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IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 18 of 2008
(Indictment No. 2/08)
C#7692/2007

Between:

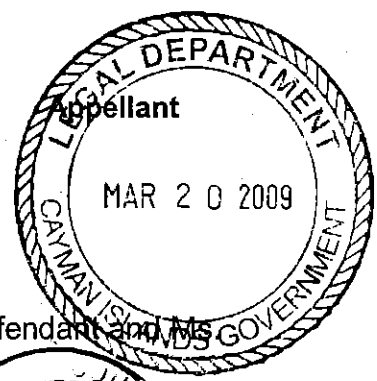
HER MAJESTY THE QUEEN

Respondent

- and -

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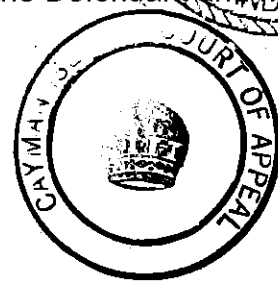
ANGEL EDUARDO CHAVARRIA-ATILY



BEFORE: THE HON. MR. JUSTICE FORTE, P. (Ag.)
THE HON. MR. JUSTICE MOTTLEY, J.A.
THE HON. MR. JUSTICE VOS, J.A.

Appearances: Mr. E. Renvoize of Samson & McGrath for the Defendant and Ms N. Moore for the Crown.

Heard and Judgment delivered: 2nd December, 2008
Reasons released: 18th March, 2008



FORTE, P. (Ag.)

Reasons for Judgment

On the 2nd of May 2008 the appellant pleaded guilty to an indictment containing two counts involving an unlicensed firearm i.e. importation of an unlicensed firearm and of illegal possession of the same firearm. He was sentenced to a "global" period of imprisonment of 2 years – the learned judge not specifying a sentence for each count. Having heard arguments of counsel, we allowed the appeal against sentence, set aside the sentence of two years, and substituted therefore a sentence of 12 months on each count, to run concurrently. We ordered that time spent in custody should be taken into account. We promised then, to put our reasons in writing. Those reasons now follow.

The offences for which the appellant pleaded guilty are offences under the Firearms Law (2006 Revision) as amended by the Firearm Amendment Law (2008 Revision) [The Law] which mandates a minimum period of imprisonment except where there are exceptional circumstances justifying a departure from imposing the minimum sentence.

The law which is relevant to the issue in this appeal states:

"Section 6. The principal Law is amended by inserting after section 38 the following section –

38A (1) This section applies where –

- (a) an individual is convicted following a trial or plea of guilty by a court of summary jurisdiction or the Grand Court, of an offence under 3(3), 15(5) or 18(6);
- (b) the offence was committed on or after 15 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 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; such exceptional circumstances shall be stated by the relevant court. (Emphasis added)

Obviously applying the unless clause [underlined above] the learned judge, finding that there were exceptional circumstances in this case, departed from the substantive provision of section 2(2) of the law, and imposed a (global) sentence of two years imprisonment. In doing so and in keeping with the provisions of the Law, the learned trial judge stated:

"I am persuaded by the case of *R v. Raymond Harrison*. I am aware that you are a young man of good character and that you took steps to register the firearm and you were shooting only at a vermin, that you cooperated with the police; you bought it openly in Walmart and came through US security, and the fact that it is an air weapon and it is highly unlikely that you would commit this crime again, and that conviction will mean that your intended career will be ruined. I find that these are exceptional circumstances. I feel, however, that I have to give you a custodial sentence. ... Time spent in custody to be taken into account. ... And forfeiture of the gun."

FACTS

The facts as were generally agreed and which formed the background of the appellant's mitigation are summarized as follows:

The appellant, while in Miami in the United States of America, purchased the firearm, the subject of the offence, from Walmart. No licence was required in the United States to purchase such a weapon which is described as a 61 Extreme breach barrel rifle more commonly called an Air-Rifle. The indictment alleged that the appellant imported the weapon into the island between the 9th and 11th March 2007 and the possession of the weapon was charged between the 11th and 31st March 2007.

Having returned from Miami, the appellant, so it is alleged, although no evidence is revealed concerning this, became aware that such a rifle had to be licenced, and took preliminary steps to obtain a licence.

It appears that, well knowing that a licence was required in respect of the firearm, the appellant nevertheless took the rifle outside of his own premises to "shoot in a secluded and safe place". He went along with others to a "waste ground" owned by a Mr. McLean and began firing, only to be observed by Mr. McLean, who reported the incident to the police. He had noted the licence number of the car in which the appellant departed the scene. The police subsequently traced the car which led them to the appellant's home. The rifle was then recovered from the appellant who was cooperative, showing them the rifle and explaining how he came to have it.

The rifle was examined by the expert Mr. Greenspan who concluded that it was a .177 calibre air weapon, capable of causing death or serious injury and fell within the definition of a lethally barrelled firearm.

In spite of the Learned Judge's finding that the explained circumstances existed, and consequently giving the appellant the benefit of escaping the mandatory sentencing provisions of the Law, the appellant now appeals the sentence of 2 years on the basis that the sentence is manifestly excessive.

He has, however, stayed clear of challenging the learned judge's finding that there were exceptional circumstances, nor has the Crown attempted to do so.

The issue that remains, therefore, is whether given the explained circumstances as found by the learned judge, a sentence of 2 years is manifestly excessive.

The appellant relies on the case of **R v. Avis** (1998) 2 Cr. App. R. (5) 178 in which Lord Bingham sets out the following sentencing guidelines for firearm offences -

"The appropriate level of sentence for a firearm offence would depend on all the facts and circumstances of the offence and the offender, and it would be wrong to seek to prescribe unduly restrictive

sentencing guidelines. It would usually be appropriate for a sentencing court to ask itself a series of questions. –

- (1) What sort of weapon was involved?
- (2) What use had been made of the firearm?
- (3) What intention (if any) did the defendant possess or use the firearm?
- (4) What was the defendant's record?"

He however went on to state:

"Any rigid formulaic approach to levels of sentence would be productive of injustice in some cases. Given the clear public need to discourage the unlawful possession and use of firearm, both real and imitation, and the intention of Parliament expressed in a continuing increase in maximum sentences, the courts should treat any offence against the principal provisions of the Firearm Act as serious ... Save for minor infringements which might and should be dealt with summarily, offences against these provisions would almost always merit terms of custody, even on a plea of guilty and in the case of an offender with no previous record."

In the Cayman Islands, it is the massive increase in offences under the Firearms Law that led Parliament to enact minimum sentences in respect of those offences, 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 persons who will have that criminal intent.

In the instant case, it is true to say that there is no challenge to the appellant's assertion that he had no initial knowledge of the requirement of a licence in order to possess such a firearm legally. However, he admitted that that knowledge came to him subsequently. Nevertheless, he did nothing to contact the police in this regard and to the contrary actually took the firearm into the public domain and used it, albeit not for any criminal purpose. The circumstances surrounding this case, including the appellant's antecedents, and plans for his future studies, convinced the learned judge to exempt him from the provisions which called for a minimum sentence of seven (7) years.

No challenge has been made of 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 constitute 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 (See judgment of Lord Woolf, C.J. in *R v. Zakir Rehman et al* (2005 EWCA Crim. 2056; [2006] 1 Crim. App. R. (g) 77). In this case we see no reason to interfere with the learned judge's finding in that regard.

We do however find, given the circumstances of the offence, (not the least of which is the nature of the firearm), the appellant's antecedents, and his plea of guilty, that the sentence of two (2) years imposed by the learned judge is manifestly excessive.

The appeal against sentence is consequently allowed. We disagree with a "global" period of imprisonment as imposed by the learned judge in respect of both offences. Judges should in all cases, sentence an offender separately for each offence for which he has pleaded guilty or been found guilty. The sentence of 2 years is set aside, and a sentence of twelve (12) months on each count is substituted therefor. It is also ordered that the sentences should run concurrently. Time spent in custody to be taken into account.

FORTE, P. (Acting)

MOTTLEY, J.A.

VOS, J.A.

