

IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 13/2017

IND.70/2016

SC#02041/2016

BETWEEN:

Torry Powery-Monterroso

Appellant

- and -

Her Majesty the Queen

Respondent

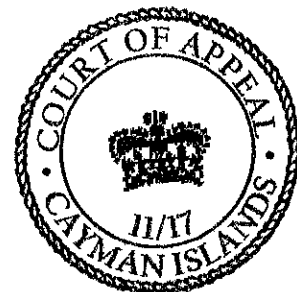
BEFORE:

**The Rt. Hon Sir John Goldring, President
The Hon John Martin QC, Justice of Appeal
The Hon Sir George Newman, Justice of Appeal**

Date of Hearing: Thursday, 3rd May 2018

**Circulated for
Comments: Tuesday, 26th June 2018**

Appearances: Mr Clyde Allen for Appellant / Mr. Patrick Moran for the Respondent



JUDGMENT

**Transcript of oral judgment 3 May 2018 and Approved
Released 24 September 2018**

NEWMAN, J.A.:

1. On 23 June 2017 the appellant, who is now approaching the age of 21 years, was sentenced to 8 years' imprisonment for being in possession of a firearm and 7 years, to run concurrently, for being in possession of ammunition.

2. He pleaded guilty to the offences at the Grand Court on 22 July 2016 before Mr. Justice Quin but he was not sentenced until 23 June 2017 when the sentences we have mentioned were passed by an acting justice of the Grand Court, Justice Wood.
3. The offences were committed in the early hours of the morning of 25 March 2016. It follows that his guilty pleas were entered four months after he committed the offences.
4. On 22 July 2016 he was represented by counsel, Miss Lerner, and a pre-sentence report, social enquiry report was requested and ordered. The judge observed to the appellant, then of course the defendant:

"You are going to be remanded in custody but a probation officer will be out to see you. And I would just urge you, I think as Miss Lerner has foreshadowed, to be as co-operative as possible with the probation officer, particularly in the light of your very early guilty plea. That will stand you in good stead, regardless of what happens. So just co-operate fully with the probation service and you are remanded in custody until 14 September".

5. The appellant did co-operate with the probation service and the report, which was produced in September of 2016, has featured as a matter of some significance on this appeal.
6. The facts outlined to the sentencing judge were that two uniformed police officers were dispatched to the George Town area known as "Rock Hole" because there had been a report or reports of a firearm being seen at that location. The appellant was travelling in a white van as a passenger, being driven by another man. On it being seen by the police, the blue lights and siren were activated but the van did not stop. It did slow down after turning into a road nearby and the appellant was seen to jump out, stumble and run away. A policeman gave chase but he briefly lost sight of the appellant. By the time he caught up with him, the appellant no longer had in his possession a gun, which the police officer had sighted a little earlier. It was seen that the appellant had injured his hand from stumbling and he was inebriated. By the time of the sentencing hearing, more was known to the police about the

offending than can be gathered from the record. The sentencing judge was not aware that the appellant had made a long written statement dated 14 September 2016 in which he had set out an account of the events on that night. The statement was given in connection with the possible prosecution of the driver of the vehicle.

7. The statement to which we have been referred at some length contains an account in which it is said by the appellant that the driver, in the course of that early morning, had sighted someone called Derek Wilson, being someone with whom he, the driver, was having a major disagreement and with whom on the previous day there had been a fight in the course of which he had been injured.
8. The driver, Jason Brown, had in his possession the pistol and the ammunition the subject of the charge and he brandished it and threatened Derek Wilson when he saw him in the vicinity of the Rock Hole area.
9. The police received a report or reports, one of them being from Mr. Wilson to the effect that there was a vehicle in the area and that a gun was being brandished. It is for that reason the two policemen came to the scene, thus giving rise to what followed.

The driver of the vehicle did not stop when the blue lights and siren were activated but travelled a short distance and then slowed down, enabling the driver to hand the weapon to the appellant thereby placing him in physical possession of the firearm. The appellant bolted from the vehicle and attempted to dispose of it. He was able to dispose of it nearby because the policeman became unsighted and at the time he was arrested he no longer had the firearm in his possession. Nor, we are bound to observe, did he, when requested, inform the police officer where the gun was.

10. The sentencing judge did not have access to the statement which we have seen but he was referred to the social enquiry report and the social enquiry report contained the account the appellant gave to the probation officer. In its most critical part, he stated that when the police saw them, the van didn't stop and the driver told him to jump and gave him the

handgun and that he did throw the gun down and kept running but eventually stopped and the police apprehended him.

11. So far as his awareness of the gun being in the vehicle and in the possession of the driver, he said he was not aware at all of a firearm being in the vehicle until the police were behind them and the driver shoved the gun at him and told him to get out and run. He stated that the night before this had happened there had been an altercation between the driver and another person and that the driver was vexed at this other person. He added he did not know whether the driver had the firearm for retaliation or out of fear.

12. The submission has been made, and to a certain extent this Court recognises it, that the account he gave to the probation officer, which was the one before the sentencing judge, was somewhat more favourable an account than the one he gave in his statement. According to his statement it is clear he was aware of the brandishing of the gun. He stated that the vehicle was driven around in order for the gun to be brandished, probably some three or four times, accompanied with threats made by Mr. Brown. Mr. Moran, who has appeared for the Crown, has urged upon us that once this state of affairs became known to the appellant, he should have responded to it and it should have led him to take steps to get out of the vehicle. Instead he remained so that, when it slowed down Mr. Brown was able to enlist his assistance by handing him the gun for disposal. The appellant had continued in a situation which he should have got out of, and then having got out of the vehicle, continued in a course of conduct which, whilst it might have been taken for his own benefit, nevertheless assisted Mr. Brown who, on any basis, had behaved with culpability. He should by that time, at the very least, have been prepared to indicate where he had disposed of the gun. Therefore, Mr. Moran urges that what emerges is a pattern of behaviour, short though it may have been, which puts it outside the circumstances in which Mr. Clyde Allen, by his very helpful submissions, has attempted to place it. Mr. Clyde Allen has come to this case very recently and we commend him for the care with which he prepared his written submissions and advanced his argument today. He has urged upon us that if you take the period of possession as the period between being handed the gun and then disposing of it,

you are looking at a period of about a minute. He submits that amounts to an exceptional circumstance in connection with the possession on this occasion.

13. We have already placed that short cameo view of what happened in its wider context, the appellant, in our judgment, is putting too much weight upon a very selective aspect of a course of conduct which falls squarely within the mischief this legislation is designed and aiming to cover. Those in possession of guns and ammunition should realise that notwithstanding a very short period of possession, the moment they have knowledge of the dilemma or position which they are in, it becomes incumbent upon them to face up to and discharge the responsibility they have to do everything they can to prevent the armed weapon falling into the hands of those who might use it for criminal purposes.
14. Mr. Moran, understandably, also urges that if you dispose of a gun which is loaded in a residential area then you do put at risk, and it is a possibility which is not fanciful, that the gun could be found by a young person and there could be terrible consequences as a result.
15. The police officers, it should be said and we commend them, spent a long time searching for the gun which had been disposed of and they found it some hours later.
16. So once one sees the short transient period of possession within its context, it is clear that to argue for this being, a case showing exceptional circumstances is something which runs counter to the very purpose of the legislation which the mandatory sentence is designed to deter.
17. What then of the sentence itself of 8 years? As it would have been apparent to those in court, the Court has indicated a certain measure of concern about the way in which the full facts were not disclosed to the judge in a way which enabled him to see them as they have been seen by this Court. There is a concern and a certain unease that the circumstance which did operate upon that night; namely, that the real producer of the gun and the one whose gun it was and who deployed it on the night in question was Jason Brown, was not something which the judge was aware of and one gains the impression, inevitably, that this

case was treated as two men riding around in the late hours of the night or early hours of the morning with a loaded firearm and one might say "*up to no good*", whereas in fact the facts were a little more specific than that.

18. He is a young man and one cannot fail to have some regard to that but principally we have an unease about the 8-year sentence which was imposed for the reasons that we have stated and in all the circumstances it seems just that the sentence should be modified so that the period of imprisonment is the mandatory minimum period of 7 years rather than the 8 years which was imposed. To that extent the appeal is allowed.

