

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

COMMONWEALTH OF DOMINICA

DOMMCRAP2024/0003

BETWEEN:

EMMERSON RICARDO MACHADO CAMPOS

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Heard together with:

DOMMCRAP2024/0004

BETWEEN:

JOSE-DEL CARMEN SERRADA CASSERO

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Heard together with:

DOMMCRAP2024/0005

BETWEEN:

WILBER OLIVEROS

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Heard together with:

DOMMCRAP2024/0006

BETWEEN:

YOFRAN ALEXANDER MARTINEZ

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Heard together with:

DOMMCRAP2024/0007

BETWEEN:

LUIS ALREDO MACHADO CAMPOS

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Heard together with:

DOMMCRAP2023/0005

BETWEEN:

OSARUMWENSE BARRECY IBUZE

Appellant

and

THE POLICE

Respondent

Before:

The Hon. Mde. Margaret Price Findlay

Justice of Appeal

The Hon. Mde. Vicki Ann Ellis

Justice of Appeal

The Hon. Mr. Trevor M. Ward

Justice of Appeal

Appearances:

Mr. Wayne Norde for the Appellants

Ms. Marie Louise Pierre- Louis and Ms. Ellisianne Wilkins for the Respondent

2025: April 10;
July 24.

Criminal appeal – Appeal against sentence – Constitutional law - Minimum mandatory sentence – Separation of powers - Section 16 (1) of the Drugs (Prevention of Misuse) Act – Whether the mandatory minimum sentence imposed by section 16(1) of the Drugs (Prevention of Misuse) Act is unconstitutional – Section 5 of the Constitution of the Commonwealth of Dominica - Sentencing practice - Departure from the sentencing guidelines.

On or about 21st August 2023, the 1st-5th appellants arrived at the Douglas Charles airport in the island of Dominica. Customs and Excise officers suspected them of carrying non-alimentary objects inside their bodies. They were transported to the Accident and Emergency Department at the Dominica China Friendship Hospital for medical examination. A CT scan revealed that there were foreign objects inside their bodies. They were detained

and eventually excreted several capsules containing cocaine. The appellants and the capsules were then handed over to the Investigating Officer, Constable Leron Bruno for further investigations. The 1st-5th appellants were found to be in possession of quantities of cocaine ranging between 817.5g to 1927.1 g.

The appellants were later formally charged with the offences of drug trafficking of cocaine and importation of cocaine contrary to section 16(1) and section 5(3) of the Drugs (Prevention of Misuse) Act (or “the Act”) respectively.

In the case of the 6th appellant, on or about 2nd July 2023, he attempted to exit Dominica via the Roseau Ferry Terminal where he was suspected by Customs and Excise officers of carrying non-alimentary objects in his body. He was taken to the Accident and Emergency Department at the Dominica China Friendship Hospital for medical examination. Investigating Officer, Constable Dwight Christmas, was informed by Dr. Randy Fabien, in the presence of the appellant, that the appellant had excreted a quantity of pellets while at the Accident and Emergency Department. The 6th appellant indicated that he had travelled to Dominica from Martinique on 28th June 2023 where he met an individual called “I-Money” who asked him to carry drugs in the form of some 81 pellets, which he ingested. In total the appellant was found to be in possession of 1507g of cocaine and was formally charged with the drug trafficking offence of possession of cocaine in a quantity exceeding one gram, with intent to supply contrary to section 16 of the Act.

When arraigned, each appellant pleaded guilty and was sentenced to 7 years imprisonment which is the mandatory minimum sentence prescribed by section 16(1) of the Act for drug trafficking offences. Such a sentence, it was agreed, marks a departure from the Sentencing Guidelines. The magistrate in, expressly stating that he was departing from the Sentencing Guidelines, cited the visible impact of cocaine on the communities as the reason for so doing. The 1st to 5th appellants, having obtained leave to appeal out of time, each filed a notice of appeal on 13th November 2024 advancing 5 grounds of appeal, namely: (i) the mandatory minimum sentence contained in section 16 of the Drugs (Prevention of Misuse) Act amounts to cruel and inhumane punishment under section 5 of the Constitution; (ii) the mandatory minimum sentence do (sic) not allow a judicial officer to make any exception in an appropriate case therefore it is unconditional (sic) as it offends the separation of powers; (iii) the mandatory minimum sentence is disproportionate in that it does not take into account the gravity of any particular offence nor does it take into account the degree of responsibility of the offender; (iv) the mandatory minimum sentence should be severed to the extent that it is unconstitutional; and (v) the sentence was excessive in all the circumstances of the case. The 6th appellant was also given permission to advance these grounds at the hearing of the appeal.

Held: allowing the appeals against sentence and varying the sentence of each appellant to time served, that:

1. Parliament has the right to determine what conduct should constitute a criminal offence and to determine the appropriate level of punishment for such conduct. To offend the separation of powers doctrine, it must be shown that the legislature is undermining the decisional authority or independence of the judicial branch by compromising judicial discretion. In determining whether the doctrine is infringed,

the court must assess whether the legislation negatively impacts its adjudicative process, constraining the court in its application or interpretation of legal principles. Parliament's exercise of its right to enact a mandatory minimum penalty does not in and of itself violate the separation of powers doctrine as that is a power within its legitimate remit under section 5 of the Constitution which does not prohibit Parliament from enacting a mandatory punishment applicable to all persons who commit a particular crime.

The Attorney General of Belize v Zuniga and others [2014] CCJ 2 (AJ) applied; **Reyes v R** [2002] 2 AC 235 applied; **Hinds v R** [1977] AC 195 applied; **Chandler v The State of Trinidad and Tobago** [2023] AC 285 applied

2. In adjudicating the constitutionality of mandatory minimum sentences, the court must assess whether the punishment as set out in law would be grossly disproportionate in its application to likely offenders. In making this assessment, the court may have regard to the reasonably hypothetical scenario. Applying the approach of testing the mandatory minimum sentence against a reasonably hypothetical scenario, the mandatory minimum sentence of seven years could result in the imposition of grossly disproportionate sentences in violation of section 5 of the Constitution. While a mandatory minimum provision may be held to be unconstitutional, it does not follow that the sentence imposed always will always be set aside. The sentence will not be disturbed if having regard to the circumstances of the offence and the offender, it is proportionate and fits the crime.

Thelbert Edwards v The Queen Criminal Appeal No. 3 of 2006 (delivered 15th January 2007, unreported) followed; **The Attorney General of Belize v Zuniga and others** [2014] CCJ 2 (AJ) applied; **R v Smith** [1987] 1 SCR 1045 applied; **R v Nur** [2015] 1 R.C.S. 773 applied; Section 16 (1) of the **Drugs (Prevention of Misuse) Act** Cap 40:07 of the Laws of Dominica considered; Section 5 of the **Constitution of the Commonwealth of Dominica** Enacted as Schedule 1 to the Commonwealth of Dominica Constitution, Chap. 1:01. considered.

3. Rule 4 of the Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules provides that when sentencing for an offence for which a guideline has been issued, the court must apply the relevant sentencing guideline and sentence unless to do so would not be in the interest of justice. In this case, the learned magistrate's reason for departing from the guidelines failed to demonstrate why the application of the guidelines in the circumstances of the case would produce an injustice. In fact, the reason advanced as warranting departure can be said about all cases of drug trafficking. If these common features are sufficient to justify a departure from the guidelines because to apply them would cause injustice, this could render the guidelines redundant for the most part and would introduce an unsatisfactory degree of arbitrariness in the approach to sentencing for drug trafficking offences, which the guidelines were intended to reduce. The learned magistrate therefore erred in principle when he purported to depart from the sentencing guidelines in the circumstances of this case.

4. Applying the relevant sentencing guidelines, a sentence of 2 years at the upper end would have been appropriate to start but reduced to 1 year and 2 months on account of the appellants' good character and their early guilty pleas. Such a sentence would have been proportionate in circumstances where each appellant was found in possession of a relatively small quantity of cocaine, each functioned at the lowest end of the chain as drug mules and who, to their credit, entered guilty pleas at the earliest opportunity and had no previous convictions.
5. Considering that an appropriate sentence for each appellant in the circumstances of these cases would have been a sentence of 2 years at the upper end, a sentence of 7 years imprisonment was grossly disproportionate and manifestly excessive on ordinary sentencing principles. The same conclusion would follow if the magistrate applied the mandatory minimum sentence of 7 years automatically. The mandatory minimum sentence constitutes inhuman and degrading treatment and in breach of section 5 of the Constitution of Dominica because its net is cast too wide and can result, as it did here, in a sentence that is grossly disproportionate to what would otherwise been an appropriate sentence.
6. In mandating that a law inconsistent with the Constitution is void to the extent of its inconsistency, the Constitution sanctions the principle of severance and encourages its exercise where possible. This approach aims to fashion a remedy that involves minimum trespass on the remit of Parliament and avoids invalidating more of the statute than is necessary while ensuring that what is left represents a sensible, practical and comprehensive scheme for meeting the fundamental purpose of the act which it can be assumed that Parliament would have intended. In this case, severing the mandatory minimum sentence provision does not so mutilate the legislative objective so that what remains does not reflect what Parliament originally intended. Parliament's general intention seems to have been to increase the penalties for drug trafficking offences as a means of deterrence. There is no reason to suppose that Parliament would not have enacted section 16(1) without the mandatory minimum provisions. Section 16(1) of the Drugs (Prevention of Misuse) Act must be read as if the words "but which shall not be less than seven years" were excised from the provision, leaving a maximum term of imprisonment of 15 years.

The Attorney General of Belize v Zuniga and others [2014] CCJ 2 (AJ) applied; **Thelbert Edwards v The Queen** Criminal Appeal No. 3 of 2006 (delivered 15th January 2007, unreported) applied.

REASONS FOR DECISION

Introduction

[1] **WARD JA:** At the conclusion of the hearing of these appeals, we allowed the appellants' appeals against sentence and promised to supply written reasons at a later date. We do so now.

[2] The six appellants were each convicted of drug trafficking offences. The 1st – 5th appellants were charged with the offences of possession of cocaine in a quantity exceeding one gram and importation of cocaine; while the 6th appellant was charged with the offence of possession of cocaine in a quantity exceeding one gram with intent to supply only. All charges were laid pursuant to the **Drugs (Prevention of Misuse) Act**, as amended (or "the **Act**").¹ They each pleaded guilty before the Senior Magistrate and were each sentenced to 7 years imprisonment. They each appealed against their sentence. For convenience, these appeals are taken together because they raise identical grounds of appeal.

The facts – 1st – 5th appellants

[3] On or about 21st August 2023, between the hours of 7:30pm and 11:00pm the 1st – 5th appellants arrived at the Douglas-Charles airport, Melville Hall in the island of Dominica. Customs and Excise officers at the Douglas-Charles Airport, suspected them of carrying non-alimentary objects inside their bodies. They were then transported to the Accident and Emergency Department at the Dominica China Friendship Hospital for medical examination. The appellants were taken to the Radiology Department where a CT scan was performed. The CT scan revealed that there were foreign objects inside the appellants' bodies. The appellants were detained and eventually excreted several capsules containing what was subsequently analysed to be cocaine.

¹ Cap. 40:07 of the Laws of Dominica.

[4] The appellants were subsequently discharged from the hospital and Customs and Excise officials handed over the appellants to the Investigating Officer, Constable Leron Bruno, along with the capsules for further investigations. Constable Bruno counted the contents in each of the appellants' presence. The appellants were in possession of the following quantities of cocaine pellets:

- (i) Emerson Ricardo Machado Campos – one hundred (100) pellets weighing 1263.7g.
- (ii) Jose Del Carmen Serrada Cassero – seventy (70) clear rubber non-alimentary objects weighing 1927.1g.
- (iii) Wilber Oliveros – one hundred and thirty (130) white pellets weighing 1358.3g.
- (iv) Yofran Alexander Martinez – ninety-nine (99) white pellets weighing 1122.6g.
- (v) Luis Alredo Machado Campos – sixty four (64) white pellets weighing 817.5g.

[5] Constable Bruno informed each appellant that he was arresting them on suspicion of importation of cocaine and drug trafficking of cocaine. The appellants were cautioned and informed of their rights to an attorney of choice. Samples of the non-alimentary objects were collected in the presence of the appellants individually, placed in clear evidence bags, labelled and sealed. The appellants were invited to sign and date the respective evidence bags, which they all did. The appellants were also invited to place their initials on the tape which was used to wrap the pellets of which the Constable took the samples. All the appellants obliged. Written question and answer interviews were also conducted with the appellants individually.

[6] The appellants were later formally charged with the offences of drug trafficking of cocaine which the charge averred was contrary to section 16(1) of the **Drugs (Prevention of Misuse) Act**, and importation of cocaine contrary to section 5(3) of the **Drugs (Prevention of Misuse) Act** of the Laws of Dominica. When the

appellants were again cautioned and informed of their rights, the 1st, 2nd, 3rd and 5th appellants made no reply. The 4th appellant however intimated that he was “forced to do it”.

The facts - The 6th appellant

- [7] On or about 2nd July 2023, Mr. Osarumwense Ibuze, the 6th named appellant, attempted to exit Dominica via the Roseau Ferry Terminal. Mr. Ibuze was suspected by officers from the Customs and Excise Department of carrying non-alimentary objects in his body and was transported to the Accident and Emergency Department of the Dominica China Friendship hospital for medical examination. There, the investigating officer, Constable Dwight Christmas introduced himself to Mr. Ibuze. Constable Christmas learnt that Mr. Ibuze was a Nigerian national with Italian citizenship living in Milan, Italy. Constable Christmas was also informed by Dr. Randy Fabien, in the presence of Mr. Ibuze, that he (Mr. Ibuze) had excreted a quantity of pellets while at the Accident and Emergency Department. Constable Christmas was shown a brown paper bag with a clear sterile container with a blue cap which contained one pellet containing cocaine. He was also shown a ziploc bag containing a quantity of pellets each containing cocaine. After being cautioned by Constable Christmas, Mr. Ibuze informed the officer that he had travelled to Dominica on 28th June 2023 from Martinique. It was on that occasion that he met a person by the name of “I Money” who asked him to carry some drugs in the form of some 81 pellets. Mr. Ibuze stated that he swallowed the pellets in the early hours of Sunday, 2nd July 2023 and proceeded to the ferry terminal. He stated that he was supposed to take the drugs to Paris for “I Money” but was intercepted by Customs Officials. In total, Mr. Ibuze was found to have in his possession cocaine in the quantity of 1,507g. Mr. Ibuze was later formally charged with the drug trafficking offence of possession of cocaine in a quantity exceeding one gram, with intent to supply contrary to section 16 of the **Act**.

- [8] When subsequently arraigned, each appellant pleaded guilty and was sentenced to seven years imprisonment, which is the mandatory minimum sentence prescribed by section 16(1) of the **Act** for drug trafficking offences.

The magistrate's reasons

- [9] The learned magistrate's reasons in relation to the sentence imposed on each appellant followed, *mutatis mutandis*, an identical template and wording. By way of illustrating this point, and because it will be necessary later in this judgment to address whether the magistrate considered his hand tied by the mandatory minimum penalties prescribed by the **Act**, or whether he was purporting to impose a discretionary sentence, I consider it necessary to set out in some detail the material parts of his reasons in the case of the first appellant.
- [10] The magistrate introduced his sentencing remarks by identifying the offences with which the appellant was charged and then stating the prescribed penalty for each offence. He noted that the appellant was a first-time offender and continued:

"In considering the New Sentencing Guidelines, the court is aware that the guidelines must be applied unless to do so would be contrary to the interest of justice. Possession of 1,263.7 grams of cocaine and the importation of same are considered two serious drug offences in the Commonwealth of Dominica.

The Court is aware that the New Sentencing Guidelines must be applied unless to do so would be contrary to the interest of justice. Possession of cocaine is a serious drug offence in the Commonwealth of Dominica. Cocaine is a scourge on the Dominican society. One can see the effects of cocaine use as one traverse (sic) the communities around the State. The message must be sent out that cocaine is a public enemy, especially to our young men and it is NOT welcomed here. Due to the visible impact of cocaine on the communities, the court is forced to deviate from the sentencing guidelines and to impose a sentence that will send a clear message to the users and abusers of cocaine.

The Sentencing Guidelines was (sic) never implemented to remove the discretion that a magistrate has in imposing a sentence that will increase the public confidence in the administration of justice. For the aforementioned reasons, the court in this case will not adhere to the sentencing guidelines. The court looked at the street value report as presented by the Prosecution and determined that since the street value of

the drugs was lower, the Court must refer to the sentence as stipulated by law. The Drugs Prevention and Misuse Act (sic) stipulates a fine of \$150,000.00 and 15 years imprisonment but not less than seven years or both for drug trafficking and a fine of \$100,000.00 and 3 years imprisonment for importation of a Class A control drug, namely cocaine.

The method used by the defendant to conceal the drugs had a cost factor to the public. Resources had to be diverted to ensure that the cocaine was removed from the defendant and in the process was not harmed by the drugs which he had ingested.

The public interest demands that cocaine and other hard drugs be eradicated from communities around the Commonwealth of Dominica. Citizens or non-nationals must not use Dominica as a trans-shipment point to bring hard drugs to Europe or the Americas. The public interest demands that when a magistrate is imposing a sentence in drug trafficking especially cocaine and other hard drugs the discretion of the magistrate will increase the public confidence in the administration of justice.

Taking these into consideration, the Court is imposing a sentence that suits the offence with which the defendant was charged. The nature isle welcomes everyone to come and bask in what nature has to offer and not to pollute the environment with hard drugs such as cocaine.

The court is aware that the defendant is a first-time offender and is cognizant of the fact that is (sic) only in rare cases custodial sentences should be imposed on first time offenders. In his plea in mitigation, the defendant stated to the court:

I did this because I was forced and under threats of my life. That's it.

The court must take judicial notice that when confronted by Customs and Excise officers at the Douglas Charles airport the defendant failed to inform the officers that he was forced to ingest non-alimentary objects into his body.

It is clear to the court that the defendant who is a non-national does not possess the means to pay a fine. Pursuant to Section 104 of the Magistrate (sic) Code of Procedure Act, Chapter 4:20 of the Consolidated Laws of 2017, since the defendant does not possess any visible means to pay a fine the court will impose a custodial sentence on the Defendant without the option of a fine. As already stated the Drug Prevention and Misuse Act (sic) stipulates a fine of \$150,000.00 or/and 15 years imprisonment but not less than 7 years or both for drug trafficking and a fine of \$100,000.00 and 3 years imprisonment for importation of a controlled drug namely cocaine.

Notwithstanding the fact that the court has decided to deviate from the sentencing guidelines, the defendant will receive credit as he has pleaded guilty on the first opportunity and has not subjected the court to a protracted trial; the defendant according to the facts cooperated with the Police and has shown remorse. The court in adopting the Baptiste Principle will give bulk credit to the defendant.

Taking the foregoing into consideration, the defendant is sentenced to seven years imprisonment on Complaint DOMMCR2023/0537 A and no separate sentence on Complaint DOMMCR2023/0537 B.

The drugs and other items seized in this drug bust are forfeited to the state.”
(Emphasis added)

The appeals

[11] The 1st to 5th appellants, having obtained leave to appeal out of time, each filed a Notice of Appeal on 13th November 2024 containing five grounds of appeal, namely:

- (i) “The mandatory minimum sentence contained in section 16 of the Drugs (Prevention of Misuse) Act amounts to cruel and inhumane punishment under section 5 of the Constitution.
- (ii) The mandatory minimum sentence do (sic) not allow a judicial officer to make any exception in an appropriate case therefore it is unconditional (sic) as it offends the separation of powers.
- (iii) The mandatory minimum sentence is disproportionate in that it does not take into account the gravity of any particular offence nor does it take into account the degree of responsibility of the offender.
- (iv) The mandatory minimum sentence should be severed to the extent that it is unconstitutional.
- (v) The sentence was excessive in all the circumstances of the case.”

[12] In the case of the 6th appellant, Osarumwense Barrecy Ibuze, he was the first to be arraigned and sentenced on 2nd July 2023. He filed a Notice of Appeal on 10th July 2023, while he was unrepresented. However, during the appeal, he was represented by Mr. Norde, who is also the counsel for all the other appellants. Mr. Norde was permitted to argue the same grounds as the other appellants, even

though these grounds were not included in Osarumwense Barrecy Ibuze's Notice of Appeal.

- [13] It is also to be noted that in his written skeleton arguments on behalf of each appellant, Mr. Norde purported to insert a ground of appeal not contained in the Notices of Appeal. That purported ground reads:

“Section 16 (1) of the Drugs (Prevention of Misuse) Act 40: 07 of Dominica’s revised law of 2017 does not create an offence but instead prescribes the penalty for drug trafficking in school, prison or military. Therefore, the learned magistrate erred when he allowed the appellant to answer to a complaint pursuant to section 16(1) of the said Act.”

- [14] Upon inquiry by the Court on the propriety of listing a ground of appeal in skeleton arguments not foreshadowed in the Notice of Appeal, Mr. Norde indicated that he would not seek to pursue that ground of appeal. The appeal was therefore argued on the five grounds contained in the Notices of Appeal, and, in the case of Mr. Ibuze, with leave of the Court those grounds were argued on his behalf although not contained in his Notice of Appeal.

The appellants’ submissions

- [15] In written submissions filed on 31st December 2024, the appellants contend that the magistrate applied the mandatory minimum sentence of seven years for drug trafficking prescribed by section 16(1) of the **Act**. It was submitted that the application of the mandatory minimum sentence regime produced a sentence that was excessive, disproportionate, and unconstitutional. It is said that such a sentence violates section 5 of the **Constitution of the Commonwealth of Dominica** (or “**the Constitution**”)² which guarantees the appellants’ rights to personal liberty, a fair hearing, and protection against inhumane or degrading treatment. Further, it removes judicial discretion in the sentencing process as a judge or magistrate is unable to consider relevant mitigating factors and leads to arbitrary punishment. In this case, in applying the mandatory minimum sentence,

² Enacted as Schedule 1 to the Commonwealth of Dominica Constitution, Chap. 1:01.

the magistrate failed to consider mitigating factors such as the appellants' lesser role as a "mules", their co-operation with the police, lack of prior convictions, and personal circumstances. The sentence was grossly disproportionate to the offence having regard to the small quantities of cocaine involved.

- [16] This Court was invited, by reference to **Davis v Commissioner of Police**,³ to quash the mandatory sentence for disproportionality and impose a lesser sentence, applying the Eastern Caribbean Supreme Court Sentencing Guidelines. It was submitted that such an approach would yield a one-year sentence. Considering the time already served, the appellants should be released. The appellants further seek a declaration that section 16(1) is inconsistent with the **Constitution of Dominica** and invites this Court to sever the mandatory minimum provision from the **Act**.

The respondent's submissions

- [17] On behalf of the respondent, Ms. Pierre - Louis contended in written submissions in relation to the constitutionality of the mandatory minimum sentence that the mandatory minimum sentence prescribed by the **Act** reflects Parliament's intent and policy objectives to deter serious drug offenses and promote uniformity in sentencing. The courts have consistently recognised Parliament's right to establish minimum penalties in furtherance of its policy objectives. The mandatory minimum provision here is a rational response to public health and safety concerns and involves no violation of the **Constitution** and may not be regarded as unconstitutional unless it can be said to be "grossly disproportionate". The test is whether the punishment is so excessive that it shocks the conscience of the public. The mere fact that a sentence is mandatory does not render it unconstitutional.
- [18] In relation to the alleged violation of the separation of powers doctrine, the respondent submitted that the mandatory minimum sentence does not violate the separation of powers doctrine. It is said that the Constitution of Dominica does not establish a strict separation of powers when it comes to punishment. It is

³ [2013] 1 LRC 213.

preeminently the function of the legislature to determine what conduct should be criminalized and punished and it is entitled to enact sentencing laws that reflect societal concerns about crime. The respondent recognises though that this legislative power is checked by the **Constitution** and by the Bill of Rights in particular and enforced by the courts.

[19] In relation to the appellants' invitation to this Court to sever the mandatory minimum provision from the **Act**, the respondent submitted that severance is appropriate only if what remains is functional and consistent with legislative intent. The respondent contends that severing the mandatory minimum is inappropriate in this case as it would undermine legislative intent to impose a baseline punishment for drug-related offences, as the mandatory minimum sentence is an integral part of that scheme and its removal would amount to judicial lawmaking rather than judicial review. The respondent submits that the mandatory minimum sentence is constitutional and serves a legitimate legislative purpose.

[20] While the respondent invites the Court of Appeal to dismiss the constitutional challenges it nonetheless takes the position that this Court should allow the appeal on the basis that the sentences were manifestly excessive (Ground 5) and thus reduce the sentences accordingly. The sentences are said to be excessive because they deviated from the Eastern Caribbean Supreme Court Sentencing Guidelines for Drug Offences without sufficient justification. The magistrate's reliance on the societal impact of cocaine lacked statistical or evidentiary support and rendered departure from the guidelines unjustified.

[21] The respondent submitted further that the guidelines prescribe a starting point of 1 year and 6 months for the offence. The sophisticated manner of concealing the drugs is an aggravating factor in relation to the offence, which should produce an upward adjustment to 2 years and 3 months. The respondent conceded on appeal that the appellants' good character warranted some discount, reducing the sentence to 2 years. On account of the early guilty plea, a 1/3 discount was in order. Given

that the appellants had already served 1 year and 6 months, they should be sentenced to time served, argued the respondent.

Discussion

[22] The **Drugs (Prevention of Misuse) Act** of Dominica makes it an offence for a person to commit a drug trafficking offence. By virtue of section 2 of the **Act**, “drug trafficking offence” means, *inter alia*, an offence under section 5(3) (importation or exportation of a controlled drug) and sections 7(2) (where subsection 4 applies) and 7(3), (possession of a controlled drug with intent to supply). Section 7(4) of the **Act** provides, so far as relevant, that subject to subsection (1)⁴, a person found in possession of more than one gramme of cocaine shall be deemed to be in possession of such controlled drug for the purpose of supplying it to another unless the contrary is proved, the burden of proof being on the accused.

[23] These drug trafficking offences are subject to the penalties prescribed in section 16(1) of the **Act**. Section 16(1) provides so far as relevant:

“A person who commits a drug trafficking offence or the offence of being in possession of a controlled drug for the purpose of trafficking in any school, prison or military premises is liable -

(a) On summary conviction –

- (i) to a fine of \$150,000 or where there is evidence of the street value of the controlled drug, three times the street value of the controlled drug whichever is greater; and
- (ii) to imprisonment for a term which may extend to 15 years but which shall not be less than seven years”

[24] Section 5 of the Constitution of the Commonwealth of Dominica provides that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

[25] Distilled to their essentials, the rival submissions advanced by the parties were as follows. The appellants challenge the constitutionality of section 16(1) of the **Act**.

⁴ Subsection (1) is not relevant for present purposes.

The provision is said to be unconstitutional because it contravenes section 5 of the Constitution of Dominica, which affords protection against inhuman or degrading punishment, and it violates the constitutional principle of the separation of powers doctrine. This resulted in a sentence that was grossly disproportionate and arbitrary. The remaining ground challenges the sentencing methodology adopted by the magistrate in fashioning the sentence of seven years imprisonment. It is said that the magistrate did not establish a starting point and did not have regard to the mitigating features or the personal circumstances of the appellants and thus the sentence arrived at was an arbitrary and excessive one.

- [26] The respondent contends that the mandatory minimum provision here is a rational response to public health and safety concerns about the prevalent drug trade in Dominica and is a proportionate response which cannot be regarded as unconstitutional given that the minimum sentence is not "grossly disproportionate". It is within parliament's right to determine what conduct should be criminalized and punished and it is entitled to enact sentencing laws that reflect societal concerns about crime. Thus, there is no violation of the doctrine of the separation of powers.

Discussion - mandatory minimum sentences

- [27] Mandatory minimum sentences have been a controversial issue for some time. Not surprisingly, there is a significant body of law addressing this issue, such that it may be said that the jurisprudence is settled in so far as it relates to the Eastern Caribbean. This issue has been directly addressed by the Eastern Caribbean Court of Appeal, the Caribbean Court of Justice (Dominica's apex court), and by the Privy Council.
- [28] Mandatory minimum provisions purport to mandate the minimum sentence that a court may impose when passing sentence on anyone convicted of a particular offence. The concept is not alien to our space as they have appeared in one iteration or another across the Member States and Territories of the OECS and indeed the wider Caribbean. For examples, see the various provisions under the respective

Drugs Prevention legislation in Saint Christopher and Nevis, the Virgin Islands, Montserrat, Saint Lucia, and Saint Vincent and the Grenadines; the Firearms Acts of Dominica, Grenada, Saint Christopher and Nevis, Saint Lucia and Montserrat; the Larceny Act of Antigua and Barbuda and the Motor Vehicle and Road Traffic Act, Saint Lucia.

- [29] Challenges to mandatory minimum sentences are also neither novel nor of recent vintage. The earliest challenges were in relation to the imposition of the mandatory death penalty for the offence of murder. Anyone convicted of murder was automatically sentenced to the death penalty regardless of the circumstances. The mandatory death penalty was a common feature of the laws throughout the Caribbean as part of our legislative colonial inheritance.
- [30] A successful challenge to the mandatory death penalty was achieved in the landmark consolidated appeals of **Spence v R**,⁵ **Hughes v R**,⁶ originating from Saint Vincent and the Grenadines and Saint Lucia respectively. The Privy Council had granted leave to the appellants to appeal against sentence and remitted the matter to the Eastern Caribbean Court of Appeal to consider and determine whether: (a) the mandatory sentence of death imposed should be quashed, and if so, what sentence - including the sentence of death - should be imposed; or (b) the mandatory sentence of death imposed ought to be affirmed. These constitutional arguments against the mandatory sentence of death were raised before the Privy Council but had not been previously raised in the Court of Appeal. The mandatory death penalty was challenged on the basis of incompatibility with the constitutional protection against the imposition of cruel and inhuman/degrading punishment since judges could not consider the character and record of the individual offender or the circumstances of the particular offence. It was argued also that the mandatory imposition of the death penalty was arbitrary, without due process and unfair. Thirdly, it was said that it violated the constitutional principle of the separation of

⁶ (2002) 60 WIR 42.

powers. The majority in the Court of Appeal held that the mandatory death penalty constituted cruel and inhuman punishment and that it removed judicial discretion to consider mitigating factors and aggravating factors in breach of due process and fair trial rights, thus, leading to grossly disproportionate outcomes. The mandatory death penalty was thus declared unconstitutional. On the Crown's appeal to the Privy Council, the Board upheld the decision of the Court of Appeal.

[31] Similar successful challenges were made to the mandatory death penalty in other parts of the Caribbean such as Saint Christopher and Nevis (**Fox v R (No.2)**),⁷ Belize (**Reyes (Patrick) v R**),⁸ and The Bahamas (**Bowe and Davis v The Queen**).⁹ Sentencing in cases of murder is now discretionary in these jurisdictions.

[32] In time, with the introduction of mandatory minimum sentences for certain other offences, such as firearms and drugs offences, constitutional challenges were similarly mounted. In the OECS, one of the earliest such cases was **Thelbert Edwards v The Queen**¹⁰ originating from Saint Lucia. In that case the appellant was convicted of causing death by dangerous driving contrary to section 73(1)(a) of the **Motor Vehicle Road Traffic Act**¹¹ ("the **Road Traffic Act**"). Section 73(2) of the **Road Traffic Act** provided that a person convicted of that offence was liable to imprisonment for a term of not less than five years and not more than fifteen years.

[33] Although section 1197 of the **Criminal Code**, which was assented to in 2004, restored the court's discretion to impose a fine instead of a mandatory minimum imprisonment term of five years, the Court of Appeal had to consider the subsequent **Motor Vehicle and Road Traffic (Amendment) Act**, which had amended 92 sections of the **Road Traffic Act**, including section 73(2) which retained the mandatory minimum term. This Act, which was assented to on 30th January 2006,

⁷ [2002] UKPC 13; 61 WIR 169.

⁸ [2002] 2 AC 235.

⁹ 68 WIR 10.

¹⁰ Criminal Appeal No. 3 of 2006 (delivered 15th January 2007, unreported).

¹¹ No. 10 of 2003 of the Laws of Saint Lucia.

was deemed to have overridden the provisions of the Criminal Code. Counsel for the appellant argued that section 73(2) of the **Road Traffic Act** contravened section 5 of the Constitution which guaranteed protection against being subjected to torture or to inhuman or degrading punishment or other treatment.

[34] In commenting on the interplay between the role of Parliament and the role of the Court, the Court of Appeal explained at paragraph [21]:

“...once one concedes that it is within the competence of Parliament to set sentencing policy, it flows ineluctably that Parliament is competent to set mandatory minimum sentences, subject to the duty of the courts to evaluate whether such laws contravene the Constitution. To put it another way, each such law must be examined by the courts to see whether the fundamental rights and freedoms are observed or contravened.”

[35] It was held that in balancing the respective powers vested in Parliament and the Judiciary, as a matter of principle the legislature should not oblige the judiciary to pass a sentence that was wholly disproportionate to the crime. The Court of Appeal adopted the test for determining whether a law prescribes inhuman or degrading punishment or other treatment articulated in the Canadian Supreme Court Case of **R v Smith**.¹² That test holds that a sentence is grossly disproportionate if it is so excessive as to outrage the standards of decency. That entailed examining the circumstances in which the offence was committed and the personal circumstances of the offender.

[36] To ascertain whether section 73(2) of the **Road Traffic Act** was wholly disproportionate and in violation of section 5 of the Constitution of Saint Lucia, the Court of Appeal held it permissible to test the impact of the Act by applying it to hypothetical situations. It justified that approach by positing that the use of hypothetical situations:

¹² [1987] 1 SCR 1045. Section 12 of the Canadian Charter of Rights and Freedoms provides that everyone has the right not to be subjected to any cruel and unusual treatment or punishment. The Court of Appeal held that Section 5 of the Constitution and section 12 of the Canadian Charter of Rights and Freedoms to be “comparable in concept seeking to protect the same interests even though expressed differently.” (para 19).

“...is encouraged so as to generalize the consideration of whether there has been a breach of section 5 of the Constitution. This must be so because the determination is not whether a particular accused person or appellant is deserving of a prison sentence or not, but whether in all realistically conceived circumstances the sanction imposed by the questioned section is proportionate.”

[37] Following through on this suggested approach, the Court of Appeal applied the Act to the following hypothetical example, which I set out verbatim so as not to do violence to the eloquent way in which it was articulated by Gordon JA:

“Suppose a Minister of religion of mature years and blameless character, in so far as the Criminal law is concerned, on his way to perform his pastoral duties to one of his flock who appears to be about to join with his maker exceeds the speed limit and, coincidentally causes the death of a third person. A jury finds him guilty of causing death by dangerous driving. I, as a trial judge, would find it obscene, using that word in its meaning of being repugnant to accepted standards of morality, to have to sentence that driver to five years imprisonment. Such a sentence would be the quintessence of disproportionality. It is worthy of note that none of the following crimes carry a mandatory minimum sentence: non-capital murder, attempted murder, causing death by gross negligence or recklessness (under the Criminal Code) or manslaughter. In the language of Smith I would find “the punishment prescribed so excessive as to outrage the standards of decency”.

[38] Viewing matters in that way and considering that much more serious offences did not attract mandatory minimum sentences, the Court of Appeal held that section 73 (2)(a) of the **Road Traffic Act** was in breach of section 5 of the Constitution, in that the mandatory minimum sentence of five years imprisonment for the crime of causing death by dangerous driving constituted inhuman and degrading punishment. The Court of Appeal exercised its discretion to re-sentence the appellant instead of remitting it to the High Court.

[39] In more recent times, very authoritative word on the subject of mandatory minimum sentences comes from Dominica’s Apex Court, the Caribbean Court of Justice (“the CCJ”) in the case of **The Attorney General of Belize v Zuniga and others**.¹³ The

¹³ [2014] CCJ 2 (AJ).

case involved a challenge to section 106(A)(3) of the Supreme Court of Judicature (Amendment) Act 2010 of Belize. The newly introduced section 106(A) contained 16 subsections which in substance created the offence of knowingly disobeying or failing to comply with an injunction, particularly an anti-arbitration injunction. The new section fell under Part IX of the principal act which dealt with contempt of court. Section 106(A)(3) prescribed what the CCJ described as “severe” mandatory minimum penalties. The penalties prescribed were:

- (a) In the case of a natural person: a minimum fine which shall not be less than \$50,000 but which may extend to \$250,000 or imprisonment for term of not less than 5 years but which may extend to ten years or both a fine and term of imprisonment. If the offence is continuing an additional fine of \$100,000 is prescribed for each day the offence continues.
- (b) In the case of a legal person or other entity: a minimum fine which shall not be less than \$100,000 but which may extend to \$500,000. In the case of a legal person if the offence is continuing the convicted entity faces an additional fine of \$300,000 for each day the offence continues.

[40] The appellant challenged the constitutionality of section 106 (A)(3) on several grounds. For present purposes, the relevant ground is that the mandatory minimum sentences prescribed in sub-section 3 were draconian and therefore contravened both the separation of powers principle and section 7 of the Constitution which prohibits “inhuman or degrading punishment.”

[41] The CCJ’s analysis of these constitutional challenges commenced with an affirmation of the supremacy of the Belize Constitution, in consequence of which no law may be enacted that is inconsistent with the Constitution. It considered it trite law that the court is entitled to determine whether laws enacted by Parliament are

in conformity with the Constitution and to strike them down to the extent of their inconsistency.¹⁴

Separation of powers

[42] In relation to the separation of powers doctrine, which broadly speaking is a reference to the distribution and delineation of power or core functions among the three arms of government: the legislature, the executive, and the judiciary, the CCJ in **Attorney General v Zuniga** recognised Parliament's right to determine what conduct should constitute a criminal offence and to determine the appropriate level of punishment for such conduct. They cited approvingly the dicta of the Court of Appeal of Belize in the same case that "it is the business of the legislature to identify conduct to which penal sanctions are to attach and to determine the severity of such punishment."¹⁵ The CCJ elaborated further at paragraph [50]:

"[50] In the realm of policy, [the legislature] is not only best equipped, but it also has a specific remit to assess and legislate what it considers suitable for ...society. The expression "peace order and good government" is not to be, and has never been seen as, words of limitation on parliament's law-making power. On the contrary, the words are to be regarded as a compendious expression denoting the full power of Parliament freely to engage in law-making subject only to the Constitution."

[43] To this learning can be added the observations of the Privy Council in **Hinds v R**,¹⁶ where Lord Diplock stated as follows:

"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)...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

¹⁴ At paragraph [49].

¹⁵ At paragraph [44].

¹⁶ [1977] AC 195.

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."

[44] To similar effect is the dictum of Lord Bingham of Cornwall in **Reyes v R**:

"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".

[45] In so far as the judicial branch is concerned, the separation of powers doctrine is intended to secure for the judiciary, freedom from actions of any of the other branches which undermine it in the exercise of its core function and its independence more generally. By the same token, as the Board points out in **Jay Chandler v The State of Trinidad and Tobago**:¹⁷ "[t]he separation of powers also works to prevent judges from arrogating to themselves powers vested in another branch of government".

[46] In the context of the nature of the challenge mounted in **Attorney General v Zuniga**, the CCJ offered the following perspective as to the ways in which the doctrine may be violated and the approach the court should adopt in seeking to discover whether that is the case:

¹⁷ [2023] AC 285 at 332 para 80.

“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 these 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. When a claim is made, in a case of this kind, that the doctrine is engaged, the task of the court is to examine and assess the various indications pointing towards or away from impermissible interference and to consider the impugned legislation as a whole to discover its true purpose. Ultimately the court makes a judgment as to whether the Act in question is an exercise of legislative power or an interference with judicial power under the guise of exercising legislative power.”¹⁸

[47] In other words, 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 must assess whether the legislation negatively impacts its adjudicative process, constraining the court in its application or interpretation of legal principles. The court's task is to examine indications of impermissible interference and consider the legislation as a whole to discover its true purpose.

[48] It is therefore plain that Parliament's exercise of its right to enact a mandatory minimum penalty does not violate the separation of powers doctrine as that is a power within its legitimate remit. Section 5 of the Constitution does not prohibit Parliament from enacting a mandatory punishment applicable to all persons who commit a particular crime. However, the issue whether a particular mandatory minimum sentence is constitutional is a separate consideration.

¹⁸ At paragraph 41.

The approach to mandatory minimum sentences

[49] Turning specifically now to the CCJ's analysis of the constitutional challenge to the mandatory minimum sentences, the court stated that "the court must assess whether the mandatory minimum punishment as set out in the law would be grossly disproportionate in its application to likely offenders."¹⁹ Grossly disproportionate can "refer to a sentence that is beyond being merely excessive,"²⁰ or one where "no one, not the offender and not the public, could possibly have thought that that particular accused's offence would attract such a penalty. It was unexpected and unanticipated in its severity..."²¹

[50] As was done in *Thelbert Edwards*, the CCJ tested the impact of the mandatory penalties against reasonable hypothetical scenarios. It considered that there were numerous ways in which a person could knowingly violate an injunction and opined:

"[60] The nature and subject matter of injunctions issued by a judge of the Supreme Court vary widely. So, too, do the consequences resulting from their breach. Moreover, there are numerous ways in which a person can be said to have knowingly violated such an injunction. The breach may represent a contumelious defiance of the court in order, perhaps, to perpetrate some other even more dangerous crime or perhaps in order to reap handsome financial reward. In such a case moreover, the offender might be someone quite notorious for flouting the law. On the other hand, one can easily envisage many reasonable hypothetical cases which would commonly arise in which the mandatory minimum penalties would obviously be grossly disproportionate. The injunction may arise out of civil proceedings, perhaps involving a minor domestic squabble between spouses or between neighbours who have a boundary dispute, and the particular offender, though unable to come within the statutorily defined extenuating circumstances, is clearly deserving of punishment that in no way rises to the level of the minimum penalty that the court is compelled by sub-section 3 to impose...

[61] ...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

¹⁹ At paragraph [58].

²⁰ At paragraph [61].

²¹ *Ibid.*

the quintessentially judicial function of tailoring the punishment to fit the crime...

[62] Ultimately, it is for judges, with their experience in sentencing, to assess whether a severe mandatory sentence is so disproportionate that it should be characterized as inhumane or degrading punishment...”

[51] Applying those principles and approach, the CCJ found the mandatory minimum penalties prescribed in section 106(A)(3) to be grossly disproportionate to the offence of knowingly disobeying a court injunction as they undermined the judiciary's role in ensuring proportionate punishment and removed the Court's ability to consider mitigating factors or the gravity of the specific offence. Additionally, the fines were well beyond the ability of the average Belizean to pay. They were also held to be arbitrary because they bore no reasonable relation to the scale of penalties imposed by the Belize Criminal Code for far more serious offenses. Accordingly, the CCJ declared the mandatory minimum sentences grossly disproportionate, inhumane and therefore unconstitutional for contravening section 7 of the Constitution.²²

[52] In terms of the remedy consequent on their finding of incompatibility with the Constitution, the CCJ held by a majority that the mandatory minimum penalties could be severed from section 106(A)(3), leaving the maximum penalties intact. This approach preserved the legislative intent of strengthening contempt laws while excising the unconstitutional aspects.

[53] It can be seen from that brief survey that the approach taken by our courts is first to consider whether the sentence imposed on the particular offender before the court is grossly disproportionate. Secondly, recognising the variety and range of circumstances under which an offence may be committed, it is also permissible to consider the potential disproportionality of the mandatory minimum sentence by having regard to reasonably hypothetical scenarios to test whether the application

²² [2014] CCJ 2 (AJ).

of the mandatory minimum sentence to those hypothetical scenarios would produce a grossly disproportionate sentence.

[54] In this regard, it seems to me that our courts may have been influenced by the jurisprudence of the Canadian Courts.²³ In the Canadian Supreme Court case of **R v Nur**,²⁴ a case relied on by the appellants, the Supreme Court asked the following question at paragraph [47]:

“In analyzing the constitutionality of a mandatory minimum sentencing provision, who does the court take as the offender? Does the court consider only the offender who brings the section 12 challenge or should it also, if necessary, consider how the provision impacts on other persons who might reasonably be caught by it?”

[55] Having reviewed the jurisprudence, the Supreme Court furnished the answer at paragraph [58]:

“I conclude that the jurisprudence on general *Charter* review and on section 12 review of mandatory minimum sentencing provisions supports the view that a court may look not only at the offender’s situation, but at other reasonably foreseeable situations where the impugned law may apply. I see no reason to overrule this settled principle.”

[56] And further at paragraphs [61] and [65]:

“[61] At bottom, the court is simply asking: What is the reach of the law? What kind of conduct may the law reasonably be expected to catch? What is the law’s reasonably foreseeable impact? Courts have always asked these questions in construing the scope of offences and in determining their constitutionality...

[65] I conclude that a mandatory minimum sentence may be challenged on the ground that it would impose a grossly disproportionate sentence either on the offender or on other persons in reasonably foreseeable situations. The constant jurisprudence of this court and effective constitutional review demand no less. In the result, a mandatory minimum sentencing provision may be challenged on the basis that it imposes cruel and unusual punishment (i.e. a grossly disproportionate sentence) on the particular individual before the court, or failing this, on the basis that it is reasonably

²³ See *Thelbert Edwards* at paras 25 & 35 and *The Attorney General of Belize v Zuniga*.

²⁴ [2015] 1 R.C.S. 773.

foreseeable that it will impose cruel and unusual punishment on other persons.”

- [57] In a similar manner, the CCJ in **Attorney General v Zuniga** dismissed the argument that the court should refrain from invalidating the penalty regime and instead wait for an actual case to arise to realistically assess whether the mandatory minimum penalties are indeed grossly disproportionate. The Court had this to say:

“[58] 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. As the assessment is hypothetical, Mr Barrow suggests that the court should not now invalidate the penalty regime but wait for an actual case to arise before we could realistically consider whether these penalties are indeed grossly disproportionate. We disagree. The Constitution fully entitles a litigant with appropriate standing not to await the full brunt upon him of a measure whose unconstitutionality is looming on the horizon. At least, in so far as the unconstitutionality relates to a breach of the citizen’s fundamental rights.

Instead, the litigant is authorised to challenge the measure even before its impact is actually felt. Further, we do not consider that it would be appropriate to leave on the statute books penal provisions that challenge the Constitution and which leave the citizen and the State in a state of uncertainty as to their future application. As pointed out by Chief Justice McLachlin, such an approach —deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. We are persuaded that, on the face of the penalty regime set out in sub-section 3, the argument that the mandatory minimum penalties should be invalidated is made out.”

- [58] Thus, the device of the reasonably hypothetical scenario has been adopted as an analytical tool when adjudicating the constitutionality of mandatory minimum sentences.

Application to this case

- [59] Unlike the case of **Attorney General v Zuniga** where the CCJ was dealing with a pre-emptive challenge to the mandatory minimum penalties, we are here faced with

appellants who have actually been sentenced under such a regime and who are challenging the constitutionality of the particular sentences that have been imposed upon them. In the present case, this Court is well-placed to assess proportionality by reference to all of the relevant factors disclosed.

Did the imposition of a seven-year sentence violate section 5 of the Constitution?

[60] That brings me directly to consider whether the mandatory minimum sentence violates section 5 of the Constitution. Undoubtedly, there may be occasions when a sentence of 7 years imprisonment for possession of cocaine with intent to supply cocaine or importation of cocaine will merit a sentence of 7 years or more. Indeed, applying the guidelines to a situation where a defendant was in possession of 400 grams or more of cocaine and was performing a leading role, the starting point would be 9 years imprisonment and can extend to as much as 12 years imprisonment applying the **Compendium Sentencing Guidelines of the Eastern Caribbean Supreme Court, Drugs and Firearms Offences (Re-issue 8th November 2021)** (hereafter “the Sentencing Guidelines”).

[61] Clearly, even where a mandatory minimum provision may be held to be unconstitutional, this does not mean that the sentence actually imposed will always be set aside. It will not be disturbed if, having regard to the circumstances of the offence and the offender, it is proportionate and fits the crime. This was the outcome in **R v Nur**. There the appellants, Nur and Charles, were convicted of possessing loaded prohibited firearms contrary to section 95(1) of the Criminal Code of Canada. Sections 95(2)(a) of the Code imposed a mandatory minimum sentence for the offence of possessing prohibited or restricted firearms when the firearm is loaded or kept with readily accessible ammunition of three years for a first offence and five years for a second or subsequent offence. They challenged section 95(2)(a) on the basis that the mandatory minimum sentences imposed were unconstitutional because they result in grossly disproportionate sentences in some cases, violating the guarantee in section 12 of the Canadian Charter of Rights against cruel and

unusual punishment. The appeal court of Ontario and the Supreme Court of Canada agreed that the mandatory minimum penalties imposed by section 95(2)(a) violated section 12 of the Charter but the Supreme Court did not disturb the sentences imposed on the appellants. Chief Justice McLachlin explained why:

“[4] In most cases, including those of Nur and Charles, the mandatory minimum sentences of three and five years respectively do not constitute cruel and unusual punishment. But in some reasonably foreseeable cases that are caught by section 95(1) they may do so. This has not been shown to be justified under s. 1 of the Charter. It follows that section 95(2)(a) is unconstitutional as presently structured...

[5] This does not prevent judges from imposing exemplary sentences that emphasize deterrence and denunciation in appropriate circumstances. Nur and Charles fall into this category. Like the Court of Appeal I would uphold the sentences imposed by the trial judges in their cases.”

[62] The same result ensued in the case of **R v Smith**, which has some parallels with the case at bar. In that case, the appellant pleaded guilty to importing 7 1/2 ounces of cocaine into Canada contrary to Section 5(1) of the Narcotic Control Act. The appellant challenged the constitutional validity of the seven-year minimum sentence imposed by section 5(2) of the said Act as being inconsistent with, *inter alia*, section 12 of the Charter. The trial judge found the mandatory minimum sentence to be cruel and unusual punishment contrary to the Charter because of the potential disproportionality of the mandatory sentence but nonetheless imposed a sentence of 8 years. The Court of Appeal ruled that section 5 was not inconsistent with the Charter but upheld the sentence of 8 years. On further appeal, the Supreme Court held that section 5(2) breached section 12 of the Charter, noting:

“The protection offered by section 12 of the charter governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed... The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of section 12 of the Charter is... “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 imposing a sentence of imprisonment, the judge will assess the circumstances of the case in order to arrive at an appropriate sentence. The test for review under section 12 of the Charter is one of gross disproportionality because section 12 is aimed at punishment more than merely excessive. We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. Section 12 will only be infringed where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate. 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 the particular circumstances of the case to determine what range of sentences would have been appropriate to punish, rehabilitate, deter this particular offender or to protect society from this particular offender.”²⁵

[63] The Court was careful to observe at page 1077:

“The simple fact that section 5(2) provides for a mandatory term of imprisonment does not by itself lead to this conclusion. A minimum mandatory term of imprisonment is obviously not in and of itself cruel and unusual. The legislature may, in my view, provide for a compulsory term of imprisonment upon conviction for certain offences without infringing the rights protected by s. 12 of the Charter. For example, a long term of penal servitude for he or she who has imported large amounts of heroin for the purpose of trafficking would certainly not contravene s. 12 of the Charter, quite the contrary. However, the seven-year minimum term of s. 5(2) is grossly disproportionate when examined in light of the wide net cast by section 5(1).”

[64] It is therefore obvious that in an appropriate case the mandatory minimum penalty would not be grossly disproportionate when applied to a particular defendant before the court, but it could be in other actual or reasonably foreseeable hypothetical scenarios.

[65] Returning to this case, one can easily envisage other reasonable hypothetical scenarios where a person on the lowest end of the conduct spectrum would face a grossly disproportionate sentence if the mandatory minimum sentence were imposed. Take the case of the 19-year-old drug addict, and mother of a 1-year-old

²⁵ Per Dickson C.J. at page 1072.

child, who imports 0.75 grammes of cocaine. This is her first offence. Because the offence of importation of cocaine is a drug trafficking offence the mandatory minimum sentence of 7 years prescribed by section 16(1) would apply with full force. A magistrate would not be free to have regard to her personal mitigating circumstances in fashioning a sentence. A sentence of 7 years would be certain and, indeed, imperative because the mandatory minimum sentence pre-determines the sentence to be imposed in every case, without distinction. The first-time offender in possession of less than 1 gram gets the identical sentence as a person in possession of 100 grammes or even a regular drug dealer caught with a large quantity of cocaine. While a sentence of seven years might be appropriate for the drug dealer in this example, I am sure that Dominican society would recoil and be outraged at the thought that a young offender in such circumstances could be deserving of such similarly severe punishment. By that test, the mandatory minimum sentence of seven years would be grossly disproportionate to the facts and circumstances surrounding the offence and that first-time offender and must thus be seen to amount to inhuman and degrading punishment, in violation of section 5 of the Constitution.

[66] The case at bar also provides a perfect example of a situation where the application of the mandatory minimum sentence would produce a grossly disproportionate sentence if applied to the circumstances present in the case of each appellant. Before turning to assessing the sentences imposed in relation to the particular circumstances of the case of each appellant, it must be said that having regard to manner in which the magistrate expressed his reasons, it is not always clear whether he applied the mandatory minimum sentence automatically, or whether he purported to disregard them and engage in discretionary sentencing.

[67] Mr. Norde seems to acknowledge this in his written submissions filed on behalf of the 6th appellant where the following submission is recorded at page 4:

“Although the learned magistrate did not directly utilize the word mandatory sentence of seven years (7) it is clear that he indirectly addressed his mind to the mandatory minimum sentence in this case of seven (7) years.”

- [68] There are certainly parts of the magistrate's reasons that produce ambiguity regarding this issue. The statements in his reasons which I have underlined in the excerpt at paragraph [10] above convey the distinct impression that the magistrate first recognised the applicability of the Sentencing Guidelines but determined that the circumstances of these cases justified a departure from them. He purported to consider a number of aggravating and mitigating factors and eventually settled on a sentence of 7 years imprisonment. Notably, he did not say that the Sentencing Guidelines had to be displaced because of the prescribed mandatory minimum penalties. There is no express statement in his reasons that he imposed 7 years purely because that was the sentence that section 16(1) mandated him to impose.
- [69] However, the fact that the magistrate settled on a sentence that coincides with the mandatory minimum sentence prescribed without saying how he calculated that sentence - for example, by indicating what figure he adopted as a starting point, what credit he gave for the early guilty plea and for the fact that the appellants were of good character - can give rise to the inference that in disapplying the Sentencing Guidelines he simply defaulted to the mandatory minimum penalty of 7 years. The appellants' arguments seem to proceed, at least in part, on the assumption that the magistrate imposed the mandatory minimum of seven years automatically.
- [70] Nonetheless, for the reasons that follow, whether on a proper construction of his reasons the magistrate applied the mandatory minimum sentences automatically, or he applied his discretion in calibrating the sentence, the sentences he imposed were grossly disproportionate and manifestly excessive in the circumstances of this case and constitutes inhuman and degrading punishment in breach of section 5 of the Constitution. I will demonstrate this by first assessing whether the magistrate's stated reasons for departing from the guidelines withstand scrutiny. Secondly, I will discuss what the appropriate range of sentence should have been had the magistrate applied the Sentencing Guidelines.

Departure from the sentencing guidelines

[71] The **Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules**²⁶ which are applicable to the Magistrates' Courts in Dominica, provide at rule 4:

“4(3) When sentencing for an offence for which a guideline has been issued, the court must apply the relevant sentencing guideline and sentence, unless to do so would not be in the interest of justice.

(4) If under sub rule 3 the judge does not apply the sentencing guideline, clear reasons for not doing so must be given when passing sentence.”

[72] Rule 6 provides that a sentencing guideline issued in relation to an offence must be applied in all criminal matters in the court.

[73] The magistrate demonstrated awareness of both rules, as evidenced by his acknowledgment of his general obligation to apply the relevant Sentencing Guidelines in his reasons.

[74] The magistrate's reasons for departing from the Sentencing Guidelines can be gleaned from his own words: “Due to the visible impact of cocaine on the communities, the court is forced to deviate from the sentencing guidelines and to impose a sentence that will send a clear message to the users and abusers of cocaine.”

[75] With respect, this reason fails to demonstrate why the application of the guidelines in the circumstances of this case would produce an injustice. The reason advanced as warranting departure is one which can be said about all cases of drug trafficking. While this reason could understandably warrant a heightened focus on the penological objective of deterrence, in my view it can hardly be regarded as justifying complete departure from the Sentencing Guidelines. These societal effects and impacts are inherent in every drug trafficking case. On the magistrate's reasoning, if these unfortunately common features are considered sufficient to justify departure from the guidelines because to apply them will cause injustice, then

²⁶ Statutory Instrument No. 3 of 2019 Dominica.

every judge or magistrate sentencing for drug trafficking under similar circumstances can disregard the guidelines. This would render them redundant for the most part and would introduce an unsatisfactory degree of arbitrariness in the approach to sentencing for drug trafficking offences, which the guidelines were intended to reduce, if not eliminate. The Sentencing Guidelines make clear that while the guidelines do not seek to achieve uniformity of sentence, they aim to produce uniformity of approach. This worthwhile aim must be safeguarded from arbitrariness.

- [76] I am satisfied and agree with counsel for the appellants and counsel for the respondent that the magistrate erred in principle when he purported to depart from the sentencing guidelines in the circumstances of this case.

The correct approach

- [77] The Sentencing Guidelines for drugs offences stipulate the steps the magistrate was required to take in constructing the sentence. First, he was required to find the starting point by considering the seriousness of the offence. For drug offences, finding the starting point requires an assessment of the quantity of drugs based on weight and the role played by each appellant, that is to say whether he was playing a leading role or was at the lower end of the chain performing the functions of a mule for example. The first stage of step 1 requires the offending to be assigned to one of 4 categories, depending on the weight of the drug and whether it is cocaine or cannabis. At the highest end of the spectrum is Category 1. In the case of cocaine, the offending is assigned Category 1 where the weight of the drugs is 400 kilograms or more. In this case the weight of the cocaine possessed by the appellants ranged from 817.5g to 1927.1g. This would place the offending of each appellant into Category 3 according to the Guidelines.
- [78] The second stage in step one required the magistrate to determine the role played by each appellant. There are three role levels. Level A denotes a leading role, such as directing or organizing drug operations. Level B denotes a significant role such

as where the defendant performs some operational or management function within a chain or has some awareness and understanding of the scale of the operation or where he has involved others in the operation. Level C represents the lowest level of involvement. Classification at Level C is appropriate where the defendant performs a limited function under direction or has very little, if any, awareness or understanding of the scale of the operation or is involved through youth, naivety or exploitation. On the facts of these cases, each appellant performed the function of a mule. This level of involvement places the offending at Level C. The starting point is thus determined by consulting the grid in the sentencing guidelines to see what range of sentence is prescribed for a defendant whose offending falls into Category 3, Level C. The guidelines prescribe a starting point of 1 year and six months, with the sentence ranging between a non-custodial one at the lowest end and 3 years at the upper end.

[79] Having determined the starting point, the next step required the magistrate to adjust the figure within the range for any aggravating or mitigating factors in relation to the offence, taking care not to double count by taking cognisance of matters considered when setting the starting point. In all these cases the manner in which the appellants concealed the drugs by ingesting them can be described as a somewhat sophisticated manner of concealment. This is an aggravating factor and would warrant an upward adjustment to 2 years.

[80] Step 2 of the sentencing process required the magistrate to adjust the figure within the range for the aggravating and mitigating factors relating to the offender. In this case, the magistrate recognised that the appellants were persons of previous good character. He was therefore required to indicate the level of credit awarded for this mitigating factor. In my view, a discount of 3 months would have been appropriate, reducing the sentence to 1 year and 9 months.

[81] Step 3 required the magistrate to give each appellant credit for their early guilty plea. It is not sufficient to simply say that credit is being given; the level of credit

must be specified. The usual practice in these courts is to award a 1/3 discount in recognition of the fact that an early guilty plea saves the court valuable and scarce time and resources that would otherwise have to be deployed in pursuing a trial. The discount on account of the early guilty plea would have reduced the sentence to 1 year and 2 months.

[82] In the case of appellants 1 – 5, they were being sentenced for 2 offences, accordingly, the magistrate was required at step 4 to bear the principle of totality in mind, fashioning the sentences for both offences in such a way as to ensure that the combined overall sentence was proportionate to the level of offending. He seems to have done so as he declined to impose a separate sentence for the charge of importation.

[83] At step 5, the magistrate was required to credit each appellant for any time spent on remand awaiting sentence by deducting that time from the sentence. In this case, given that at the date of hearing this appeal, the appellants had all served more than the term of imprisonment of 1 year and 2 months to which they should have been sentenced, we made an order of time served and ordered their immediate release.

[84] The last step requires consideration of ancillary orders such as confiscation or forfeiture. This the magistrate did when he ordered that the drugs be forfeited.

[85] From the foregoing discussion, and applying the relevant sentencing guidelines, a sentence of 2 years at the upper end would have been appropriate to start but reduced to 1 year and 2 months on account of good character and the early guilty pleas. Such a sentence would have been proportionate in circumstances where each appellant was found in possession of a relatively small quantity of cocaine, each functioned at the lowest end of the chain as drug mules and who, to their credit, entered guilty pleas at the earliest opportunity and had no previous convictions.

[86] I find myself in agreement with both counsel for the appellant and counsel for the respondent that the imposition of a sentence of 7 years imprisonment in the circumstances of these cases was grossly disproportionate and manifestly excessive on ordinary sentencing principles. The same conclusion would follow if the magistrate applied the mandatory minimum sentence of 7 years automatically. The mandatory minimum sentence constitutes inhuman and degrading treatment and in breach of section 5 of the Constitution of Dominica because its net is cast too wide and can result, as it did here, in a sentence that is grossly disproportionate to what would otherwise been an appropriate sentence.

[87] The consequence of such a finding requires the approach taken in **Attorney General v Zuniga** and **Thelbert Edwards**. In **Zuniga**, the CCJ explained:

“[88] In mandating that a law inconsistent with the Constitution is void to the extent of its inconsistency, the Constitution sanctions the principle of severance and encourages its exercise where possible. When faced with a statute that contains material that is repugnant to the Constitution the court strives to remove the repugnancy in order, if possible, to preserve that which is not. 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.”

[88] This approach aims to fashion a remedy that involves minimum trespass on the remit of Parliament and avoids invalidating more of the statute than is necessary while ensuring that “what is left represents a sensible, practical and comprehensive scheme for meeting the fundamental purpose of the act which it can be assumed that parliament would have intended”.²⁷

[89] This Court is satisfied that in this case severing the mandatory minimum sentence provision does not so mutilate the legislative objective so that what remains does

²⁷ At paragraph [58] citing Lord Diplock in *Hind v R* [1977] AC 195 at 229.

not reflect what Parliament originally intended. Parliament's general intention seems to have been to increase the penalties for drug trafficking offences as a means of deterrence. I say this because the maximum sentence of 15 years imprisonment on summary conviction together with a fine of \$150,000.00 or three times the street value, represents a significant increase over the sentence of 3 years and a fine of \$100,000.00 which was previously applicable to both possession with intent to supply and importation of a Class A drug such as cocaine.²⁸ There is no reason to suppose that Parliament would not have enacted section 16(1) without the mandatory minimum provisions.

[90] Accordingly, we hold that section 16(1) of the **Drugs (Prevention of Misuse) Act** must be read as if the words "but which shall not be less than seven years" were excised from the provision, leaving a maximum term of imprisonment of 15 years.

[91] For all the foregoing reasons, we allowed the appeals against sentence and varied the sentence of each appellant to time served.

I concur.
Margaret Price Findlay
Justice of Appeal

I concur.
Vicki-Ann Ellis
Justice of Appeal

By the Court

Chief Registrar

²⁸ These penalties were prescribed in the Fourth Schedule to the 1988 Act pursuant to sections 5(3) and 27(1) until amended by the Drugs (Prevention of Misuse) (Amendment) Act No.3 of 1993, which replaced them with section 16.