

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL 22/2014 Brandon Liberal
(Ind 85/13)
C# 07939/2013
CRIMINAL APPEAL 23/2014 Manuel Carter
(Ind 98/2012)
C#05379/2012

BETWEEN:

BRANDON LIBERAL & MANUEL CARTER

APPELLANTS

AND

HER MAJESTY THE QUEEN

RESPONDENT

BEFORE

**THE RIGHT HON SIR BERNARD RIX, JUSTICE OF APPEAL
THE HON SIR RICHARD FIELD, JUSTICE OF APPEAL
THE RIGHT HON SIR ALAN MOSES, JUSTICE OF APPEAL**

Appearances: Crister Brady of Brady law for the Appellants and Tanya Lobban-Jackson Senior Crown Counsel for the Director of Public Prosecutions.

JUDGMENT

**Revised from transcript of oral judgment 17 November 2015 and Approved
Released 24 May 2016**

RIX JA (Orally)

1. These are the appeals of Brandon Liberal and Manuel Carter who, on 23 July 2014, were sentenced to six years' imprisonment for robbery and seven years' imprisonment for possession of an unlicensed firearm, the minimum prescribed by law.
2. The essential circumstances of the robbery may be briefly stated and they do not in themselves really enter into the grounds of appeal in these two cases. Nevertheless, it is sufficient to say that on 4 October 2012, at approximately 11 minutes past 1:00 in the afternoon, a cash courier was set upon by the appellant Carter armed with a gun, and masked, which he pointed at the courier in order to rob him of his bag which contained deposits of cash and cheques. Carter made good his escape in a white Mitsubishi.

3. The appellant Liberal was the person who had provided the firearm to Carter and who was waiting in a second car which was the switch car. The firearm was a loaded Bryco .38 semi-automatic pistol. The amount stolen was some CI\$8,000 — CI\$8,117 and US\$593. The appellants, together with a third man who turned Queen's evidence, were identified through the discovery, close to the Mitsubishi car which was located, of a number of items hidden underneath a large container from which fingerprints and DNA could be extracted.
4. In due course, but only after a substantial period, the appellant Liberal pleaded guilty following a Goodyear direction in relation to the count of robbery to the effect that the maximum sentence that the judge would impose would be one of seven years. Following that, both appellants changed their plea to one of guilty on both counts on the indictment, on the day of trial itself.
5. The judge was compelled by the provisions of sections 15 and 39 of the Firearms Law (2008 Revision) to sentence the appellants to a minimum of seven years without licence. He concluded that the sentence for robbery would be one of six to seven years before taking into account the plea of guilty, and he considered that the late plea in the circumstances to which we have referred on the day of trial itself merited a discount of only ten percent. Such a finding was well within the appropriate United Kingdom Guidelines on the timing of a plea of guilty.
6. The appeal of Mr. Liberal, which has been succinctly advanced by Mr. Crister Brady on his behalf, is that there were exceptional circumstances in his case, in that, following his plea of guilty and before sentence he had disclosed to the police the whereabouts of a hidden firearm — that is, a second firearm — which the police were able to recover from where it had been hidden according to the directions provided by Mr. Liberal, and Mr. Liberal relied upon that before the judge as exceptional circumstances such as might liberate the judge to impose a sentence below the otherwise statutory minimum of seven years without licence. However, the judge found that exceptional circumstances did not exist in the present case.
7. The relevant statutory provision is in section 39(2) of the Firearms Law which states that the minimum sentence of seven years, even on a plea of guilty, applies "unless the relevant court" — that is a reference to the provisions earlier in the subsection referring to "the court of summary jurisdiction or the Grand Court before which the individual pleads guilty or is convicted" I revert to the critical words, "unless the relevant court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so; and such exceptional circumstances shall be stated by the relevant court." "its not doing so" is a reference to the imposition of a term of at least seven years' imprisonment.
8. We emphasise the words "unless the relevant court is of the opinion that there are exceptional circumstances," because those words make clear that the essential decision is that of the sentencing judge whose opinion on the question is to be decisive, unless of course, as jurisprudence has gone on to remark, the judge can be said to be clearly wrong. That comes from the judgment of the Court of Appeal of the Cayman Islands

itself in the case of *Chavarria-Atily v R* [2009 CILR 118] where Acting President Justice of Appeal Forte at paragraph 12 said this:

"No challenge has been made to the learned judge's finding in this regard and so we make no comment. We would say, however, that the section makes it clear that it is the opinion of the court that is critical as to what constitutes exceptional circumstances. Consequently, unless the judge is clearly wrong in identifying exceptional circumstances when they do not exist, or clearly wrong in not identifying exceptional circumstances when they do exist, this court will not readily interfere".

He referred then to the judgment of Lord Woolf, CJ in *R v Rehman* 1 Cr.App.R.(S) 77.

9. As to the question of exceptional circumstances, Mr. Justice Quin said this at paragraph 55 and following, of his sentence ruling:

"55. Mr. Liberal's assistance to the police has now occurred far too late — a mere afterthought long after he had fully instructed his counsel through his Goodyear hearing on the 24th February 2014 and the full mitigation submissions made on his behalf at the Sentence hearing on the 10th April 2014.

56. Accordingly, it is my view that, whilst Mr. Liberal's handing in of a weapon was a creditable act on his part, this assistance is far too late and it does not alter his position in relation to this Indictment. I therefore reject the submission that the handing in of an unrelated firearm, sometime after Mr. Liberal had already fully instructed his counsel through a sentence hearing on his behalf, is an exceptional circumstance and deserving of a discounted term of imprisonment.

57. The Court can take judicial notice of the fact that there has been no amnesty in relation to firearms in the late 2013 or in 2014 and, therefore, whilst the Court commends Mr. Liberal for handing in an unlicensed firearm, the fact that he has not been charged with another offence of possession of an unlicensed firearm means that the authorities have already given him the credit he seeks.

Consequently, and despite the fact that there is no current amnesty, in handing in the illegal firearm Mr. Liberal has avoided facing a new and second charge for possession of an unlicensed firearm contrary to sections 15(1) and (5) of the Firearms Law (2008 Revision).

58. Accordingly it is my view that this late handing in of the unlicensed firearm does not, in my opinion, constitute 'exceptional circumstances' relating either to Count 2 on Indictment 85/2013 or to Mr. Liberal which would justify this Court giving Mr. Liberal less than the minimum prescribed of seven (7) years' imprisonment".

10. It will be observed from that citation that Mr. Justice Quin's finding was that this was "the handing" in of the appellant's own weapon, not, as it was submitted on his behalf, the disclosure of some other person's weapon, and also that it was in the opinion of that court, the sentencing court, that exceptional circumstances did not exist.

11. We agree that this case is very far indeed from being one of exceptional circumstances. The leading case on exceptional circumstances in this court, apart from the case to which we have already referred of *Chavarría-Atily v R*, is that of Justice of Appeal Sir John Chadwick, President in *Todd Bowen v R* [2009 CILR 246]. There is no need for us to repeat the explanation of the relevant provisions of the Cayman Islands and the United Kingdom's equivalent statute and the jurisprudence which flows from them. We would merely observe that cases such as *Powell v R*, CACR 009/2013 in the Cayman Islands, and, for instance, *Rehman* [2006] Cr.App.R.(S) 77 demonstrate how very different are the circumstances of cases in which exceptional circumstances have been found.
12. In *Powell*, a seven-year sentence was upheld even against a man of previous good character who had stumbled upon but kept a firearm, and that is another judgment of Sir John Chadwick, President in which the jurisprudence is well reviewed; whereas, *Rehman* was a case where not only was there previous good character, but the weapon was a replica which had not been converted for use. No blank ammunition had been found or acquired; the weapon had not been fired prior to its being tested following its seizure; it was found in its original wrapping; the appellant had done nothing to disguise his identity as a purchaser; and the appellant had purchased the weapon as a collector's model. It was, in fact, a replica weapon.
13. We would also refer to the Scottish case of *McGovern* [2007] HCJAC 21, where, rather exceptionally, although the sentencing judge had found exceptional circumstances, the appeal court had found that the sentence was unduly lenient and that exceptional circumstances had been wrongly found in a case where a second firearm — as in this case — had been disclosed to the police, which led to the recovery of that firearm before a plea of guilty had been entered.
14. We, therefore, reject the submissions on behalf of appellant Liberal that exceptional circumstances were here to be found and we dismiss his appeal.
15. We turn to the appeal of Mr. Carter. Mr. Carter did not have counsel to represent him, but he has addressed us and handed to us an eloquent letter, which we have read and carefully considered, expressing his sorrow and apology for his crime, attributing it to the influence of his addiction to crack cocaine at the time and asking the court to exercise its mercy upon him, if it possibly can.
16. Now, Mr. Carter's ground of appeal is that the discount of ten percent, which the judge awarded him for his very late plea of guilty on the day of trial, in circumstances which we have set out, was too little and that he should have had a greater discount.
17. We fully understand the written plea that Mr. Carter has addressed to us, but we feel that it is impossible to say that the judge was in any way in error in limiting his discount for the plea of guilty to ten percent. This was a plea made exceptionally late in circumstances where a *Goodyear* direction had already been given at the request of both appellants.
18. In any event, there is no possibility of a discount in respect of the seven-year minimum for the firearm offence, it could only be given in respect of the robbery offence, and it is

clear to us that, quite apart from the six- to seven-year starting point of the judge being completely justified by the circumstances which he sets out in his judgment, and which Mr. Carter does not deny in any event, a discount of ten percent for the lateness of the plea in this case as a limited discount is fully justified.

19. We would, therefore, while commending Mr. Carter for what he says by way of remorse in his letter to us, dismiss his appeal as well.
20. For these reasons, both appeals are dismissed.

Rix JA

Field JA

Moses JA