M. Geddes

R v Lloyd: A Perspective on Mandatory Minimum Sentences

Recognised in *R v Lloyd*, cases involving statutes that impose mandatory minimum sentences ("*MMSs*") may challenge s.12 of the *Charter*, subsequently, pressuring the courts to find appropriate remedies in circumstances where *MMSs* produce unfair, or in this case, cruel and unusual punishment.

Following a questionable decision in *Lloyd*, the issue was raised concerning constitutional vulnerability in relation to *MMS*s involving drug related offences. Parliament has since repealed s.5 of the *Controlled Drugs and Substances Act* ("*CDSA*"). In my opinion, Parliament should abolish *MMSs* all together, and let the judiciary use discretion and provide appropriate sentences. In accordance with the fundamental principles of sentencing, judges impose sentences that are fit and proportionate to the gravity of particular offences. These fundamentals should not differ in areas of law such as drug trafficking.

Due to the undesirable residual effects (*i.e.* gang activity, violence, addiction, etc.) that drug trafficking and drug abuse have on the public, strict sentencing is essential to benefit societal interests. *MMSs* have a purpose aimed at deterring crime, as well as creating uniformity and transparency in sentencing. However, decades of evidence have demonstrated that *MMSs* have not been effective in their purpose in any measurable way.[1] In addition, the majority decision in *Lloyd* created a situation where drug related charges became more constitutionally vulnerable.

To determine whether a sentence infringes s.12 of the *Charter* and constitutes "cruel and unusual punishment" depends if it is "grossly disproportionate to the sentence that is appropriate, having regard to the nature of the offence and the circumstances of the offender".[2] Historically, the court has established a high bar for finding that a sentence represents a cruel and unusual punishment –

[1] Michael Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings" (2009) 38 Crime & Justice 65 at 67 [*Torny*].

[2] R. v. Nur, [2015] 1 S.C.R. 773 at para 39.

a sentence must be so excessive as to outrage standards of decency. In *Lloyd*, the court was not concerned with establishing this standard, however, they addressed the defence brought forth nonetheless.

The appellant raised the issue regarding the constitutionality of *MMSs* in relation to the trafficking of controlled substances. They challenged s.5 of the *CDSA,* claiming that it is inconsistent with s.12 of the *Charter*. Lloyd conceded that the one-year minimum jail term is not a sentence that is grossly disproportionate as applied to him, however, he argued that it could be, in relation to reasonably foreseeable applications of the law to others. Due to the circumstances of the offence and Lloyds prior convictions, it is clear that the public would not consider a one-year sentence abhorrent or indecent. Regardless, the court must provide an argument in response to the constitutionality of s.5 of the *CDSA*.

The courts creation of what is considered to be a "foreseeable" situation is extremely far-fetched. Nevertheless, the *SCC* manages to formulate an argument by relying on the definition of the word "traffic" in the *CDSA*, which includes all who administer, give, transfer, transport, send or deliver a controlled substance. Their argument seems to stem from the strict and textual interpretation of the statute. By focusing primarily on the words "give" and "transfer", it was ultimately deemed that a mere transfer of the littlest amount of a controlled substance, without any exchange of money or consideration, could constitute trafficking.

The hypothetical situation fabricated by the majority was rather unsubstantiated. I cannot imagine any circumstance where an individual in the described situation would be convicted of drug trafficking. I seriously question the courts disregard of the process for convicting an individual of drug trafficking. Proving that someone was in possession of a controlled substance *for* the purpose of trafficking requires an acknowledgement of multiple variables. The crown must call on expert evidence to give an opinion that the circumstances allow for the inference that the possessor intended to traffic.[3] Factors such as the amount of drugs in question, the presence of unexplained wealth and packaging are a few of many factors that are accounted for

[3] R. v. Balla, [2014] A.J. No. 502 at para 50.

in the court's deliberation of an individual's intent for trafficking. A lesser and more realistic charge of possession would not be sufficient to rely on s.5 of the *CDSA* to invoke a *MMS*.

In light of this, I strongly believe that repealing s.5 of the *CDSA* was the correct decision for Parliament. It alleviates the courts in creating what a believe to be weak arguments in order to adhere to the constitution. In addition, it respects the fundamentals of sentencing, and gives deference to the appointed judges. That being said, the judiciary must focus on achieving the underlying purposes of *MMSs* - deterring crime and providing Canadian citizens with a just and credible court system that is devoted to uniformity and transparency is increasingly important in today's society.

R. v. Lloyd, [2016] 1 S.C.R. 130