

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

**Criminal Appeal No. 24 of 2007
(Indictment No. 7/07)(Summary Case No: 8038/06)**

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

TODD OMAR BOWEN

Appellant

**Before: The Right Hon. Sir John Chadwick, President
The Hon. Mr. Justice Forte, Justice of Appeal
The Hon. Dr. Justice Conteh, Justice of Appeal**



Appearances: Clyde Allen for the appellant and Tricia Hutchinson, Crown counsel for the respondent.

Heard: 25th & 30th March, 2009.
Reasons released: 8th April, 2009.

Judgment delivered: 30th March, 2009

Chadwick, P.

Reasons for Judgment

1. On 5 October 2007 Todd Omar Bowen was convicted before Justice Henderson and a jury on a charge of possession of an unlicensed firearm contrary to section 15(1) of the Firearms Law (2006 Revision).
2. Section 15 of the Firearms Law, as it stood on 5 October 2007 following amendment by the Firearms (Amendment) Law, 2005, contained provisions in these terms:

“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 Firearms Users (Restricted) Licence.

(5) Whoever contravenes a provision of this section commits an offence and is liable on conviction:

- (a) where the offence is in respect of a firearm referred to in subsection (6), to a fine of one hundred thousand

dollars and to imprisonment for twenty years, subject to a minimum term of ten years;

(6) For the purposes of subsection (5)(a) a firearm referred to in this section is a machine gun, submachine gun, rifle, shot gun, pistol, or any lethal barrelled weapon from which any shot, bullet or other missile can be discharged."

3. In sentencing the defendant to the minimum term of ten years, the judge said this:

"I will say for the record that had I had a discretion with respect to the penalty, I would have imposed a sentence of less than ten years. I say that because the gun is a .25 calibre pistol in what I judge to be poor condition. It does not strike me as the kind of gun that is resorted to in serious crimes such as armed robberies. I know it could be used in that way, but it is not the sort of gun one ordinarily associates with armed robberies or shootings. It was also unloaded and the sere pin had to be manipulated manually before it could be fired. I consider those to be mitigating factors, together with the age of the defendant. The combination of those reasons would have led me to impose a sentence of less than ten years had I had the discretion.

I should also note for the record that the defendant has a previous conviction for burglary and one for handling stolen goods and three marijuana related convictions. . . ."

Notwithstanding that he took the view that he was required to impose a sentence of not less than ten years, the judge went on to order a social enquiry report because, as he said, "if the law is to be amended to remove the mandatory minimum, then your client will clearly wish to ask the Court of Appeal to resentence him and they will probably want a social enquiry report".

4. Some five weeks before those remarks were made, the Firearms (Amendment) Bill, 2007 had been published. The Bill contained a proposal – at clause 6 – for the amendment of the Firearms Law (2006 Revision) by the introduction of words qualifying the mandatory minimum sentence requirement in section 15(5): that requirement was made subject to the

proviso "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". Although the judge did not refer to the Bill in terms, his observations, when ordering a social enquiry report, suggest that he was aware, at least in general terms, of the proposal to amend the mandatory minimum sentence requirement by which he was then bound.

5. The Bill was passed by the Legislative Assembly on 23 January 2008 as the Firearms (Amendment) Law, 2008 (Law 3 of 2008). It received the Governor's Assent on 7 February 2008; and was published with the Gazette on 18 February 2008. Its provisions have subsequently been incorporated, on consolidation, in the Firearms Law (2008 Revision). They include the following:

"15(5) Whoever contravenes this section commits an offence and, subject to section 39, is liable on conviction to a fine of one hundred thousand dollars and to imprisonment for twenty years.

39(1) This section applies where –

- (a) an individual is convicted following a trial or a plea of guilty, by a court of summary jurisdiction or the Grand Court, of an offence under section 3(3), 15(5) or 18(6);
- (b) the offence was committed on or after 15th November, 2005; and
- (c) the offence is in respect of a machine gun, submachine gun, rifle, shot gun, pistol, or any lethal barrelled weapon from which any shot, bullet or other missile can be discharged.

(2) Notwithstanding sections 6(2) and 8 of the Criminal Procedure Code (2006 Revision), the court of summary jurisdiction or the Grand Court before which the individual pleads guilty or is convicted, shall –

- (a) in a case where the individual pleads guilty, impose a sentence of imprisonment for a term of at least seven years (with or without a fine); or
- (b) in any other case, impose a sentence of imprisonment for a term of at least ten years (with or without a fine), 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.

45(1)

Where —

- (a) prior to the 18th February, 2008, an accused person is convicted following a trial or a plea of guilty to an offence (irrespective of when the offence was committed; and
- (b) at the 18th February, 2008, no judgment or sentence has been passed on him in respect of the offence,

the accused person shall, for the purpose of the judgment or sentence, be dealt with in all respects under the Law as contained in this Revision and the provisions of the law as contained in this Revision are to apply accordingly.

(2) Where, at the 18th February, 2008, any trial or proceedings in respect of an offence are pending before a court, the trial or proceedings shall, after that date, be dealt with in all respects under the Law as contained in this Revision (irrespective of when the offence was committed) and the provisions of the Law as contained in this Revision are to apply accordingly.

(3) Where, on or after the 18th February, 2008, an accused person is convicted following a trial or a plea of guilty to an offence (irrespective of when the offence was committed), the accused person shall for the purpose of judgment or sentence in respect of the offence, be dealt with in all respects under the Law as contained in this Revision and the provisions of the Law as contained in this Revision are to apply accordingly.”

It can be seen that sections 15(5) and (6) of the 2006 Revision have been replaced by sections 15(5) and 39(1) and (2) of the 2008 Revision; that words qualifying the mandatory minimum sentence requirement have been included in section 39(2); and that section 45 includes transitional provisions.

6. Notice of appeal against both conviction and sentence was filed on 19 October 2007. But, when the appeal came before us for hearing on 25 March 2009, it was made clear by counsel for the appellant that he had been instructed to pursue only the appeal against sentence. In counsel's written submissions reliance was placed on section 39(1)(b) of the 2008

Revision which, it was said, was "essentially a retrospective provision to 15 November 2005", and so covered the period (14/15 November 2006) during which the offence was committed. The Court was asked "to apply the proviso" – meaning the qualifying words in section 39(2) of the 2008 Revision - and either (i) to remit the matter to the Grand Court for sentencing in accordance with the new law, or (ii) to exercise its own discretion to find that there were exceptional circumstances in this case, either in respect of the offence or the offender, which would justify setting aside the sentence of ten years imposed by the judge and, itself, sentencing the appellant to a lesser term.

7. On 30 March 2009, we indicated that we would dismiss the appeal. We said that we would put our reasons in writing. I now do so.
8. The first question, as it seems to me, is whether – on an appeal against sentence passed before 18 February 2008 – this Court is required, or is enabled, to deal with the matter on the basis that the applicable law is that contained in the 2008 Revision: in particular, whether this Court is required to approach the appeal on the basis that the mandatory minimum sentence requirement is that in section 39(2) of the 2008 Revision rather than (as formerly) that in section 15(5) of the 2006 Revision. At first sight, section 45(2) of the 2008 Revision requires an affirmative answer to that question.
9. Counsel for the Crown – supporting that view – pointed out that the three subsections of section 45 of the 2008 Revision must be construed together; and that, construing the section as a whole, it can be seen that each sub-section is directed to a different factual situation. Section 45(1) is, plainly, directed to the case where a defendant is convicted before 18 February 2008 but has not been sentenced by that date. In such a case the trial judge is required to sentence in accordance with the provisions of

section 39(2) of the 2008 Revision. Section 45(3) is directed to the case where the defendant is convicted on or after 18 February 2008: again, the trial judge is required to sentence in accordance with the provisions of section 39(2). Neither section 45(1) nor section 45(3) is directed to a case (which is the present case) where a defendant has been both convicted and sentenced before 18 February 2008. But, it is said, section 45(2) is apt to cover such a case, provided always that, at 18 February 2008, "any proceedings in respect of [the] offence are pending before a court". It is said that, when read in context, the expression "any proceedings . . . pending before a court" is wide enough to include proceedings pending before this Court on appeal; that proceedings under the notice of appeal were pending before this Court on 18 February 2008; that it follows that this Court is required, by section 45(2) of the 2008 Revision, to deal "in all respects" with the appeal under the Law as contained in the 2008 Revision, including the qualified mandatory minimum sentence requirement now contained in section 39(2); and that this Court must give effect to the statutory instruction that the provisions of the Law as contained in the 2008 Revision "are to apply accordingly" to the proceedings by way of appeal which are before it.

10. Those are powerful arguments; but I am not persuaded that they are correct. It is necessary to keep in mind that the powers of the Court of Appeal are conferred – and circumscribed – by the Court of Appeal Law (2006 Revision). Section 7 of that Law gives the Court jurisdiction to hear and determine appeals from the Grand Court by a convicted person – "(c) with the leave of the Court, against sentence passed on his conviction unless the sentence is one fixed by law". Section 9(3) of that Law is in these terms:

"9(3) On an appeal against sentence the Court shall, if it considers that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence

warranted in law by the verdict (whether more or less severe) in substitution therefore as the Court considers ought to have been passed, and in any other case shall dismiss the appeal”.

The problem which the appellant faces in the present case, as it seems to me, is that the Court’s power to quash the sentence passed by the trial judge on 5 October 2007 is exercisable only if the Court is able to say that “a different sentence ought to have been passed”.

11. The effect of the Firearms (Amendment) Law, 2008, was to amend the then existing law (contained in the 2006 Revision) from “the date of commencement of this Law”. That date may be taken either as the date (7 February 2008) on which the 2008 Law received assent; or, perhaps, from the date on which it was published with the Gazette (18 February 2008). On either view, the date of commencement of the 2008 Law was some four months after the defendant was convicted and sentenced. The 2008 Law had some retrospective effect – in the sense that it applied the provisions in the new section 38A of the 2006 Revision (introduced by section 6 of the 2008 Law and subsequently re-numbered on consolidation as section 39 of the 2008 Revision) to offences committed on or after 15 November 2005 (that is to say, to offences committed before the date of commencement) – but it did not purport to alter the existing law (under the 2006 Revision) as it was on any date prior to the date of commencement. In particular, there is nothing in the 2008 Law which enables it to be said that the law on 5 October 2007 was not the law then contained in section 15(5) of the 2006 Revision. Nor do the transitional provisions introduced by section 8 of the 2008 Law (which, on consolidation, became section 45 of the 2008 Revision) have that effect. Those provisions require certain matters to be dealt with “in all respects under the new Law”; but they do not enable matters already dealt with under the existing law (in the 2006 Revision) to be re-opened or revisited.

12. On 5 October 2007 the trial judge was required by the existing law as it then was to pass a sentence of not less than ten years. Nothing that has happened since that date affects the law as it was on that date. I find it impossible to hold that a lesser sentence ought to have been passed by the judge on 5 October 2007: he was plainly correct in taking the view that it was not open to him to pass a lesser sentence. In those circumstances I am satisfied that section 9(3) of the Court of Appeal Law requires the Court to dismiss the appeal against sentence. The appellant obtains no assistance from the Firearms (Amendment) Law, 2008 or the 2008 Revision.

13. I should add that, on the facts in the present case, I would have taken the view that – even if the transitional provisions now found in section 45 of the 2008 Revision (in particular, those in section 45(2)) did require the Court to approach the appeal on sentence on the basis that the mandatory minimum sentence requirement is that in section 39(2) of the 2008 Revision rather than (as formerly) that in section 15(5) of the 2006 Revision – that approach would be of no benefit to the appellant. The effect of the qualifying words in section 39(2) of the 2006 Revision is not to give a court an unfettered discretion to impose a sentence of less than ten years whenever it thinks fit. It may only impose a lesser sentence than the mandatory minimum when it is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify that course. There were no circumstances in the present case – in relation either to the offence or to the offender – which could justify a departure from the mandatory minimum prescribed by the legislature.

14. Given that there is now no appeal against the conviction, I can take the circumstances to be as alleged by the Crown. Those allegations are conveniently stated in the legal submissions prepared by counsel for the appellant:

- (1) On the night of 13 and 14 November 2006 there was a Pirates' Week function in Bodden Town at which, at about 1.00 am, the defendant and his brother, Kevin Bowen, were observed by a police officer, PC Bovell.
- (2) PC Bovell, seeing that the Bowen brothers were talking to two juveniles, decided to conduct a drug search. He sent the juveniles away and began to search Kevin Bowen. The defendant then began to walk away. PC Bovell stopped his search of Kevin, and followed the defendant. The defendant took a silver handgun from his back pocket and threw it over a wall. There was a metallic sound as it hit an unseen object on the other side. PC Bovell restrained the defendant and enlisted the help of another constable, who found a pistol near to a skip which was on the other side of the wall.
- (3) The defendant said, at the time, and repeated at his subsequent interview, that he had never had a gun; and that he had thrown nothing over the wall.

The Crown called as witnesses the four officers who were at or attended the scene in the early hours of 14 November 2006. The defendant gave evidence in his own defence, denying that he had had a gun. Notwithstanding the absence of any DNA or finger print evidence found on the gun, the jury convicted by a majority. They must be taken to have accepted the police evidence.

15. The judge, for understandable reasons, took the view that this was not within the class of the most serious cases: but it must be kept in mind that the most serious cases may attract a sentence of imprisonment of up to twenty years. In saying what he did, the judge was not addressing his remarks to the "exceptional circumstances" test: that was not a test relevant to his task at the time.

16. The "exceptional circumstances" test was introduced into the equivalent provisions of the firearms legislation in the United Kingdom as section 51A of the Firearms Act 1968. The test was considered by Court of Appeal of England and Wales in *Regina v Zahid Rehman, Regina v Gary Dominic Wood* [2005] EWCA Crim 2056. We were taken the observations of Lord Woolf of Barnes, Chief Justice, in that case. He referred to the context in which the qualifying words had been introduced; and went on to say this:

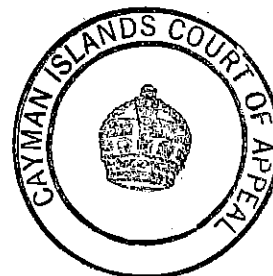
"It is clear in our judgment that, read in the context to which we have referred, the circumstances are exceptional for the purposes of section 51A(2) if it would mean that to impose five years' imprisonment would result in an arbitrary and disproportionate sentence".

Applying that test the Court found the test to be satisfied in the *Rehman* appeal; but not satisfied in the *Wood* appeal. It is instructive to note the factors which led the Court to those conclusions. They are set out, respectively at paragraphs [23] and [30] and at paragraphs [25] and [32] of the judgment. I need not rehearse them here. It is sufficient to say that both Mr Rehman and Mr Wood were defendants of extremely good character who co-operated with the police and pleaded guilty at the earliest opportunity. The Crown accepted that Mr Rehman had every reason to believe that the gun was not one which it was illegal to possess.

17. Having regard to the observations in *Rehman* - and, taking full account of the judge's remarks in the present case - it would have been impossible to hold that the circumstances in the present case came near to the threshold posed by the "exceptional circumstances" test.

18. It was for those reasons that I took the view that this appeal must be dismissed.

Chadwick, P.



I have read the draft judgment of Chadwick, P. I agree with his conclusion and the reasons therefor.

Forte, J.A.

I have read the draft judgment of Chadwick, P. I agree with his conclusion and the reasons therefor.

Conteh, J.A.

