IN THE GRAND COURT OF THE CAYMAN ISLANDS

SCA 17 OF 2011; SCA 17A OF 2011

RICHARD JOSEPH PARSONS

V

THE ATTORNEY GENERAL

IN OPEN COURT
THE 20TH JANUARY 2012; AND 17TH FEBRUARY 2012
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: Mr. Kerri Cox of Stenning & Associates for the Appellant
Ms. Candia James, Crown Counsel for the Crown

JUDGMENT

1. The Appellant appeals against the sentence of nine years' imprisonment imposed upon him by the Hon. Chief Magistrate in respect of the unlawful possession of a shotgun. The appeal arises in the context of section 39(2) of the Firearms Law (2008 Revision) which mandates the imposition of a term of at least 7 years imprisonment for the offence in the absence of exceptional circumstances.

2. The grounds of appeal are in the alternative:

   (i) That the Chief Magistrate misdirected herself and thereby erred in law by failing to take account of relevant factors which would go to determine that in the circumstances relating to both the offence and the offender, there were "exceptional circumstances" to justify a departure (from) the minimum term of

imprisonment of seven years as mandated by virtue of section 39 (2) (a) of the firearms Law (2008 Revision).

Further, she took into account factors that she should not have taken into account in coming to her conclusion, failing to take into account factors she should have; and, (in the alternative);

(ii) That in any event, the imposition of a term of imprisonment for nine years was manifestly excessive having regard to the mitigation presented at court on the occasion and that the learned Chief Magistrate misdirected herself that the Appellant's state of mind was an aggravating feature of the case which contributed to the decision that a sentence longer than the statutory minimum was indicated.

The circumstances of the offence

3. The Appellant is now 24 years of age and was 22 when the offence was committed.

4. It is his case, as presented to the Chief Magistrate when he pleaded guilty, that in August 2010, while searching for crabs in the bushes at Northwest Point, Grand Cayman, he found the shotgun to which the charge relates. It was found wrapped in a black plastic bag and from its rusty condition, appeared to have been abandoned. He chose to keep the shotgun, according to him, under the misguided thinking that its presence in his home would make him feel more secure and safe.

5. He claims to have felt a heightened need for personal protection at the time because of three incidents in particular which had occurred and which he says had had a profound psychological effect upon him:

(i) In February 2010, a violent shooting took place within close proximity to his house in which one individual was killed, one person paralyzed and another injured;

(ii) a first burglar of his house occurred in or around May 2010; and

(iii) a second more violent burglary took place in or around July 2010.

6. It was the result of his heightened sense of insecurity, anxiety and "hyper-vigilance" caused by those incidents, that he decided to keep the shotgun when he later found it in the bushes.

7. The Appellant also cites his own psychiatric condition as evidence of what is described as "*an adjustment disorder*" secondary to a perceived threat of injury and death related to the burglaries. He seeks to rely upon this condition, when taken with the other circumstances of this offence, as evidence of the existence of "*exceptional circumstances*" justifying the mitigation of the minimum mandatory sentence of seven years imposed by section 39 (2) of the law.

8. By way of further background to the offence, on the 27th October 2010 the Appellant was detained following an alleged traffic violation leading to the discovery of ganja in his vehicle. As a result, the police officers decided to search his residence invoking powers of search under the Misuse of Drugs Law. Whilst on the way to his residence the Appellant told the Police Officers that he had a shotgun inside his residence. Among the items recovered upon the search were the shotgun and six live 12-guage shotgun cartridges, the same calibre as the shotgun. Four of the cartridges were found within and removed from the breach of the shotgun.

9. A search at the rear of the APPELLANT's premises revealed two ganja plants and a book on the cultivation of ganja. Also recovered from his premises was an unlicensed spear gun. The ganja plants and the unlicensed spear gun formed the basis of other charges to which, like those relating to the shotgun and cartridges, the Appellant pleaded "guilty" at the earliest opportunity.

Psychiatric Report of Professor Jon Shaw

10. As a result of the nature of the principal offence, the commission of which seemed "*out of character*" to his parents, an independent psychiatric assessment and report in respect of the Appellant was undertaken by Prof. Jon Shaw of the Miller School of Medicine, University of Miami.

11. Prof. Shaw's report documents and elaborates on the background history to the offences noting as follows:

- that Richard Parsons was reclusive and made a conscious effort to avoid "negativity" and others whom he saw as bad influences and who were involved in the drug culture;
- that when his spear gun was stolen, he felt as if he had lost his livelihood – he used his spear gun to source his own food – he is striving for self-sufficiency;
- that the second burglary had left him extremely distressed and shaken and he had nightmares about what might have happened if he had been at home or turned up during the incident;
- that when he found the shotgun, he felt it gave him a layer of protection…he felt safer. He obtained an application form for a firearm permit but failed to act upon it;

- that he had tried to give up ganja on several occasions but experienced headaches, sleep disturbance and general ill-ease which resulted in him returning to the drug;

Prof. Shaw's report made the following conclusions in respect of the Appellant:

- The continued effects of ADHD, multiple school placements and his parents' divorce led to an increasing sense of social isolation;
- ADHD increases the risk of ganja abuse as it [(ganja)] is well known to decrease anxiety, alertness, depression and tension;
- As the dependency on ganja becomes chronic, its use leads to *"impairment of attention, memory and ability to process complex information"*. It also exacerbates symptoms of anxiety, paranoia, depression, tiredness and lack of motivation.

The "exceptional circumstances" as submitted on behalf of the Appellant

12. While accepting that there is no simple "*striking facture*" to either the commission of the offence or appertaining to the offender that would reasonably establish exceptional circumstances in this case, it is nonetheless submitted on behalf of the Appellant by Mr. Cox, citing Lord Woolf LCJ in ***Rehman v Wood [2005] EWCA ….. 2056 at para. 11*** that *"the collective impact of all the relevant circumstances truly makes the case exceptional"*.

13. In effect, this is a submission that the Hon. Chief Magistrate should have decided that there were circumstances relating to the offence or the offender in this case to justify not imposing the minimum sentence of seven years prescribed by the Law. It is said that no custodial sentence should have been imposed or alternatively that a much lesser sentence than seven years imprisonment should have been imposed.

14. A number of factors are advanced:

(i) The Appellant is a young man of good character and exemplary record. In this regard, reliance is placed on the testimonial of Mr. Kenneth Hydes. Mr. Hydes was the Appellant's boss at the Turtle Farm where the Appellant worked for 4 ½ years as a general labourer.

The following is an excerpt from Mr. Hydes' statement:

> *"When Richard was 16, I asked him whether he would like a job at the Turtle Farm as a general labourer. He accepted this position and I found him to be reliable, hardworking and trustworthy. In the 4½ years that he worked for us, he was always punctual and there was never any cause for complaint.*
>
> *Although we never had any problems with Richard, I was aware of his medical difficulties in respect of hyperactivity....*
>
> *It was widely rumoured that Richard was a regular user of ganja and his father talked about his disappointment that Richard used the drug albeit that it helped to keep him calm. Therefore, I was not surprised that Richard has been charged with an offence of possession of ganja.*
>
> *In respect of the charge of possessing a shotgun, I am astonished by this. It is completely out of character and simply does not fit Richard's demeanour. He is a quiet and kindly young man who has never demonstrated any indication of violent tendency....* (He then refers to incidents of shooting and burglaries involving the

Appellant's home]. *The fact that despite his medical condition and soft drug use, he has never been in any trouble with the police before and has been able to lead a completely normal life up to now, should be given appropriate credit."*

(ii) The Appellant co-operated fully with the police admitting to the possession of the shotgun before his home was searched, albeit that its discovery would have been anticipated. He did give what has been accepted to be a full account of how he came by the gun and admitted to the police that had test-fired it. He also assisted by giving evidence in an unrelated case;

(iii) The Appellant pleaded guilty to all charges at the earliest opportunity;

(iv) It is, of course, of real significance to the Appellant's case that he did not acquire he shotgun deliberately. His plea of guilty having been accepted on the premise of his explanation of having found the shotgun in the bushes, the prosecution is not in a position to seek to refute it. The Learned Chief Magistrate, while expressing scepticism about the Appellant's account, declared to have proceeded nonetheless to sentence on the basis that it was true.

The rusty condition in which the gun appeared when recovered by the police (as shown in photographs in Court) suggests weathering;

(v) The absence of risk of the Appellant re-offending. The Appellant has been in custody for some 15 months. He expresses remorse for his conduct and finds himself to be in an alien environment where he is now mixing with the type of persons that he had hitherto avoided.

Despite adversity, he has used his time in prison for self-improvement both in terms of accessing further education and has striven to avoid the freely available ganja in prison.

In view of his previous good character and the consequences which have attached to committing the principal offences, it is submitted that the Appellant is simply unlikely to commit any similar offence again;

(vi) The general circumstances of the Appellant's commission of the firearms offence is said, in and of themselves, to be exceptional because his decision to retain the shotgun was the cumulative effect of a number of factors which took place, in reality over a number of years:

(a) the effects of his diagnosed ADHD;

(b) the fact that despite various attempts to take alternative prescription medicine, the use of ganja appeared to him to satisfy a relief from symptoms.

(c) that many years of continual usage caused a chronic dependency on the drug;

(d) as a result, he was an individual vulnerable to depression and the recent experiences of a proximate violent shooting and being the victim of two burglaries caused him to perceive a threat to his personal safety;

(e) to the extent that he suffered from a diagnosable adjustment disorder;

(vii) That in the opinion of Professor Jon Shaw, a lengthy term of imprisonment would be detrimental to the psychological well-being of the Appellant. At paragraphs 41

of his report, in answer to the question regarding the impact of a prison sentence, Prof. Shaw states:

> *"Incarceration will increase significantly the risk of further depression, damaged self-efficacy and would destroy any hope of rehabilitation of a young man who has shown himself to be inherently hard working, reliable and trustworthy and who at this time in his life could benefit from appropriate intervention not only for cannabis dependence and his adult ADHD but for his depression and social anxiety."*

The case law

15. In ***Chevarria-Atily v R 2009 CILR 118,*** the Cayman Islands Court of Appeal said that it would not readily depart from the sentencing judge's assessment of what constituted "exceptional circumstances" and thus that it would not readily interfere with the court's decision at first instance unless it was clearly wrong. That approach must, I consider also correctly apply to any review of the Learned Chief Magistrate's decision to be undertaken here.

16. In ***Chevarria-Atily v R*** not only did the Court of Appeal accept, like the Grand Court, that there were exceptional circumstances – (that is: that the defendant was of good character, had taken steps to register the firearm which was "only an air weapon", had only been shooting vermin, that he was unlikely to commit the crime again and that the conviction had ruined his intended career) – the Court of Appeal also went further by reducing the sentence imposed by the Grand Court, already less than the statutory minimum, from two

to one year's imprisonment. This large reduction by six years from the statutory minimum can be explained by reference to the case law generally, I think, primarily because the gun was "*only an air weapon*".

17. Implicitly, the Court of Appeal there nonetheless had regard to the requirement that the circumstances of the offence and the individual circumstances of the offender must be taken into account.

18. And this was notwithstanding the Court's recognition that:

> *"In the Cayman Islands, it has been the massive increase in offences under the Firearm Law that has had Parliament to enact minimum sentences in respect of these offences, while at the same time making special provision for cases of exceptional circumstances. The mere possession of a firearm, even without any intention to use it for a criminal offence, can still be a danger to the public for the reason that it could get into the hands of someone who dies have that intent."*

19. The case authorities do indeed require that all the circumstances both of the offence and of the offender be considered. As Lord Chief Justice Woolf said in ***Rehman v Wood*** (above) (at para. 11):

> *"...it is not appropriate to look at each circumstance separately and to conclude that it does not amount to an exceptional circumstance. A holistic approach is needed. There will be cases where there is one single striking feature, which relates either to the offence or the offender, which causes that case to fall within the requirement of exceptional circumstances. There can be other cases where no single factor by itself*

will amount to exceptional circumstances, but the collective input of all the relevant circumstances truly make the case exceptional."

20. And further, at para. 15:

"The reference in the section to the circumstances of the offender is most important. We have no doubt that the fact that an offender is unfit to serve a five year sentence may be relevant, as is the fact that he or she is of very advanced years. This is necessarily to be read into the words used, otherwise a sentence may be inappropriately harsh and even fall within the language of Article 3 of the European Convention. Finally, we emphasize what we have already referred to in this judgment, the importance of not dividing the circumstances into those that are capable of being exceptional and those which are not.

21. And further, at paragraph 16, considering that Parliament would have intended to comply with the requirements of the Human Rights Act 1998 and the European Convention (as should our local Legislature be intended to comply with the European Convention to which the Cayman Islands subscribes unless the Legislature expressly or by necessary implication otherwise provides), the Court said in ***Rehman***:

"It is clear in our judgment that, read in the context to which we have referred, the circumstances are exceptional for the purposes of [(the Firearms Act)] if it would mean that to impose five years [here seven more] imprisonment would result in an arbitrary and disproportionate sentence."

22. The tension within all the foregoing dicta, between the imperative of deterrence and the concern of the rehabilitation of the offender, is a stark example of the challenges presented by the exercise of sentencing. Despite that tension, however, the purpose and intent of the statute must be correctly discerned and applied. As was also said in ***Rehman*** (at para. 4):

> *"The weapons, with which we are concerned, are ones in relation to which Parliament has by [the section of the Firearms Act] signaled it was important that there should be imposed deterrent sentences. By "deterrent sentences" we mean sentences that pay less attention to the personal circumstances of the offender and focus primarily upon the need for the courts to convey a message that an offender can expect to be dealt with more severely so as to deter others than he would be were it only his personal wrongdoing which the Court had to consider."*

23. And further, at paragraph 12 in terms similar to those expressed by the Cayman Islands Court of Appeal in ***In Chevarria-Atily v R***:

> *"In the case of the Firearms Act the focus is different:*
>
> *So far as we can determine the rationale of Parliament, the policy was to treat the offence as requiring a minimum term unless there were exceptional circumstances, not necessarily because the offender would be a danger in the future, but to send out the deterrent message to which we have already referred. The mere possession of firearms can create dangers to the public. The possession of a firearm may result in that firearm going into circulation. It can then come into possession of*

someone other than the particular offender for example by theft in whose hands the firearm would be a danger to the public. Parliament has therefore said that usually the consequences of merely being in possession of a firearm will in itself be a sufficiently serious offence to require the imposition of a term of imprisonment of five [(here seven)] years, irrespective of the circumstances of the offence or the offender, unless they pass the exceptional threshold to which the section refers. This makes the provision one which could be capable of being arbitrary...firearms offences under s.5 [section 39] are absolute offences. The consequence is that an offender may commit the offence without even realizing that he has done so. That is a matter of great significance when considering the possible effect of (the Act) creating a minimum sentence."

24. In the present case, there is no suggestion other than that the Appellant was aware at the time he took possession of the shotgun that it was unlawful to do so. His admitted intention to apply for a firearms user's licence reveals as much.

25. He was also fully aware of its lethal capabilities: he had test fired it, kept it loaded and intended to use it to defend himself and his home, against further intrusion.

26. His possession of the firearm could in no sense therefore be regarded as innocent or unwitting.

27. Having found and kept the firearm, it was available in his home for his intended recourse, and so also accessible to a thief in the very event of another burglary which so concerned and motivated the Appellant.

28. The mischief that the Legislature seeks to prevent by the deterrent effect of section 39 is therefore that which is acutely presented by the Appellant's conduct in this case. The statute as explained by the case law requires, nonetheless, the consideration of whether exceptional circumstances are presented so as to justify the amelioration of the minimum mandatory imprisonment. The exercise is no mere formality. A genuine consideration must be given to all the circumstances in a holistic way so as to ensure that the provisions of the statute are not merely arbitrarily imposed. While the primary thrust of the statute in deterrence, the Legislature is understood to be in earnest to avoid arbitrary and thus unduly harsh or disproportionate punishment, including as that might turn out to be the case having regard to the subjective circumstances, not only of the offence, but of the offender as well.

29. While the Chief Magistrate placed due weight upon the importance of the deterrent effect of the statute, I do not think that in this case she paid sufficient attention to the circumstances of the offence and the offender. This approach may likely have been propelled by her initial scepticism about the Appellant's account of how he came by the shotgun: She said, at para. 3:

> *"It is difficult to accept that he found this gun in the light of the assertion that he had it to protect himself in response to the events mentioned earlier. It would be entirely consistent with his paranoia and his need to feel secure and to protect himself that he had deliberately acquired the gun. His assertion that he found it hasn't been challenged however, but in any event it is not a mitigating feature of the offence that he came into*

possession of it accidentally. Arming oneself with a shotgun against perceived threats is the sort of self-help the law deplores."

30. His plea having been proffered and accepted by the prosecution on the basis that he had found the shotgun, the Appellant was entitled to have his sentence considered with an unsceptical approach to that issue. Viewed in that way, I think a court would properly have had regard to all of the Appellant's other circumstances as mitigating against the further conclusion that a sentence greater still by two years than the statutory minimum – that of nine years imprisonment – should be imposed. This was a case in which the offender came into possession of the firearm not deliberately seeking to do so but by an error of judgment on the part of a young offender emboldened by too scant a regard for the consequences.

31. It was an error of judgment too which it is only fair to accept (there being compelling evidence to that effect and none to the contrary) was influenced by the recent experiences and threat of further intrusions into his home.

32. Succumbing to one's own paranoia in such circumstances absent any intention of criminal conduct, should not be seen inevitably as an aggravating feature of the offence.

33. It should not be forgotten that in the context of section 39 of the Law, the statutory minimum is meant to give effect to a discount for a guilty plea. It signals a sentence of seven years after a guilty plea rather than the mandatory minimum of ten years after trial.

34. In ***Leon Hydes v R*** ***App. No. 26 of 2009, Ind. No. 28B/08;*** the court of appeal (per Chadwick P.) explained the meaning of the provision in this way:

"Section 39(2) gives effect to the principle that, in a guilty plea, the offender can expect a discount from the sentence that would have been

passed on the conviction after a contested trial. That statutory discount on the minimum sentence is three years off ten; some thirty percent. But that, of course, is subject to two qualifications. First of all, there is no automatic discount of thirty percent, or any other proportion; and second, the ten year sentence is itself, a minimum sentence and not necessarily an appropriate starting point in the circumstances of any particular case."

35. While that dictum recognises that the judicial discretion is preserved in an appropriate case, even one involving a guilty plea, to impose a term greater than the statutory minimum because "there is no automatic discount of thirty percent", it also recognises that a primary objective of section 39 (2) is to encourage the offender to acknowledge the wrongdoing of the offence and even where appropriate, to assist the law enforcement authorities.

36. The statute thus affords a *locus poenitentiae* even in the face of an inevitable sentence of imprisonment.

37. That objective is usually to be achieved by affording a defendant in return for his guilty plea, the thirty percent discount from the otherwise mandatory minimum of ten years, to seven years imprisonment. In ***Hydes v R*** the Appellant, despite having pleaded guilty, failed to give the obvious assistance to the police that would have assisted in detecting another perpetrator involved with the firearm and so was sentenced to eight years imprisonment, not having quite availed himself of the full benefit of the discount.

38. In the context of a statutory scheme that imposes severe mandatory sentences, there must, in my view, be clear and compelling reasons such as were present in ***Hydes v R*** for

denying an offender the discount which he would ordinarily expect to receive by virtue of his guilty plea.

39. For those reasons, I find myself in disagreement with the imposition of a sentence that is even greater than the statutory minimum.

40. I can, however, find no fault with the Chief Magistrate's conclusion that would otherwise justify the imposition of the mandatory minimum for the absence of exceptional circumstances where she concluded:

> *"The simple fact is that the defendant took a gun into his possession to arm himself against a perceived threat of harm. He manifested every intention of using it in the future to the extent of making sure it was working. If every victim of crime, or indeed, everyone who felt threatened by current events, did the same, we would rapidly sink into lawlessness and violence."*

41. The Appellant's reasons for keeping possession of the firearm, having come across it accidentally, do not give rise to "exceptional circumstances" within the meaning of the Law. On the contrary, armed with the firearm, his vigilante attitude caused the Appellant to present just the kind of threat to society that the statute aims to deter.

42. Nor, in my view, does the subjectively harsh effect that imprisonment will likely have upon this Appellant as described by Prof. Shaw, present "exceptional circumstances".

43. Each offender will be impacted in a subjective and unique way by a sentence of imprisonment.

44. The Appellant's condition is not such as to make him "*unfit to serve a (seven) year sentence*" (per Woolf LCJ in ***Rehman*** above) at para. 15) . The concern is that due to his

proneness to ADHD, paranoia and depression "*incarceration will increase significantly the risk of further depression, damaged self-efficacy and would destroy any hope of rehabilitation....*" That kind of prognostication is, in my view, insufficient to found a conclusion now that the Appellant is unfit to serve a term of imprisonment.

45. While I am deeply concerned about the possibility of such an unfortunate outcome as that prognosed by Dr. Shaw, such concerns would attend the incarceration of very many young offenders for whom imprisonment is indicated as the only appropriate sentence. And while his previous good character would serve to distinguish the Appellant from very many of those others, good character is, by itself, not enough to found "exceptional circumstances". This is made clear enough by the passage cited above from ***Rehman*** (para. 4) which advises that the statute prescribes deterrent sentences which pay less attention to the personal circumstances of the offender and focuses primarily upon the need to deter others who would possess and use illegal firearms.

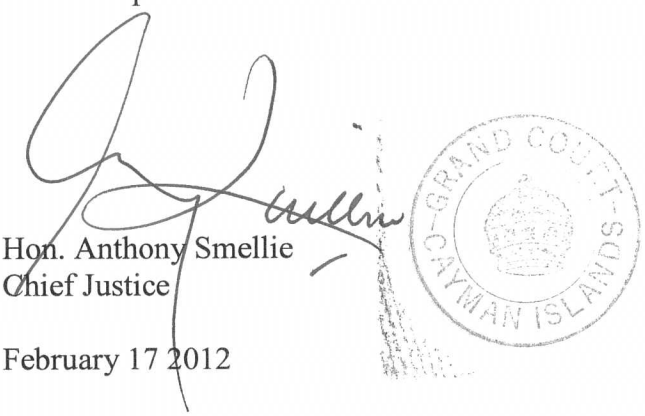
46. The Appellant's wilful disregard of the Law and the potentially lethal consequences of possessing the shotgun avoid, in this case, any notion of the statutory minimum sentence being an "arbitrary and disproportionate" sentence (***Rehman*** para. 16).

47. In my view, all the circumstances of the offence and of the offender considered, the Appellant is entitled to the reduction allowed by the statute from the sentence imposed of nine years to seven years imprisonment, but his case does not present exceptional circumstances of the kind required to avoid the imposition of that statutory minimum of seven years.

48. Concerns about the exceptional impact that prolonged incarceration might have upon the Appellant are for the Prison Authorities – no doubt with the benefit of independent

psychiatric advice – to address and, if appropriate, to advise His Excellency the Governor in exercise of the prerogative of mercy under sections 39 and 40 of the Constitution. In that context, Dr. Shaw's assessment could be most relevant.

49. The appeal is allowed by the reduction of the sentence from nine years to seven years imprisonment but is otherwise dismissed.



Hon. Anthony Smellie
Chief Justice

February 17 2012