



IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 21/2020

IND. 15/2020

SC#0322/2020

BETWEEN:

DEAN RYON DERBY

Appellant

- and -

Her Majesty the Queen

Respondent

BEFORE:

**The Rt. Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Rt. Hon Sir Jack Beatson, Justice of Appeal**

Date of Hearing: 6th May 2021

Appearances: Mr. Keith Myers, Attorney for Appellant
Mr. Neil Kumar Office of the DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 6th May 2021 and Approved for Release 25th May 2021

Goldring J, President

1. On the 26th of August 2020, the Applicant, who was then 26, and of previous good character, was convicted after a trial by Justice Richards of possessing a loaded Smith & Wesson 9mm semi-automatic pistol. Count 1 related to the possession of that weapon, count 2 to the nine rounds of ammunition within it.

2. On the 15th of September 2020, he was sentenced to 10 years' imprisonment. He now seeks leave to appeal against that sentence.

The facts

3. They were set out in clear detail by Justice Richards in her sentencing judgment in the following terms:

"3. ...*In summary, on the date in question, at about 7:15 pm, the described firearm and ammunition were found by the Police in the glove department of a silver Mitsubishi Colt motor car registration number 173 015 which was driven by and in the possession of the Defendant. The car had been left open, whilst parked along the street in the vicinity of a house where the Police executed a search warrant. The Defendant had been seen earlier coming from the house and was asked by the Police to wait until the search of the house was completed. He told the police that he had arrived at the area on foot and remained there for about an hour before being allowed to leave. He walked away leaving the car behind. After he left, the Police who had seen the car on initial arrival, made inquiries as to the owner of the car, given that it appeared to have been left unattended for a lengthy period. They searched the vehicle under the Misuse of Drugs Law and found the described firearm and ammunition. A Police search then began to locate the Defendant. They spoke to his mother. He handed himself in to the Police station just before midnight on the said day.*

4. *The case for the Defendant at trial and in interview with the Police was that he found the gun in the glove compartment of the car while driving towards the house, about three minutes before the arrival of the Police. The Defendant thus alleged that he had been 'set up'. This, on the basis*

that the car had, in the course of that day, been in the possession of other persons, that the firearm and ammunition did not belong to him, had not been placed in the car by him and must therefore have been planted by a person or persons unknown. The Court rejected his account, concluding that the Prosecution had discharged its burden of proof to the required standard and that his claim of possession for only three minutes was not true. There was no evidence as to the length of time that he had been in possession."

4. In the light of Mr Myers' realistic and helpful submissions on the Applicant's behalf, it is worth underlining what the judge found at trial. In short, she rejected the Applicant's account of not knowing the firearm was in the glove compartment of the vehicle. She did not consider his evidence credible. She rejected his account that the firearm had been planted. He had lied in evidence in a number of significant respects.

The Judge's sentencing remarks

5. Section 15 of the *Firearms Act* prescribes the maximum sentence of imprisonment for these offences as 20 years. By s.39(2), the minimum term in respect of these offences is seven years' imprisonment in the case of someone who has pleaded guilty, ten years following a trial:

"Unless the relevant court is of the opinion that there are exceptional circumstances relating to the offence or the offender which justify its not doing so".

6. As he has before this court, Mr Myers submitted to the judge there were exceptional circumstances. The judge, having had a number of cases placed before her, often decided upon their own facts, analysed them meticulously. She said:

"34. In applying the discussed principles to the instant case, the four questions to be considered are:

- i. *What sort of weapon is involved in this case?*
 - a. *It is a genuine firearm which is a lethal weapon which was loaded with nine live rounds of ammunition inside of it. It was left in an open car.*

- ii. *What if any use has been made of the firearm?*
 - a. *There is no evidence as to the use of the firearm.*

- iii. *With what intention if any did the Defendant possess or use the firearm?*
 - a. *The only evidence as to intention comes from the Defendant himself that he was going to try to determine the owner of the firearm and to search for the owner of the firearm. There is no other evidence.*

- iv. *What is the defendant's record?*
 - a. *The defendant is a person with no previous convictions and he is of good character...*

37. I have considered all the circumstances of this case, the personal circumstances of the Defendant as raised by his Counsel and as indicated from the evidence in the case, to include his gainful employment, his good family background and character, and the fact that he turned himself in on the same night and handed over his phone and his clothing.

38. I have considered the question of momentary possession, in light of all the cases cited, to include the cases of R v Dawson and R v Bartell. I have also considered whether in the particular circumstances of this case, given the inability to say precisely when the Defendant came into possession of the firearm, and that his possession was thus for a limited period of time, would constitute such a striking feature such as would justify a finding that

exceptional circumstances are present when taken into account with his personal circumstances and all the other circumstances of this case. The important focus is on the nature and outcome of the possession rather than merely its fleeting duration.

39. This is a serious offence in which the Defendant was in possession of a dangerous and loaded weapon. He claimed to have been in unwilling and temporary possession yet did not seize the opportunity which he had for at least one hour, to hand it over to the authorities. Instead he left it unsecured in an open car, on the street, both before and after the arrival of the Police leading to the possibility that it could have fallen into the hands of those who might use it for a criminal purpose.

40. In my view, there is nothing in the circumstances looked at holistically which can be regarded as exceptional, either in relation to the offence or to the offender. Neither is there any single striking or specific feature which would justify such a finding.

41. I have considered whether the minimum sentence would be disproportionate or arbitrary in light of all the circumstances of this case and am satisfied that imposing the minimum term herein would not result in such a sentence. I am mindful that care must be taken not to lower the threshold for exceptional circumstances and as discussed in the judgment of the Court in the case of R v Dawson, to "blunt the effect of the scheme of deterrent sentences for which Parliament has made clear provision and which the courts have repeatedly emphasized is necessary."

7. In his grounds of appeal, in what he accepts is a very difficult case, Mr Myers essentially repeats the submissions he made below. He submits that the Applicant only had the weapon fleetingly. He emphasises, in particular, what was the fourth point in the well-

known case of *Avis* [1998] 1 Cr.App.R. 420, that he was a man of previous good character. Mr Myers emphasises that it was not his weapon, and submits that a sentence of ten years was arbitrary and disproportionate.

8. In our judgment, the difficulty faced by Mr Myers, as he realistically accepted, was the rejection by the judge of the Applicant's account as to how he came by his possession of this loaded firearm. She concluded, as we have said, that he knew it was there. Because the Applicant will not say, it is not possible to know for how long he had it, but what is clear is that the possession was more than merely transitory. Moreover, again because the Applicant will not say, it is not possible to know whether he owned the weapon, had borrowed it, or why he had it. On these facts, like the judge, we cannot conclude the circumstances were exceptional so as to justify a reduction from the minimum sentence of ten years' imprisonment.
9. This application for leave to appeal is therefore refused.