IN THE COURT OF APPEAL OF BELIZE, A.D. 2023

CRIMINAL APPEAL NO. 7 OF 2016

ERVIN RENEAU **APPELLANT**

AND

THE KING **RESPONDENT**

Before

The Hon. Mde. Justice Minnet Hafiz-Bertram	-	President
The Hon. Mde. Justice Sandra Minott-Phillips, KC	-	Justice of Appeal
The Hon. Mr. Justice Peter Foster, KC	-	Justice of Appeal

Mrs. Peta-Gay Bradley for the appellant.
Mrs. Cheryl-Lynn Vidal SC, The Director of Public Prosecutions for the respondent.

Date of Hearing: 16 June 2023
Date of Promulgation: 29 September 2023

REASONS FOR JUDGMENT

MINOTT-PHILLIPS, J.A.

[1] This appeal by the Appellant against his conviction on two counts of murder, and the concurrent life sentences imposed upon him, was heard by us on 16 June 2023, following which we reserved our decision.

[2] Our decision and order is that:

(a) the appeal against sentence is allowed.

(b) The life sentences imposed upon the Appellant (being among those vacated by the Caribbean Court of Justice for being unconstitutional at the date imposed), are vacated and the matter remitted to a judge of the High Court for re-sentencing.

(c) The Appellant must remain incarcerated until his resentencing hearing is completed.

(d) The appeal against conviction is dismissed and the Appellant's conviction on both counts of murder is affirmed.

(e) A declaration is granted that the Appellant's constitutional right to a fair trial within a reasonable time was breached by delay in his trial and that his remedy for that delay is a reduction in sentence; the extent of said reduction to be determined by the High Court judge at the Appellant's re-sentencing.

[3] Our reasons for our decision are set out below.

[4] On 30 November 2010 a shooting incident occurred at the Texaco gas station on the Phillip Goldson highway. In that incident Edgar Ayala, a security guard, and David Longsworth, a customer travelling with his wife and child, who had stopped to purchase gas, were both killed by means of fatal gunshot wounds inflicted by the Appellant. The Appellant was charged with their murder on 1 December 2010, the day following the shooting. He was indicted on 8 January 2012 for two counts of murder. The trial was by Judge alone. The trial commenced on 16 February 2016 and concluded on 6 June 2016. He was found guilty by the judge on both counts of murder and was sentenced on 6 June 2016 to two terms of life imprisonment with effect from 6 June 2016, both to run concurrently.

[5] The Appellant filed several grounds of appeal which, at the hearing before us, he whittled down to two. They are that:

a) His constitutional right to a trial within a reasonable time was breached; and

b) The sentence is excessive in light of the decision of the CCJ in **Gregory August v R**[1]**.**

[6] At the time (in 2016) when the Appellant was sentenced, the judge had no discretion regarding sentence where (as here) the sentence of life imprisonment was imposed in lieu of the sentence of death in respect of each count of murder. Under the proviso to section 106 of the Criminal Code, the sentence of imprisonment for life was then mandatory. Section 106 (1) of the Criminal Code provided,

"*Every person who commits murder shall suffer death,*

[1] **Gregory August & Alwyn Gabb v The Queen** [2018] CCJ 7 (AJ)

Provided that in the case of a Class B murder (but not in the case of a Class A murder), the court may, where there are special extenuating circumstances which shall be recorded in writing, and after taking into consideration any recommendations or plea for mercy which the jury hearing the case may wish to make in that behalf, refrain from imposing a death sentence and in lieu thereof shall sentence the convicted person to imprisonment for life.

[7] Subsequent to the trial of this matter there was a challenge to the constitutionality of the mandatory minimum sentence of life imprisonment for murder imposed by the proviso to section 106(1) of the Criminal Code. In the majority judgment of this court given by my sister, Hafiz-Bertram, JA (as she then was) in the case of ***Gregory August v R***[2], we concluded that the mandatory minimum sentence of life imprisonment prescribed in the proviso to section 106 (1) of the Criminal Code, violated both sections 6 and 7 of the Constitution, to the extent that the proviso to section 106(1) of the Criminal Code is mandatory in nature.

[8] In the aftermath of that decision, on 29 March 2017, three new pieces of legislation were enacted – the Criminal Code (Amendment) Act, 2017[3], the Parole Act, 2017[4], and the Indictable Procedure (Amendment) Act, 2017[5]. The first of those three is relevant to the appeal before us. It amended section 106 so that it now, so far as is relevant, reads,

> (1) Subject to sub-section (2), a person who commits murder shall be liable, having regard to the circumstances of the case, to– (a) suffer death; or (b) imprisonment for life.
>
> (2) [relates to persons under 18 years] …
>
> (3) Where a court sentences a person to imprisonment for life in accordance with sub-section (1), the court shall specify a minimum term, which the offender shall serve before he can become eligible to be released on parole in accordance with the statutory provisions for parole.
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> (4) In determining the appropriate minimum term under subsection (3), the court shall have regard to–
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> (a) the circumstances of the offender and the offence;
> (b) any aggravating or mitigating factors of the case;
> (c) any period that the offender has spent on remand awaiting trial;

[2] Criminal Appeal No 22 of 2012. Judgment delivered on 4 November 2016
[3] Act No 22 of 2017
[4] Act No 25 of 2017
[5] Act No 23 of 2017

(d) any relevant sentencing guidelines issued by the Chief Justice; and
(e) any other factor that the court considers to be relevant.

(5) Where an offender or the Crown is aggrieved by the decision of the court in specifying a minimum term under subsection (3), the offender or the Crown, as the case may be, has a right of appeal against the decision.

[9] Section 106A(1)[6] provides,

> *"Subject to subsection (2), every person who has been previously convicted of murder and is, at the time of the coming into force of the Criminal Code (Amendment) Act, 2017, serving a sentence of imprisonment for life, shall be taken before the Supreme Court for the fixing of a minimum term of imprisonment, which he shall serve before becoming eligible for parole, or for a consideration of whether he has become eligible for parole.*"

[10] After the new legislation was enacted, the Caribbean Court of Justice (CCJ), in its decision in the appeals of ***Gregory August v The Queen*** and ***Alvin Gabb v The Queen***[7]***,*** expressed its view of that new legislative framework for imposing sentences of imprisonment for non-capital murder as being *"constitutionally compliant"*[8].

[11] Section 6 (2) of the Constitution provides,

> 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.

[12] Section 7 of the Constitution provides,

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

[6] As recited in the footnote to paragraph [125] in ***Gregory August & Alwyn Gabb v The Queen*** [2018] CCJ 7 (AJ).
[7] ***Gregory August & Alwyn Gabb v The Queen*** [2018] CCJ 7 (AJ). Delivered on 29 March 2018.
[8] *Ibid*. At numbered paragraph 7

[13] Quite helpfully, in the ***Gregory August v The Queen*** and ***Alvin Gabb v The Queen*** case, the CCJ addressed the fate of those prisoners serving life sentences under the old regime[9]. This it what that court said,

> *"…. it becomes necessary to address the fate of those persons currently incarcerated who were sentenced to life imprisonment for murder, under a now declared unconstitutional mandatory life imprisonment penal provision. In the exercise of our jurisdiction under section 20 of the Constitution[10], we must order that notwithstanding the provisions of section 106 (A)(1), these offenders must be individually re-sentenced by a trial judge. Bearing in mind the utter abhorrence of society towards the crime of murder, the sentencing judge may well take the view that the fit sentence is one of life imprisonment unless, having regard to mitigating factors, a lesser sentence is deserved.*
>
> *Since the sentences of these persons have been vacated by this judgment, as a practical interim measure, we order that all such persons must remain incarcerated until, in relation to his or her case, respectively, a sentencing hearing is completed. In the event that the sentencing judge should decide that a fit sentence is one of life imprisonment, then the judge shall stipulate a minimum period which the offender shall serve before becoming eligible for parole, or for a consideration of whether the prisoner has become eligible for parole."*

[14] The Appellant falls within the category of prisoners serving life sentences under the old regime. In compliance with the directive issued by the CCJ set out above, we have allowed his appeal against sentence and remitted the matter to a trial judge for re-sentencing in the terms set out in paragraph 2 above.

[15] The remaining ground of appeal advanced before us was that the Appellant's constitutional right to a trial within a reasonable time was breached. Counsel Bradley recited the facts in support of that ground as being,

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[9] ***Gregory August & Alwyn Gabb v The Queen*** [2018] CCJ 7 (AJ). At paragraphs numbered [125] and [126].
[10] Section 20 addresses enforcement of the protective provisions of the Constitution

> "The Appellant was arrested since 1st day of December, 2010 and his trial did not commence until 16th day of February, 2016. That is over 5 years after being arrested."

Additionally, Counsel Bradley submitted orally before us that there was post-conviction delay, not attributable to the Appellant, for another 5 years between February 2016 and March 2022 (actually 6 years) when his appeal was not brought before the Court of Appeal for hearing. She submitted the Appellant was not to be faulted for the delay and urged us to determine, resultantly, that he received an unfair trial.

[16] The Director of Public Prosecutions whilst conceding unreasonable delay caused by the arms of the State, said it did not span the entire period between 2010-2023. Problems were experienced by the State in getting counsel to represent the Appellant who was unable to retain counsel on his own behalf. This was the main cause of the pre-trial delay. Three of the six years of post-trial delay appear to have been caused by a failure to provide the Record of Appeal and the time it took for counsel to be assigned by the Court to represent the Appellant. All told, the unreasonable delay on the part of the State amounted to approximately 8 years – 5 years pre and 3 years post-trial delay.

[17] Counsel Bradley submitted that, in the event we found the Appellant's constitutional right to trial within a reasonable time was breached, the appropriate redress for that breach would, in this case, be a reduction in sentence. She took no issue with the DPP's submission that the quashing of the conviction or a permanent stay of the proceedings would not be appropriate. The court agreed with that submission of the DPP, and its dismissal of the appeal against conviction inexorably followed.

[18] Against the accepted unreasonableness of the delay on the part of the State together with its length, it was, however, the view of the Court that the Appellant was entitled to a declaration that his constitutional right to trial within a reasonable time was breached; and we so declared.

[19] It then only remained for us to determine the appropriate redress for that breach. In considering this we were guided by our prior decision in ***The King v Zita Shol***[11] when, in considering the appropriate redress for breach of that particular constitutional right, we said,

> *"Where a breach of this right is established, there is no automatic result and the remedy granted is invariably tailored to suit the circumstances, particularly the stage at which the delay occurs. … Ultimately, what has been repeatedly stressed is that there is no automatic entitlement to a permanent stay of all further proceedings or far less the quashing of a conviction for a breach of this right, given the public interest in the punishment and prevention of crime. As such, a permanent stay is regarded as a wholly exceptional remedy. In cases where such an exceptional course has been ordered, it has been for periods of delay in excess of a decade, and even for such periods a permanent stay is not automatic."*

[20] As was stated by the Caribbean Court of Justice in **Solomon Marin Jr v The Queen**[12]

> *"The element of discretion as to what is the appropriate remedy for a breach of the right to a fair trial within a reasonable time…. requires courts to consider the matter on a case-by-case basis, taking account of all the circumstances of the case …*
>
> *The discussion in* ***Gibson****[13] provides a helpful indication of relevant circumstances to consider in deciding what is an appropriate remedy. Thus an accused person may have contributed substantially to the delay and there may have been other factors contributing to the delay including lack of legal representation or access to critical resources, such as a highly specialized expert. Wider considerations may also be included in the circumstances a court must consider, such as the nature of the crime and the impact on the society's sense of justice, when deciding on what is appropriate.*"

[11] Criminal Appeal 2 of 2018. Judgment delivered on 28 September 2022. Per Bulkan, JA at numbered paragraph [41].
[12] [2021] CCJ 6 (AJ) at paragraph [110], Per Barrow, JCCJ
[13] **Gibson v Attorney General** [2010] CCJ 3 (AJ) (2010) 76 WIR 137 (BB)

[21] In this case the Appellant murdered two people going about their business in a gas station. One was a security guard carrying out his protective duty, the other a husband/father driving his wife and child and who had stopped for gas. In shooting the driver of the car the Appellant discharged several bullets into the vehicle seemingly heedless of the presence of the wife and child. The crimes were heinous and, in our view, the breach of the Appellant's right to a fair trial within a reasonable time does not warrant either a quashing of his conviction on each count of murder, or a permanent stay of the remainder of his concurrent life sentences.

[22] In our view the appropriate redress in the circumstances of this case would be a reduction in the length of the concurrent sentences with the extent of the reduction to be determined by the judge of the High Court conducting his re-sentencing.

[23] Those are the reasons informing our decision and order set out at numbered paragraph 2 of this judgment.

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MINOTT-PHILLIPS, J.A.

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HAFIZ-BERTRAM, P.

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FOSTER, J.A.