



The Court of Appeal for Bermuda

CRIMINAL APPEALS No. 6 of 2015 & No. 6 of 2016

Between:

WOLDA GARDNER

Appellant

-and-

THE QUEEN

Respondent

**Before: Baker, President
Bell, JA
Clarke, JA**

Appearances: Mr Richard Horseman, Wakefield Quin Limited, for the Appellant
Ms Cindy Clarke, Office of the Director for Public Prosecutions, for the Respondent

Date of Judgment:

8 March 2017

EX TEMPORE JUDGMENT

Resentencing for second murder following acquittal on appeal of first murder – Difference between determinate sentence and tariff – Meaning of Table 3 firearms Act 1973

Baker, P

1. On 28 July 2015, following conviction for premeditated murder, the Appellant was sentenced to life imprisonment. He had previously been sentenced to life imprisonment for another murder with a tariff of 25 years. However, his appeal against that conviction was successful, and he is currently awaiting a retrial. In the result, he is no longer subject to any sentence for that murder.

2. However, on 28 July 2015, the judge in the present matter, Simmons J, was faced with the problem of how to structure sentence in the light of the fact that the Appellant was already serving a sentence with a 25 year tariff; by tariff I mean the minimum period that has to be served before eligibility for parole.
3. What the learned judge did; was to impose a concurrent life sentence with a tariff in this instance of 20 years. Additionally, there was a 20 year determinate sentence for a firearm offence; namely, that the murder was committed with the use of a gun. That determinate sentence was expressed to be concurrent with the 20 year tariff, but consecutive to the 25 year tariff for the earlier murder.
4. A 20 year sentence was required for the firearms offence, by virtue of section 26A of the Firearms Act 1973. The earlier murder had also been committed with a firearm, and that meant that the provision in Table 3 section b applied, and that imprisonment was required for the firearms offence of either imprisonment for life, or a lesser term, not however been less than 20 years.
5. Now that the earlier sentence has gone, the Appellant is left with life imprisonment for the current murder, with a 20 year tariff and the 20 year determinate sentence for the firearms offence concurrent with the 20 year tariff. The 20 year determinate sentence has become inappropriate, if not unlawful, in the light of the fact that the firearms offence is no longer a second offence but a first offence, and therefore falls under Table 3 of sub paragraph (a), where the appropriate punishment is imprisonment for not less than 10 years and not more than 20 years.
6. The prosecution contends that in the present circumstances the 20 year tariff in respect of the murder – premeditated murder – is manifestly inadequate. They appeal under section 17A of the Court of Appeal Act 1964, and the Court has to determine the issue under section 23A of the same Act. We have come to the conclusion that in the particular circumstances of this case, that the

20 year tariff is manifestly inadequate. We do not repeat a description of the circumstances of the murder, which can be found in detail in the reported judgment of this Court. Suffice it to say, that it was an offence of very considerable gravity.

7. Accordingly, we accede to the Crown's submission of manifest inadequacy, and increase the tariff from 20 years to 25 years. There remains the question of the appropriate determinate sentence for the firearms offence. We have come to the conclusion, and this was not disputed by counsel for the Crown or Counsel for the Appellant; that in the circumstances, the appropriate sentence for the firearms offence is one of 10 years imprisonment. That is the lower end of the range. We have reached that conclusion, because we have very much in mind the overall question of totality, and the period that this Appellant is likely to serve before he becomes eligible for parole.

8. Table 3 concludes with this provision –

“A sentence of imprisonment imposed on a person convicted of an offence under section 26A shall be served consecutively to any other punishment imposed on him for an offence arising out of the same event or series of events and to any other sentence to which he is subject at the time the sentence is imposed on him for an offence under section 26A”

9. The first point to make about that provision is that it appears mandatory that the sentence of imprisonment in respect of the firearms offence must be consecutive rather than concurrent. But, the question arises: consecutive to what? It is of note, in our judgment, that the provision refers both to punishment and to sentence and that therefore, the draftsman is distinguishing between punishment, on the one hand, and sentence on the other; and the sentence is to be imposed for the firearms offence is to be served consecutively to any other punishment.

10. What in these circumstances does punishment mean? It seems to us that the draftsman in distinguishing punishment from sentence is looking not at the

overall sentence of life imprisonment, in a case such as the present, but to what is sometimes described as the punishment or retribution element of it, namely the minimum period or tariff to be served before there is eligibility for parole.

11. We have thought carefully about the true meaning of this provision, and have come to the conclusion, that there is no other construction that makes sense, and therefore, it is in these circumstances mandatory that the determinate sentence of 10 years be served consecutively to the tariff period of 25 years, which we are going to impose.

12. We should, however, make this point; that there is an important and significant difference between a tariff on the one hand, and a determinate sentence on the other because, as we have already said, the tariff is the period that has to be served before eligibility for parole. It does not mean that the Appellant will, at that point, be given parole, but he becomes eligible for it at that stage. On the other hand, a determinate sentence, is such that, according to our understanding, after the defendant has served one-third of it, he then becomes eligible for parole. So, the practical effect of making the consecutive order, that we are about to make, is that the Appellant will serve 25 years tariff and then additional 3 and a third years, being that part of the determinate sentence, before he becomes eligible for parole.

13. The Appeal is accordingly allowed to the extent that we have indicated.

Signed

Baker, P

Signed

Bell, JA

Signed

Clarke, JA