Simeon v Attorney-General

(2010) SLR 280

Basil HOAREAU for the petitioner
Ronny GOVINDEN for the respondent

Judgment delivered on 28 September 2010 by

EGONDA-NTENDE CJ: I have had the benefit of reading in draft the judgment of Gaswaga J. For the reasons he has given I agree that this petition should be dismissed.

As Renaud J also agrees, this petition is dismissed with no order as to costs.

RENAUD J: I had the benefit of reading the draft of the judgment drawn by my brother Duncan Gaswaga. I concur with that judgment.

GASWAGA J: Aaron Simeon lodged a petition against the Attorney-General in his capacity as representative of the Government of Seychelles in terms of rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994 for the following orders:

(i) Declaration that section 29 and the Second Schedule of the Misuse of Drugs Act have contravened articles 1 and 119(2) of the Constitution and the petitioner's interest has been affected by the said contravention;

(ii) Declaration that article 16 of the Constitution has been contravened in relation to the petitioner by the provisions of section 29 and the Second Schedule of the Misuse of Drugs Act;

(iii) Declaration that section 29 and the Second Schedule of the Misuse of Drugs Act are inconsistent with articles 1, 119(2) and 16 of the Constitution and hence are void;

(iv) Declaration that the sentence of 10 years imposed on the petitioner is unconstitutional and void and order the immediate release of the petitioner.

The facts

The facts as deposed by the petitioner in his affidavit of 13 January 2010 and presented before the Court are that the petitioner was charged and convicted of the offence of trafficking in a controlled drug contrary to section 5 of the Misuse of Drugs Act read with sections 14(d) and 26(1) as amended by Act 14 of 1994 and punishable under the Second Schedule of the said Act read with section 29 of the same, and sentenced to ten (10) years in prison after he had been found in possession of 2.44 grams of diamorphine (heroine) which gives rise to the rebuttable

presumption of the accused having possessed the said drug for the purpose of trafficking.

Whereas these facts are not disputed by the respondent, the Attorney-General vehemently objects to the petition being filed.

The issues

Two issues have been raised by the parties:

(1) Whether the provisions of section 29 and the Second Schedule of the Misuse of Drugs Act Cap 133 contravene articles 1 and 119(2) of the Constitution; and

(2) Whether article 16 of the Constitution has been contravened in relation to the petitioner by section 29 of the Misuse of Drugs Act Cap 133 and the Second Schedule of the Misuse of Drugs Act.

Petitioner's case

The petitioner avers that at the trial of the case against the petitioner, Dr Jakharia the drug analyst testified that the total weight of the drug (powder) was 2.4 grams but only 2% of it was diamorphine. That the sentence of ten years imposed on the petitioner by the Supreme Court on 14 October 2009 was disproportionate to the offence with which the petitioner was convicted, having regard to the total weight of the drug 2% of which was actually diamorphine and the fact that the petitioner was a first offender.

In support of the petition it was submitted by counsel that the mandatory sentence of ten years imposed on the petitioner contravenes the principle of separation of powers entrenched in our Constitution (vide article 1) and the independence of the judiciary provided for under article 119(2). According to article 1 Seychelles is a "sovereign Democratic Republic". It observes a separation of powers amongst the three organs of state namely the Executive, Legislature and Judiciary. He referred to the case of *State of Mauritius v Khoyratty* [2006] UKPC 13, wherein section 1 of the Constitution of Mauritius which is similarly worded to our article 1 was interpreted by the Privy Council. Section 1 provides that "Mauritius shall be a sovereign democratic state, which shall be known as the Republic of Mauritius". The court held that section 1 lays down the doctrine of separation of powers.

In addition the case of *Ali v Republic* [1992] 2 All ER 1 was cited. This case illustrated the importance of the doctrine of separation of powers.

As to whether a mandatory minimum sentence could be set out in a law by the legislature, the petitioner's counsel cited the authority of *Philibert v State of Mauritius* (2007) SC 5274 which answered that question in the affirmative. He then invited the Court to differ from this position since it was not bound by that authority and instead hold that the legislature was in contravention of the principle of separation of powers. That by so doing the legislature interferes with the discretion of the judiciary which is unable to impose a sentence lower than the prescribed minimum sentence even in

deserving cases whose circumstances may warrant such lesser sentence. It was also submitted that the legislature was at liberty to prescribe a range of sentences other than mandatory sentences to be imposed by the judiciary.

That generally given the circumstances of the case and specifically the antecedents of the petitioner as indicated above, the sentence of ten years breached the petitioner's right not to be subjected to inhuman or degrading treatment or punishment. It is the petitioner's contention that the trial judge was compelled to impose the minimum mandatory ten year sentence thereby contravening the principle of proportionality which amounts to cruel and degrading treatment or punishment. He supported this position with the authority of *Philibert v State of Mauritius*(2007) SCJ 274.

Counsel concluded his submission with a prayer that this court holds that separation of powers has been breached or in the alternative, that article 16 has been breached in relation to the petitioner.

Respondent's case

On the other hand the respondent contends that if the petitioner's submission is upheld such judgment will have far-reaching consequences on the justice system of this jurisdiction given that there are more than one hundred offences pending before the Courts in which the accused have been charged with drug trafficking and therefore attracting the rebuttable presumption and minimum mandatory sentence. Further, that there are numerous offences under the Penal Code falling in the same category also pending before the Courts and quite a number of people already convicted and serving time in the Montagne Posée prison facility as a result of convictions from such cases which relied on the provisions and principles sought to be impugned now.

Contrary to the petitioner's submission the respondent contends that the provisions of section 29 and the Second Schedule of the Misuse of Drugs Act, Cap 133 (hereinafter referred to as 'the Act') do not contravene articles 1 and 119(2) of the Constitution. It was argued that the Court has unfettered discretion when it comes to matters of sentencing. In support of this position is the South African authority of *S v Bruce* [1990] ZASCA 38; 1990 (2) SA 802 (AD) at 806H-807Cwhich held that the legislature was at liberty to decree a mandatory sentence that the courts in turn will be obliged to impose. Following the principles in the said case it was submitted that in respect of punishment for crimes there is no separation of powers between the legislative and judicial arms of government but what exists is interdependence within the two. For further discussion on the interdependence between the judiciary and the legislature we were referred to the case of *Dodo v State* (2001) 4 LRC 318 where the question `whether a mandatory sentence of life imprisonment for a murder conviction conflicted with the provisions of the South African Constitution' was entertained.

In addition, the interdependence between the two arms, according to the constitutions of most democratic countries, means that there is no absolute separation of powers between the judicial and legislative functions when it comes to the framework of sentencing.

The executive has a general duty to ensure that law abiding persons are protected as a whole from persons about to or who breach the law. The respondent relied on *Patrick Reels v Queen*, *Attorney-General v Dow* [1992] BLR 119, *Dadu v State of Maharashtra* [2000] 8 SCC 437*, Jeffrey Napoleon v Republic* Const Court 1 of 1997, and *Philibert* (supra) and urged the court to follow the principles enshrined therein.

It was also submitted that by enacting provisions of minimum mandatory sentences in the Misuse of the Drugs Act the legislature was doing it for the public good, law and order in this country as well as carrying out its mandate to create an offence and the penalty applicable. The Court does not create offences nor enact sentences. It simply interprets the law as enacted.

On the second issue the Attorney-General argued that the sentence imposed on the petitioner is neither inhuman nor degrading. He submitted that according to the *Oxford Dictionary* 'Inhuman' means "destitute of natural kindness or pity brutal, unfeeling, cruel, savage, barbarous" or, in short "cruel" or "brutal" and also made reference to *Ex Parte Attorney-General: Re Corporal Punishment* (1992) LRC 515 at 522,*S v Vries* (CR 32/96) [1996] NAHC 53 (Namibia High Court) at 15, and *S v Petrus* (1984) BLR 14 CA at 40-41.

It was stated that the legislature mandated to prescribe minimum mandatory penalties cannot enact any punishment that would amount to cruel, inhuman or degrading treatment as this will conflict with article 16 of the Constitution. On this point the authorities of *State v Vrice*[1997] 4 LRC 1 and *Dodo* (supra)were cited. In the latter case it was stated that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime as this could be inimical to the rule of law and to the constitutional state and, in particular to the Bill of Rights. In other words the court may impose any sentence but it must not be disproportionate to what would be appropriate.

It is further contended for the respondent that for a court to consider whether a sentence is inhuman or degrading one must note that (1) a statutory minimum sentence of imprisonment is *perse* not unconstitutional and (ii) it will be however regarded as unconstitutional and amounting to inhuman and degrading punishment if it is grossly disproportionate to the severity of the offence. A sentence will only be a violation when it is so unfit having regard to the offence and the offender involved. The decision as to whether the sentence is disproportionate or falls foul of a given law involves the exercise of a value judgment by the Court which should be based not on a subjective consideration but on objective factors with regard being had to the norms applicable in the society of Seychelles and the conspectus of values in civilized democracies of which Seychelles is one. Reference was made to the Canadian case of *Robert Latimer v R* [2001] 1 SCR 1;*S v Stephanus Vries* (CR 32/96) [1996] NAHC 53 (Namibia High Court); and *R v Smith* [1987] 1 SCR 1045*.*

Discussion of the issues

Before resolving the issues at hand I find it imperative to say something about the

burden of proof and standard of proof in constitutional cases. Article 130(7) is pertinent and reads -

> Where in an application under clause (1) or where a matter is referred to the Constitutional court under clause (6), the person alleging the contravention or risk of contravention establishes a prima facie case, the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on theState.

In *Hans Josef Hackl v Financial Inteligence Unit (FM and AG)* Constitutional Case No 1 of 2009, CM 10, para 60, it was stated by Egonda-Ntende CJ that the duty on the petitioner is to establish a prima facie case in respect of the allegations of contravention or risk of contravention of the constitutional provisions, upon which the evidential burden would shift to the State to show that there is no contravention or risk of contravention of the impugned constitutional provisions.

Issue one

I shall start with the first issue 'whether the provisions of section 29 and the Second Schedule of the Misuse of Drugs Act contravene articles 1 and 119(2) of the Constitution'. The issue basically deals with the question of separation of powers and section 29 is relevant. It states:

> (i) The Second Schedule shall have effect, in accordance with subsections (2) and (3), with respect to the way in which offences under this Act are punishable.

Sub-section (2) refers to the Second Schedule of the Act which is basically a chart laying out the different provisions creating the controlled drug-related offences, descriptions of the general nature of the offences and the respective punishments according to class of the drug, unauthorized manufacture, import, export or traffic in relation to quantity of the controlled drug.

Section 29(2)(f) particularly will be reproduced given its central importance in this petition:

> in columns 3, 4, 5, 6 and 7 a reference to a period gives the maximum or, subject to subsection (3), minimum term of imprisonment as is specified and reference to a sum gives the maximum or minimum fine as is specified.

As already indicated above article 1 lays down the principle of separation of powers (vide *Khoyratty* (supra)) while article 119(2) re-emphasises the independence of the judiciary in the following terms:

> The judiciary shall be independent and be subject only to this Constitution and the other laws of Seychelles.

Mr Hoareau had submitted that sentencing was a matter for the judiciary and not for

any other organ of the state and that by prescribing mandatory minimum sentences the legislative organ had transgressed into the territory of the judiciary and assumed a judicial function which contravened the doctrine of separation of powers enshrined in articles 1 and 119(2) thereby affecting the petitioner's interests. Mr Govinden submits that there is no contravention of the said provisions and further that the judiciary enjoys unfettered powers to impose any sentence prescribed by law, including minimum mandatory sentences which the legislature is indeed mandated and at liberty to prescribe.

The Constitutional Court of South Africa in *Re Certification of the Constitution of the Republic of South Africa* (1996) ZACC 26 at para 109 said -

> The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. *No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.* In Justice Frankfurter's words, "[t]he areas are partly interacting, not wholly disjointed". [Emphasis added]

The Appellant Division of the Supreme Court of South Africa had this to say on the matter in the cases of *S v Tomsand S v Bruce* [1990] ZASCA 38; 1990 (2) SA 802 (AD), per Smakberg JA:

> The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court (of *R v Manumulo and Others*(1990) AD 56 at 57). The courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such a discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is fruity entrenched in our law.

Commenting on the terms in which the South African Constitution has provided for the nature and process of punishment in light of the doctrine of separation of powers, Ackermann J's observations in the *Dodo* case, para 22-26 were found to be quite instructive:

> (22) There is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other. *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 criminalized and punished. Even here the separation is not complete, because this function of legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks are enforced through the courts.

(23) *Both the legislature and executive share an interest in the punishment to be imposed by courts, both in regard to its nature and its severity.* They have a general interest in* sentencing policy, penology and the extent to which correctional institutions are used to further the, various objectives of punishment: 'The availability and cost of prisons, as well as the views of these arms of government on custodial sentences, legitimately inform policy on alternative forms of non-custodial sentences and the legislative implementation Thereof. Examples that come to mind are the conditions on, and maximum periods for which sentences may be postponed or suspended.

(24) The executive and legislative branches of state have a very real interest in the severity of' sentences. The executive has a general obligation to ensure that law-abiding persons are protected, if needs he through the criminal laws, from persons who are bent on breaking the law. This obligation weighs particularly heavily in regard to crimes of violence against bodily integrity and increases with the severity of the crime.

(25) In order to discharge this obligation, which is an integral part of constitutionalism, the executive and legislative branches must have the power under the Constitution to carry out these obligations. *They must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society.* The legislature's objective of ensuring greater consistency in sentencing is also a legitimate aim and the legislature must have the power to legislate in this area. The legislature’s interest in penal sentences is implicitly recognized by the Constitution.

(26) The legislature's powers are decidedly not unlimited. Legislation is by its nature general. It cannot provide for each individually determined case. Accordingly such power ought not, on general constitutional principles, wholly to exclude the adapt a general principle to individual case. This power must be appropriately balanced with that of the judiciary. What an appropriate balance ought to be is incapable of comprehensive, abstract formulation, but must be decided as specific challenges arise. *In the field of sentencing, however, 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. This would be inimical to the rule of law and the constitutional state.* It would a fortiori be so if the legislature obliged the judiciary to pass a sentence which was inconsistent with the Constitution and in particular with the Bill of Rights.

A similar scenario to the one in this case occurred in Mauritius in the case of *Philibert* (supra) to which both parties have referred this court. While answering the question whether mandatory sentences offend section I of the constitution as it infringes the separation of powers which is implicit in the declaration that 'Mauritius shall be a sovereign democratic state' the Court placed considerable reliance on the passage by Lord Diplock at pages 225-226 in the case of *Hinds v The Queen* [1977] AC 195. It reads:

> 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. see Constitution, Chapter III, section 20(1). The carrying out of the punishment where it involves a deprivation of personal liberty is a function of the executive power, and subject to any restrictions imposed by a law, it lies within the power of the executive to regulate the conditions under which the punishment is carried out. In the exercise of its legislative power, Parliament may, if it thinks fit, prescribed 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 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 this case.
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> 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 gravity of the offender's conduct in the particular circumstance of this case…
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> In this connection their Lordships would not seek to improve on what was said by the Supreme Court of *Ireland Deaton v Attorney-General and the Revenue Commissioners* (1963) IR 170, 182-183, a case which concerned a law in which the choice of alternative penalties was left to the executive.
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> > 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 fix 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 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…

In the cases of *Labonne v State* [2000] MR 65which wasin relation to a minimum sentence for unlawful possession of firearm and/or ammunition, and *Laviolette v State* SCR No 7069 of 2006 it was held that the National Assembly of Mauritius was free to impose by enactment a minimum sentence in respect of offences. But the court also observed that *Laviolette* can hardly be considered as a case where the law imposes a mandatory minimum sentence in view of section 52 of the Road Traffic Act which gives a discretion to the court not to impose the minimum sentence laid down where there are “special reasons" which dictate otherwise vide *Rangasamy v State*[2007] SCJ 232, *Ramtohul v State*[1992] MR 204 and *Douce v State* [2005] SCJ 238. The *Hinds* case (supra) was quoted with approval in *Labonne*.

It is now clear that the separation of powers under our Constitution, just like other liberal, democratic societies listed above, although intended as a means of controlling government by separating or diffusing power, is not strict; it embodies a system of checks and balances designed to prevent an overconcentration of power in any one arm of government; it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another; this engenders interaction, but does so in a way which avoids diffusing power so completely that government is unable to take timely measures in the public interest. Even when a constitution contains a provision explicitly mandating strict separation of powers, it behoves us to read the rest of the document to ascertain what sort of separation that particular charter actually imposes. See *Dodo* (supra) paras 16- 18.

Strengthening the position of the Parliament in making informed policies with regard to prescribing punishment, McIntyre J in the case of *R v Smith*[1987] 1 SCR 1045 at [98] stated:

> The formation of the public policy is a function of Parliament. It must decide what aims and objectives of social policy are to be, and it must specify the means by which they will he accomplished. It is true that the enactments of Parliament must now be measured against the Charter, and where they do not come within the provisions of the Charter, they may be struck down. This step, however, must not be taken by the courts merely because a court or a judge may disagree with a parliamentary decision but only where the Charter has been violated. Parliament has the necessary resources and facilities to make a detailed inquiry into relevant considerations in forming policy. It has the capacity to make a much more extensive inquiry into matters concerning social policy of the court. It may test public opinion, review and debate the adequacy of its programs and make decision based upon wider consideration, and infinitely more evidence that can, ever be available to a court.

It is worthy of note that many other open and democratic societies like ours have permitted the legislature to limit the judiciary's power to impose punishment, and have not found such exercise to be in breach of the separation of powers. For example the United States of America, in *US v Brown* [1965] USSC 129; 381 US

437,443 (1965) where it was observed that:

> If a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.

Canada, where it is implicit in the jurisprudence of the Supreme Court that mandatory minimum sentences are not regarded as being inconsistent with any separation of powers doctrine, see *R v Latimer*[2001] SCC 1 File No 26980, 18 January 2001 (unreported); Australia, see *Parlling v Corfield* [1970] HCA 53, (1970) 123 CLR 52; Germany, see article 92 and 97 of German Basic Law, also Currie "Separation of powers in the Federal Republic of Germany' in (1993) 41 American Journal of Comparative Law 201; New Zealand; United Kingdom; India; Namibia, see *State v Likuwa* [2000] 1 LRC 600 and *State v Vries* [1997] 4 LRC 1; Mauritius; Swaziland; and South Africa.

The court in *Philibert* had also emphasized that –

> the provision of a mandatory sentence in the law is therefore in a twilight zone within which the sovereignty of both the legislature and judiciary to act within their respective domain must be acknowledged and respected.

Mr Hoareau urged us not to consider this authority and that it was not binding on the court. I respectfully disagree. This Court fully endorses the authority of *Philibert*. Equally, the Court subscribes to the views and position taken on the subject-matter in the above-cited cases dealing with constitutional provisions *in pari materia* to ours.

Accordingly, on issue one I find that section 29 and the Second Schedule of the Act do not contravene articles 1 and 119(2) of the Constitution.

Issue two

With regards to the second issue, whether article 16 of the Constitution has been contravened in relation to the petitioner by the provisions of section 29 of the Misuse of Drugs Act and the Second Schedule of the Act, I find it necessary to first bring into purview the provisions of article 16 (right to dignity):

> Every person has a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.

Given the circumstances of the case and those in relation to the accused himself, as outlined above, can it be said that the sentence of ten years inflicted on the petitioner amounted to cruel, inhuman or degrading treatment or punishment? The Attorney-General has adopted the dictionary definition of the word 'inhuman'. In the case of *Dodo*, the Court, quoting extensively from *Latimer*, stated that in the phrase "cruel, inhuman or degrading" the three adjectival concepts are employed disjunctively and it follows that a limitation of the right occurs if a punishment has any one of these

three characteristics. This imports notions of human dignity. Human dignity of all persons is independently recognized as both an attribute and a right in the Constitution and is woven, in a variety of other ways, into the fabric of our Bill of Rights. The impairment of human dignity, in some form and to some degree, must be involved in all three concepts. In *R v Smith* [1987] 1 SCR 1045 at [57] Lamer J pointed out that the measurement of the effect of a sentence is often a composite of many factors including but not limited to its length, nature and the conditions under which it is served.

From the facts I note that in this case the petitioner's major concern is about the effect of the duration of the minimum sentence of ten years, and therefore the freedom aspect of the right in question and its relation to human dignity is crucial. An inquiry into the proportionality between the nature and seriousness of the offence and personal circumstances of the offender to length of punishment lies at the very heart of human dignity. On this point see also *S v Makwanyane* (1995) ZACC 3, paras 94, 197 and 352-6.

In *Latimer*, the Supreme Court, referring to section 12 of the Canadian Charter of Human Rights which is similar to our article 16 set the criteria to be used whether the punishment prescribed is so excessive as to outrage the standards of decency.

Dealing with a similar issue in *Philibert*,the court referred to a case by the High Court of Namibia *State v Vries* [1997] 4 LRC 1 wherein the accused had been sentenced to eighteen months in prison by the Magistrates Court for the theft of a goat in May 1995, and the sentence suspended *in toto.* On review, the High Court questioned the sentence as it did not comply with section 14(1)(b) of the Stock Theft Act 1990 which provided for a minimum mandatory sentence of three years' imprisonment for a second and subsequent conviction of stock theft (the accused had a previous conviction in 1969 for stealing a sheep), which according to section 14(2) could not be suspended. The issue was whether the prescribed minimum sentence was in conflict with article 8(2)(b) of the Constitution of Namibia (similar to our article 16) which provides that "no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". It was held by the Full Bench that:

> whether the minimum sentence imposed by section 14(1)(h) of the Stock Theft Act infringed the protection against cruel, inhuman or degrading treatment guaranteed by Article 8(2)(b) of the Constitution of Namibia required a *value judgment which was one not arbitrarily but judicially arrived at by reference to prevailing norms* .. Legislative provision for a minimum sentence was not unconstitutional per se, not being necessarily in violation of the constitutional guarantee against cruel and unusual punishment.
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> 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, the court had to look at the facts of each case before it and determine what a proper sentence would have been. *The appropriate sentences 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 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 need to be struck down as unconstitutional, or *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 mine)

It was noted from the facts that that section excluded a Court from suspending any portion of the minimum mandatory sentence. Furthermore, there was no limit on the number of years which may elapse between the date of the last previous conviction and the offence in respect of which the minimum penalty had been applied. There was also a failure to distinguish between kinds of stock. The previous conviction for stock theft dated back to 1969 whereas the second conviction which triggered the minimum sentence occurred in 1995. It was held that a sentence of 3 years was startlingly inappropriate in all the circumstances and it was readily foreseeable that hypothetical cases would arise commonly in which imposition of the minimum sentence would also be shocking.

However, as it was not the imprisonment per se which was unconstitutional but only the minimum prescribed period of imprisonment the whole of section 14(1)(b) was not unconstitutional. Instead the section would be read down in such a way that upon a second or subsequent conviction an offender would have to undergo a period of imprisonment which would be at the discretion of the court but which the Court would not be able to suspend because of section 14(2). It followed that section 14(2)(b) of that Act was unconstitutional in so far as it provided for mandatory minimum sentences of not less than three years. The sentence of 18 months' imprisonment was reduced to 6 months.

It followed similarly in *State v Likuwa* [2000] 1 LRC 600 the High Court of Namibia held that section 38(2)(a) of the Arms & Ammunitions Act 1996 which provided for a minimum mandatory sentence of imprisonment for a period of not less than 10 years for importing, supplying or possessing armament without permit contrary to section 29(1)(a), (b), (c) of that Act was unconstitutional on the ground that it infringed article 8(2)(b) of the Constitution of Namibia. The Court held that while a sentence of ten years' imprisonment for certain contraventions of section 29(1) might not be an inhuman or cruel punishment in some circumstances, there could be no doubt that such a lengthy sentence in other circumstances (such as where the rifle was obtained and possessed merely for the protection of livestock) would be. The accused who worked with livestock and farmed for a living was found in possession of a rifle and was 21 years old and a first time offender. On successful appeal

against the constitutionality of the mandatory minimum sentence, his sentence was reduced to two years' imprisonment.

Applying the principles to the facts, the Attorney-General submitted that the punishment of ten years even for a first offender cannot be regarded as excessive or disproportionate to the offence of trafficking in a class A drug, having regard to the offence itself and the circumstances of the society in which it was committed. That a class A drug causes damage to society in direct and indirect ways, by imposing burdens on the individual consumers especially addicts, their families, the health and criminal justice systems as well as persons involved in the trafficking. Moreover, the need to protect members of the public cannot be overemphasised, yet the traffickers are well aware of the prevalence of the scourge and consequences, involving long jail terms in case of a conviction. The Attorney-General also stated that in some democracies similar to ours drug trafficking and related offences carry more severe sentences like capital punishment. That due to the influx of such cases in the country it was clearly the intention of the legislature to act in the public interest and reduce or curb the trafficking with severe minimum sentences.

The Attorney-General supported this submission with the authority of *Terrence Alphonse v Rep* SCA No 6 of 2008 in which the Seychelles Court of Appeal said:

> On the point that the sentence of 10 years imprisonment is harsh and excessive the argument has no merit either. It is not insignificant to note here that drug related crimes do not affect the individual consumer only but society at large. In offences such as the one which the Appellant was convicted the obvious victims are the Seychellois people at large. One needs to consider what are the consequences of drug related offences, to the people of Seychelles, to its economy, to its law and order enforcement mechanism, to its social and moral values in the short, immediate and long term. Obviously a genuine consideration would lead to an irresistible conclusion that drug related offences are serious offences which should call for severe punishment. Some jurisdictions have in their statute books severe punishment for drug related offences. That is not a mere coincidence.

I have also looked at the facts of this case and the aggravating as well as extenuating factors as advanced by counsel. Going by these facts and in light of the above principles it cannot be said that the sentence of ten years imposed was excessive and not proper even when measured against the mandatory sentence so prescribed. Neither can one say that the imposition of the minimum ten year sentence was startlingly or disturbingly inappropriate with respect to hypothetical cases which could be foreseen as likely to arise commonly. Therefore, the sentence legislated was not shocking in reasonable hypothetical cases and cannot be impugned. It was the minimum while the maximum was pitched at thirty years and, was arrived at after the Court conducted an inquiry considering all the pertinent factors.

As long as one is convicted for the offence of trafficking in a controlled drug as prescribed by the Act, like in the instant case, it cannot be said that a sentence of ten years is excessive or startlingly or disturbingly inappropriate. Instead the amount or

weight of the drug will trigger an increment in the duration of the sentence starting from or in excess of ten years. Indeed a sentence of ten years or more is ordinarily a long period of time for one to spend in a prison facility.

But a long prison term is not necessarily a cruel, inhuman or degrading treatment or punishment as long as it is proportional to the seriousness of the offence. It is worthy of note in the present case that even if a comparison was to reveal a great disparity between the appropriate sentence and the mandatory sentence causing infringement of the constitutional guarantee to warrant an interference on appeal, then only the sentence imposed on the individual accused, and not the mandatory minimum sentence, would be struck down.

However, the situation at hand is to some extent somewhat different from the Namibian cases of *Likuwa* and *Vries* (discussed above) where the provision for minimum mandatory sentences were declared unconstitutional and struck down. Unlike in the present case, in *Vries* the minimum mandatory sentence of 3 years was startlingly inappropriate in all circumstances and it was readily foreseeable that hypothetical cases would arise commonly in which imposition of the minimum sentence would also be shocking.

As I have stated the petition is concerned with the length of the sentence which, according to the petitioner, is not proportional to the offence committed and therefore amounts to cruel, inhuman or degrading treatment or punishment. However, apart from alleging, he has not established to the required standard that anyof the three concepts outlined in paragraph 1351 has affected his dignity. The said punishment or sentence does not outrage the standards of decency in the circumstances of the case.

From the foregoing discourse I find that article 16 has not been contravened by the imposition of a minimum mandatory sentence of ten years. In the circumstances it suffices to say that the sentence in question neither amounts to cruel nor inhuman or degrading treatment or punishment. Consequently, I hold that the provisions of section 29 and the Second Schedule of the Misuse of Drugs Act, Cap 133 do not contravene article 16 of the Constitution.

I wish to note at this juncture that there are changes in the circumstances of the petitioner which were caused by the recent Court of Appeal judgment in *Aaron Simeon v Attorney General* SCA No 23 of 2009 that had been lodged to the said court concomitantly with this petition. I further note that the petitioner's conviction for trafficking was set aside and substituted with that of possession and his sentence fixed at seven years imprisonment.

For the reasons indicated I hold that the petitioner's claim is without merit and I would dismiss it in its entirety but without any order regarding costs.

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