

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **CRIMINAL SIDE**

3  
4 **INDICTMENT NO: 13/11**

5  
6  
7 **THE QUEEN**

8  
9 **v.**

10  
11 **HERBERT MITCHELL FOSTER**



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13  
14 **Appearances:**

**Ms. Trisha Hutchinson for the Crown**

15  
16 **Mr. John Furniss for the Defendant**

17  
18 **Before:**

**The Hon. Mr. Justice Charles Quin**

19 **Heard:**

**21<sup>st</sup> October 2011**

20  
21 **SENTENCE RULING**  
22

23 1. On the 1<sup>st</sup> July 2011 the Defendant pleaded guilty to two counts of unlawful  
24 possession of a firearm contrary to s.15(1) and 15(5) of the Firearms Law  
25 (2008 Revision).

26 2. The particulars of both offences are that the Defendant, between the 29<sup>th</sup>  
27 September 2004 and the 1<sup>st</sup> October 2004 at West End on Cayman Brac had  
28 in his possession two Benjamin Sheridan pump action pellet rifles, except  
29 under and in accordance with the terms and conditions of a firearms user's  
30 licence.

*Summary of Facts*

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3. Crown counsel, Ms. Hutchinson, told the Court that on Friday the 1<sup>st</sup> October 2004 the uncle of the accused received information from the Defendant's spouse that she had been going through some items in a locker when she came across an item which appeared to be a pump action pellet rifle. This information was passed on to the police and the house was visited. The Defendant's bedroom was searched and the Benjamin Sheridan pump action pellet rifle was pointed out and the police took custody of it.

4. On the 1<sup>st</sup> October 2004 the Defendant was taken into custody on suspicion of being in possession of an unlicensed firearm.

5. On the 4<sup>th</sup> October 2004 the Defendant led the police to a remote area in the West End section of Cayman Brac, where he retrieved a second Benjamin Sheridan pump action pellet rifle, which he told the police he had hidden there. The Defendant was then placed under arrest for the second firearm and interviewed.

6. During his interview the Defendant admitted being in possession of both firearms and said that he had taken them from a younger relative and sought to hide them to prevent that relative getting himself into any problems.

7. When asked why he had not handed over the items to the police earlier the Defendant said he did not know why.

8. Nearly six years elapsed and the two firearms were examined by firearms expert Alan Greenspan, who received them on the 13<sup>th</sup> May 2010. The first firearm was a 1 calibre .22(5.5mm) Benjamin Sheridan model pump action

1 pellet rifle and the second firearm was a 1 calibre .177(4.5mm) pellet rifle.  
2 Mr. Greenspan confirmed that both firearms were air rifles, designed to fire  
3 .22 and .77 pellets respectively. They were both in good condition and  
4 operable. Both air rifles were capable of producing velocity sufficient to  
5 perforate skin and penetrate organs, and therefore able to cause either severe  
6 injury or death, if struck by a discharged pellet.

7 9. It appears that although the Defendant was charged on the 4<sup>th</sup> October 2004,  
8 the charges were not filed in the Summary Court until the 16<sup>th</sup> March 2005.

9 10. It appears to be common ground that the next event in the chronology is that  
10 the Defendant was brought before the Drug Court in 2007. It is accepted that  
11 Mr. Foster had a drug problem and also encountered certain problems with  
12 the Drug Court, and that was when the charges relating to these firearm  
13 offences came back to light.

14 11. For some inexplicable reason, although these offences came to light before  
15 the Drug Court in 2007, the air rifles were not sent off for examination by the  
16 firearms expert until May 2010.

17 12. Consequently, another four years elapsed before the Indictment for the  
18 firearm offences was laid on the 10<sup>th</sup> February 2011 with the two charges  
19 pursuant to s.15(1) and s.15(5) of the Firearms Law (2008 Revision).

20 13. The Defendant was then remanded in custody from the 10<sup>th</sup> February 2011  
21 until he was granted bail on the 27<sup>th</sup> May 2011. The Defendant has been on  
22 bail since that date.

23

*Defence Case*

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2       14.     Counsel for the Defendant said the Defendant lived in Grand Cayman, but in  
3             2004 he had gone over to Cayman Brac because Hurricane Ivan had  
4             destroyed Grand Cayman so severely. At that time, submits counsel for the  
5             Defence, Mr. Foster had no previous convictions for firearm offences, nor  
6             did he have any interest in firearms. During Mr. Foster's interview on the 4<sup>th</sup>  
7             October 2004 he confirmed that immediately after Hurricane Ivan he had to  
8             move from his place of residence in Grand Cayman and that he had been  
9             residing at his grandfather's house in Cayman Brac for about three weeks  
10            with his mother, his wife and his children. Defence counsel submits that the  
11            Defendant saw a younger relative with the rifles and he, the Defendant, took  
12            them from his younger relative in order to remove him from any problems.

13       15.     The Defendant accepts that he should have handed over the air rifles to the  
14             police, but he said that he left them where they were because he was not  
15             going to trouble them.

16       16.     It is quite apparent that Sgt. Casey Conolly would not have found the second  
17             air rifle had the Defendant not taken him to it. To that extent, the Defendant  
18             was extremely cooperative with the police.

19       17.     The Defence submits that the 2008 Law removes the Defendant from being  
20             subject to mandatory penalties because the law relates to when an accused is  
21             charged and not to when the accused appears before the Court. Defence  
22             counsel submits that s.39(1)(b) of the Firearms Law (2008 Revision) simply  
23             reads that the section relating to minimum sentences:

1                   “...applies where the offence was committed on or after the 15<sup>th</sup>  
2                   November 2005...”

3                   These offences were committed between late September and early October in  
4                   2004, over 12 months prior to the 15<sup>th</sup> November 2005.

5           18.       In addition, Defence counsel submits that there are exceptional  
6                   circumstances relating to the offences and to the offender, which justify not  
7                   imposing a minimum term of imprisonment of seven years.

8           19.       Defence counsel submits that the Defendant was, at that time, a man of good  
9                   character. It was immediately after Hurricane Ivan and the Defendant had  
10                  agreed to hold the air rifles for his young cousin. The Court accepts that the  
11                  period of three months after Ivan was far from normal, with many public  
12                  services compromised. I believe that I can take judicial notice of the fact that  
13                  the immediate weeks after the occurrence of Hurricane Ivan were very  
14                  difficult and stressful for most Caymanians and residents alike. One could  
15                  not describe the style of living during the weeks immediately after Hurricane  
16                  Ivan as normal, and so many people, like the Defendant, were temporarily  
17                  displaced. The Defendant himself was forced to move from Grand Cayman  
18                  to Cayman Brac, and it was there that the Defendant held these air rifles for  
19                  his young cousin. According to Defence counsel, the Defendant is unlikely to  
20                  be involved in a similar set of circumstances in the future.

21           20.       The English Court of Appeal in *R v. Avis and Ors* [1998] 1 Cr. App. R. 420  
22                   stated that:

23                                   “*The appropriate level of sentence for a firearms offence will depend on*  
24                                   *all the facts and circumstances relevant to the offence and the offender.*”

1 The then Chief Justice, Lord Bingham, provided helpful guidance to Courts  
2 considering these matters and recommended that the following questions  
3 should be addressed before passing sentence.

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5 “1. What sort of weapon is involved? Genuine firearms are more  
6 dangerous than imitation firearms. Loaded firearms are more  
7 dangerous than unloaded firearms... .”

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9 I note from the evidence of the firearms expert, Mr. Allan Greenspan, in his  
10 report of the 13<sup>th</sup> May 2010, that he describes one weapon as a .22, 5.5 mm  
11 Benjamin Sheridan model pump action pellet rifle and the other firearm as a  
12 1 calibre .177(4.5 mm) Benjamin Sheridan model 397 pump action pellet  
13 rifle. Mr. Greenspan confirms that both are pump action air rifles designed to  
14 fire calibre .22 and calibre .177 pellets respectively. Mr. Greenspan  
15 confirmed that both air rifles are capable of producing velocity sufficient to  
16 perforate skin and penetrate organs, and are therefore able either to cause  
17 severe injury or death if one is struck by a discharged pellet. There is no  
18 evidence that either gun was loaded at the time the Defendant was in  
19 possession of them.

20 “2. What (if any) use has been made of the firearm?”

21 The evidence before the Court is that the Defendant kept one firearm in his  
22 home and the other in a piece of scrubland in Cayman Brac. There is no  
23 evidence that either air rifle had been used.

24 “3. With what intention (if any) did the Defendant possess or use the  
25 firearm?”

1           There is no evidence before the Court that the Defendant intended to use  
2           either of the air rifles. The evidence is that he was keeping them for his  
3           young cousin, so that his young cousin would not need to be in possession of  
4           them.

5                     “4.       What is the defendant's record?”

6           The Defendant has no record of committing firearm offences or crimes of  
7           violence.

8       21.       Defence counsel relies on the CICA decision of *Chavarria-Atily v. R* 2009  
9           CILR 118. This was a very similar case to the one now before this Court in  
10          that the Defendant had pleaded guilty to two charges of possession of air  
11          rifles contrary to the Firearms Law (2006 Revision). The Grand Court had  
12          exempted the Appellant from the minimum sentence of seven (7) years  
13          prescribed s.38(A) of the then Firearms Law (2006 Revision) on the ground  
14          that there were “exceptional circumstances.” Forte LJ held at paragraph 12:

15                     *“The Judge was right in identifying exceptional circumstances ... We do,*  
16                     *however, find, given the circumstances of the offence – not least of which*  
17                     *is the nature of the firearm, the Appellant's antecedents and his plea of*  
18                     *guilty that the sentence of two years imposed by the learned Judge is*  
19                     *manifestly excessive.”*

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21          Accordingly CICA set aside the two-year sentence and imposed a sentence of  
22          12 months on each count. The Court ordered that the sentences run  
23          concurrent, with the time that the Appellant has spent in custody taken into  
24          account.

1       22.     I am grateful to both Defence counsel and Crown counsel for their assistance  
2             in this case. I commend Crown counsel for her efforts in trying to discover  
3             how this case has taken eight years to come before this Court. Ms.  
4             Hutchinson, quite properly, concedes that there are exceptional  
5             circumstances which, when taken into account would persuade the Court to  
6             depart from the minimum sentence, should it apply.

7       23.     This case has many similarities with the CICA decision in *Chavarria-Atily v.*  
8             *R*, in which the CICA imposed a sentence of 12 months' imprisonment for  
9             each count, to run concurrent, with time spent in custody to be taken into  
10            account.

11      24.     I have looked at all the facts and circumstances relating to this case as well as  
12             at the CICA Ruling in *Chavarria-Atily v. R*, and it is my view that the  
13             Sentence should be twelve (12) months on each Count to run concurrent.  
14             However, in light of the fact that the Defendant has spent some time in  
15             custody, and has waited over seven (7) years to have the case come before  
16             the Grand Court, I will suspend the 12 months for two (2) years.

17      25.     The Court accepts the recommendation of Ms. Maxine Anglin of the  
18             Department of Community Rehabilitation (Probation) and I order that the  
19             Defendant is to return to the Drug Court forthwith.

20      26.     This is truly an exceptional case and hopefully we will never see a repeat of  
21             the extraordinary delay in bringing a case of this nature to trial again. It has  
22             had the effect of ensuring that the minimum sentence set out in s.39 of the  
23             2008 Law does not apply to this case because the two offences took place  
24             well before the 15<sup>th</sup> November 2005. In any event, as I have found, there are

1 exceptional circumstances which would justify the Court not imposing the  
2 minimum Sentence under the 2008 law. I sincerely hope this will be a unique  
3 case which will never be repeated, because all persons found in unlawful  
4 possession of unlicensed firearms must be subject to the 2008 law and the  
5 minimum sentence of imprisonment of at least 7 years following a guilty  
6 plea.

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9 **Dated this the 30<sup>th</sup> November 2011**

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14 **Honourable Mr. Justice Charles Quin**  
15 **Judge of the Grand Court of the Cayman Islands**