POONOO V ATTORNEY-GENERAL

(2011) SLR 424

B Hoareau for the appellant
C Jayaraj for the respondent

Before MacGregor P, Domah, Twomey JJ

Judgment delivered on 9 December 2011 by DOMAH J:

This is an appeal from a decision of the Constitutional Court on the constitutionality of section 27A(1)(c)(i) and section 291(a) of the Penal Code which imposes a mandatory minimum penalty of 5 years' imprisonment upon any person found guilty for the offence of burglary. The Court, with Dodin J delivering the judgment, and with whom the Chief Justice Egonda-Ntende C J and Burhan J agreed, decided that the mandatory minimum provision in the circumstances did not contravene the Constitution, that it constituted a valid law and the appellants, then petitioner, was correctly convicted and sentenced to 5 years' imprisonment.

Counsel for the appellant had challenged the provision under two heads of argument: article 1 as read with article 119(2) and article 16 of the Constitution of the Republic of Seychelles. The Constitutional Court held that there was contravention of neither article 1, nor article 119(2), nor article 16. Accordingly, it confirmed earlier decisions of the Constitutional Court on the matter that minimum mandatory sentences may not be regarded as unconstitutional and proper legislation validly enacted by the legislature cannot be impugned as being inconsistent with the Constitution of the Republic of Seychelles.

THE GROUNDS OF APPEAL

The appellant has put up the following grounds of appeal:

1. The learned Judge erred in law in holding that the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code have not contravened article 1 and article 119(2) of the Constitution, namely the doctrine of separation of powers.

2. The Judge erred in law in holding that the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code have not contravened article 16 of the Constitution, in relation to the petitioner;

3. The Judge erred in law in failing to hold that the objection to the petition was not proper in law as the affidavit in support was sworn by principal State counsel Chinnasamy Jayaraj who was also counsel for the Respondent.

Ground 3 has been addressed together with the other procedural issues by sister Judge Twomey J in a separate judgment. In this judgment, we consider grounds 1

and 2. It is worthy of note that the relief which appellant has sought is his immediate release from prison on account of the averred unconstitutionality. We shall address this point at the end of our determination. It follows that the decisions in both the procedural as well as the substantive issues have been the result of intense deliberations and consultations among the President, MacGregor P, Twomey J and myself.

THE NATURE OF THE COMPLAINT

It is important to apprise ourselves of the nature of the complaint which the appellant had made to the Constitutional Court and the remedy that he was seeking under the Constitutional Relief Rules. The Court could only have properly decided on the matter *in concreto* and not *in abstracto.* The issues could only have been canvassed, argued and decided on the particular facts of the case rather than on the general principles relating to mandatory minimum sentences.

THE FACTS

The particular facts and circumstances of the appellants' case was that he had stood trial under two counts of an information: under Count 1 for breaking and entering into a building and committing a felony therein, contrary to section 291(a) of the Penal Code; and, under Count 2, for the offence of stealing contrary to section 260 of the Penal Code. The appellant had pleaded not guilty. The trial proceeded with the hearing of witnesses and the evidence on oath by the appellant. His version was that his involvement in the case was limited to his buying a pair of shoes from other persons who had broken into a shop where he had been led to by the others who had seemingly already committed the burglary. The pair of shoes was the only item secured from him in course of the investigation. The Magistrate found him guilty on both counts on a clear finding on her part that the accused "may not have been the one who actually opened the window" of the Indian shop that was broken into. She relied on "his meeting with the other persons by the roadside at the Indian shop and his presence at the scene" for her finding of guilt, all suggestive of appellant's minimal participation. She then convicted him and sentenced him to undergo five years' imprisonment under count 1 and 18 months' imprisonment under count 2, both the terms were ordered to run concurrently from the date of conviction which was 26 February 2010.

THE REASONING OF THE COURT

As important as the nature of the complaint which the appellant made is the reasoning of the Magistrate before she meted out the prison sentence of 5 years. Her reasons, in her own words, were:

> The maximum term for the offence on Count 1 is 14 years imprisonment. By virtue of section 27A(1)(c) (Q) of the Penal Code, a first conviction on such a charge attracts a minimum sentence of 5 years imprisonment.
>
> As a result of the minimum mandatory term the fact that the accused is a first offender which is a mitigating circumstance is almost irrelevant. It stands only to be considered to the extent whether he should be given a term above the 5 years prescribed.

> Having considered all the above, I find that a sentence of 5 years imprisonment more than meets the justice of the case.
> Accordingly, on count 1, the accused is sentenced to a term of 5 years imprisonment. On Count 2, he is sentenced to a term of 18 months imprisonment.

THE SENTENCING OF THE APPELLANT

Two aspects of the actual sentencing process may be noted here:

(1) The Magistrate felt bound by the mandatory minimum sentence of 5 years by stating that "accused is a first offender which is a mitigating circumstance .. almost irrelevant;"
(2) The fact that he is a first offender stands only to be considered to the extent whether he should be given a term above the 5 years prescribed.

In other words, the Court when sentencing the appellant felt that Parliament by a mere legislation had removed from this Magistrate sitting as a Court of law, the discretion vested upon her by a democratic Constitution to mete out an appropriate sentence upon him. Accordingly, she imposed what Parliament had dictated to her as the minimum of 5 years imprisonment, regardless of the facts of the case and his personal circumstances. She stated therein that even the fact that the appellant was a first offender which is a mitigating circumstance was of bare consequence.

THE NATURE OF THE CONSTITUTIONAL CHALLENGE BEFORE THE CONSTITUTIONAL COURT

The question came as a legal challenge of the mandatory minimum of 5 years imposed by 27A(1)(c)(i) and section 291(a) of the Penal Code and its constitutionality or otherwise in the light of provisions under article 1, article 119(2) and article 16. That is unfortunate. The results might well have been different if the appellant had invoked that his punishment in a democratic society resting on the rule of law under the Constitution had been decided by Parliament rather than by a Court of law which had heard his case and the manner in which the sentencing Court had felt bound by the legislative *diktat.*

THE DECISION OF THE CONSTITUTIONAL COURT

We are unsurprised, therefore, considering the manner in which the grievance of the appellant was presented to the Court and argued, that the Constitutional Court concluded that the appellant's petition was without merit. In the words of the Constitutional Court which and dismissed the petition:

1. …section 27A(1)(c)(i) and section 291(a) of the Penal Code have not contravened Article 1 and, therefore, have not affected the interest of the petitioner (now appellant);
2. .. Article 16 of the Constitution has not been contravened in relation to the Petitioner by the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code;

3. .. section 27A(1)(c)(i) and section 291(a) of the Penal Code are consistent with the provisions of Article 1, Article 119(2) and Article 16 of the Constitution and are therefore valid; and therefore, have not affected the interest of the petitioner (now appellant);
4. .. the sentence of 5 years imprisonment imposed on the petitioner was properly imposed and is valid.

THE MAIN THRUST OF THE ARGUMENT OF THE APPELLANT BEFORE THE COURT BELOW

The main thrust of the argument before the Court below was two-pronged and centred on: one, article 1 read with article 119(2); and two, article 16. We take the view that it would make more sense to take each of articles 1, 119(2) and 16 separately. In doing so, however, we advise ourselves of two important cautions: one, the Constitution and constitutional provisions for that matter are interpreted integrally as a coherent whole with one section read with the other and not any section apart from the other; two, there is bound to be some inevitable overlapping in the arguments surrounding each of the articles.

ARTICLE 1 OF THE CONSTITUTION AND THE MEANING OF DEMOCRACY IN THE CONTEXT

Invited to state whether counsel on either side relied on the decision of *P. Philibert v The State* (2007) SCJ 274, counsel for the appellant stated that he did.

Counsel for the respondent, on the other hand, stated that he also did but with the rider that article 1 of the Constitution of Mauritius on which *Philibert* was grounded is not the same as article 1 of the Constitution of the Republic of Seychelles. Article 1 of the Constitution of Mauritius reads as follows: Mauritius shall be a sovereign democratic State which shall be known as the Republic of Mauritius.

On the other hand, Article 1 of the Constitution of Seychelles reads as follows: Seychelles is a sovereign democratic Republic.

Article 49 of the Seychelles Constitution expatiates on the meaning of democratic society in the following terms:

> "Democratic society" means a pluralistic society in which there is tolerance, proper regard for the fundamental human rights and freedoms and the rule of law and where there is balance of power among the Executive, Legislature and the Judiciary.

We would grant counsel for the respondent that the wording in the two constitutions is not the same. But from there to suggest that the meaning of 'sovereign democratic' should be different looks to us to be an exercise in semantics and not one of constitutional interpretation and application. Abel de Smith who led the drafting of the Mauritian Constitution made it clear in his article ·Constitutionalism in a Plural Society" that the Constitution of Mauritius is a Constitution of a plural society; that Chapter 2 contains the entrenched provisions of fundamental freedoms and liberties and equally entrenched provisions regarding the separation of powers: Abel de Smith, *Constitutionalism in a Plural Society,* 1967 Modern Law Review p 67.

As we see the two, we are talking of the same substance in the same language but in different words.

We would also grant counsel for the respondent that if *Philibert* was to be considered any authority at all, it should necessarily be interpreted in light of the provisions of the Constitution of Seychelles to the extent that the principles of interpretation in article 48 (d) allows it, ie -

> .... a court shall, when interpreting the provision of this Chapter, take judicial notice of –
> (a) …….
> (b) …….
> (c) ……
> (d) the Constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their Constitutions.

We have to say, however, that we cannot not consider *Philibert*, for the very good reason that the Constitutional Court relied on it to dismiss the petition. *Philibert* properly interpreted and as is evident by the endorsement which the Judicial Committee gave to it in subsequent cases, was not a decision on the definition of democracy in the Constitution. It is a decision on what democracy should mean in action. More particularly, what it means in terms of the relationship between the three arms of government and the central question on the scope and limits of legislative and judicial power: the sovereignty of parliament and the independence of the judiciary in a democratic constitution. Balance of power means not the tilting of power from one arm of the state to the other but the keeping of the pans of the scales at the same level. It also means that there is a mutual deference among the three arms of the state with respect to the exercise of their respective powers where all the three arms mutually recognize, respect and pay due homage to their respective scope as well as limitation.

Nobody would deny that whichever model has been used to customize the democratic systems to the needs of various peoples in their nation states, whether in the Republic of Seychelles, the Republic of Mauritius, Canada, Australia, United States, United Kingdom etc, the overriding characteristics are the same:

(a) that the Constitution is the supreme source of law;
(b) that human rights and fundamental freedoms are protected as inherent and inalienable rights of the people of the country concerned;
(c) that the Constitution is based on the rule of law;
(d) that the principle of separation of powers is entrenched in the Constitution;
(e) that one branch of government may not trespass on the province of any other under the principle of separation of powers.

COURT DECISIONS

All the cases dealing with the issue of mandatory minimum sentences referred to whether in Seychelles law, Mauritian law, English law or Commonwealth law look at

it from those overriding features of the various constitutions. With the above parameters laid down, we proceed to analyse the decision of the Constitutional Court in this case.

The Constitutional Court relied on the Mauritian decisions of *State of Mauritius v Khoyratty* [2006] UKPC 13, *Philibert & Ors v State of Mauritius* [2007] SCJ 274, *Ali v R* ,the South African case of *Dodo v State* 4 LRC, *Attorney-General v Dow* [1992] BLR 119; the Indian cases of *Dadu v State of Maharashtra* [2000] 8 SCC 437, *Bach Singh v State of Punjab* [1980] 2CC 684; and the Seychelles cases of *Jeffrey Napoleon v The Republic* CS 1 1997, *Brian Azemia v The Republic* CS 82 of 1997; *Aaron Simeon v The Attorney-General* CC 1 of 2010; the English case of *Hinds v The Queen* [1977] AC 195; and the Council of Europe jurisprudence of *Saadi v Italy* Appl No *37201/06,* 28 February 2008 to hold that the mandatory minimum inserted by the legislature was not a breach of the constitution.

The Canadian case of *Latimer v Her Majesty the Queen and Ors* 2001 SCC 1 was referred to us by counsel for the State. It had to do with a father who, in his tortured anxiety, had found it necessary to take the life of his 12-year old daughter who had a severe form of cerebral palsy to prevent as it were prolonging her life of continuing pain. Charged with first degree murder, the appellant was found guilty of second degree murder by a jury which was concerned much more about the nature of the sentence which was to be meted out to him. The law imposed a minimum of 10 years whereas they recommended a prison sentence of one year with one year probation. The Court of Appeal affirmed the conviction but reversed the sentence, imposing the mandatory minimum sentence of life imprisonment without parole eligibility for 10 years.

The Canadian Court stated as follows:

> The test for what amounts to "cruel and unusual punishment" is a demanding one, and the appellant has not succeeded in showing that the sentence in his case is grossly disproportionate to the punishment required for the most serious crime known to law, murder.

We find the case of *Latimer* not adding anything more to what is known about mandatory minimum sentences. First, it was a case of murder, the most serious crime in law. Second, the Court agreed that the minimum mandatory was not grossly disproportionate in this case. Third, the mandatory minimum sentence plays an important role in denouncing murder. Fourth, the case was decided on section 2 of the Canadian Charter of Rights and Freedoms.

With regard to the Mauritian jurisprudence which invalidated such a provision, the respondent's argument was that *Khoyratty* was a case dealing with bail and *Philibert* one with a 45 year imprisonment. That is correct. However, those cases become relevant not for the facts but for the legal principles. Bail like sentencing is a matter for the Courts and not for the legislature so that the principle enunciated in *Khoyratty* applies to sentencing as it applies to bail. Likewise, the Court in *Philibert* made sure to state that their decision should be taken to apply to other laws of varying duration. The judgment makes it clear that the many other cases pending on the issue of mandatory minimum "will no doubt stand guided" by the judgment in the case and

that it had in mind a "list of mandatory sentences" which would include "various fiscal or customs offences consisting in payment of a fine at least equivalent to 3 times the value of the evaded duty or tax." The decision in *Philibert* was followed in later decisions such as *Bhinkah v State* , confirmed by the Judicial Committee in *Aubeeluck v State* which went so far as to state that *Bhinkah v State* provided a good summary of the law. *Bhinkah v State* was a case like the present one where the sentence imposed was one of 5 years imprisonment for burglary but that all that he had done was to be possessed of a pair of spectacles which had been the proceeds of that burglary.

As regards the South African cases of *Dodo* and *Dow,* the mandatory minimum sentences questioned had an in-built discretion in the section which allowed the Court to depart from the mandatory sentence for reason of "substantial or compelling circumstances." The Indian cases and the other cases had to do with the interpretation of the torture provisions.

We endorse the reliance of the Constitutional Court on *Philibert.* We are not quite sure, however, whether the attention of the Judges was brought to the two aspects of *Philibert:* namely, (a) that it was not a decision limited to a sentence of 45 years only but encompassed in so many words other cases of mandatory minimum sentence; and (b) *Philibert* was acknowledged to be good law in subsequent cases of *Bhinkah* and *Aubeeluck,* etc. We take into account that citation of foreign judgments, however material to a case, poses some practical problems in this jurisdiction even if it is becoming progressively easier than before.

We have stated above that if *Khoyratty* had to do with bail which is one aspect of the exercise of judicial power which is jealously preserved by the judiciary in all democratic systems of government, so is the question of sentencing. The subject-matter may be different but the principle the same. Just as the granting of bail is an intrinsically judicial matter so is sentencing an offender who is before the Court. That is more than an analogy. It is an axiom. While the legislature is concerned in a general way with the penalty that should attach to an offence, the Court is concerned in a case to case basis the actual sentence that should be meted out to the particular offender. There is a difference between the preoccupations of the legislature in legislating a penalty provision and the pre-occupations of the court in sentencing a particular offender.

SENTENCING AN INDIVIDUAL OFFENDER LIKE BAIL IS AN INTRINSIC JUDICIAL POWER

We find it relevant at this stage to state what is involved at the time of sentencing an offender. It is not the mechanical application of letters and number in a formulaic table. It is the human deliberation of what is the just desert which can be given to a particular offender seen to have strayed from the set of norms at the time laid down by society. In this sense, convicting or discharging someone is easier. The formidable task, constitutional in character, comes at the moment of sentencing.

In the preface of his textbook, *Sentencing Law and Practice*, Thomas O'Malley, p. ix, (1 Edition, Thomson Round Hall, Dublin 2, 2006)states so pertinently:

> It has been said that while legislatures understand offences, courts understand offenders. No statute or guideline system, no matter how finely tuned, can cater in advance for the unique circumstances of every offender who will come before the courts for sentence.

SENTENCING INVOLVES A JUDICIAL DUTY TO INDIVIDUALIZE THE SENTENCE

Sentencing involves a judicial duty to individualize the sentence tuned to the circumstances of the offender as a just sentence. It cannot be likened to the mere administration of a common formula or standard or remedy. We quote from Thomas O'Malley again:

> The proper exercise of discretion required attention to established guiding principles. In a sentencing context, the objective must be to achieve a viable mix of consistency and individualization.

We are, as is evident from the above, concerned not with the definition of democracy as it exists in the various constitutions in various jurisdictions but with the idea of democracy as it should be translated in the day to day life of government and the actual lives of the people. The Constitution of a nation is not a leaf in a booklet containing black and white letters as good as dead. It is a charter of the people's aspirations, pledges and commitments which are to be progressively attained through an evolutionary process in search of a still better and better society. Those aspirations, pledges and commitments are to be translated into dynamic actions and deeds in the everyday working of government and the lives of the people.

In *Khoyratty* at 92 the Law Lords stated as follows:

> The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive and the judiciary is necessary.

That is a fundamental of the Constitution of the Republic of Seychelles whose basic structure is no different from that of the Constitution of Mauritius or a good many constitutions of democratic states whether or not customized on the Westminster model. And the aspirations, pledges and commitments of all the democratic systems are no different.

This Court does take into account, however, that the Constitutional Court was barely enlightened by the counsel on those recent developments in the law which the recent cases before the Judicial Committee of the Privy Council had delivered. We, on the other hand, have had the advantage of making use of *Aubeeluck* which had given judicial approbation to *Bhinkah* and put *Khoyratty* and *Philibert* in their proper perspective. With the benefit of those decisions, the Constitutional Court would have found that the question of constitutionality or unconstitutionality of a mandatory provision in an Act of Parliament occurs at three levels (a) the gravity of the sentence in the text of the law itself; (b) the manner in which the court deals with it; and (c) the

right afforded to the citizen to challenge the mandatory sentence in the particular circumstances of his case.

THE THREE TESTS OF CONSTITUTIONALITY IN THE CASE OF A MANDATORY MINIMUM PENALTY

The first is a legal test of constitutionality. A law may impose a mandatory minimum of say 50 whip-lashes for throwing an empty can in a public place. Some democratic constitutions would approve. Some would not. The second is a judicial test of constitutionality. The Court may find that its discretion to individualize the sentence has been completely removed from it and taken away by Parliament. In some cases, but not in all, the mandatory minimum would be appropriate but in a few cases, it will not. The third is the test of constitutionality of defence rights. Each accused has a right to be sentenced according to his just deserts. To sentence him to 5 years imprisonment for a pair of shoes because Parliament says so may outrage standards of decency.

The first is tested on the basis of the powers of Parliament under article 16 of the Constitution which relates to torture, cruel, inhuman or degrading treatment or punishment. The second is tested against article 119(2) of the Constitution which relates to the independence of the judiciary. The third is tested against the rights of an accused to a fair hearing by an independent and impartial court established by law (article 19(1)) and with all that that concept connotes under article 1.

Accordingly, the question is larger. It is not limited to whether the minimum is 45 years (murder), 30 years (drug dealing), 5 years (burglary) or 3 times the value of the goods (revenue law). The question is whether the mandatory minimum passes the legal test, the judicial test or the fair trial test. It may pass the legal test but still fall foul of the judicial test. It may pass even the judicial test and fall foul of the fair trial test in that there has been a breach finally of the accused right to mitigate against the imposition of the mandatory minimum along the principle of proportionality and the individualization of his sentence by the court.

In the case of the appellant, the proper question was not whether the five-year sentence violated the provision of article 16 relating to torture, cruel, inhuman and degrading treatment or punishment. The proper question was larger. It also covered the predicament of the appellant in his given situation. He came to court for his case to be determined by due process. The Court found him guilty. But at the moment of sentencing, the Court relegated his sentencing to the legislature. The Court thereby abandoned an intrinsic judicial power which goes with a sentencing process.His right was a right of fair hearing which included a just sentence decided by an independent and impartial Court established by law and not decided by the legislature. The legislature could only prescribe sentences as a general principle. It was the responsibility of the court to take into account the particular facts of the case and his personal circumstances adhering to the principle of proportionality which underlie due process.

NOT ANY MANDATORY MINIMUM PENALTY IS UNCONSTITUTIONAL

It cannot be gainsaid that not every mandatory or mandatory minimum penalty prescribed by legislation breaches the constitutional principle of the separation of powers, as an encroachment by the legislature on judicial power. We endorse that view expressed in *Philibert.* The Judicial Committee of the Privy Council in *Aubeeluck* endorsed that constitutional principle when it stated at 27:

> .. while it would not be prepared to say that a mandatory sentence would necessarily infringe the principle of the separation of powers between the judiciary and the legislature, a particular mandatory sentence might be held to be disproportionate.

In other words, Parliament had the constitutional right to impose a mandatory minimum as a general principle for reasons that it is best able to decide and for which legal fiction has given Parliament unlimited wisdom. However, Parliament could never envisage that a court of law would feel bound to say: "If this Court convicts you, your sentence will be the one which Parliament has written down for you in advance as a general principle; it matters little what the facts are and your personal circumstances are!" The appellant has his constitutional rights. The power of Parliament as well as the power of the Courts stop where the constitutional rights of the citizen begins. That is the whole concept of constitutionalism.

It is from that angle that *Philibert*decided that the 45-year mandatory penalty under attack was incompatible both with the right to a fair hearing guaranteed by section 10(1) of the Constitution of Mauritius and with the right not to be subjected to inhuman or degrading punishment or other such treatment guaranteed by section 7 of the Constitution of Mauritius which is the equivalent of article 16 of the Constitution of the Republic of Seychelles.

ACCUSED'S RIGHTS IN THE FACE OF A MANDATORY MINIMUM PENALTY

The rights of a convicted offender faced with a minimum mandatory penalty may be gauged from the following pronouncement in *Philibert.*In line with the principles outlined above, in relation to the statutory imposition of a mandatory death sentence, we believe that it would be equally objectionable for a law to require of the Mauritian courts to impose any substantial amount of prison sentence which would be mandatorily fixed by the legislature and which would be binding the hands of the judiciary. There would, otherwise, be no possibility for an accused party to claim that the mandatory prison sentence imposed by law would be disproportionate and inappropriate in spite of mitigating factors which could otherwise have been invoked, in relation to him.

Furthermore, a law which denies an accused party the opportunity to seek to avoid the imposition of a substantial term of imprisonment which he may not deserve, would be incompatible with the concept of a fair hearing enshrined in section 10 of the Constitution of Mauritius and section 19(1) of the Constitution of Seychelles. A substantial sentence of penal servitude like in the present situation cannot be imposed without giving the accused an adequate opportunity to show why such sentence should not be mitigated in light of the detailed facts and circumstances surrounding the commission of the particular offence or after taking into consideration the personal history and circumstances of the offender or where the

imposition of the sentence might be wholly disproportionate to the accused's degree of criminal culpability. Fair hearing includes fair sentencing under the law but includes individualization and proportionality.

According to the Mauritian courts, therefore, confirmed by the Judicial Committee, the unconstitutionality of a mandatory minimum is tested not only by what democracy is as a word in article 1 but also what democracy does in point of fact in the existing justice system. Does it include the right to a fair hearing? Does it ensure the right to be given a punishment proportional to the acts committed with respect to the offence charged? Does it ensure the right to offer pleas in mitigation to challenge the imposition of the mandatory minimum?

O'Dalaigh CJ in the case of *Deaton v Attorney·General and the Revenue Commissioners* (1963) IR 170 at 182-183 on the same issue arising under the Irish Constitution:

> The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule and the application of the rule is for the Courts ..... The selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive ...

The citizen in a given case of mandatory minimum has a right to put in a plea in mitigation in the following terms: "My case is a special one. It is removed from the hypothetical cases for which the legislature felt that a mandatory minimum is to be imposed. I rely on the special facts of my case and the other pleas in mitigation to show that the imposition of the mandatory minimum is not warranted in my case". If the Court in considering all the facts and circumstances of the case comes to the conclusion that that indeed is the case, the Court would be perfectly entitled to read down the mandatory minimum without feeling bound by it.

That aspect of a citizen's right in a democratic set-up is broached in the case of *Aliv Rand Rassool v R* [1992] 2 All ER 1 at 8 which reproduces the words of Lord Diplock in relation to other Constitutions "the legislature under such constitutions not only does not but it cannot prescribe the penalty to be imposed in any individual citizen's case".

Lord Diplock had completed his thought expressed above in the following manner: "... this statement, uttered in relation to the Constitution of the Irish Republic, applied with greater force to constitutions on the Westminster model".

COURT DISCRETION IN SENTENCING IS NOT TO BE GIVEN AWAY IN A DEMOCRATIC SYSTEM

In the practical application of article 1 and article 48 of the Constitution of the Republic of Seychelles, courts may not dictate to Parliament not to impose mandatory minimum penalties in appropriate cases any more than Parliament may dictate to courts not to go below the mandatory minimum in appropriate cases. While the power of Parliament to legislate remains absolute, likewise the power of the court to interpret the law and mete out sentence remains absolute. The Court is empowered to interpret that the imposition of any grossly disproportionate penalty as

unconstitutional. The court is also empowered to interpret that the legislative removal of the intrinsic discretion of the court to sentence a particular accused in the special circumstances of his case who in the court's judicial view deserves much less, is unconstitutional. Finally, the accused may raise the unconstitutionality of the workings of the two arms of government and argue that on the special facts of his case, he has not obtained a fair hearing by an independent and impartial court established by law because his facts very different from the hypothetical cases envisaged by Parliament at that time pre-occupied with the grave concerns which motivated the provision of a mandatory minimum penalty to address a particular mischief.

The above only means that when any individual comes to court, the trial court will look at those aspects of constitutionality. With respect to the principle of proportionality, the breach of which would render a mandatory minimum unconstitutional, the quote hereunder from the case of *Aubeeluck v State* and *Bhinkah v The State* in which the Law Lords properly summarized the position in law becomes relevant:

> The minimum penalty would be considered disproportionate in cases wherein 'the imposition of a mandatory minimum sentence would be startlingly or disturbingly inappropriate with respect to hypothetical cases which could be foreseen as likely to arise commonly' (*Miller and Cockriell v R* [1977]2 SCR 680 per Laskin CJ) and 'where the minimum sentence would be disproportionate in relation to the degree of seriousness of the offence, with no exceptional circumstances available to the court to weigh down the scale (Madhub).

PRINCIPLE OF PROPORTIONALITY IN SENTENCING

One very persuasive example of the process of individualization of the penalty and application of the principle of proportionality in sentencing is the case of *Bhinkah,* which was judicially approved by the Judicial Committee. The Court found that the minimum 5 years' imprisonment under the impugned section 301A of the Criminal Code is not disproportionate in itself but would be so, if indiscriminately applied without taking into account factors which would mitigate the seriousness of the offence for which the legislature regarded it important to impose a minimum ceiling. A 5-year mandatory minimum sentence would be appropriate in many foreseeable hypothetical cases of aggravated burglary and the concerns of the legislature will be met by such an imposition. However, in a few cases it would prove to be *'so excessive as to outrage standards* of *decency,* ' in the words of Laskin CJ in *Miller and Cockriell v R.*

The unconstitutionality in this case arises not out of the mandatory minimum penalty of 5 years imposed by the legislature but by the acknowledged constraint felt by the court which saw it bound by the legislative provision and the court's inability in the circumstances to afford the appellant a fair trial which included an appropriate sentence in his personal circumstances. That unconstitutionality should not be confused with the types of unconstitutionality where (a) either the penalty imposed by the legislature; or (b) or the sentence imposed by the court for that matter, is grossly disproportionate. Lord Bingham is cited at [30] of *Aubeeluck* as having commented that, despite the semantic differences between the various expressions,

it seemed clear that the essential thrust of them was the same. In that regard he quoted a passage from the judgment of Lamer J in *R v Smith* (Edward Dewey) [1987] 1 SCR 1045 at 1072, which concluded in this way:

> 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.

Lord Clarke giving the judgment in *Aubeeluc*k made reference to Lord Bingham in the case of *Reyes v The Queen* [2002] 2 AC 235, at 37, who stated that the need for proportionality and individual sentencing should not be confined to capital cases only. He again referred to *Smith (Edward Dewey)*(supra), which concerned the compatibility with section 12 of the Canadian Charter of a statute imposing a minimum sentence of 7 years imprisonment on conviction for importing any narcotic into Canada. The Supreme Court of Canada recognized that in some cases seven years for such an offence would be appropriate but held the provision to be incompatible with section 12 because it would in some cases be grossly disproportionate to the gravity of the offence. Lord Bingham is alluded to as quoting a 'pithily put' sentence from Lamer J's judgment at page 1073 which we consider eloquent:

> This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves.

WHAT THE OFFENDER DESERVES IS WHAT WE TRULY MEAN BY SENTENCING AN OFFENDER

At the end of the day, "what the offender deserves" in the real sense of the word is what we mean by fair hearing which includes a fair sentence in the evolving concept of constitutionality and constitutionalism. In the adherence to the rule of law and application of democratic principles to given situations, constitutionalism is not limited to mere interpretations of the various articles but in the actual application of the articles with the evolving concepts behind them to the different and actual scenarios coming to court for the actual sentencing process. In the evolving concept of justice, sentencing should no longer be considered as an orphan of the law.

We have stated that the Constitutional Court was called upon to decide the constitutionality or unconstitutionality of the mandatory sentence in this case on limited premises of interpretation of the various articles but not the actual application of those articles to the particular facts and not in the larger context of intrinsic discretion of the court in sentencing the accused related to what the offender deserved. This involved his right to a fair hearing under article 19(1) and the application of the principles of proportionality in sentencing him. More specifically, the Court was called upon to decide whether the impugned section was in contravention with article 1 and article 16 with a side reference to article 119(2) of the Constitution *in abstracto* rather than *in concreto.* The Constitutional Court, accordingly, carried out the task in hand on the limited submissions made to it and on the materials given to it.

ARTICLE 119(2) AND THE IMPUGNED PROVISION.

Now a word about 119(2). The Constitutional Court referred to article 119(2) of the Constitution of Seychelles which states: “The Judiciary shall be independent and be subject only to this Constitution and the other laws of Seychelles”. (Emphasis ours)

We consider that it is a serious matter to interpret this as a provision which subjects the Judiciary to the Legislature. According to the Constitution of the Republic of Seychelles, Article 119(2) cannot be interpreted to mean that the independence of the Judiciary is subject also to “other laws" passed by the Legislature and subservient to Parliament, just in case that is what it may mean. Such an interpretation of the Constitution would have serious consequences. That would deal death to the Constitution itself. Either the Judiciary of Seychelles is independent under the Constitution or it is not. To the like extent, either Parliament in the Republic is the sole authority to legislate for the people or it is not.

That is the only interpretation that can be given in the light of the provision of article 5 of the Constitution which clearly specifies: “This Constitution is the Supreme law of Seychelles and any other law found to be inconsistent with this Constitution is, to the extent of the inconsistency, void”.

That should answer the misapprehension of the Constitutional Court on the inter-relation between article 1 and Article 119(2) of the Constitution.

The most important aspect of the separation of powers is the absolute independence of the Judiciary. There may be some form of confusion existing at the level of the Executive and the Legislature on the interrelation between their powers. But that cannot be allowed in the independence of the Judiciary. As Lord Bingham stated at 92 of *Khoyratty:*

> The function of independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a corner stone of the rule of law itself

We hold that to begin to even think that Seychelles democracy is different from other democracies in that its Judiciary is subject in part to the Constitution and in part to the "other laws' is impermissible. Courts, by any stretch of imagination, cannot abdicate any part of their judicial function to the legislative. Not only would it fly in the face of article 1 but also article 5 of the Constitution. Article 119(2) needs to be interpreted in light of article 1 and article 5.That is what we hold specifically.

The words "the other laws” in article 119(2) can only mean "the other laws unless declared to be unconstitutional under Article 5 and only to the extent of the unconstitutionality”. And so we hold as a specific pronouncement.

ARTICLE 16 AND THE IMPUGNED PROVISION.

Article 16 of the Constitution of Seychelles provides: “Every person has the right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment”.

On this matter, we are in agreement with the reasoning of the Constitutional Court that if the applicant relied on the case of *Philibert* to so argue, he misapprehended the law. The Constitutional Court accepted the reasoning of *Philiber*t clearly decides that -

> a mandatory sentence per se does not amount to cruel, inhuman or degrading treatment. It may only amount to cruel, inhuman or degrading treatment jf the length and severity of the sentence is such that it violates principle of proportionality and removes all discretion from the Court to impose any other term whatsoever.

It is worthy of note that the decisions of the courts of Seychelles on this aspect of the law has been looked at principally from the angle of article 16: see *Michael Esty Fergusan v Her Majesty the Queen* [2008] 1 SCR 96 2008 SCC; Jeffrey *Napoleon* v *The Republic* (supra); and *Brian Azemia v The Republic*(supra).

Those decisions remain correct insofar as they relateto article 16 which is comparable to section 7 of the Mauritian Constitution. Article 16 of the Seychelles Constitution, and section 7 of the Mauritian Constitution for that matter, would applyonly in the extreme cases where a mandatory minimum would look to be wholly or grossly disproportionate to the offence charged. This is exactly alsowhat the JudicialCommittee commented in the case of *Aubeeluck v The State* (supra), at 21:

> A literal reading of section 7 of the Constitution does not immediately suggest that that is the correct approach to it. The prohibition against subjection “to torture or to inhuman or degrading punishment or other such treatment" might be read to refer to something much more severe than the three years penal servitude in the present case. However, the DPP accepts, in their Lordships' opinion correctly, that the effect of section 7 is to outlaw wholly disproportionate penalties. Moreover, the Board has been referred to a number of cases, both in Mauritius and elsewhere, which support that approach.

Section 16 should be reserved for such category of cases where the sentence imposed is grossly disproportionate or wholly disproportionate penalties and not where the issue is a penalty of merely 5 years as in this case unless the offence relates to a common man stealing a chick from the commons, a goat from the road or a pair of shoes from a box.

Indeed, a literal meaning of article 16 of the Constitution of Seychelles does not immediately suggest that appellant's reliance under this section was the correct approach. As rightly observed by the Law Lords at 21 of *Aubeeluck*, the prohibition against subjection "to torture or to inhuman or degrading punishment or other such treatment" might be read to refer to something much more severe than the three years' penal servitude in the present case" of five years imprisonment as decided by the Constitutional Court.

In this regard, this Court endorses the line of decisions of the Constitutional Court which is also espoused by the Law Lords that the "torture or degrading treatment" provision is meant to outlaw wholly disproportionate penalties. The jurisprudence of Seychelles, Mauritius and elsewhere, support that approach.

APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY AND INDIVIDUALIZATION

The sentencing of an offender is part of a fair hearing, indeed an essential part of it. As Thomas O'Malley states in his book: This aspect of the sentencing court's responsibility is to be taken seriously by the courts in the exercise of their high responsibility:

> Despite some considerable progress having been made in recent years, particularly in relation to the construction of proportionate sanctions, we are still struggling to produce a coherent set of sentencing principles.

As it is with the principle of proportionality so it is with the pleas in mitigation. One hour's loss of freedom is one too many for any individual in a democratic state, let alone one day, or one week, still less one month or one year.

The above were the serious issues which were in play at the trial below, in the case before the Constitutional Court and before us. Parliament as well as the courts should not take sentencing as if it is a question of just falling off a log:

> There is, to be sure, broad agreement on the main mitigating and aggravating factors, and on the indicia of offence gravity. But the precise ambit of many of these principles and the weight to be attributed to them in specific contexts remains unclear.(Thomas O'Malley, ibid)

We have stated that the Constitutional Court was called upon to pronounce on the constitutionality of the impugned section with respect to article 1 and article 16. It decided that none of the impugned sections had been breached.

If we have been persuaded by the argument with regard to section 16 for a 5 year sentence, we have not been persuaded by the argument with respect to article 1 insofar as the facts and the circumstances of the case of the appellant transgressed his right to a fair trial. His right to both proportionality in sentencing and the individualization of his sentence with proper regard to the mitigating factors in his case should have been taken into account by the court for the justice of his case. The Court should not have surrendered its intrinsic powers to the mandatory provision of the legislature, if the legislature felt that the facts warranted a reading down of the provision.

THE APPLICATION OF THE THREE TESTS

We hold that the constitutionality of an accused party like the appellant coming before the court faced with a mandatory minimum sentence lies in the following tests being passed:

1. The first test is the test of parliamentary power. It is as follows:

   (a) is the penalty imposed by the legislature wholly or grossly disproportionate with regard to the mischief to be avoided;
   (b) if it is, then it is unconstitutional as it violates article 16;

(c) if it is not, a second test should be applied in relation to article 119(2).

2. The second test is the test of judicial power under article 119(2). It is as follows:

(a) does the mandatory provision remove all discretion from the court to exercise its judicial powers to sentence an offender in the particular circumstances of his case;
(b) If it does, the law is unconstitutional and constitutes a breach of section 119(2) of the Constitution inasmuch as the legislature in that case is, thereby, interfering with the independence of the judiciary.
(c) If it does not, a third test should be applied.

3. And the third test is the test of the right of the citizen under the Constitution. It is as follows:

(a) does the mandatory provision breach the principle of proportionality, fair trial or other imperatives of a democratic system;
(b) If it does, the law is unconstitutional and constitutes a breach of section 1 in terms of that principle or imperative.
(c) If it does not, that is the end of the matter.

RELIEF FOR CONSTITUTIONAL BREACH

The question which will arise after the breach of the Constitution has been found is how the Court should proceed to sentence the offender. Will it decide that the whole Act has to be struck down or will it simply strike down that part of the law which is inconsistent with the Constitution?

The Constitution itself has provided the answer by way of article 5 which provides that the Constitution is the supreme law of Seychelles and any other law found to be inconsistent with this Constitution is, to the extent of the inconsistency, void.

That means in practical terms that that the courts will read down the provision to impose a just punishment appropriate to the case while taking into account the objective which the legislature had in mind when it imposed the penalty it did.

Applying the above tests, we come to the following results. The appellant's petition passes the first test. It cannot be said that by imposing a minimum of 5 years for the offence of burglary, Parliament imposed a punishment grossly disproportionate or contrary to article 16. However, it fails the second test. It also fails the third test. We explain.

It fails the second test because, in the instant case, the learned Magistrate felt bound to impose the sentence which the legislature had imposed. She felt that she had no other choice but to follow the diktat of the legislature.

It fails the third test because the facts of the case suggested that for such a case as a pair of shoes, the appellant could not undergo 5 years imprisonment. There was no

proportionality in the sentence meted out and in the circumstances of the offence and the offender.

WE HOLD

We, accordingly, hold as follows:

(1) To the extent that the trial court in this particular case felt that it was bound by the minimum mandatory sentence imposed by the legislature and further felt that all discretion had been removed from it to sentence the appellant according to his just deserts, there occurred a breach of the right of the appellant to a fair trial by an independent and impartial court established by law;
(2) Subject to sub-paragraph (1), a mandatory minimum sentence is not per se unconstitutional inasmuch as the legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates so long as the sentence indicated does not contravene section 16 or is grossly disproportionate.
(3) Accordingly while section 27A(1)(c)(i) and section 291(a) of the Penal Code could not be said to have contravened article 1 of the Constitution in abstracto, there was a breach in concreto by the manner in which the appellant's sentence was determined.
(4) Further that, the mandatory minimum sentence of 5 years prescribed by legislature for section 27A(1)(c)(Q) and section 291(a) of the Penal Code does not violate article 16 of the Constitution.

GRANTING THE CONSTITUTIONAL RELIEF

What we need to do now is to see the effect of the unconstitutionality following the breach which occurred of the fair hearing provision under article 19(1) of the Constitution. The relief which appellant has sought is his immediate release on account of the unconstitutionality. The Constitution does not allow us to do that.

Article 5, we have cited above, indisputably provides that it is the Constitution that is the supeme law of Seychelles and any other law found to be inconsistent with this Constitution is, to the extent of the inconsistency, void. The law can only be declared void *pro tanto.* In other words, to the extent of the inconsistency. The only inconsistency was that the appellant, following a valid conviction, was not properly sentenced. The conviction cannot be made void but the sentence can be.

It is another constitutional imperative that once the breach has been found to exist, the Court should proceed to grant the claimant such relief as may be necessary. This is what we shall proceed to do now.

We take into account the following factors: that the appellant was charged under two counts of an information, that he is a first time offender, that he was 26 years old at the time of the offence, is the father of one child whom he is maintaining and that what is alleged against him is that he was found to have in his possession only a pair of shoes from the lot which had been taken away in the burglary.

We consider that a custodial sentence of 3 years' imprisonment would be an appropriate sentence to be imposed upon the appellant. We, accordingly, quash the sentence of 5 years imposed upon him and substitute there for one of 3 years.