IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

INDICTMENT NO: 0043/2018

REGINA

v.

ASSAD ADANA WALKER

FITZROY OTTEY

OWEN OMAR REID

Appearances:	**Ms. Nicole Petit for the Crown**
	Ms. Amelia Fosuhene of Brady Attorneys for Defendant Walker
	Mr. Jonathon Hughes of Samson Law for Defendant Ottey
	Mrs. Prathna Bodden of Samson Law for Defendant Reid
Before:	**Dame Linda Dobbs**
Written Submissins:	**December 2018**
Legal Argument Hearing:	**4th January 2019**

HEADNOTE

Criminal Law – Legal Argument – Possession *–* ***Firearms Law*** *– "Possession".*

RULING ON LEGAL ARGUMENT ON "POSSESSION"

INTRODUCTION

1. The three defendants are charged on this Indictment with offences of:

   (a) Possession of an unlicensed firearm – namely a firearm and some ammunition;

   (b) Being concerned in the importation of cocaine and MDMA[1]; and

   (c) Possession of the same drugs with intent to supply.

They have pleaded guilty to the drugs offences in the Summary Court.

FACTS

2. The brief facts are that on 2nd March 2018 a canoe – containing the three Defendants and the drugs – was intercepted at sea. The three defendants were arrested. A scan of the packages seized revealed that inside one of them, buried in the centre of the main package within two other packages, was a firearm. There was another package inside which, when cut open, contained an energy drink bottle inside of which were 49 live rounds of ammunition.

3. When interviewed, all three defendants admitted having been engaged to smuggle drugs, but all denied knowledge of a firearm/ammunition in any of the packages.

[1] Methylenedioxymethamphetamine (MDMA), commonly known as Ecstasy

PROCEDURAL HISTORY

4. At a Mention hearing in relation to another similar case, this case was alluded to. The court was told that this case had been fixed for trial on the outstanding firearm offences. The Court, mindful of the backlog of cases and persons in custody awaiting trial, asked the Crown to consider its position in light of, the evidence, the public interest, given the guilty pleas, bearing in mind that the defendants would be deported back to their country, and, having regard to the pressures on the criminal courts at present with the absence for medical reasons of the Grand Court's senior criminal judge, Justice Charles Quin Q.C..

5. The case was, therefore, listed for another mention. At that hearing, the Crown indicated that it intended to proceed to trial on the basis that it had sufficient evidence to proceed. "Possession" seemed to be the issue in point. The Court decided that, as a legal issue arose which could affect the outcome of the case, the issue ought to be argued well in advance of the current trial date set for March 2019.

6. Thus, I have heard the legal argument today.

SUBMISSIONS

7. The Crown's position, simply put, is this: that the offence is one of strict liability. All the Crown has to show is that the Defendants knew they had the packages in their possession which contained something which turned out to be a firearm. It is immaterial what they thought it was. The knowledge and control of the packages has been shown by their pleas of guilty.

8. The Crown produced an extract from ***Archbold*** - para 24-8. Reliance is placed on the authorities cited in that extract, namely, ***Hussain***[2], ***Waller***[3], and ***Steele***[4]. Reference is also made to a Cayman Islands Grand Court case of ***R v GA General***[5] in which Graham J., interpreting s.15 of the Cayman Islands ***Firearms Law*** (2008 Revision), (the same section pursuant to which the defendants are charged), and, considering the UK equivalent in the ***Firearms Act 1968***, namely Section 1, and, in addition, having reviewed the UK authorities which are now relied on by the Prosecution in this case, found that the Cayman Islands legislature clearly intended to create an offence of strict liability.

9. The Defence submit that where the drugs are contained in a parcel, as in this case, the Crown must prove that the Defendant was in possession of the contents of the parcel, i.e. that he was not completely ignorant as to the type of thing contained in it. If it were to be shown that a person in possession of a parcel was completely mistaken as to its content, he is not guilty of unlawful possession. It is submitted that the Crown has conflated two types of knowledge – i.e. knowledge that something exists and knowledge of what it is.

10. The Defence distinguish the present case and the authorities cited by the Crown on the facts – namely, because of the nature of the container in which the firearm is located. The defence point out that in each case on which the Crown relies, the Defendant knew he had an article in his possession within a container and could easily have checked what it was. In the case before this court the Defendants were ignorant that there was anything concealed within the drugs they were carrying. Reliance is placed by the

[2] (1981) 72 Cr App R 143
[3] (1991) Crim LR 381
[4] (1993) Crim LR 298
[5] 2002 CILR 276

Defence on three local cases to which I will refer shortly, such as the well-known case of ***Warner***[6] but particularly the case of ***Swaby-Powery, Hydes, Crowe***[7].

LEGISLATIVE PROVISIONS

11. Section 15 of the ***Firearms Law*** (2008 Revision) reads:

> *"15. (1) Subject to subsection (2), no person shall be in possession of any firearm except under and in accordance with the terms of a Firearm User's (Restricted) Licence*."

Subsection (2), which I need not rehearse, as it is not relevant to the facts of this case, sets out the exceptions to subsection (1).

12. It is not dissimilar to s.1 of the UK ***Firearms Act 1968*** which reads:

> "*1 (1) Subject to any exemption under this Act, it is an offence for a person-*
>
> *(a) to have in his possession, or to purchase or acquire, a firearm to which this section applies without holding a firearm certificate in force at the time, or otherwise than as authorised by such a certificate;*
>
> *(b) to have in his possession, or to purchase or acquire, any ammunition to which this section applies without holding a firearm certificate in force at the time, or otherwise than as authorised by such a certificate, or in quantities in excess of those so authorized*."

[6] 1962 2 AC 256
[7] Ind. 35, 36 + 37/2016

THE AUTHORITIES

13. I deal first with the local Grand Court authorities relied on by the defence.

14. In ***R v Orrett, Borden, Montague and Ebanks***[8], Quin J found that:

> *"a person is in possession of a firearm if he or she (a) exercises control over premises in which the firearm is located; (b) knows that the firearm is on the premises; and (c) takes no proper steps to remove it (such as asking its owner to leave or alerting the relevant authorities).' It is not necessary for him or her to have control over the firearm itself."*

The facts of the case are not set out in the reference cited and provided.

15. In ***Ebanks v R***[9]: The appellant had been charged with possession of an unlicensed firearm, the evidence being that he had been seen by police to throw away a revolver. The submission on the appellant's behalf was that there was no case to answer as the evidence of possession or control of the weapon was inadequate. The conviction was upheld by Hercules J stating that the Crown had presented enough clear and cogent evidence to prove the appellant's possession of the revolver by establishing that he had been knowingly and willingly in control of the object he had thrown away. The Crown was not required to prove that he had actual knowledge that the object in his possession had been a revolver. The Defence rely on the phrase "knowingly and willingly".

[8] [2010(1)] CILR Note 7
[9] 1980 – 83 CILR 248

16. In ***R v McCafferty***[10], Graham J (who was also the Judge in the ***General*** case) held that *mens rea* is an essential element of the offence of importation of a firearm under the ***Firearms Law*** (1998 Revision).

17. The defence therefore submit that knowledge of the presence of a firearm amongst the imported goods is necessary for conviction and that the present case, although charged as a simple possession, in order to circumvent this aspect of the law, is *de facto* a case of importation and that, therefore, the same principles should apply.

18. Reliance is also placed on the case of ***Swaby-Powery, Hydes, Crowe***, a case in which Justice Quin acquitted the defendants on Count 2 of the indictment (i.e. the Count of Attempting to Import Firearms) in virtually identical factual circumstances as the present case. Originally there was no judgment provided - a copy of an article in the media being the only source of the case. The Court was invited to proceed on the basis that Quin J had considered the relevant authorities when coming to his decision. However, Miss Livingston in her usual efficient manner has tracked down the judgment. Justice Quin found that there was no case to answer on the basis that there was no forensic evidence to link the Defendants to the gun. Although there were fingerprints on the gun but not identified, there was no evidence of the Defendants having been involved in the packing of the ganja and no evidence that anyone told them about the gun in the ganja.

[10] 2000 CILR 177

THE UK AUTHORITIES

19. I have set out very briefly the extracts relied on by the Crown in the cases of ***Hussain***, ***Waller*** and ***Steele***.

20. The Defence rely on the well-known case of ***Warner***[11] which was a case of possession of drugs which it is submitted held that the prosecution must prove that the Defendant was in possession of the contents of the parcel – that he was not completely ignorant as to the type of thing contained therein.

21. I now turn to three other cases to which the court drew the attention of all counsel – they are the cases of: ***Price v DPP***[12]; ***Deyemi and Edwards***[13] and ***Zahid***[14].

22. ***Price*** appealed by way of case stated against conviction of ammunition without holding a firearms certificate contrary to s.1(1) of the ***Firearms Act 1968***. He contended that a rucksack found in his house which contained ammunition was not his; the rucksack, having been left by a friend who was a gamekeeper and authorised to carry firearms, and having picked up Price's very similar rucksack by mistake. He did not know the contents of the friend's rucksack. The Divisional Court, following the cases of ***Bradish***[15], ***Waller*** and ***Steele***, dismissed the appeal finding that all that was required was that ***Price*** had knowledge of the fact that he was in possession of a rucksack. It was not necessary for him to have knowledge of the nature and the quality of the object in his possession.

[11] 1962 2 AC 256
[12] 1996 CLY 1469
[13] 2008 1 CAR 25
[14] (2010) EWCA Crim 2158
[15] 1990 90 CAR 271

23. The case of ***Deyemi*** involved possession of a prohibited weapon. Following a ruling from the trial judge that s.5 of the ***Firearms Act 1968*** created an offence of strict liability, the Defendants pleaded guilty. They were in possession of an electrical stun gun which they claimed to have thought was a torch. They appealed on the basis that the offence should not have been considered an offence of strict liability particularly in light of the provisions of Articles 6 and 7 of the European Convention on Human Rights.

24. Latham LJ Vice President of the English Court of Appeal Criminal Division gave the judgment of the court. The court reviewed the authorities which had previously dealt with the issues of possession, noting that both s.1 and s.5 of the ***Firearms Act 1968*** were expressed in similar terms and finding that Parliament intended to impose a draconian prohibition on the possession of firearms. The Court considered and distinguished the cases of ***Warner*** and ***Vann*** and ***Davis*** in coming to the conclusion that no *mens rea* was required for the offence of possession under s.1 and s.5 of the ***Firearms Act 1968***. Insofar as the case of ***Vann*** seemed to suggest that an accused might have a defence if he did not know the nature of the object, that went too far[16].

25. The English Court of Appeal was taxed again with the issue of possession in the case of ***Zahid*** which sought to distinguish ***Deyemi*** and the cases which went before. In that case, following a ruling by the trial judge that an offence of possession of expanding ammunition under s.5 of the ***Firearms Act 1968*** was one of strict liability, the Appellant pleaded guilty. He had been arrested for a non-related matter and when searched using a metal detector, two bullets were found in the inside breast pocket of his jacket. He told the police that it must have been left over from when he was on a

[16] *See Latham LJ @para. 24 p.355*

shooting range in Dubai and he did not realise they were there. A search of his home revealed a taped package containing 38 bullets of the same calibre as those found inside the jacket pocket. The package was inside a Gucci washbag in the study. The Defendant said that he had found the package outside his front door and had later put it in the washbag thinking that it contained bolts or screws left by workmen who had been working at his home. He did not know that it contained ammunition. His DNA was not found on the bullets.

26. On behalf of the Appellant, it was submitted that there should be a distinction between two factual situations involving the firearm being in a container:

i. cases where the defendant's case is that he was unaware of the contents of the relevant container and

ii. cases where the defendant's case is that he believed that the contents of the container were something other than a firearm and/or ammunition.

27. Reliance for a defence in the second category was placed on the speech of Lord Pearce in ***Warner*** with which Lords Reid and Wilberforce agreed.

28. The Court of Appeal rejected this argument finding that there can be no reason in principle for the alleged distinction. The judgment of Auld J in the case of ***Bradish***[17] was cited as the reason for the court's conclusion. In that judgment Auld J sets out why the s.5 is one of strict liability based on, *inter alia*, the words of the legislation and in particular the comparable words and structure of s.1 of the ***Firearms Act 1968***, the clear purpose of the legislation; the fact that the ***Firearms Act 1968*** has other provisions where there is specific reference to the accused's state of mind or an express

[17] 1990 90 CAR 271

provision of a defence and also the public policy issue of making evasion easier and putting a burden on effective control.

DISCUSSIONS AND DECISION

29. Does s.15 of the Cayman Islands ***Firearms law*** create an offence of strict liability?

30. As can be seen from a brief distillation of the authorities at appellate level concerning offences under s.1 and s.5 of the ***Firearms Act 1968***, the position in UK law is that they are offences of strict liability.

31. That means that the prosecution only has to show that the Defendant knew he had something in his possession which is in fact a firearm; it is irrelevant what he thought it was.

32. So far as the UK authorities are concerned, the defence submit that the facts of this case can be differentiated from those – because this case is not about mistaken identity or possession.

33. It is submitted that the Defendants were in possession of what they thought they were – namely ganja, inside which, very thoroughly concealed, was a firearm – for which they cannot, in these circumstances, be in possession.

34. What is the position in the Cayman Islands?

35. No appellate authorities have been drawn to my attention by any of the parties. I have set out a brief distillation of the local cases provided. I remind myself that these cases are not binding on me but are of persuasive value. I also bear in mind that the UK appellate authorities are not binding. That having been said, they are of highly persuasive value, not least because the legislation, so far as s.1 of the ***Firearms Act***

1968 and s.15 of the Cayman Islands equivalent law are concerned, are effectively the same.

36. I deal with the local cases relied on by the defence.

37. In ***Orrett*** the facts are not set out to put the principles relied on into context.

38. In ***Ebanks*** the words "knowingly and willingly" relied on seem to me to reflect the actual facts of the case as opposed to an exposition of whether the count was one of strict liability. It is to be noted that the judge went on to say that the Crown was not required to prove that the Defendant had actual knowledge that the object in his possession had been a revolver.

39. The case of ***McCafferty*** deals with a different section of the legislation. The fact that the defendants could possibly have been charged with importation of the firearm is not a reason to deviate from the charge they actually face.

40. So far as ***Swaby-Powery, Hydes, Crowe*** is concerned, there is now a judgment available. The important thing to note is that the case is not on all fours with this case because the Defendants in that case were charged with attempted importation of the firearms, the reason most likely being because they were intercepted some 24 miles off the coast and therefore were not within the jurisdiction.

41. As Graham J found in ***McCafferty"*** importation is not an offence of strict liability and thus Quin J did not address, as he did not need to, the same issues as now face this court. It was treated as a submission of No Case strictly on the facts.

42. I agree with Graham J in the ***GA General*** case that s.15 creates an offence of strict liability. The essence of the defence submissions, not dissimilar to the submissions

made in ***Zahid***, is that a defence ought to be available depending on the facts of the case - in other words, moving the goalposts depending on the facts. I reject that submission for much of the same reasons expressed in ***Zahid*** and the other authorities cited.

43. On the facts of this case a lay person may well find the strict liability approach difficult to understand and may consider that there is an injustice in such cases. There are some jurists who are uncomfortable with this interpretation of the law. Indeed, Mr Hughes, in what might be teasingly said to be an attempt to pull the heartstrings of the court asked rhetorically – how difficult will it be for the defendants to understand how the three Defendants in the case of ***Swaby-Powery, Hydes, Crowe*** could be acquitted on similar facts, but they could be guilty. He submitted that they would have a legitimate expectation they would be dealt with in the same way. The just thing was that they be treated in the same way. But, as already noted, there is a distinction between the two cases and that lies in the charges and the fact that the charges are treated differently in law. That can be explained to the defendants.

44. But remaining on the issue of injustice: Depending on the facts of a particular case, the remedy for what could be considered an injustice as a result of the draconian prohibition, lies in the courts powers of sentence - that is for the court to be able to pass a sentence which mitigates the position, for example to pass a sentence which does not increase the overall totality.

45. When this case was mentioned informally, the court asked the Crown to review its position, including considering the public interest in pursuing a trial in light of the particular circumstances – *inter alia* - the pleas of guilty, the fact that the defendants will be deported and the need for a speedy determination to free up the court's lists.

When announcing that it intended to proceed, no indication was given of having considered that aspect.

46. I propose to give the Crown 7 days to confirm their further course of action. Should the Crown still wish to proceed the Defence must indicate to the court within 7 days thereafter whether the case is still to proceed to trial in light of the ruling I have made.

Dated this the 4th day of January 2019

Dame Linda Dobbs
Acting Judge of the Grand Court