IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA
CONSTITUTIONAL AND ADMINISTRATIVE JURISDICTION

FIXED DATE APPLICATION

2017-HC-DEM-CIV-FDA-1372

BETWEEN:

In the matter of Article 8, Article 39, Article 40, Article 65, Article 122(A), Article 141 and Article 154(A) of the Constitution of the Cooperative Republic of Guyana.

-and-

In the matter of an Application by Fixed date Application by VINNETTE JAMES.

-and-

In the matter of Applications by Fixed Date Applications by VINNETTE JAMES and Others for and on behalf of DELLON ST. HILL and Others

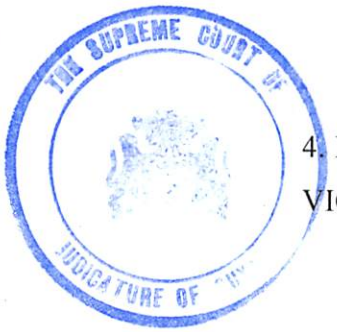
Applicants

-and-

1. THE ATTORNEY GENERAL OF GUYANA, HONOURABLE BASIL WILLIAMS, S.C

2. THE DIRECTOR OF PUBLIC PROSECUTIONS GUYANA, SHALIMAR ALI-HACK

3. THE CHIEF MAGISTRATE OF GUYANA, HER WORSHIP ANN MCLENNAN



4. HIS WORSHIP PETER HUGH, MAGISTRATE OF THE VIGILANCE MAGISTRATES COURT

Respondents

Jointly and Severally

Before: Honourable Madam Justice Jo-Ann Barlow

Appearances: Mr Eusi Anderson for the Applicants and Mrs. Onika Archer-Caulder for the Respondents

DECISION

The Applicant Vinnette James has moved the Court by Fixed Date Application 1337/2017 challenging the penal provisions of the Narcotics Drugs and Psychotropic Substances Control Act Chapter 10:10 and the Firearms Act Chapter 16:05 herein after referred to as the Narcotics Act and the Firearms Act respectively. The Applicant filed this action for and on behalf of Dellon St Hill, a citizen of Guyana. Subsequent to the filing of this Application by Vinette James, two other Applications were filed – one by Indrani Dayanarain on behalf of Parsram Shancharra and the other by Karen Crawford on behalf of Khalil Mustafa also known as Khalil Mustapha. The Applications are identical in every material particular. By Order of the Court they were consolidated and heard together.

The Applicants challenged the constitutionality of the imposition of the mandatory minimum sentences prescribed by the Narcotics Act and the Firearms Act. They contended that the mandatory minimum sentencing

provisions in the Narcotics Act and the Firearms Act are contrary to Articles 8, 39, 40, 65, 122(A), 141 and 154(A) of the Constitution of the Co-operative Republic of Guyana.

While many breaches of the Constitution and their consequences were cited in the Application, the challenges can be summed up as follows:-

1. That the mandatory minimum sentencing provisions of the Narcotics Act and the Firearms Act are unconstitutional, null, void and of no legal effect insofar as they render nugatory the doctrine of Separation of Powers.

2. That the mandatory minimum sentencing provisions of the Narcotics and the Firearms Act are unconstitutional in that they are grossly disproportionate, arbitrary and excessive.

3. That mandatory minimum sentencing provisions of the Narcotics Act and the Firearms Act amount to torture, cruel and inhuman punishment.

The Respondents contended:

1. That the mandatory minimum sentencing provisions contained in these Acts do not offend the provisions of the Constitution.

2. That the power is and has always been vested in the Legislature to make laws for the peace, order and good government of Guyana.

3. That the mandatory minimum sentencing provisions as contained in the Narcotics Act and the Firearms Act are proportionate and just considering the nature and seriousness of the offences and the prevailing legal, social and economic climate.

History of the Matter

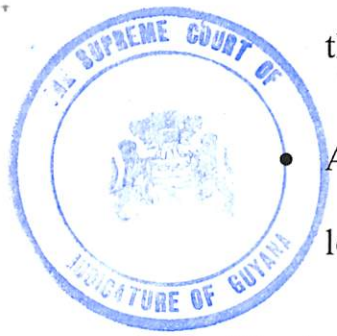
Dellon St Hill, Parsram Sancharra and Khalil Mustafa also known as Khalil Mustapha appeared before Magistrate's Courts charged with offences under the Narcotics Act. Trials ensued and they were convicted and sentenced. In addition to these Applications, citing breaches of the Constitution, they have all filed appeals against the convictions.

Issues

The issues which the Court must address can be summarised as follows:

- Can Vinette James and the other Applicants challenge the constitutionality of the provisions of the Narcotics Act on behalf of Dellon St Hill and others?

- Can Vinette James and the other Applicants challenge the constitutionality of the penal provisions of the Firearms Act, given that their contentions relate to possible future breaches?



- Are the Mandatory minimum sentences of the relevant pieces of legislation unconstitutional?

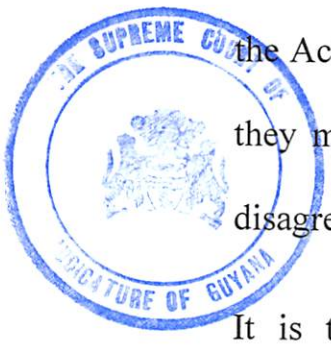
The first two issues can with swift dispatch be answered in the affirmative. In the first instance, Vinette James and others are proper parties in the Applications relative to the penal provisions of the Narcotics Act since Article 153(1) of the Constitution of the Co-operative Republic of Guyana confers a right on any person acting on his or her own behalf or on behalf of another to apply to the High Court in enforcement of the protective provisions of the Constitution. In the second instance, the Caribbean Court of Justice in the case of the Attorney General of Belize v Zuniga and others, CCJ Appeal No.8 of 2012, made it clear that a citizen need not await a breach of the Constitution to approach the Court but is at liberty to do so in the face of a likelihood of breach.

The third issue must perforce be treated under different sub heads:

1.SEPARATION OF POWERS

Counsel for the Applicants argued that the Legislature by fixing a mandatory

minimum sentence has blurred the lines between two arms of the state - that is the Legislature and the Judiciary. He contended that by stipulating an upper and lower ceiling for sentencing offenders under the relevant penal sections of the Acts, the Legislature is dictating to judicial officers what course of action they must take when sentencing an offender. With this argument the Court disagreed.



It is the Legislature that is tasked with ascertaining through measures available, what ills or mischief beset a society. Armed with such information, the Legislature must then determine what reasonable measures would treat with those ills or with the particular mischief. While this may seem to be an overlap between the powers of the Legislature and the Judiciary, the principle of Separation of Powers remains unaffected as long as there are sufficient checks and balances in place. *In Hinds v. R [1975] 24WIR 326 @ 341 Lord Diplock* in addressing the question of separation of powers in Caribbean Constitutions opined that-

> *"The power conferred upon the Parliament to make laws for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law: .... In the exercise of its*

legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence- as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case. 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."

This Court found favour with these sentiments and did not accept that the mere setting of parameters within which a court ought to act blurs the lines and creates an obfuscation of the doctrine of Separation of Powers.

2. REMOVAL OF JUDICIAL DISCRETION

The Applicants' arguments in relation to the removal of the judicial discretion by the Legislature are in some senses tied to the separation of powers argument but warrant separate treatment. One of the arguments advanced by the Applicants is that by fixing a mandatory minimum sentence, the

Legislature has removed from the sentencing court that discretion which any sentencing court must possess thereby rendering the provisions unconstitutional. This Court found that this is not an accurate assessment of the nature of a mandatory minimum sentence and that in holding that view, the Applicants are mistaken.

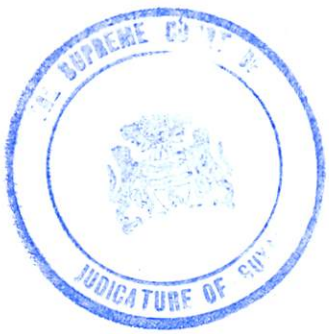
In *Reyes v. R [2002] 2 AC 235 @245* Lord Bingham of Cornwall addressed what can only be described as necessary interdependence that exists between the Legislature and the Judiciary. He said -

> *"In a modern liberal democracy it is ordinarily the task of the democratically elected Legislature to decide what conduct should be treated as criminal, so as to attract penal consequences, and to decide what kind and measure of punishment such conduct should attract or be liable to attract. The prevention of crime, often very serious crime, is a matter of acute concern in many countries around the world, and prescribing the bounds of punishment is an important task of those elected to represent the people. The ordinary task of the courts is to give full and fair effect to the penal law which the Legislature has enacted. This is sometimes described as deference shown by the courts to the will of the democratically - elected Legislature. But it is perhaps more aptly described as the basic constitutional duty of the courts which, in relation to enacted law, is to interpret and apply it".*

The abovementioned judicial pronouncements make clear the fallacy in the argument of the Applicants. That notwithstanding, a Court's task in matters such as these is to examine the legislative framework to be sure that while there exits that interdependence, there is no crossing of the line and sentencing remains in the hands of the judicial arm of the state.

Ó'Dálaigh CJ in the Irish case of *Deaton v A-G and Revenue Comrs [1963] IR 170 said at 182—18:*

> *'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 ...'*



Lord Diplock in *Hinds v R*, [1975] 24 WIR 326 referred to that passage with approval. He observed that that statement, uttered in relation to the Constitution of the Irish Republic, applied with even greater force to Constitutions based on the Westminster model.

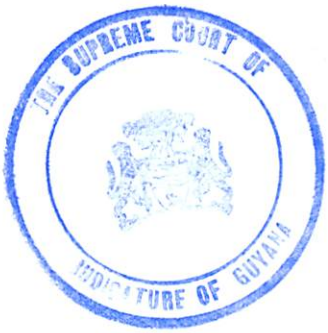
In examining the provisions complained of in the extant Applications the Court examined the penal provisions to determine in which arm of the State the sentencing of offenders rests. That examination revealed that there are sufficient safe guards to keep the powers of sentencing exclusively within the purview of the Judiciary. To this issue the Court will return shortly.

3. GROSSLY DISPROPORTIONATE, ARBITRARY AND EXCESSIVE

Another limb on which the Applicants based their challenge to the mandatory minimum sentences prescribed by the Legislature is the view that mandatory minimum sentences are grossly disproportionate, arbitrary and excessive and therefore amount to cruel and inhuman punishment.

It is a hallowed principle that the penalty must fit the crime and a penalty that is out of proportion with the offence is liable to be struck down on the grounds that it offends not only general sentencing principles but also offends the fundamental rights of the citizen and is therefore unconstitutional.

The Applicants rely on *R v Lloyd [2016] SCR 130* and other Canadian cases where mandatory minimum sentences were struck down by the Supreme Court of Canada as being unconstitutional. Counsel for the Applicants pointed to M^{c}Lachin CJ's views @ page 152 para 35 of that judgment. There he said -



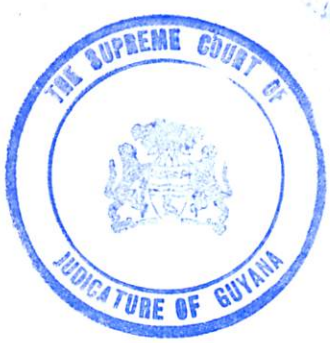
"The reality is this: mandatory minimum sentence provisions that apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are constitutionally vulnerable. This is because such provisions will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional."

It is not every sentence, even a mandatory minimum sentence, that appears harsh or excessive that amounts to cruel, inhuman or degrading punishment and therefore unconstitutional. To be cruel, inhuman or degrading punishment a sentence must be more than merely excessive. It must be "so excessive as to outrage standards of decency" and be "abhorrent or intolerable" to society ..." per M^{c}Lauchlin CJ in Lloyd's case (supra)@ page 149 para 24.

It is clear too that being "constitutionally vulnerable" is not the same as being unconstitutional if there are appropriate checks and balances in place to ensure that no offender would be subject to the mandatory minimum sentence if the circumstances of his case warrant a lesser sentence. In Lloyd (supra) M^{c}Lauchlin CJ said:-

".....If Parliament hopes to maintain mandatory minimum sentences for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit that mandatory minimum sentences. In the alternative,

Parliament could provide for judicial discretion to allow for a lesser sentence where the mandatory minimum would be grossly disproportionate and would constitute cruel and unusual punishment..."



.... no precise formula and only one requirement — that the residual discretion allow for a lesser sentence where application of the mandatory minimum would result in a sentence that is grossly disproportionate to what is fit and appropriate and would constitute cruel and unusual punishment."

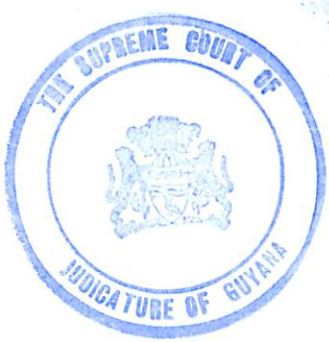
Examples of legislative preservation of the judicial discretion in the face of mandatory minimum sentences can be found in the Precious Stones Trade Act 1982 of Zimbabwe, New Zealand Sentencing Act 2002 and the Misuse of Drugs Act 1990 as amended by the Justice Act 26/1994 of Belize. These Acts all provide that a Court may impose a sentence lower than the mandatory minimum sentence if there are reasons for doing so which must be recorded. Some pieces of legislation speak of "special reasons" while others simply speak of "reasons."

Both the Narcotics Act and the Firearms Act contain similar provisions. These are sections 73(2) of the Narcotics Act and sections 16 (a) and (b), 32, and 39 of the Firearms Act.

4. SPECIAL REASONS

The sections of the Firearms Act which are the subject of these Applications are sections 16, 32, 38 and 39. Section 38 does not prescribe a mandatory minimum penalty but the other sections do. All of the sections of the Firearms Act that prescribe a mandatory minimum sentence also provide:- ***".....provided that the Court may for special reasons to be recorded in writing impose any other sentence...".***

Section 73 of theNarcotics Act states;



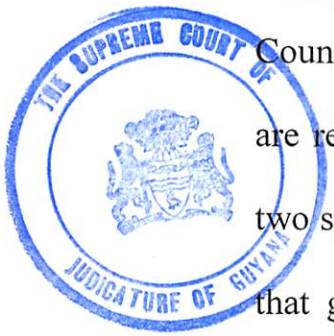
(1) "*where any provisions of this Act requires imposing on any person convicted of any offence under this Act a sentence of death or a sentence of imprisonment for life or imprisonment for a minimum term or imprisonment then notwithstanding anything contained in any other provisions of this Act or any other written law but subject to the provisions of section 166 of the Criminal Law (Procedure) Act*

(a) no other punishment shall be substituted for the sentence of death or the sentence of imprisonment as the case may be; and

(b) the sentence of imprisonment for life or imprisonment for a minimum term is required to be imposed, the sentence of imprisonment shall not be a lesser tern than life or the minimum term so required as the case may be

unless there are special reasons for doing so which shall be recorded in writing.

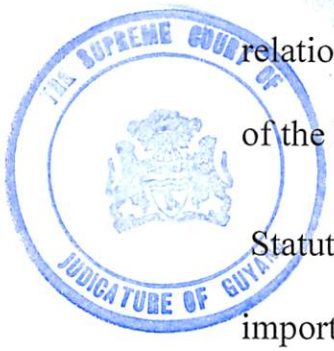
Section 73(2) (a) and (b) then lists what this Court has found to be two examples of special reasons. Section 73(2) (a) refers to the fact that the person was a child or young person at the date of commission of the offence and section 73 (b) speaks to a person convicted for an offence of possession where the substance is cannabis, the amount does not exceed five grams and the court is satisfied that the cannabis was for the offender's personal consumption.



Counsel for the Applicants argued strenuously that section 73(2) (a) and (b) are restricted in their scope and application because there listed are the only two special reasons. Extending his argument in relation to this issue he argued that given the narrow limits of the section, it rendered the penal sections invalid to the extent that they left susceptible to cruel and inhuman punishment many offenders who did not fall within those two special reasons. This Court found no such restriction imposed by section 73(2) (a) and (b). Section 73(2) (a) and (b) merely provide two examples and not a closed list of special reasons.

The Court was also cognizant of the fact that the Guyana Court of Appeal in the case of *Knights v De Cruz (1996) 54 WIR 252*, relying on the principles in *R v Crossen [1939] NI 10* which were cited with approval by Goddard CJ in *Withal v Kirby [1946] 2 All ER 552*,held that a 'special reason' within the

exception is one which is special to the facts which constituted the offence, and not one which was special to the offender, as distinguished from the offence. In *Knights v De Cruz*, the Court excluded considerations personal to the offender such as his plea and family hardship from affecting sentencing in a firearms matter. This Court distinguished that case from the present in relation to the Narcotics Act and will explain its applicability to the provisions of the Firearms Act shortly.



Statutory provisions cannot be examined and interpreted based on principles imported wholesale from another offence or another set of circumstances. Statutory Provisions must be interpreted by examining its sections as a whole. The Legislature in providing those examples of "special reasons" in section 73(2) (a) and (b), set out examples that that are special both to the offence and the offender and thereby departed from the *Knights v DeCruz* formula. That formula therefore has no applicability to narcotics matters.

The Firearms Act has no examples to which the Court may look to determine the Legislature's intent in relation to 'special reasons'. In relation to cases decided on the issue, there is *Knights v De Cruz* (supra). In that case Kennard C as he then was @ p 253 cited with approval from *R v Crossen* (supra); the following principle;

A "special reason" within the exception is one which is special to the facts of the particular case that is special to the facts, which constitute the offence. It is, in other words, a mitigation or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not "a special reason" within the exception.'

An analysis of this principle reveals that it does not shut out reasons special to the offender if those reasons are directly connected to the commission of the offence.

Examples of a "circumstances peculiar to the offender" would be the fact that financial hardship would befall his family. See *R v Wickins (1958) 42 Cr App Rep 236; Basil Mortimer Bernard [1997] 1Cr App R 134* (illness of convicted person). Those reasons have no connection to the "circumstances of the offence" and therefore are outside of the exception.

Notwithstanding *Knights v De Cruz* (supra) this Court has found that the discretion to go below the mandatory minimum sentence prescribed in the Firearms Act exists. Courts are urged to guard against excluding every fact personal to the offender in their analysis of the circumstances under this Act.

Proper analysis of the circumstances before a sentencing court will often reveal that reasons special to an offender may be so inextricably bound up with other circumstances that separation is not possible.

Counsel has invited the Court to provide a list of examples that amount to special reasons. The principle *expresis unius est exclusion alterius* obliges the Court to decline the invitation. To create a list of special reasons is to immediately exclude from the operation of section 73(1) and those provisions of the Firearms Act that speak of special reasons, an offender whose circumstances do not fall among those matters on such a list. Sentencing must always be a stage in the proceedings that is entirely in the hands of the tribunal seized of the matter, knowledgeable of all the circumstances and in a position to assess all mitigating and aggravating circumstances - *Ponoo v Attorney General of the Seychelles [2012] 5 LRC 305 @ 305 para 37-39.* It is not for a court sitting as this Court is, to dictate to a sentencing court what are special reasons in the matter before that court.

In arriving at an appropriate sentence under the Narcotics Act and the Firearms Act, a court in assessing the circumstances to determine what are special reasons, must bear in mind that both narcotics offences and firearms offenses are serious offences and that the Legislature by fixing mandatory

minimum sentences in all of the sections complained of was saying that these offences must be treated with seriousness given the effect that they have on society. Having noted the seriousness with which the Legislature treats such offences, the court must embark on a search of the circumstances before it to determine what sentence best suits the case and that individual offender before the court. Special reasons are reasons not special to the general public but peculiar to the case before the court and the offender before the court.

By way of example and not by way of creating a list this Court is of the view that an early guilty plea from a young offender may be seen as a special circumstance while for another young offender with an equally early guilty plea, a court may find that because of the repeated nature of his appearances and because of the less aggravating or more aggravating circumstances that attended his previous appearances before a court, an early guilty plea coupled with his youth do not have the same value. In each case it is for the sentencing court to make a value judgment of the information that is before that Court.

CONCLUSION

In concluding, this court determined that section 73 of the Narcotics Act and

the provisions of the Firearms Act that speak to special reasons preserve for a sentencing court that inherent jurisdiction that every judicial officer must possess at the time of sentencing an accused person. The safety net that those special reasons provisions provide, renders baseless the challenges raised by the Applicant. The declarations of unconstitutionality sought by the Applicants are therefore refused.

Before leaving this matter this Court takes occasion to observe that both pieces of legislation have been engaging the attention of the Courts for some considerable period of time. The ills that they sought to address may still exist but the question to be answered is whether the legislation in its present form adequately treats those ills. Has the time not come for there to be comprehensive review of these pieces of legislation? Such review would include mature deliberation on whether mandatory minimum sentences are still necessary. It might also address whether the present sentencing regime which contemplates mainly custodial sentences is still necessary.

.....
Hon. Jo-Ann Barlow
Puisne Judge
2018-03-28