[2010] UKPC 13
**Privy Council Appeal No 0075 of 2009**

# JUDGMENT

# Gangasing Aubeeluck *v* The State of Mauritius

## From the Supreme Court of Mauritius

**before**

**Lord Phillips**
**Lord Rodger**
**Lord Walker**
**Lord Brown**
**Lord Clarke**

## JUDGMENT DELIVERED BY
## Lord Clarke
## ON

## 21 July 2010

**Heard on 28 April 2010**

*Appellant*
Siddhartha Hawoldar
Yanilla Moonshiram
(Instructed by MA Law LLP)

*Respondent*
Satyajit Boolell DPP
Mrs Sulakshna Beekarry
(Instructed by Royds LLP)

**LORD CLARKE:**

## Introduction

1. The principal question raised by this appeal is whether, and in what circumstances, a court is entitled to pass a lesser sentence than the minimum sentence provided by law for the commission of a criminal offence.

## The convictions

2. On 5 October 2004 the appellant, Gangasing Aubeeluck, was convicted by the Intermediate Court of three offences, all of which were committed as long ago as 15 December 1998. On count one, he was convicted of unlawfully and knowingly having in his possession 2.9 grams of gandia wrapped in ten packets, each in cellophane paper. The Magistrate, B Marie Joseph, in a conspicuously clear judgment, inferred that he was engaged in trafficking in drugs on the basis of these considerations: that he had in his possession ten small packets of gandia; that the gandia was wrapped in a manner which readily lent itself to retail sale; that he was standing at a conspicuous spot at the corner of two streets with no plausible reason to account for his presence there; that when cautioned he readily stated that he *'pe trace ene la vie'* (which means 'I am trying to make a living') and that the money was the proceeds of sale of gandia; and that he also readily confessed to having sold one packet of gandia before he was caught.

3. The sale of the one packet of gandia for Rs 100 was the subject of count two. Count three simply alleged that he was smoking gandia. The Magistrate observed that those counts depended upon admissions made by the appellant in the first statement he had made to the police. There had been an issue as to whether the admissions were voluntary and admissible in evidence but the Magistrate had held a *voir dire* at which she had concluded that they were both voluntary and admissible. She also inferred that he was trafficking in drugs when he sold the packet the subject of count two, essentially for the reasons given above.

4. In short, the Magistrate held that the appellant was guilty of possession of drugs as a trafficker, of selling the single packet of gandia as a trafficker and of smoking gandia and that it followed that all three counts were proved.

**The sentences**

5. On 12 October 2004 the Magistrate sentenced the appellant to a minimum term of penal servitude for three years on counts 1 and 2. She also fined him Rs 15,000 on each of those counts. She fined him Rs 2,000 on count 3. In addition she ordered him to pay costs of Rs 400 and made some further consequential orders in relation to his assets.

**The appeal to the Supreme Court**

6. The appellant appealed against his conviction to the Supreme Court. He advanced a number of discrete points. It was said, among other things, that the Magistrate should have upheld a submission of abuse of process and that she should have ruled the admissions to be involuntary and inadmissible. In a judgment given on 29 January 2007 the Supreme Court (P Balgobin and AA Caunhye JJ) rejected all the appellant's grounds of appeal and dismissed his appeal against conviction. The appellant applied to the Supreme Court for leave to appeal to the Privy Council on a number of grounds. At the hearing of the application only two grounds were argued, both of which related to conviction. In a judgment given on 3 March 2009 the Supreme Court (YKJ Yeung Sik Yuen, Chief Justice, and R Mungly Gulbul, Judge) rejected them both.

7. Although the original grounds of appeal to the Supreme Court stated that the appellant was appealing against sentence as well as conviction, the only ground upon which he did so was that the sentence 'is manifestly harsh and excessive'. None of the points which have been advanced before the Board was put before the Supreme Court. The appellant has been on bail throughout.

**The grounds of appeal to the Judicial Committee**

8. In his statement of case before the Board the appellant advanced four grounds, only one of which related to conviction. It was a ground which had failed in the Supreme Court and was abandoned at the hearing of the appeal before the Board. The three grounds which were argued before the Board all related to sentence. None of them had been advanced, either before the Magistrate, or in the Supreme Court. However, the Board granted permission to appeal on 16 July 2009 and it was not contended by the Director of Public Prosecutions ('the DPP') that any of the points now relied upon should not be considered by the Board.

9. The issues now raised are these:

i) whether the delay of 11 years since the commission of the offences infringes the appellant's right to a fair hearing within a reasonable time under section 10 of the Constitution, such that the court should not now require him to serve a sentence of imprisonment;

ii) whether, having regard to the provisions of the Dangerous Drugs Act 2000, the application of the principle of 'la peine la plus douce' requires that he should not be required to serve such a sentence; and

iii) whether the sentence of three years imposed by the Magistrate and in effect upheld by the Supreme Court on appeal breaches the principle of proportionality enshrined in section 7 of the Constitution.

10. It is convenient to consider the proportionality point first but, before doing so, it is appropriate to identify the relevant provisions both of the Constitution and of the Dangerous Drugs Acts 1986 and 2000 ('the DDA 1986' and 'the DDA 2000')

**The Constitution**

11. Sections 2, 7 and 10 provide, so far as relevant, as follows:

> "**2 Constitution is supreme law**
>
> This Constitution is the supreme law of Mauritius and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.
>
> **7 Protection from inhuman treatment**
>
> (1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.
>
> **10 Provisions to secure protection of law**
>
> (1) Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case

shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

**The DDA 1986 and the DDA 2000**

11. The appellant was charged and convicted under the DDA 1986, as amended by Acts 1/92 and 29/94. On counts one and two, which of course alleged possession and selling, he was convicted of a breach of section 28(1)(a) and (b) of the DDA 1986, as amended, respectively. Section 28 provided, so far as relevant, as follows:

"**28 Unlawful dealing with dangerous drugs**

(1) Subject to section 38, every person who unlawfully -

(a) (i) has in his possession, smokes, consumes or administers to himself or to any other person any drug specified in subsection (2);

…

shall commit an offence and shall on conviction be liable to a fine which shall not exceed 5,000 rupees and to imprisonment for a term which shall not exceed 8 years;

(b) sells … any drug specified in subsection (2) shall commit an offence and shall on conviction be liable to a fine which shall not exceed 50,000 rupees and to penal servitude for a term which shall not exceed 12 years.

(2) This section shall apply to

…

(b) … gandia …"

12. Section 38 provided for trafficking in drugs and by subsection (3) provided, so far as relevant here, that any person tried under section 28 and found to be a trafficker was liable in the case of a first conviction to a fine not exceeding Rs 100,000 "together with penal servitude for a term which shall not exceed 20 years".

13. Section 47 of the Interpretation and General Clauses Act provides that where several penalties are provided for an offence,

> "the use of –
>
> > (a) 'or' means that the penalties are to be inflicted alternatively;
> >
> > (b) 'and' means that the penalties may be inflicted alternatively or cumulatively;
> >
> > (c) 'together with' means that the penalties are to be inflicted cumulatively."

Section 11(1) of the Criminal Code provides that the punishment of penal servitude is imposed for life or for a minimum term of 3 years.

14. It is common ground that the effect of those, somewhat unusual, provisions is that the Magistrate had no alternative but to sentence the appellant to penal servitude for a minimum of three years. The Board was told that, whereas penal servitude was at one time a particularly harsh form of imprisonment, it is now no different from what could be called ordinary imprisonment.

15. The appellant was charged, convicted and sentenced under the DDA 1986, which had been passed when there was very serious concern about drugs in Mauritius. Although that concern remains, the DDA 1986 was replaced by the DDA 2000, which came into force in September 2001. Section 28(1)(a) of the DDA 1986 was replaced by section 34 of the DDA 2000 which, for possession, provided for a fine not exceeding Rs 50,000 and, in the case of a second or subsequent conviction, for imprisonment for a term not exceeding two years.

16. Section 30 provided for a number of drug dealing offences, including selling gandia. The prescribed penalties for selling gandia were originally a fine not exceeding Rs 1 million and a term of penal servitude not exceeding 25 years. The period of 25 years was reduced to 20 years in 2008. Until early 2009 the effect of

section 48 was that, where a court convicted a person of an offence under section 30 (among other sections) it was bound to inflict a fine of not less than Rs 10,000 'together with' imprisonment for a term of not less than 12 months. It follows that, if the DDA 2000 had applied to the appellant and he had committed an offence under section 30 while section 48 applied to section 30, the court would have been bound to impose a term of imprisonment of not less than 12 months. The present position is that section 48 does not apply to convictions under section 30, with the result that there is now no minimum sentence in such a case.

17. The structure of the DDA 2000 is significantly different from that of the DDA 1986. In particular, section 41 is entitled 'Aggravating circumstances' and identifies a large number of such circumstances. They include cases where the offender belongs to a criminal organisation or ring, where he participates in other unlawful activities facilitated by commission of the offence, where he uses violence or a weapon in its commission, where another person under the age of 18 years is concerned in the offence; where the drugs delivered cause death or serious injury to health, where the offence was committed in a penal institution or a school or the like, where the offender mixes additional substances with the drugs which aggravate danger to health and where he has previous drug convictions. By section 41(2), in all those cases the offender is liable to double the maximum penalties for the offence.

18. By section 41(3), notwithstanding those provisions, any person convicted of an offence under section 30 shall be sentenced to a fine not exceeding 2 million rupees 'together with' penal servitude for a term not exceeding 60 years where it is averred and proved that, having regard to all the circumstances of the case, the person was a drug trafficker. The minimum of three years described above would apply in such a case. Finally, by section 41(4), without prejudice to the generality of subsection (3), a person shall be deemed to be a drug trafficker where the street value of the drugs, the subject-matter of the offence, exceeds one million rupees or such other value as may be prescribed.

19. It can be seen that the effect of sections 30 and 41 of the DDA 2000 is to provide a system which is in some ways more draconian and in some ways less draconian than the system in force under the DDA 1986. The Board was informed by the DPP that the approach is now different and that a person like the appellant, who commits a first offence of selling a small amount of gandia would not be accused of drug trafficking under the DDA 2000. It follows that, whatever the position could in theory be under section 41(3) of the DDA 2000, if the appellant had committed the offences of which he was convicted after the DDA 2000 came into force, it would not have been averred that he was a trafficker and he would not therefore have been convicted or sentenced as a trafficker. It follows that he would not have been exposed to a minimum sentence of three years penal servitude. He would have been exposed to a minimum of 12 months imprisonment if the offences had occurred before section 48

ceased to apply to convictions under section 30 in 2009. Now he would not be exposed to any minimum sentence of either imprisonment or penal servitude.

**Proportionality**

20. The appellant's case is that the effect of section 7 of the Constitution is that a statute which has the effect that the application of a minimum sentence would be wholly disproportionate and, as such, contrary to section 7 of the Constitution, in a particular case, must be disapplied. It is further said that the effect of the statutory provisions which required the Magistrate to sentence the appellant to a minimum period of three years penal servitude is wholly disproportionate, that they should be disapplied and that the sentence of three years penal servitude should be set aside.

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.

22. The most recent such case is the decision of the Supreme Court of Mauritius in *Bhinkah v The State* 2009 SCJ 102, where the appellant pleaded guilty to two counts of larceny, on one of which, because he was one of two offenders and was wearing a mask, the minimum sentence was five years penal servitude under section 301A of the Criminal Code. He was sentenced by the Magistrate to that minimum sentence. The issue before the Supreme Court was whether such a sentence would be disproportionate to the seriousness of the offence, so as to be excessive and inhuman contrary to section 7 of the Constitution.

23. The Supreme Court directed itself by reference to a number of cases in the Supreme Court, namely: *Pandoo v The State* 2006 MR 323, *Gunputh v The State* 2007 SCJ 128, *Philibert v The State* 2007 SCJ 274, *Madhub v Director of Public Prosecutions* 2007 SCJ 282 and *Noshib v The State* 2009 SCJ 6. The cases show that the principle of proportionality has been applied in a wide range of cases, from the very serious to the much less serious.

24. In *Pandoo* the Supreme Court held that section 7 of the Constitution incorporates the principle that the sentence must be proportionate to the seriousness of the offence. *Pandoo* was itself a case in which the defendant had pleaded guilty to a charge of wilfully and unlawfully failing to pay tax. The minimum fine was Rs

200,000, whereas the tax was said to be Rs 35,600. It was accepted on behalf of the defendant that a provision that provided for a sentence of treble the amount of the tax was unexceptionable. The Supreme Court held that a minimum fine of Rs 200,000 for wilfully failing to pay what might be a few cents tax on the sale of a matchbox was disproportionate. The Court declared the minimum sentence of Rs 200,000 to be unconstitutional, at any rate as applied to the facts of the case before it, and substituted a sentence of treble the tax, namely Rs 106,800.

25. In *Gunputh* the Supreme Court applied the same principles but held that minimum sentences for driving with excess alcohol were not disproportionate or unconstitutional.

26. In *Noshib* the defendant had pleaded guilty to one count of possession of 0.51 gram of cannabis in a cellophane packet and to one count of unlawfully and knowingly making a false statement in connection with a drugs offence, namely that he gave a statement to the police that he had purchased cannabis from a named person on two occasions but subsequently gave a further statement exculpating the named person and stating that he had bought the drugs from an unknown man. He was fined Rs 10,000 on the first count but was sentenced to a fine of Rs 10,000 and to 2 years imprisonment on the second count. The sentence of 2 years was the minimum period under section 42(1)(a) and (4) of the DDA 2000. The Supreme Court applied the principles in *Pandoo* and *Madhub* but rejected the submission that such a minimum sentence was disproportionate. In doing so, it drew attention to the seriousness of drug offences in Mauritius.

27. In *Philibert*, where the principles were discussed in some detail, the Supreme Court said that, 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. It held that section 221 of the Criminal Code and section 41(3) of the DDA 2000, as enacted prior to amendment by Act 6/07, provided for a mandatory sentence which was disproportionate and contrary to section 7 of the Constitution. The minimum sentence was 45 years penal servitude in all cases. The Court held that the provisions were unconstitutional only to that extent and that they should be read down so as to provide for a maximum sentence of 45 years.

28. The Board notes in passing that in *Joosub v The State* 2008 SCJ 318 the Supreme Court applied a similar approach to the mandatory sentence of 30 years penal servitude imposed upon a person convicted of unlawful possession of heroin as a trafficker under sections 28(1)(a) and 38 of the DDA 1986. The offence was committed shortly before the DDA 1986 was repealed in 2001. The Court held that section 38(3)(b) of the DDA 1986 should be read down to mean that the 30 years

penal servitude should be the maximum sentence for the offence. The case was remitted to the Intermediate Court for a hearing on sentence.

29. In *Madhub* the Supreme Court considered the minimum mandatory penalty of 12 months imprisonment for possession of a firearm without a licence under section 24(1)(a) of the Firearms Act and held that, in so far as it provided for a minimum penalty, it fell foul of the requirement of proportionality imposed by section 7 of the Constitution. The Court held that, having regard to the fact that the appellant had a clean record and that no shot was fired, the minimum mandatory sentence of 12 months should be read down and should be replaced in that case by one of 6 months imprisonment.

30. In *Bhinkah* the Supreme Court also referred to the decision of the Board in *Reyes v The Queen* [2002] UKPC 11; [2002] 2 AC 235 and to that of the Eastern Caribbean Court of Appeal in *Spence v The Queen; Hughes v The Queen*, unreported, 2 April 2001. *Reyes* was concerned with the mandatory death penalty and so was a case of a quite different order from this. Similar principles were, however, applied. The judgment of the Board in *Reyes* was given by Lord Bingham of Cornhill. In considering section 7 of the Constitution of Belize (which is in very similar terms to section 7 of the Constitution of Mauritius), Lord Bingham observed at para 29 *et seq* that similar expressions are also used in many other human rights' instruments, as for example 'cruel and unusual treatment or punishment' in the Canadian Charter and the Constitution of Trinidad and Tobago and 'cruel and unusual punishments' in the eighth amendment to the United States Constitution.

31. Lord Bingham noted at para 30 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."

32. At para 37 Lord Bingham said that the need for proportionality and individual sentencing is not confined to capital cases. He again referred to *Smith (Edward Dewey)*, 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 recognised 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 then quoted this 'pithily put' sentence from Lamer J's judgment at page 1073:

> "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."

As the Board sees it, that is the principle which the Supreme Court has correctly applied in the cases referred to in *Bhinkah*.

33. The Supreme Court in *Bhinkah* also referred to the decision of the High Court of Namibia in *State v Vries* [1997] 4 LRC 1, which contains a detailed analysis of the problem of mandatory sentences. The accused was convicted of the theft of a goat. He had a previous conviction for theft of a sheep in 1969. In the Magistrates' Court he was sentenced to a wholly suspended period of 18 months imprisonment. On review attention was drawn to section 14(1)(b) of the Stock Theft Act 1990, which provided for a minimum mandatory sentence of 3 years imprisonment for a second or subsequent offence of stock theft. Attention was also drawn to section 14(2), which provided that such a sentence could not be suspended, either in whole or in part. The Court applied very similar principles. It concluded that a sentence of 3 years would be grossly disproportionate, that section 14(1)(b) (but not section 14(2)) should be read down and that a sentence of six months would be appropriate on the facts of the case.

34. After referring to *Philibert*, the Supreme Court in *Bhinkah* summarised the position thus:

> "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*).
>
> Applying these principles to the present case, we find that the minimum 5 year penalty under 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. It would not be appropriate in all the foreseeable hypothetical cases likely to arise, where the minimum 5 year mandatory sentence would prove to be 'so excessive as to outrage standards of decency'; (*Miller and Cockriell v R* per Laskin CJ).

35. The Court substituted a sentence of three years penal servitude. In doing so it noted that in the Judicial Provisions Act 2008 the legislature, in what the Court called its "enhanced wisdom", had removed the 5 year minimum but had increased the maximum sentence to 30 years imprisonment.

36. In the instant case the DPP submitted that the Board should not strike down the statutory provisions which provided for a minimum period of penal servitude of three years. He accepted that, as explained in *Vries,* there may be cases in which it would be appropriate for the Supreme Court or the Board to declare that a provision was of no force or effect for all purposes or to declare it to be of force and effect in particular classes of case and to read it down accordingly. However, he submitted that neither approach would be appropriate here. He submitted that, if the Board concluded that the minimum sentence was grossly disproportionate on the facts of this case, the appropriate course would simply be to hold that such a sentence was not (or would not now be) compatible with section 7 of the Constitution, to quash the sentence and to remit it to the Supreme Court for consideration of an appropriate sentence in all the circumstances of the case.

37. The Board accepts those submissions. The first course would plainly be inappropriate. There is a case for taking the second course. However, the Board has concluded that much the best course is the third. It notes in passing that, if the point had been taken before the Intermediate Court at the time of sentence, the proper course would have been for the Magistrate to remit the question to the Supreme Court under section 84 of the Constitution. The question for remission would have been whether the minimum sentence provisions should be disapplied on the ground that they were wholly disproportionate because not to disapply them would be to deprive the appellant of his rights under section 7 of the Constitution.

38. The Board has concluded that a sentence of three years imprisonment would be wholly disproportionate to the offences committed by the appellant. Although convicted as a drug trafficker, he was dealing in a small way in small quantities of gandia (ie cannabis). He was a person of good character and it is noteworthy that he would not now be charged as a trafficker under the DDA 2000. Having full regard to

the fact that the legislature regarded trafficking in drugs, including gandia, as a serious matter, the Board has nevertheless concluded that to disregard all mitigation, including the fact that these were first offences by the appellant, and to impose a minimum sentence of 3 years penal servitude would be grossly disproportionate.

39. Subject to its comments on delay below, the Board expresses no view upon what an appropriate sentence would be. The sentencing court will no doubt wish to have regard to the present position. That of course includes a consideration both of the current approach to sentencing for drug offences and of up to date information about the appellant, none of which is available to the Board. It will of course be a matter for the Supreme Court whether it sentences the appellant itself or remits it to the Intermediate Court, assuming that it has power to do so.

**Delay**

40. It was submitted on behalf of the appellant that the delay in this case infringes his right under section 10 of the Constitution to a fair hearing within a reasonable time. There have indeed been very considerable delays in this case. He was arrested in December 1998 and tried and sentenced in 2004. Since then it has taken an inordinate time for his appeal, first to the Supreme Court and then to the Judicial Committee to be concluded. It is true that a good deal of that delay was caused by his own lawyers. However that may be, the fact remains that, given the conclusion of the Board that the minimum sentence of 3 years imposed on the appellant must be set aside, he only now finally falls to be sentenced for events which took place over 11 years ago.

41. The correct approach to delay has been considered by the Board in a number of cases in recent years, since regrettably delay seems all too common in the system. The relevant principles were considered in *Dyer v Watson* [2002] UKPC D1, [2004] 1 AC 379, 403-3, *Prakash Boolell v The State of Mauritius* [2006] UKPC 46 and *Haroon Rashid Elaheebocus v The State of Mauritius* [2009] UKPC 7.

42. There is no necessity to repeat the principles here. It is sufficient to refer to two passages in the judgment of the Board given by Lord Brown in *Elaheebocus* at paras 18 and 20:

> "18. If one asks the fundamental question, does the period which elapsed here between the appellant's arrest in April 1997 and the dismissal of his appeal to the Supreme Court on 20 January 2006 give ground for real concern as to whether this case has been heard and completed within a reasonable time,

there can surely be only one answer: yes. Thus it is necessary for the respondent state to explain and justify what appears overall to be an excessive lapse of time. As *Boolell* makes clear, the Board is concerned particularly with, first, the complexity of the case, secondly, the conduct of the defendant, and thirdly, the manner in which the case has been dealt with by the state's administrative and judicial authorities. As already stated, this case involved absolutely no complexity; it was about as straightforward as any serious conspiracy can be. As for the conduct of the defendant, whilst it is plain that the appellant was entirely content for those proceedings to take their own leisurely course from beginning to end, there was no question of his engaging in the sort of reprehensible conduct which the Board found had contributed so largely to the even longer lapses of time in *Boolell's* case. There, as the Board observed at para 37, "the appellant was bent on dislocating the course of the trial and prolonging the proceedings by every means within his power".

20. Overall their Lordships feel driven to conclude that the judicial authorities here cannot sensibly be regarded as having honoured the reasonable time guarantee provided for by section 10 of the Constitution. True, the appellant was wholly complaisant in every successive delay which occurred: never once does he appear to have sought to hasten matters, for example by enquiring when he might finally expect to hear the result of his appeal. He was, of course, on bail at all times since 17 June 1998 and he seems to have been entirely content to postpone the final day of judgment, about which he can hardly have been optimistic. That, however, can provide no answer to the constitutional challenge. If it was no answer in *Boolell* (where the Board found "the conduct of the defendant was altogether reprehensible and contributed very largely to the lapse of time"), it certainly provides none here. It is to be acknowledged that the delay in *Boolell* was significantly longer even than in the present case – 12 years elapsed between *Boolell's* statements to

> the police under caution and his conviction by the Intermediate Court (his subsequent appeal to the Supreme Court being dismissed just 14 months later). It was, indeed, that quite extraordinary delay which impelled the finding there of a constitutional breach notwithstanding earlier authority that the defendant cannot ordinarily complain of delay of which he himself was the author. Again, however, the yet longer delay in *Boolell's* case obviously cannot serve to justify the passage of nearly nine years between this appellant's arrest and the dismissal of his appeal against conviction."

43. Those comments apply to this case in much the same way. Without analysing each period of delay, it can readily be seen that there has been inordinate delay amounting, in the opinion of the Board, to an infringement of the appellant's rights under section 10 of the Constitution.

44. It was submitted on behalf of the appellant that, by way of redress for that infringement, the court should not now require him to serve a sentence of imprisonment. In *Boolell*, as Lord Brown noted at para 21 of *Elaheebocus*, the Board thought it

> "[un]acceptable that the prison sentence imposed by the Intermediate Court should be put into operation some 15 years after the commission of the offence unless the public interest affirmatively required a custodial sentence, even at this stage."

The Board in *Boolell* set aside the sentence of six months imprisonment and substituted for it a fine of Rs 10,000. By contrast, in *Elaheebocus* the Board took the view that the appellant's criminality was very much greater than in *Boolell* and reduced the original sentence of 4 years by 6 months.

45. All therefore depends upon the circumstances. Having concluded that the correct approach on the proportionality issue is to quash the sentence of three years penal servitude and remit the matter of sentence to the Supreme Court, the Board thinks that the appropriate course is to remit this question too to the Supreme Court, which, when deciding what is the proper sentence must take account of the inordinate delay in the case. It may well conclude that it is not necessary that the appellant should now serve a custodial sentence, but it is in a better position than the Board to decide what is the just course.

**La peine la plus douce**

46. It was submitted on behalf of the appellant that, having regard to the provisions of the DDA 2000, the application of the principle of 'la peine la plus douce' requires that he should not now be required to serve a sentence of imprisonment because he would not be required to do so under that Act.

47. As stated above, the Board was told that the appellant would not now be charged with trafficking. It follows that he would not in practice be faced with the draconian sentences for trafficking under the DDA 2000. As indicated earlier, if he were now charged with an offence under section 30 of the DDA 2000, there would be no minimum sentence. However, the Board is not well placed to decide whether the appellant would be sentenced to a period of imprisonment if he were now convicted under section 30. It did not find the statistics with which it was provided entirely easy to follow. Given that the matter is to be remitted to the Supreme Court as explained above, the Board again thinks that this is a matter which is best decided by the sentencing court. Just as that court must have regard to the delay point, so it must have regard to the present approach to sentencing in Mauritius.

**CONCLUSION**

48. The appeal is allowed to the extent that the sentence of 3 years penal servitude is quashed. The question of sentence is remitted to the Supreme Court. Subject to written submissions, which are to be delivered within 21 days, the respondent is to pay the appellant's costs of this appeal.