

Libby 10/4/2008

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**  
**CRIMINAL APPEAL NO. 19 OF 2007**  
(Ind 42/04 C#2732/04)

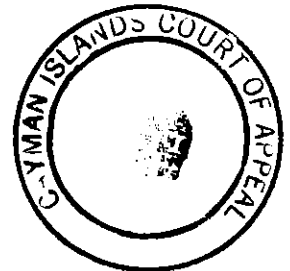
**BETWEEN      MARICELLE MANAHAN      APPELLANT**  
**AND            HER MAJESTY THE QUEEN      RESPONDENT**

**BEFORE: THE RT. HON. MR. JUSTICE ZACCA PRESIDENT**  
**THE HON. MR. JUSTICE FORTE J.A.**  
**THE HON. MR. JUSTICE MOTTLEY J.A.**

**Appearances: Mr. N. Dixey of Mourant for the Appellant**  
**Ms. C. Richards Solicitor General for the**  
**Respondent**

**HEARD: 3<sup>rd</sup> & 10<sup>th</sup> April, 2008.            JUDGMENT: 10<sup>th</sup> April, 2008.**

**Reasons delivered: 14<sup>th</sup> August, 2008.**



**PRESIDENT**

1. The appellant was convicted on August 9, 2007 after a trial in the Grand Court of two offences:

Count 1 - Possession of an unlicensed firearm (Marlin .22 rifle)

Count 2 - Possession of unlicensed firearm (ammunition – 3 (.22) rounds and a magazine containing three rounds.)

2. These offences were alleged to have been committed on June 2, 2004. He was sentenced to ten (10) years imprisonment on Count

1 and five (5) years imprisonment on Count 2, the sentence on Count 2 to be concurrent to Count 1. Time spent in custody was to be taken into account. There is now an appeal against sentence.

3. The facts briefly, were that on June 2, 2004, the police executed a search warrant at the home of the appellant. They found the rifle behind a space saver with toys and a cardboard box with Christmas trees. The appellant admitted to the police that the firearm had been placed there by him about three (3) weeks previously. He further told the police that he had found the firearm and as to where in the house the magazine and the ammunition could be found. In a recorded interview with the police on June 3, 2004, he stated that he had found the firearm buried in the sand on a beach in Barkers wrapped in a plastic bag.

4. After finding it, he left it there and returned at about 2 – 3 a.m. and took it home and placed it where it was found. He had separated the magazine and rounds for safety purposes. When asked what he intended to do with the firearm and ammunition, he stated that he had kept it for protection.

5. Section 15 of the Firearms Law (1998 Revision) provides:
- (1) subject to sub-section 2, no person shall be in possession of any firearm except under and in accordance with the terms of a Firearms Users (Restricted) licence.
  - (3) Whoever contravenes this section is guilty of an offence and liable on conviction to a fine of one hundred thousand dollars and to imprisonment for twenty years.

This was therefore the applicable law at the time the appellant committed the offence on June 2, 2004. However, when the appellant was convicted and sentenced on August 9, 2007, the Firearms (Amendment) Law 2005 had been passed, which at section 9 amended section 15 of the principal Law by repeating ss. (3) as it related to sentence and introduced ss (5) and (6) which provided:

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 subsection is a machine gun, sub machine gun, rifle, shot gun, pistol, or any lethal barrelled weapon from which any shot, bullet or other missile can be discharged.

However the savings and transitional provisions of the Firearms (Amendment) Law, 2005 provided at section 21:

(1) .....

- (2) Where on or after the date of commencement of this Law [15<sup>th</sup> November 2005] an accused person is convicted of or pleads 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 new law and the provisions of the new law are to apply accordingly.

6. The effect of the 2005 amendment and retrospective provision, albeit that no mandatory sentence existed at the time the appellant

committed the offence, the mandatory minimum sentence of ten years applied and the learned trial judge was obliged to have regard to the minimum mandatory sentence. See **Allan Garfield Ebanks v The Queen** C.I. C.A. 29/06, December 3, 2007.

7. Subsequent to the decision of this Court in **Ebanks v The Queen**, and the filing of this appeal, there was a further amendment to the Firearms Law, the Firearms (Amendment) Law 2008. The relevant amendments are provided for in sections 6, 7 and 8:

6. The principal law is amended by inserting after s.38 the following section –

38A. (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 15 November, 2005; and
- (c) the offence is in respect of a machine gun, sub-machine 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 the 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.

7. The principal Law is amended by repealing section 44.  
(savings and transitional provisions)

8(1) Where –

- (a) prior to the date of commencement of this Law, an accused person is convicted following a trial or a plea of guilty to an offence (irrespective of when the offences was committed); and
  - (b) at the date of commencement of this Law, no judgment or sentence has been passed upon 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 new Law and the provisions of the new Law are to apply accordingly.
- (2) Where at the date of commencement of this Law, any trial or any 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 new Law, (irrespective of when the offence was committed) and the provisions of the new Law are to apply

accordingly.

(3) Where, on or after the date of commencement of this Law, 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 new Law and the provisions of the new Law are to apply accordingly.

(4) In this section –

“new Law” means the principal Law as amended by this Law.

8. Mr. Dixey for the appellant submitted that this new amendment seeks to remedy the retrospective effect of the mandatory sentencing regime as it previously applied to those offenders who committed their offences prior to its' introduction.

In order to understand the purpose of this new amendment, one may turn to the official Hansard Report of Wednesday, January 23<sup>rd</sup>

2008 when the bill was being debated. The Honourable Attorney

General stated:

“The objective is to remove any retrospectivity in the 2005 amendment. So it would only apply prospective. The original amendment in 2005 had a retrospective provision in it. Well, not “a” but “some” retrospective provisions in it. This amendment is removing those retrospective provisions. So the Law applied prospective November 2005 and onward, that is for offences committed on or after.”

9. Section 38(1) (b) refers to an offence committed after 15<sup>th</sup> November 2005. Section 8 (2) refers to any trial or proceedings in respect of “an offence” pending before a Court.

In our opinion when the legislature used the words “an offence” in s. 8(2), it must relate back to s. 6(b) and therefore the new amendment applies only to offences committed after 25<sup>th</sup> November 2005.

10. The appellant’s offence was committed on June 2, 2004. The new mandatory amendments do not therefore apply and the appellant is to be sentenced under the old Law where the maximum sentence is one of imprisonment for twenty years.

11. The Court was therefore asked to consider what would be an appropriate sentence for the offence committed by the appellant and for which he was convicted after a trial.

12. Guidelines as to sentencing were published by the Honourable Chief Justice on 16<sup>th</sup> January, 2002 with respect to offences under the Firearms Law. The Chief Justice stated:

“The Legislation is quite clear that the possession or use of any unlicensed lethal barrel firearm is an extremely serious offence. Under the Firearms Law, the maximum penalty for possession of an unlicensed firearm is 20 years and a fine of C.I. \$100,000. The tariff for that offence unless there are very mitigating circumstances will be 10 years. If, on the other hand, aggravating circumstances exist, for instance, the use of the firearm for the commission of a serious offence, the tariff will be in keeping with the decided cases and will be significantly higher.”

In sentencing the appellant in the Grand Court, the learned trial judge was wrong to speculate as to the possible use of the gun and the reason for the appellant's possession of the gun. The firearm was in the appellant's possession for some three weeks. Ammunition was found in a drawer which could be used in the firearm.

13. In arriving at a sentence of ten years imprisonment the Court considered the submissions of Mr. Dixey and Ms. Richards and also

the relevant previous sentences relating to possession of an unlicensed firearm.

14. The appellant pleaded not guilty and therefore is not entitled to any discount for a guilty plea. This was clearly a case where a guilty verdict was inevitable.

15. The appeal against sentence was allowed for the above reasons. However, the sentence of ten years, although for different reasons was maintained.

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Zacca, P.

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Forte, J.A.

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Mottley, J.A.

