Pty Ltd v Leighton Contractors Pty Ltd** [2002] NSWSC 450 at para 46; **Ann Street Mezzanine Pty Ltd v KPMG** [2011] FCA 453 at para 20; see, generally, **Cross on Evidence op. cit., [11045] – [11080]; [33595] – [33735]**). Accordingly, it is a serious *betise* to treat the Act as non-existent. We now turn to examine the Act.

[98] **S. 2** of the **Evidence Act** defines "admission" or "confession" as "a previous representation made by a person who is or becomes a party to proceedings, being a representation that is adverse to the person's interest in the outcome of the proceedings." **S. 69** of the **Act** restates the well-known principle that admissions and confessions constitute an exception to the hearsay and opinion evidence rules.

[99] **Ss. 70** and **71** of the **Act** are directly relevant to written confessions. They provide:

> 70. Evidence of an admission is not admissible ***unless the court is satisfied*** that the admission, and the making of the admission, were not influenced by violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admissions towards some other

person, or by a threat of conduct of that kind, or by any promise made to the person who made the admission to any other person.

71.(1) This section applies only in criminal proceedings and only in relation to evidence of a confession made by an accused.

(2) Evidence of a confession is not admissible unless the circumstances in which the confession was made were such as to make it unlikely that the truth of the confession was adversely affected.

(3) For the purposes of subsection (2), evidence that the confession is true or untrue is not relevant.

(4) For the purposes of subsection (2), the matters that the court shall take into account include

(a) any relevant condition or characteristic of the person who made the confession, including the age, personality and education of the person and any mental, intellectual or physical disability to which the person is or appears to be subject; and

(b) if the confession was made in response to questioning

(i) the nature of the questions and the manner in which they were put, and

(ii) the nature of any threat, promise or representation made to the person questioned.

[100] **S. 70**, which is *verbatim* with **s. 84** of the **Australian Evidence Act**, enacts a "significant change. . .to the common law - in particular, the concept of voluntariness no longer applies to confessional evidence under the Act." (see, **The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts**, Anderson, Hunter and Williams, LexisNexis-Butterworths 2002, at Part 3.4, p. 258). The section "alters the common law by establishing threshold requirements for admitting evidence of admissions in civil (and also in criminal cases). A party

wishing to adduce evidence of an admission must show on a balance of probabilities that the admission or its making was not influenced by violent, oppressive, inhuman or degrading conduct or a threat of such conduct." (**The New Evidence Law**, *op cit.*).

[101] In **Cross on Evidence** (*supra*, at para. [33595]) **Justice Heydon** notes that "the confession must not be made in consequence of an inducement of a temporal nature held out by a person in authority, or by oppression." He refers to the seminal *dicta* of **Sir Owen Dixon** in ***McDermott v R***, (1948) 76 CLR 501, 511, that "if he [the accused] speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne." Hence, it is no longer safe simply to cite the well-known principle laid down in the oft-cited *dictum* of **Viscount Sumner** in ***Ibrahim v R* [1914] AC 599, 609** and the cases based thereon. The statute requires nothing less than an examination of the totality of the circumstances in which the confession was taken rather than the mere concentration on a "person in authority".

[102] As pointed out in **Cross on Evidence**, *supra*, at [11075], **s. 84** establishes that "the burden of proving that an admission was not influenced by violent conduct, once an issue on that question has been raised, is on the prosecution." Similarly, the effect of **s. 71** of the **Evidence Act**, the cognate of **s. 85** of the 1995 Australian Act, is that "the burden of proving that an admission of a defendant tendered in a criminal proceeding was not

made in circumstances affecting its truth is on the prosecution." It is noteworthy that **s. 71 (3)** provides, similarly to **s. 189(3)** of the Australian Act, that when considering the admissibility of a confession on the *voir dire*, the truth or untruth of the confession is irrelevant. The pivotal issue is, therefore, not the truth of the confession itself but rather proof that the circumstances under which the confession was made did not adversely affect its truth. See, further, **Cross on Evidence**, *supra*, [11055 – 11065].

[103] At issue therefore is whether there was sufficient proof adduced by the prosecution that *the signature* on the appellant's written statement was not obtained in circumstances proscribed by **ss. 70** and **71** of the **Evidence Act.** In ***Ajodha***, the Board asked the question whether "this raise[d] a question of law for decision by the judge as to the admissibility of the statement?" (***Ajodha*** at page **196**). In that case, the appellants argued that the contents of the confession should not be attributed to them as, in each case, it had been prepared by the police; he had no opportunity to read it; and had been forced to sign it by being beaten by the police and threatened with further beatings if he did not do so.

[104] The **Board** cited with approval the reasoning of **Haynes C** who, writing for the majority in the Guyana Court of Appeal in **The State v Gobin *and Griffith* (1976) 23 W.I.R. 256** at **page 278 (Haynes C, Crane, RH Luckhoo, and Jhappan JJA; Bollers, CJ,** dissenting) observed that "[i]f the confession of an accused in writing must be voluntary, then the

signature that makes it his must be voluntary also. For when the prosecution puts in a signed statement, what they seek to rely on is not the words of oral confession spoken to the recording policeman; it is what is adopted as true and correct 'in black and white' by the signature." In ***Gobin and Griffith***, the Guyana Court of Appeal had overruled its prior decisions in ***The State v Fowler*** **(1970) 16 W.I.R. 452**, and ***The State v Ramsingh*** **(1973) 20 W.I.R. 138**.

[105] **Lord Bridge of Harwich**, delivering the advice of the **Board** in ***Ajodha***, identified four typical scenarios most likely to be encountered in practice in regard to incriminating statements tendered in evidence by the prosecution in which a question might arise as to the respective functions of judge and jury. Those scenarios, as found at pages 201 to 202 are as follows:

> (1) The accused admits making the statement (orally or in writing) but raises the issue that it was not voluntary. This is a simple case where the judge must rule on admissibility and, if he admits the evidence of the statement, leave to the jury all question as to its value and weight.
>
> (2) The accused, as in each of the instant appeals, denies authorship of the written statement but claims that he signed it involuntarily. Again, for the reasons explained, the judge must rule on admissibility, and, if he admits the statement, leave all issues of fact as to the circumstances of the making and signing of the statement for the jury to consider and evaluate.
>
> (3) The evidence tendered or proposed to be tendered by the prosecution itself indicates that the circumstances in which the statement was taken could arguably lead to the

> conclusion that the statement was obtained by fear of prejudice or hope of advantage excited or held out by a person in authority. In this case, irrespective of any challenge to the prosecution evidence by the defence, it will be for the judge to rule, assuming the prosecution evidence to be true, whether it proves the statement to have been made voluntarily.
>
> (4) On the face of the evidence tendered or proposed to be tendered by the prosecution, there is no material capable of suggesting that the statement was other than voluntary. The defence is an absolute denial of the prosecution evidence.
> (Emphasis added)

[106] All counsel agreed at trial that the second scenario was the most relevant in the circumstances. However, during argument before us, Mrs. Comissiong for the Appellant submitted, as an additional contention, that the trial judge failed to distinguish between the oral and written statements attributed to the accused and directed the jury to determine the voluntariness of both statements. Once the determination is made by the judge to admit the statement, she contended, the evidence, including what was said in the *voir dire*, is canvassed before the jury who then determines on the totality of the evidence whether or not the statement was given by the accused man. If the jury, she said, is being asked to determine voluntariness, as well as other facts, they should be afforded proper directions and assistance from the trial judge.

[107] Counsel's quarrel lay with the following passages of the record:

> The Court: Miss Comissiong, I think the question of the voluntariness of the statement is a matter of fact for the determination of the jury…
> (page 30, lines 9 to 11)
>
> The Court: Madam Foreman and members of the jury, in the fullness of time, I will give you direction on the statements, oral and written. In the meantime, I'll formally admit them into the records. You are then to determine the voluntariness of this aspect of the evidence.
> (page 37, lines 13 to 17)
>
> The Court: On the other hand, the defence's contention is that the statements attributed to him were not made – in which they were recorded, they were obtained by threats and promises. If you accept the defence's contention, in obtaining of the statement was by use of threats, violence or promises, or inducements, then the statement must be ignored and you will return a verdict of not guilty.
> (page 140, lines 20 to 26)

[108] The Crown, in response, referred to the trial judge's directions at page 129 and those on the written statement at pages 135 to 136 of the record (reproduced at paragraphs [111] and [116] below, respectively). Counsel then referred to the judge's directions at page 137, line 3:

> The Court: When you come to assess the evidence in this case, Madam Foreman and members of the jury, you have to look at the totality of the evidence.

[109] Neither position has merit. The argument that the judge left voluntariness to the jury misconceives the fact-finding function of both the judge and jury. In ***Sinclair v R* (1946) 73 CLR 316, 326, Rich J** in the High Court

of Australia, summarised the functions of judge and jury in relation to confessions as follows:

> If the admissibility of the evidence depends on the existence of the fact and the judge is not satisfied by the evidence given at the *voir dire* that it exists, he rejects the evidence. If he is so satisfied, he admits it, but it does not follow from this that the evidence given before him on the *voir dire* on the question of whether the evidence should be admitted may not, in a proper case, be given again in its entirety as evidence in the trial, not of course for the purpose of inviting the jury to give a ruling on admissibility of the evidence, but for the purpose of assisting them to consider whether, in their opinion, the evidence qualifies the weight of the evidence which the judge has admitted.

At page 221 of ***Ajodha***, **Lord Bridge** observed:

> Hearing evidence on the *voir dire*, the judge will of necessity examine all the circumstances and form his own view of how the statement came to be written and signed. In practice the issue as to authorship and that as to whether the signature was voluntary are likely to be inseparably linked. One can hardly envisage a case where a judge might decide that an accused was not responsible for the contents of the statement but had signed it voluntarily. A purist might say that, in considering the issue of authorship, the judge was usurping the function of the jury; but if it is necessary to consider the issue of authorship before the judge can be satisfied that the statement was signed voluntarily. ***There is in truth no usurpation but only a discharge by the judge of his necessary function in deciding the question of admissibility. If the judge rules the statement to have been signed voluntarily and therefore admissible, in this, as in the simple case, the issues both as to authorship and as to the manner in which the signature was obtained will again have to be canvassed before and left for consideration by the jury.*** [Emphasis added]

[110] In other words, both the trial judge and the jury are required to perform a fact-finding function regarding the issue of voluntariness, albeit at different points in the trial. The judge's function flows from the statutory

formulation in **ss. 70** and **71** of the **Evidence Act** that the court must be "***satisfied*** that the admission, and the making of the admission, were not influenced by violent…conduct" and as to the circumstances under which the confession was obtained. Hence the judge, ***initially***, when faced with numbers 1 to 3 of the ***Ajodha*** typical situations, is required, as **Lord Bridge** pointed out, "of necessity [to] examine all the circumstances and form his own view of how the statement came to be written and signed." His Lordship further noted at pages 220-221:

> It has to be remembered that the rule requiring the judge to be satisfied that an incriminating statement by the accused was given voluntarily before deciding that it is admissible in evidence is anomalous in that ***it puts the judge in a position where he must make his own findings of fact and thus creates an inevitable overlap between the fact-finding functions of judge and jury.*** [Emphasis added]

[111] But, equally importantly, the judge does not misdirect the jury in directing them to consider voluntariness while determining the truth of the statement or whether it was made by the accused. This is the jury's function, after the *voir dire*, assuming that the judge rules the statement to be admissible. In the circumstances at bar, this would necessarily include a determination whether the signature to the appellant's written statement was true because it was, *inter alia*, voluntary.

[112] The inevitable overlap of fact-finding functions of the judge and jury that arises in this area was discussed in the case in ***Maynard, Gaskin, Phillips and John v R*, Crim. Appeals Nos. 44, 50, 51 and 52 of 2000 (date of**

decision 17 November 2005), when this Court dismissed the appellant's submission that the trial judge erred when directing the jury that the determination of the voluntariness of the statements allegedly made by the appellant was in their purview.

[113] The record in this case clearly shows that, in line with the principles in ***Ajodha*** and ***R v Mitchell*** **[1998] A.C. 695 (*"Mitchell"*)**, the *voir dire* was conducted by the trial judge to allow him, not the jury, to determine the totality of circumstances as a prerequisite to the admissibility of the written statement. Notably, the appellant neither testified nor called any witnesses to dispute the account given on the *voir dire* by Constables Jacobs and Layne as to the circumstances surrounding the giving of the written statement. The only allegation raised, by way of cross-examination on the *voir dire*, was as to threats by another alleged police officer whose identity was never proven.

[114] There was nothing in the circumstances surrounding the taking of the confession which justified any other conclusion but that the signature was freely appended to the statement by the appellant. I therefore find that the learned judge made no error in admitting the statement and directing the jury, with regard to both the oral and written statements, that it was their duty, as finders of fact, to determine whether these statements were freely made and, therefore, true.

[115] As to the contention that the learned trial judge failed to distinguish between the oral and written statements of the accused, I need do no more than to reproduce *in extenso* the directions of **Blackman J** in the trial record as they pertain to both the oral and the written statements. Dealing first with the oral statements, page 129 of the record reads:

> The Court: Now, Madam Foreman and your members, in the evidence it was said that various oral statements were made to the police by the accused man. With regard to oral statements alleged to have been made the accused, your function as jurors is two-fold. First, you have to make a finding as to whether the words were in fact spoken. Secondly, if you find that they were in fact spoken by the accused, you then have to go on and determine what they mean. These are matters of fact entirely for you. Were they spoken? And if so, what do they mean? If you find that the words are capable of more than one meaning, then you must accept the meaning most favourable to the accused.
>
> Now, Madam Foreman and your members, the accused man objected to statements that were attributed to him on the grounds that they were not made. Now, as regards those oral statements allegedly made by the accused man, as I said, you have to determine what they mean, and as I go through the evidence of the officers I will focus on those particular orals.

[116] The judge then gave the following directions regarding the treatment of the written statements:

> The Court: The accused man has also said that the statement he made was not his statement or

the statement was made through a carrot and stick approach. If you give me the statement you will get three years as opposed to somebody telling him if I give you trouble I gine cut your ass.

The police officers have told us that there were no threats or promises made to the accused man. That no force or violence was used to obtain the written statement, nor was the accused induced to make the statement. And I repeat. You've seen the manner in which the police witnesses gave their evidence, so you could determine whether you consider them to be witnesses on whose testimony you can rely in determining whether the statement was made in the circumstances attested by them. If you have any doubt whatsoever when considering the case against the accused man that the written statement was give by him, you will resolve that doubt in his favour and reject the statement.
(page 130, lines 11 to 28)

The Court: On the other hand, the defence's contention is that the statements attributed to him were not made – in which they were recorded, they were obtained by threats and promises. If you accept the defence's contention, in obtaining of the statement was by use of threats, violence, or promises or inducements, then the statement must be ignored and you will return a verdict of not guilty.

You have seen the witnesses for the prosecution give their evidence before you in-chief and under cross-examination, and you've therefore had the opportunity of seeing and assessing the demeanour of the witnesses. It is now your task, Madam Foreman and members of the jury, to say

> what weight you will attach to the evidence and which of these witnesses you believe or disbelieve.
> (page 140, lines 20 to 32)

[117] The learned trial judge then read the written statement to the jury. I therefore reject the Appellant's submission that the trial judge failed to distinguish between the treatment of the oral and written statements when directing the jury. A cursory reading of the record reveals the distinction drawn by the trial judge between the oral statements, as to which the Appellant raised no issue of voluntariness, and the written statements, as to which the issue of voluntariness was raised and which were the subject of a *voir dire*. For these reasons, this ground, too, lacks merit and is dismissed.

Grounds 4 and 5

[118] Counsel for the Appellant submitted that the trial judge prejudiced the Appellant's case by inquiring about the reasons for the *voir dire* in the presence of the jury, and that he erred in failing to rule on the voluntariness of the written statement at the end of the *voir dire*. She referred us to pages 17 to 20 of the record.

[119] The relevant portions of the dialogue are reproduced as follows:

> Miss Reneé: Your Lordship, we have a jury. **I was wondering if we should excuse this jury**, Your Lordship, to look at certain matters.
>
> The Court: Is the **other jury** coming back?

Miss Reneé: That's good timing.

The Court: Madam Foreman and members of the jury, for two reasons I need to excuse you, one **the other jury is coming back**. The other reason is there may be some housekeeping matters I need to do in you absence. **So for the time being, I excuse you…Bring back the jury and you go and take their place**.

(Jury withdraws under sworn Marshals: 11:44 a.m.)
(Case adjourns: 11:45 a.m.)
(Case resumes: 11:48 a.m.)

Miss Reneé: Your Lordship, we were going to come to the written statement, I just want to have that dealt with now. What is the position of counsel?

Mrs Comissiong: My Lord, my instructions are that he did not make that statement to the police officers.

Miss Reneé: And what about the signature?

Mrs Comissiong: He signed the statement, but it is not what he told the officers.

Miss Reneé: Right. So we need to have something done, Your Lordship.

…

The Court: Right. So do we need to have a voir dire with Constable Jacobs in terms of that statement?

Miss Reneé: Yes, Your Lordship, and his corroborating officer.

The Court: Yes, Miss Reneé.

Miss Reneé: Your Lordship, perhaps if I can hear the allegation being made by Mrs. Comissiong; the circumstances as to why he signed it, Your Lordship.

Mrs Comissiong: The circumstances are that the accused man was talking to the officer when another officer passed and he said, "If he does not cooperate I would deal with him", something to that effect. The statement that he was giving to the officer, he balled it up and threw it away.

...

The Court: Yes, Constable Jacobs, we would now go into --- we will deal with the statement so far as it speaks not to the statement in this voir dire.

Miss Reneé: Pardon me, Your Lordship?

The Court: Constable Jacobs' evidence in this voir dire will now focus on the issue of this statement.

Miss Reneé: Yes, sir.

The Court: So where was he going in terms of other things will be suspended until I rule on the voir dire.

Miss Reneé: Yes, sir. This is where he was going, Your Lordship, to the witness statement.

The Court: All right, let's go.

(**Jury withdraws under sworn Marshals: 11:54 a.m.**)

VOIR DIRE BEGINS"

[Emphasis added]

[120] Equally relevant is the dialogue which occurred after the conclusion of the *voir dire* and which is reproduced here, from pages 35 to 37 of the record:

The Court: Thank you, Constable.

Miss Reneé: That is the case on the voir dire, Your Lordship, for the prosecution.

...

Miss Reneé: Your Lordship, can I have Mrs. Comissiong indicate to the Court that she has closed the case on the voir dire?

The Court: That she has closed the case on the voir dire?

Mrs Comissiong: Yes, sir.

...

The Court: I have good news for counsel. Do your addresses tomorrow, not today.

Mrs. Commissiong: Yes, Sir.

The Court: Or you can do them on Monday.

Mrs. Commissiong: I believe, it is going to be a short matter, sir, we are not going beyond tomorrow. We will not go beyond tomorrow, sir.

Miss Reneé: Your Lordship, what's the plan, ***when the jury come back***, that's it for today or?

The Court: No, no. We will take Jacobs, Layne. We wouldn't go past 2 o'clock. It depends upon what - -

Miss Reneé: Well, I am like the last witness, Your Lordship, I am very fast. Not this one, I meant ***in the other case***, Jackman, I am very quick, Your Lordship.

(Jury returns: 12:34 p.m.)

[Emphasis added].

The Court: Miss Reneé, ready to go back to Mr. Jacobs?

AUGUSTINE JACOBS, being duly sworn, testifies as follows:

EXAMINATION-IN-CHIEF BY MISS RENEÉ: (CONT'D)
BY MISS RENEÉ:

Q: I will just recap. You told the accused...he has a right to consult with an attorney-at-law....Tell us, did the accused make a response?

...

A: The accused replied, "Officer, I do not want no lawyer." I told the accused Elvis Alexander that I was continuing investigations into the matter...and I asked him if he wished to give a written statement in connection with this matter and cautioned him. He replied –

The Court: Mrs Comissiong.

Mrs Comissiong: I had already made official objection that the accused man did not make these statements, the oral statements.

The Court: Madam Foreman and members of the jury, in the fullness of time, I will give you direction on the statements, oral and written. In the meantime, I'll formally admit them into the record. You are then to determine the voluntariness of this aspect of the evidence.

[121] Mrs. Comissiong submitted that the initial discussion surrounding the voluntariness and/or obtaining of the written statement should have never occurred in front of the jury and contended that, at the time of their withdrawal, the jurors would have been aware that the subject of the *voir dire* was the issue of the voluntariness of the written statement.

[122] The Crown responded that the record clearly reflected that no inquiry on the subject of the *voir dire* took place in front the jury and that no prejudice was caused to the Appellant by the judge's failure to formally or expressly state that the written statement was voluntary and therefore admissible. She also submitted that page 37 of the record clearly shows where the judge, albeit not making a formal ruling on the *voir dire*, ruled that the written statement had been admitted into evidence.

[123] I begin by highlighting the fact Mrs. Comissiong candidly admitted before us that she herself participated in the discussion surrounding the voluntariness of the statement, after it was raised by the Crown. Not only did she not object, formally or otherwise, to the discussions, but she proceeded, in front of ***a jury***, to explain fully, at pages 17 to 18 of the record, what her instructions were regarding the provenance of the written statement. She also conceded that it was her duty, as defence counsel, to request a *voir dire*, and acknowledged that she had informed neither the trial judge nor the prosecutor ***in advance*** of her intention to object to the statements. Indeed, at page 19 of the record, Miss Renee stated that "Your Lordship, we don't know anything about it. . .This is the first time I'm hearing." This was unacceptable.

[124] **Lord Steyn** in ***Mitchell*** stated at page 704:

> It is primarily the responsibility of defence counsel to inform the prosecution and the judge ***in advance and in the absence of the jury*** of an intended objection to the admissibility of statements

> of a defendant. On the other hand, if the position remains unclear, counsel for the prosecution is under a duty to seek clarification of the position in the absence of the jury. At the appropriate time counsel must ask the judge to request the jury to withdraw so that a matter can be raised on which the ruling of the judge is required. No discussion of an intended objection must take place in front of the jury. The judge should simply tell the jury that a matter has arisen on which his ruling is required and that they must please retire for the time being. When the voir dire has been completed, and the judge has given his ruling, the judge should give no explanation of the outcome of the voir dire to the jury. [Emphasis added]

[125] A close analysis of the record shows that the Alexander jury had already been excused at the time those statements were made. As is obvious from the record, there were, in fact, two juries sitting in two separate matters in the trial judge's court. The Alexander jury was excused by the judge and withdrew at 11:44 a.m. The case was adjourned at 11:45 and resumed at 11:48. To my mind, this three-minute window was the time the Alexander jurors took to exit the court before discussions surrounding the need for the *voir dire* commenced at 11:48. Miss Reneé then raised the issue of the written statement and confirmed the need for a *voir dire*.

[126] This must surely have occurred in front of the other jury, not the Alexander jury, and I find that the second reference to the jury having withdrawn at 11:54 must be a reference to the second jury if one is to avoid the conclusion that the Alexander jurors withdrew twice without the trial record indicating when they re-entered the courtroom. The *voir dire* was then conducted in the absence of both juries, a conclusion buttressed by the

fact that the prosecutor asked the trial judge at page 36, lines 13-14 "what's the plan, when ***the jury*** come back." The record then indicates that "Jury returns: 12:34 p.m.", obviously referring to the Alexander jury. This contention is without substance and lacks merit.

[127] As regards the Appellant's argument that the trial judge erred in failing to rule on the voluntariness of the written statement at the end of the *voir dire*, we again refer to ***Mitchell*** where the Privy Council held that a judge should give no explanation as to the outcome of a *voir dire*, since to do so could prejudice the accused. **Lord Steyn** opined at page 703:

> The decision on the admissibility of a confession after a voire dire is the sole responsibility of the judge. There is no logical reason why the jury should know about the decision of the judge. It is irrelevant to the consideration by the jury of the issues whether the confession was made and, if so, whether it is true. There is also no practical reason why the jury need to be informed of the judge's decision. Moreover, if the judge reveals his decision to the jury, the risk of unfair prejudice to a defendant is created. That risk will often be greater than in the case of a no case submission. That is so because in the typical case, of which the present is a paradigm, the decision of the judge on the voluntariness of the confession may convey to the jury that the judge believed the police witnesses and disbelieved the defendant...
>
> ...In these circumstances, and relying particularly on the irrelevance of the judge's decision to the task of the jury taken together with the potentiality of prejudice created by informing the jury of the judge's decision, their Lordships hold that the jury ought not to be informed of a judge's decision on a voir dire held to determine the admissibility of a confession. Any contrary practice in The Bahamas or elsewhere in the Caribbean ought to be discontinued.

[128] This principle has been followed by this Court in ***Pilgrim et al v The Queen*, Criminal Appeal No. 15 and 16 of 1994 (date of decision 13 June 2003)** and reaffirmed by the Privy Council on appeal from this Court in ***Foster and Williams v The Queen*, Privy Council Appeal Nos. 60 and 61 of 2006 (date of decision 29 March 2007)**.

[129] Applying this ruling, it is clear that the trial judge fell into error in informing the jury that he was admitting the written statement. In the language of **Lord Steyn** in ***Mitchell***, there was "no logical reason why the jury should know about the decision of the judge." However, I do not find that this error resulted in any prejudice whatever to the appellant. I have already noted that the jury was excused before any mention of the written statement was made. After the *voir dire*, the judge only informed the jury that he was admitting both the oral and written statements into the record and promised them future directions in that regard. Since the jury was not made aware of the nature of the testimony or other evidence adduced or discussed in the *voir dire*, there is little likelihood that the judge's error in any way imperilled the fairness of the trial. Accordingly grounds 4 and 5 lack merit and are dismissed.

Ground 2

[130] Counsel for the Appellant submitted that the trial judge failed to deal adequately with the discrepancies and inconsistencies in the prosecution's

case. She referred the Court to the evidence of PC Jacobs, PC Layne, Christopher Harvey and pages 128 to 129 and 138 of the summation.

[131] In relation to the evidence of Constables Jacobs and Layne, Counsel referred to: (1) their contradictory statements as to whether they were cruising the area or parked when they spotted the Appellant; and (2) whether the area they were in was illuminated by their vehicle's spotlights or dark. She argued that the evidence of Christopher Harvey was "brushed off by the Court" when, in fact, his evidence supported the view of Mr Layne that the officers were parked and in a dark area when himself and the Appellant were spotted. More crucial was Harvey's evidence to the affect that he, and not the accused, was carrying the bag containing the ammunition. She further argued that the learned judge should have directed the jury as to the possible dangers of accepting the police evidence. Counsel for the Crown refuted these submissions by referring the Court to pages 127, 128, 134 to 137 of the trial record.

[132] I note that, on page 137, the trial judge directed the jury that "discrepancies go to the weight, value and reliability of the evidence" and that they must "first look to find the reason for the discrepancy". The learned judge then went on to highlight the following discrepancies: (1) between officers Jacobs and Layne in terms of the stationary or moving nature of the police vehicle and the lighting coming therefrom; (2) between the statement given by Officer Jacobs in the High Court and the Magistrate's Court in relation

to Appellant's response upon being asked whether he was the holder of a license; (3) as to the making of the written and oral statements (see page 134 lines 21 and 22 of the trial record).

[133] In terms of directions to the jury, the judge quite rightly directed the jury that, where there was more than one inference, they were to adopt the inference most favourable to the accused and that where they were in doubt as to any of the evidence, they were to resolve those doubts in favour of the accused. Such directions are fitting as jurors are arbiters of the facts. This ground is unfounded and also fails.

Ground 3

[134] The appellant contends that, during the summation, the trial judge misstated and unfairly presented his case to the jury. Counsel referred to pp. 135 to 140 of the trial record. She argued that the trial judge erred in referring to the written statement as "the statement given by the accused to the police..." and argued that the learned judge should have referred to it as the statement '*allegedly* made by the accused'. However, it should be pointed out that, in the appellant's own Amended Grounds of Appeal filed on 16 September 2008, his Re-Amended Grounds of Appeal filed 26 March 2010 and his Skeleton Arguments filed 31 March 2010, his counsel referred to "the written statement made by the accused." Hence, the trial judge could not have erred in describing the statement in exactly the same language as appellate counsel in their written submissions.

[135] Counsel also contended that the trial judge should have referred the jury to defences not raised by the defence. In support of this contention she cited **Archbold para 4-379** under the heading *"Putting the prosecution or defence case on basis other than that relied on by the advocates"* which states:

> The judge should look for any possible defence to the charge arising from the evidence and refer to it even though the defence has not been relied on by the defending advocate.

[136] There is no merit in the appellant's argument. The record indicates that the judge gave the following directions: (1) the jury is to determine questions of fact; (2) the jury is entitled to draw inferences from proven facts; (3) the jury is duty bound to return a verdict in accordance with the evidence heard within the courtroom and with the oath taken; (4) the jury must determine the materiality of the discrepancies raised by the appellant in relation to the issues of parking and cruising and the lights emitted by the police vehicle; (5) the jury is to evaluate and determine the voluntariness of both the written and oral statements; (6) where there is doubt as to the voluntariness of the written statement, the jury must accept the version of events advanced by the defence; (7) in relation to the oral statements, the jury was to determine whether the words were spoken and, if so, determine their meaning. Should the jury find they were capable of more than one meaning, they were to accept the meaning more favourable to the accused (8) if the jury is unsatisfied with the evidence led by the prosecution they

must find the Appellant not guilty; (9) if on the totality of the evidence they are satisfied and sure that the prosecution has proved its case beyond a reasonable doubt they must return a guilty verdict; and (10) if they were unsatisfied or in doubt that the prosecution has proved its case beyond a reasonable doubt, they were to return a verdict of not guilty. There were also various cautions given to the jury throughout the trial and summation.

[137] Finally, I have also taken into consideration that, prior to concluding his summing up, the trial judge asked both counsel if there was any matter that he should have put to the jury that he has omitted. They both responded no. In light of these factors, I cannot accept that the learned judge misstated the appellant's case. On the contrary, he gave the jury a fair and balanced account of the evidence and the circumstances surrounding the appellant's case.

[138] As regards the alleged failure of the judge to present alternative defences to the jury, it is noteworthy that, during argument before us, when pressed as to what other defences should have been raised by the trial judge, Counsel could not identify a single legal defence, referring only *en passant* to the constitutional right to counsel. While it is acknowledged that a judge is not confined to the arguments put forward by the parties and is entitled to comment on matters given in evidence (see ***R v Evans*** **91 Cr. App. R 173, CA**), it was impossible for the trial judge to refer to alternative defences which counsel could not identify.

[139] I respectfully adopt the language of ***Winn LJ*** in ***R v Kachikwu*** **(1968) 52 Cr. App. R. 538, 543**, where his Lordship stated:

> It is asking much of judges...to require that they should always have in mind possible answers, possible excuses in law which have not been relied on by defending counsel...Nevertheless, it is perfectly clear that this court has always regarded it as the duty of the judge...to ensure that he himself looks for and sees any such possible answers and refers to them in his summing up to the jury and takes care to ensure that the jury's verdict rests upon their having in fact excluded any of those excusatory circumstances.

[140] There was no fault in the manner in which the trial judge presented the appellant's case to the jury. This ground of appeal is, therefore, dismissed.

Ground 7

[141] Based on the findings in grounds one to six above, I accordingly dismiss this ground which contends that the verdict was unsafe.

V.III The Sentence Imposed

[142] Finally, it falls to be determined, based on the discussion above, whether the sentence imposed by the trial judge was appropriate in the circumstances.

[143] I note, initially, that the trial judge, as expected, made it very clear that he had no discretion and was bound by **s. 30** of the statute to impose a mandatory sentence. In fact, he ought to have imposed a sentence of 15 years rather than 10. To this extent only did he fall into error. And he was not asked to, and so did not, rule on the constitutionality of the section. The question, then, is what guidance is there for sentences for firearms

offences in the absence of the mandatory and unconstitutional sentencing restrictions in **s. 30**.

[144] The simple answer is that I can find no reason to depart from the guidelines issued by this Court in ***Bovell*** where **Simmons CJ** stated that "the range of sentence for offences involving possession should be between 8 and 10 years." As noted above, in ***Bovell*** this Court expressed its consciousness of the rise in criminal activity involving firearms. In the English Court of Appeal decision of ***R v Wilkinson*** **[2010] 1 Cr. App. R. 100**, **Lord Judge CJ** stated at para. 2:

> The gravity of gun crime cannot be exaggerated. Guns kill and maim, terrorise and intimidate. That is why criminals use them…Sentencing courts must address the fact that too many lethal weapons are too readily available: too many are carried: too many are used, always with devastating effect on individual victims and with insidious corrosive impact on the wellbeing of the local community.

[145] In this case, it was not simply that the Appellant was convicted of possession of a gun and ammunition that was troubling. Rather, it was the type of gun he possessed and had planned to sell. It was a .22 rifle with a telescopic lens. The trial judge was clearly aware of the danger posed to the community by this type of weapon. At page 151 of the trial record, he quite rightly referred to this Court's decision in ***Bovell***, where **Simmons CJ** observed at [83] that "in determining an appropriate sentence, we agree that sentencers should ask themselves the four questions recommended by

Lord Bingham CJ in ***Tony Avis*** **([1998] 2 Cr App Rep 178, 180]).**" The first of those questions is "What sort of weapon was involved?"

[146] I also wish to underscore this Court's recent decision ***Burton and Nurse v The Queen*****, Criminal Appeal Nos. 1 & 4 of 2011 (date of decision 4 October 2013)**, where **Moore JA**, observed at paragraph 23:

> Sentencing is an art, not a science. Every sentence must be considered with due regard being had to all of the circumstances of the particular case. Therefore, the sentence imposed in every case must be left to the discretion of the sentencer acting on known sentencing principles.

[147] In light of the concerns expressed by the trial judge, with which I agree, it cannot be said that the Judge erred in the sentence imposed. It was not excessive. However, I have carefully considered the judgment in draft of **Peter Williams JA**. I have considered that, fortunately, the rifle had not been used to cause either death or injury, and I have taken into account the youthfulness of the Appellant, and the delay in issuing this decision. In circumstances such as this, delay must redound to the benefit of the Appellant. Adopting therefore the conclusion, and not necessarily the reasoning, of **Peter Williams JA**, I conclude that when the Court rises today, the Appellant will be free to go. Notwithstanding our concern about the failure to cite the **Evidence Act**, we would like to thank all counsel involved for their careful and well presented submissions and the abundance of authorities cited for our consideration.

DISPOSAL

[148] In the circumstances, I would order as follows:

1. The appeal is allowed as to the Constitutional contention and it is declared that the mandatory minimum provisions of **section 30 of the Firearms Act (Amendment) 2002**, are severed as unconstitutional;
2. The appeal is allowed as to the sentence which is varied to permit the Appellant to be released when the Court rises; and
3. The appeal is dismissed as to all the procedural grounds.

Marston Gibson

Chief Justice

MASON, JA:

I have had the opportunity to read in draft the judgment of the Chief Justice. I agree with it as to the procedural grounds only.

Justice of Appeal

MASON JA:

I have read the opinions expressed by my brothers in their separate judgments. I am in substantial agreement with the conclusion of **Williams JA** on the constitutional points.

I, however, wish to make a very brief comment on the constitutional redress of reading down. **Section 11(2)** of the Criminal Procedure Act, Cap. 127 provides as follows:

> "11.(2) Every person convicted of any offence not punishable by death shall be punished in the manner prescribed by the statute specially relating to such offence or by such fine or such other manner as the High Court may determine in addition to or in substitution for the punishment prescribed by the statute."

Section 11(2) was enacted in 1992, a mere 10 years before the **Firearms Act** was amended. It is therefore impossible to conceive that Parliament, in enacting this amendment, did not have firmly in mind the existence of **section 11(2)**. Thus having not disturbed that provision, there is the presumption that Parliament intended that **section 30** of the **Firearms Act** should be read subject to the overriding judicial discretion which resides in **section 11(2)**. Consequently **section 30** of the **Firearms Act** should be "read down" in order to bring it into conformity with **section 11(2)**.

I have examined the remaining 6 grounds which dealt with the criminal aspects of the appeal and having considered the arguments of counsel for the appellant am of the opinion in agreement with the Honourable Chief Justice that they are not sustainable.

With respect to the sentence I am of the view that in all the circumstances of the case, the appellant will be deemed to have served his sentence at the rising of the Court.

Justice of Appeal.