

3-12-07

CICA No. 29 of 2006

(Ind. 68/05)

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

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BETWEEN:

ALLAN GARFIELD EBANKS

Appellant

AND

HER MAJESTY THE QUEEN

Respondent

Before: The Right Hon. Edward Zacca, President
The Hon. I. Forte, Justice of Appeal
The Hon. E. Mottley, Justice of Appeal

Heard on 18, 19 July, 2007: December 2007. Judgment and reasons delivered: 3rd December, 2007

Appearances: James Austin Smith of Walkers for the Appellant.
Cheryll Richards, Solicitor General for Respondent.



JUDGMENT AND REASONS

MOTTLEY, J.A.

1. On 17 July 2006, the appellant pleaded guilty to the offence of unlawful possession of an unlicensed firearm contrary to section 15(1) and (3) of the *Firearms (Amendment) Law 2005*. The particulars of the offence stated that, on 18 April 2003, the appellant unlawfully had in his possession a handgun. The facts, as disclosed, showed that on the night of the 17 April 2003, while on his way home, the appellant found a firearm which he took to his home. On the

following day, while showing the gun to his brother, it was accidentally discharged causing injury to the brother's leg. The appellant immediately called an ambulance and notified the police of what had taken place. He explained to the police what had taken place and expressed his regret. He stated that it was his intention to take the gun and hand it over to the police. At an early stage of the investigation, he indicated that it was his intention to plead guilty. However, by reason of a series of delays, he was unable to enter a plea to the indictment until July 2006. On 17 November 2006, he was sentenced by the judge to a term of ten years' imprisonment.

2. The appellant has appealed against that sentence. The grounds of appeal are:
 - i) the sentence is unconstitutional, unlawful and *ultra vires* as it is arbitrary and disproportionate.
 - ii) the sentence is unconstitutional, unlawful and *ultra vires* as it is a retroactive penalty.
 - iii) The Firearms (Amendment) Law is unconstitutional, unlawful and *ultra vires* as it is not in accordance with the *Human Rights Act* 1998.
 - iv) The Firearms (Amendment) Law is unconstitutional, unlawful and *ultra vires* as it is not in accordance with international treaty obligations.
 - v) The Firearms (Amendment) Law is unconstitutional, unlawful and *ultra vires* as it violates the principle of the separation of powers.
 - vi) The Firearms (Amendment) Law is unconstitutional unlawful and *ultra vires* as it was not passed for "the peace order and good government of the Island".

BACKGROUND

3. In 2003 when the offence was committed section 15(3) of the *Firearms Law* provided:

“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.”

In October 2005, the *Firearms (Amendment) Law 2005 (2005 Law)* was passed by the Legislative Assembly. It was brought into force on 15 November 2005.

Section 9(b) of the *2005 Law* repealed section 15(3) of the *Firearms Law* and substituted the following subsection (5) which states:

“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 imprisonment of ten years; and
- (b)

This amendment provided for a minimum sentence of ten years’ imprisonment.

4. Section 21 of the *2005 Law* provides:

“1) Where-

(a) prior to the date of commencement of this Law, an accused person is convicted of or pleads guilty to an offence (irrespective of when the offence 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 as if the new Law had not come into force.

2) Where on or after the date of commencement of this Law, 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 purposes of judgment or sentence of the offence, be dealt with in all respects under the new Law and the provisions of the new Law are to apply accordingly.

3) In this section-

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

The effect of this section meant that, even though the offence was committed before the amendment had been passed, the appellant was subject to being imprisoned for the minimum of ten years.

5. In dealing with the issue of sentencing, there was discussion on the retroactivity of the provision of the *2005 Law*, but it does not appear that any specific objection had been taken on the ground that the amendment was unconstitutional. However in passing sentence on the appellant, Levers J accepted the submission that the provisions of the *2005 Law* relating to the sentence which could be imposed applied, even though they may appear to be retroactive. The judge felt constrained to impose a minimum sentence of ten years imprisonment. The judge said:

“...as the law stands, my hands are tied.....I, therefore have to give you ten years imprisonment. If my hands were not tied, I would have given you four years in prison.”

GROUND 1 – ARBITRARY AND DISPROPORTIONATE SENTENCE

GROUND 4 – INTERNATIONAL TREATY OBLIGATION

6. The law relating to these grounds overlap and therefore the Court considers that it is appropriate to deal with these grounds together. The appellant submitted that the provisions of section 21 (2) of the *2005 Law* were contrary to the *Bill of Rights* and, as such, were *ultra vires*. It was also submitted that provisions of the *2005 Law* were contrary to certain fundamental rights which

were protected by the common law and which are now protected by the *European Convention on the Protection of Human Rights and Fundamental Freedoms* (the Convention). It was also contended that the *2005 Law* was also *ultra vires* the powers under section 29(1) of the Constitution of the Cayman Islands which explicitly provides for legislation to be made “for the peace, order or good government of the islands”. It was asserted that the sentencing regime created by the *2005 Law* fails to take account of the particular facts of each case and imposes a blanket sentence for a class of offences and offenders which may vary widely in their criminality. As a result of the mandatory nature of the sentence, counsel submitted that it is arbitrary and grossly disproportionate to the gravity of the crime.

7. The *2005 Law* did not make any changes to the elements of the offence of possession of a unlicensed firearm nor did it change the maximum penalty which the Court could impose. It was submitted on behalf of the respondent that, by enacting a minimum sentence, the Legislature was in fact giving effect to the Guidelines in respect of Firearm offences which had been issued in 2001 by the Chief Justice with the approval of the Court of Appeal. The Guideline provides:

“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 CI\$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.”

8. The Bill of Rights which was enacted by Parliament in England in 1689 provides inter alia that:

“.....excessive bail ought not to be required nor excessive fines imposed and no cruel and unusual punishments inflicted.”

The prohibition against arbitrary and disproportionate punishment has its genesis in this provision of the *Bill of Rights*. This prohibition has been recognized as an essential feature of the rule of law and would later be incorporated as a Convention Right in many, if not all, of the International Conventions. There is no doubt that the *Bill of Rights* apply in Cayman Island and, to this end, this Court endorses what was said by Graham J. in **Warren v. Immigration Board (2002) CILR 188** at paragraph 14 of his judgment. The judge said:

“14 That the Bill of Rights is part of the law of the Cayman Islands is beyond doubt. In **Roberts-Wray, Commonwealth & Colonial Law**, at 540-541 (1966), the learned author recites the well-known propositions that-

“British subjects who settle abroad in territory not within the jurisdiction of any civilized power take English Law with them...The English law taken by the settlers is both the unwritten law (common law and equity) and the statute law in force at the time of settlement. The colonists ‘carry with them only so much

of the English law as is applicable to their own situation and the condition of an infant Colony’.”

Statute law passed after the time of settlement does not automatically apply to the colony but must be extended to it.

...18. As to the further test of suitability, whilst various approaches have been suggested, I prefer to follow the decision in **Cooper v. Stuart (1)**, a decision of the Privy Council. It was there held that “suitability” should be determined by allowing the litigant to enjoy the privilege of any English statute which was on the English statute book at the time of the settlement if, in years to come, the Act suited the settlers’ circumstances. In **Roberts-Wray** that approach is commended (*op. cit.*, at 547), as it allows for the development of courts and civil government in the territory in question. Accordingly, once such institutions were established in the Islands, then the Bill of Rights applied *mutatis mutandis*.”

9. In **R v. Smith (Edward Dewey) [1987] S.C. R 104** McIntyre J, in the Supreme Court of Canada (in his dissenting judgment) speaking of the Bill of Rights observed:

“The expression “cruel and unusual punishment” was first found in the English Bill of Rights of 1688, 1 Wm. & M sess. 2., c. 2., and was aimed at preventing resort to the barbarous punishments of earlier times, particularly of the recent Stuart past. As time passed, the civilizing influence of the late nineteenth and twentieth centuries eliminated, or at least greatly reduced, the danger of such barbarous punishments. The concept was considered by some to have become obsolete by the early twentieth century (see *Hobbs v. State*, 32 N.E. 1019 (1893), at p. 1021). The belief grew that resort would no longer be had to the savage punishments of more primitive times. Nonetheless, in view of the fact that the prohibition in s. 10 of the English Bill of Rights, repeated in the Eighth Amendment to the American Constitution a century later, has now been restated in the Canadian Charter of Rights and Freedoms, it must not be considered obsolete. A meaning must be ascribed to it. In this, we are assisted by the fact that over the years the concept has become broadened by judicial interpretation to encompass more than a consideration of the quality or nature of punishment and to include, as well, under the heading of proportionality, considerations of the extent or duration of punishment and to include, as well, under the heading of

proportionality, considerations of the extent or duration of punishment in deciding whether it would fall within the prohibition. This broadening process has been advanced, I suggest, in the Charter by the inclusion of the word “treatment” in s. 12, which was not in the original formulation of the prohibition in the English Bill of Rights nor in the Eighth Amendment to the American Constitution.”

10. As stated above, provisions of the *Bill of Rights* were accepted as the basis of the fundamental rights and freedoms incorporated and guaranteed in a series of modern International Conventions protecting Human Rights and Fundamental Freedoms including the Convention for the Protection of Human Rights and Fundamental Freedoms – the European Convention. This Convention, which is a treaty under international law, was applied to the Cayman Islands, a dependent Territory under the provision of Article 56. Article 3 of the Convention, which prohibits torture, expressly provides:

“No one shall be subjected to torture or to inhumane or degrading treatment or punishment”.

Article 5 of the Convention provides *inter alia*:

- i) Everyone has the right to liberty and security of the person. No one shall be deprived of liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the unlawful detention of a person after conviction by a competent court.

Article 7, dealing with no punishment without law provides, *inter alia*, that:

“Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed”.

We shall return to the Convention and its impact on legislation in the Cayman Islands.

11. The provisions of Articles 3 and 5 therefore provide protection under International Law for the residents of the Cayman Islands against being subjected to torture or having sentences imposed on them which could be considered to be inhumane or degrading. It also ensures that persons may only be deprived of their liberty by reason of sentence of imprisonment after being convicted by a court of competent jurisdiction.
12. The Constitution of the Cayman Islands (“the Constitution”) does not contain any provisions which guarantee the Fundamental Rights and Freedoms of persons within the Islands. While this at first sight may appear strange, it is entirely consistent with the constitutional status of a Dependent Territory which has not achieved the political development of some of the other countries in the Caribbean.
13. We were referred to a number of cases from the European Court dealing with the European Convention on Human Rights. In **Soering v The United Kingdom 11 EHRR 439** the applicant, a German national, was detained in prison in England pending extradition to the United States of America to face charges of capital murder in the Commonwealth of Virginia. The applicant alleged that, if he was extradited to United States by the United Kingdom, he would be exposed to what was called “death row phenomenon”. He contended that his extradition would give rise to a breach by the United Kingdom of Article 3 of the Convention which provides “No one shall be

subjected to torture or inhumane or degrading treatment or punishment”. The European Court held that a sentence will violate Article 3 of the Convention if the sentence was unjustified or disproportionate to the gravity of the crime committed. This case clearly established that the disproportionality between the offence and sentence imposed could amount to a breach of the provisions of Article 3 of the Convention.

14. In **R v. Lichniak [2003] 1AC 903** two appellants had applied by way of judicial review claiming that their mandatory life sentences were arbitrary, excessive and disproportionate and contrary to articles 3 and 5 of the European Convention as scheduled to the *Human Rights Act 1998*. Lord Bingham of Cornhill at paragraph 13 made the following observation:

“13 There is ground for concern if the sentence is imposed on those who, despite the seriousness of their crimes, could be adequately punished by a determinate sentence. Indeed, any mandatory or minimum mandatory sentence arouses concern that it may operate in a disproportionate manner in some cases. It was a consideration of this kind which led the Supreme Court in Canada to conclude that a mandatory seven year minimum sentence for importing drugs was incompatible with section 12 of the Canadian Charter of Rights and Freedoms, which guaranteed that no one should be subjected to cruel and unusual treatment of punishment. **R v. Smith (Edward Davey) 1987 1 SCR 1045**.

Lord Hutton observed in **R v. Lichniak [2003] 1 AC903** at p. 914:

“..the jurisprudence of the European Court also establishes that punishment which is arbitrary and disproportionate can be regarded as inhumane. See **Weekes v. United Kingdom [1987] 10 EHRR 293, 311 para 47.**”

15. In *R v Smith (Edward Davey)* 1 SCR 1045, the issue which engaged the attention of the Supreme Court of Canada was whether the mandatory minimum sentence of seven years for importing drugs into Canada was “contrary to, infringes, or denies the rights and guarantees contained in the Canadian Charter of Rights and Freedoms”. S12 of the Charter provided:

“12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”

Lamer J, speaking of the history of the Canadian Charter, pointed out that Canada adopted, through the preamble of its Constitution the legislative restraint set out in s. 10 of the English *Bill of Rights* of 1688, which stated that excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted. Lamer J, however observed that he knew of no reported instances where the courts had interpreted the laws of Canada so as to invoke that part of s. 10 of the English *Bill of Rights*. His Lordship considered that Article 3 of the *Convention* provided similar protection against cruel or inhumane punishment but was little assistance in dealing with the matter before the Court. His Lordship expressed the view that:

“The limitation at issue here is s. 12 of the *Charter*. In my view, the protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed. I would agree with Laskin C.J. in *Miller and Cockriell*, *supra*, where he defined the phrase “cruel and unusual” as a “compendious expression of a norm”. The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is, to use the words of Laskin C.J. in *Miller and*

Cockriell, supra, at p. 688, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate."

It is significant that Lamer J indicated that, prior to the enactment of the Canadian Charter, he knew of no reported case in Canada where the courts had interpreted the law, presumably the common law, so as to enforce the Bill of Rights. In other words, even though the *Bill of Rights* formed part of the common law of Canada the judge was not aware of any reported decision in Canada which enforced s 10 of the *Bill of Rights*.

16. In **Shorter & Others v R [1989] LRC 440**, the Court of Appeal in Bermuda had to consider whether an amendment to the Firearms Act 1993, which provided that the sentence for using a firearm while committing an indictable offence had to be served consecutively to any other sentence imposed, was in breach of section 3 of the Constitution of Bermuda. Section 3, which is part of the Fundamental Rights and Freedom Provisions gives protection against inhumane or degrading treatment or punishment. The Court of Appeal stated at p. 523:

"The formation of public policy is the function of the legislature; and it's not the function of this court to express an opinion on the appropriateness of what may have been the policy underlying a legislative enactment. The function of the court is simply to measure the content of the legislation against the guarantees in the Constitution."

The Court of Appeal had earlier reviewed the case of Constitutional Reference by the **Morobe Provincial Government [1985] LRC Const. 642** and adopted the reasoning of Bredmeyer J who stated at p 669”

“When Parliament fixes a mandatory penalty it does so in the public interest - to punish, to deter to protect society, etc. - to the detriment of the other aspects, the offender’s interest, the victim’s interest and the like.”

17. The Appellant contended that the mandatory sentence created by the *2005 Law* fails to take into account the particular facts relating to the appellant and simply imposed a blanket sentence for an entire class of offences and offenders which may vary widely in their criminality. In the circumstances, the appellant submitted that the mandatory sentence is arbitrary and grossly disproportionate to the gravity of the crime.
18. Counsel for the Respondent submitted that in accordance with the principle of parliamentary democracy, Parliament had authority to take a firm, even harsh position in relation to the punishment of criminal offences provided that the legislation is clear.
19. Proportionality of the sentence imposed to the crime committed becomes an ingredient in considering whether the sentence imposed is cruel or inhumane. In the Privy Council case No. 64 of 2001 **Reyes v. R.** Lord Bingham of Cornhill, in delivering the judgment of the Board, accepted the statement of the

Constitutional Court of South Africa in **State v. Makwanyane 1995 (3) SA**

391 on the significance of proportionality where the Court stated at para. 94:

“Proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhumane or degrading.”

The prohibition against imposing sentences which may be said to be cruel or inhumane is usually contained in the Constitutional provisions protecting the Fundamental Rights and Freedoms or enacted into the domestic law by way of a Charter of Rights and Freedoms as was done in Canada or the *Human Rights Act 1998*, as was done in the United Kingdom.

20. Cayman Islands is a parliamentary democracy in which the powers of the Legislature are set out under section 29(1) of the Constitution which states:

“29(1) Subject to the provision of this Constitution, the Governor, with the advice and consent of the Assembly may make law for the peace, order and good government of the Islands.”

It is clearly the responsibility for the Legislature, as a matter of policy, to determine what sentence should be imposed for a particular crime having regard to the needs of the society as a whole. If the provisions of that law do not offend the Constitution or any other domestic legislation incorporating any Bill of Rights or Charter of Rights and Freedoms, the Court has no authority to strike down that law as being offensive to the international obligation of the Cayman Islands. This Court accepts the statement Bredmeyer J, set out in the judgment of **In Morobe’s** case that “when Parliament fixes a mandatory

penalty it does so in the public interest to punish to deter to protect society etc., to the detriment of the other aspects, the offender's interest, the victim's interest and the like". The formation of policy is the function of the Legislature. It is for the Legislature to decide and enact such legislation as it considers to be necessary, "for the peace, order and good government of the Cayman Islands."

21. As stated, the Constitution contains no provision guaranteeing the fundamental rights and freedoms of the residents of the Islands. Article 3 of the Convention has not been incorporated into the domestic law within the Islands by way of domestic legislation enacted by the Legislature. How therefore does this affect the enforcement of the provisions of the Convention by the Courts in these Islands?
22. Article 1 of the Convention provides that "contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". Rights granted under the Articles of the Convention cannot therefore be enforced by the Court of the Cayman Islands unless the Legislature has enacted those rights into the domestic legislation of the Islands. And this is so even though the Convention may now be directly enforced in the European Court by the residents of the Islands. On 21 February 2006 the right to directly petition the European Court of Human Rights was re-extended

to the Cayman Islands. Counsel for the appellant contended that the rights afforded under the Convention can be “directly” invoked by the inhabitants’ of the Cayman Islands in the European Court of Human Rights. He asserted that the appellant has a right to petition the Court in Strasburg if he considered that the rights guaranteed by the Convention in articles 3, 5 and 7 have been breached by the *2005 Law*.

23. The Convention applies to the Islands. But this does not mean that the Courts in the Islands are under a duty to apply the provisions. In **Salomon v Commission of Customs and Excise [1967] 2QB 116**, Diplock LJ (as he then was) at page 143 said:

“Where, by a treaty, Her Majesty’s Government undertakes either to introduce domestic legislation to achieve a specific result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English Court until Her Majesty’s Government has taken steps by way of legislation to fulfill its treaty obligations.”

24. In **Maclaine Watson & Co. Ltd. v. Department of Trade and Industry [1989] 3ALL ER523**, Lord Oliver of Aylmerton set out the principle which relates to treaties and other international obligations in the United Kingdom.

His Lordship stated at p. 545:

“The second is that, as a matter of Constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in

domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of the English law unless and until it has been incorporated into law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligation, and it is outside the purview of this Court not only because it is made in the conduct of foreign relations, which area prerogative of the Crown but because, as a source of rights and obligations, it is irrelevant.”

25. In 2001, this Court had to consider the effect of an International Convention on the domestic law of the Cayman Islands in **E. Grant and Chin (as Guardian ad litem of S. Grant, a minor) v Principal of John A Cumber Primary School, Chief Education Officer and Education Council [2001]** CILR 78 Collett, J.A. delivering the judgment of the Court observed at paras 11 and 12:

“11 Another point which was once at the forefront of the appellants’ argument in these proceedings was an alleged contravention of a series of international bind in international law upon the UK Government and also applied specifically to the Cayman Islands. Specific reference was made in the originating notice of motion to the Universal Declaration of Human Rights, the European Convention on Human Rights, the Convention against Discrimination in Education and the Convention on the Rights of the Child.”

“12 So formidable a list of legal obligations might appear at first sight to present an equally formidable case for the appellants. The flaw in that line of argument is, however, that none of the conventions has yet been translated into the domestic law of the Cayman Islands either by a law of the legislature or by the enactment of a bill of rights into the written constitution of these Islands as laid down by Order in Council. In the absence of such a provision, the English authorities have clearly establish that no relief can be entertained by the Courts of the Cayman Islands for the alleged breaches of these or any other applicable international

conventions. The learned Chief Justice found (1999) CILR at 335), succinctly quoting the words of Lord Oliver in **McClaine Watson & Co. Ltd. Department of Trade and Indus. [1989] 3 ALL ER** at 544-545:

“Quite simply, a treaty is not part of English Law unless and until it is incorporated in the law by legislation. So far as individuals are concerned, it is *res inter alia acta* from which they cannot derive rights.....and it is outside the purview of the court...”

26. In **Moncrieff v R Criminal Appeal No. 3 of 2003** this Court again rejected arguments based on the provision of Articles 5(4) of the European Convention on the ground that the convention did not form part of the domestic law of the Cayman Islands.

27. In **Reyes v. R Privy Council No. 64 of 2001**, Lord Bingham of Cornhill pointed out at para 28:

“28 This does not mean that in interpreting the Constitution of Belize effect need be given to the treaties not incorporated into the domestic law of Belize or non binding recommendations or opinion made or given by foreign court or human rights bodies.

28. This Court was also referred to the *Universal Declaration of Human Rights* more particularly Article 5 which provided that “no one shall be subjected to torture or to cruel, inhumane, or degrading treatment or punishment”. In the International Covenant on Civil and Political Rights we were referred to Articles 7, 9 and 15. Article 7 states inter alia, that “No one shall be subject to torture or to cruel, inhumane or degrading treatment or punishment”.

We were also referred to the *American Declaration of the Rights and Duties of Man* which provided inter alia that everyone has the right to humane treatment

during his time in custody. Article 26 stipulates that a person is 'not to receive cruel, infamous or unusual punishment'. In the American Conventions on Human Rights Article 5(2) dealing with the Right to Humane Treatment:

“(2) No one shall be subjected to torture or to cruel, inhumane or degrading punishment or treatment....”

These International Conventions all contain Articles which prohibit torture or cruel or inhumane treatment. Unless and until the Legislature in the Cayman Islands enacts legislation incorporating the provisions of the Convention, then the Convention cannot be enforced by the Court.

29. When the laws of the Cayman Islands are clear and unambiguous it is the duty of the court to give effect to the domestic laws even if, in so doing, the domestic laws would conflict with the Cayman Islands' intern In the case of Privy Council Appeal no. 12 of 2004 **Charles Matthew vs. The State** it was stated at para 55:

“ An obligation binding on a state in international law but not forming part of its domestic law cannot override or even influence the construction of a clear and unambiguous provision of domestic law cannot override...These propositions apply to constitutions as to other domestic laws and apply even if the international obligations were undertaken after the date of Constitution”

In Bolkih & Others v. The State of Brunei Darussalam & Anor [2007]
UK PC 62 Lord Bingham of Cornhill, speaking of the duty of the Privy Council, as the highest Court of Brunei under the Brunei (Appeals) Order 1989

as amended, pointed out that the Board had to apply the law of Brunei. He went on to observe at para. 28 of the judgment:

“...no discretion to apply any other law, and would indeed act unlawfully were it to do so. Unlike many other Constitutions, that of Brunei contains no chapter on human rights. The European Convention on Human rights was extended to Brunei by the United Kingdom in 1967, but the state is no longer party to the Convention. It has not been suggested that the domestic effect has been given in Brunei to any other relevant international human rights convention, and it is not a party to the International Covenant on Civil and Political Rights. Even if it had acceded to such a convention, effect must be given by a national judge sitting in a national court to unambiguous national legislation even if it conflicts with a treaty obligation (*Salomon v Commissioners of Customs and Excise* (1967) 2 QB 116, 143). As Lord Hoffman observed in *R v Lyons* (2002) UKHL 44, (2003) 1 AC 976, para 40:

“In domestic law, the courts are obliged to give effect to the law enacted by Parliament. The obligation is entirely unaffected by international law.”

30. Like Brunei, the Constitution does not contain any chapter dealing with fundamental rights and freedoms. Also, like Brunei, the Cayman Islands have not given effect to the Convention in its domestic law. The provisions of the *2005 Law* are unambiguous and the Court must give effect to the law even though the law appears to be in conflict with the treaty obligations under the Convention. This Court is therefore obliged to give effect to the *2005 Law*.

31. Although the Convention was extended by the United Kingdom to the Cayman Islands, the Legislature of the Cayman Islands was not under any obligation to enact domestic legislation to have the provision enforceable in its domestic law.

Article 13 of the Convention provides:

“Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

In *Al-Skerni v Secretary of State for Defence* [2007] UKHL 26, Lord Brown of Eaton – under Heywood, at paragraph 147 pointed out:

“Certainly the UK undertook no specific treaty obligations to incorporate the convention into domestic law, the Strasbourg Court has said that many times. Article 13 does, however, impose upon the UK an international law obligation to afford “everyone whose rights and freedoms are set forth in [the] convention are violated...an effective remedy before a national authority “As the Court explained in *James v United Kingdom* (1986) EHRR123, 158 – 159:

“Although there is this no obligation to incorporate the Convention into domestic law, by virtue of article 1 of the Convention the substance of the rights and freedoms set forth must be secured under domestic legal order in some form or another, to everyone within the jurisdiction of the contracting states”.”

32. Complaint was also made that the *2005 Law* offended Article 5 of the Convention. Article 5 states inter alia:

“Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court,
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.”

Specific complaint is made against the length of this sentence. It should be noted that in in *Flynn v H M Advocate* [2004] S.C. (PC) the Privy Council pointed out that:

“...article 5(1) does not limit the period for which a person can be detained, provided that the detention is lawful.”

33. The appellant made submissions in respect to section 2 of the *Colonial Laws Validity Act*. Counsel submitted that any colonial law which, in any respect, is repugnant to the provision of any Act of Parliament which extends to a colony is to be read subject to the *Colonial Laws Validity Act*. He contends that the provision of the *2005 Law* is repugnant to the Constitution which is an Act of Parliament. Section 2 of the *Colonial Laws Validity Act* specifies:

“Any Colonial Law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.”

By this provision therefore any legislation enacted by a colonial legislature would be void to the extent that the legislation is repugnant to any Act of the Parliament at Westminster, any Order made under such an Act of the Parliament at Westminster, and a Regulation made under an Act of the Parliament at Westminster which is extended to the Colony. It is not void because it is repugnant to the common law.

34. In the matter of **Euro Bank Corporation 2001 CILR 156**, Mr. Justice Smellie, Chief Justice, commenting on the application of the *Colonial Validity Act 1865* said at para 39:

“39As the Constitution is given effect as an Order or Orders made under the West Indies Act 1962 (An Act of Parliament of the United Kingdom, by virtue of s. 2 of the Colonial Laws Validity Act 1865), to the extent that s. 101 of the Law (the Companies Law (2000 Revision)) is in respect repugnant to the Constitution, it would as a matter of law, and to the extent of that repugnancy, be absolutely void and inoperative: see *Nadar v R* [1926] A.C. 492-493.”

35. Part of the challenge of the appellant is that the *2005 Law* offends the Bill of Rights 1689 and the provisions of the International Conventions. However, any challenge to the *2005 Law* on the ground that it is repugnant to the common law cannot be maintained under section 3 of the *Colonial Law Validity Act, 1865* which provides:

“No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order or Regulation as aforesaid.”

Any challenge on the grounds of repugnancy must therefore be founded under the provisions of section 2 of the Act.

36. In *Liyanage v The Queen* 1967 1AC 259, the Privy Council, speaking of the effect of sections 2 and 3 of the *Colonial Laws Validity Act 1865* stated at 284:

“It provided that colonial laws should be void to the extent in which they were repugnant to an Act of the United Kingdom Parliament applicable to that colony, ‘but not otherwise’ (section 2) and that they should not be void or inoperative on the ground of repugnancy to the law of England (section 3). ‘The essential feature of this measure is that it abolished once and for all the vague doctrine of repugnancy to the principle of English law as a source of invalidity of any colonial Act.....The boon thus secured was enormous; it was now necessary only for the colonial legislature to ascertain that there was no Imperial

Act applicable and his field of actions and choice, of means became unfettered (Keith, *The Sovereignty of British Dominion* 1929, p. 45).”

37. The Constitution of the Cayman Islands is contained in an Order in Council made pursuant to the West Indies 1962 Act. However, as stated previously, the Constitution does not contain any provisions which guarantee the Fundamental Rights and Freedom. It is not sufficient to show that the Act of the colonial Legislature is repugnant to the common law. It does not satisfy the provision of section 2 of the *Colonial Validity Act*. To be successful as challenge under s 2 of the *Colonial Validity Act*, the appellant must show that the *2005 Law* is repugnant to the *West Indies Act* or an Order in Counsel made under the Act. The appellant has not shown that the *2005 Law* is repugnant to any provision of the Constitution. Consequently to the challenge under this head must fail.
38. The sentence imposed by the trial judge is in our opinion lawful under the law in force in the Cayman Islands. It was the sentence the Legislature prescribed for such offences. In the absence of any provisions in the Constitution protecting fundamental rights and freedoms as set out in the various International Conventions to which we earlier adverted, and in the absence if any domestic legislation giving effect to the Conventions within Cayman, the sentence cannot be set aside as being arbitrary and disproportionate. Imprisonment under the *2005 Law* cannot in the context of the Cayman Islands be regarded as unconstitutional, unlawful or ultra vires.

GROUND 2 - RETROACTIVE PENALTY

39. In the second Ground of Appeal, it is alleged that the sentence was unconstitutional, unlawful and *ultra vires* as it is a retroactive penalty. Counsel for the appellant submitted that retroactive penalties are unjust and contrary to the rule of law. He pointed out that the dislike of retroactive laws and the fact that they are considered unfair may be traced back to the Magna Carta.

The relevant provisions of the Magna Carta provide:

“No freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties or free Customs or be outlawed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his Peers or by the Law of the Land we will sell to man, we will not deny or defer to anyman either Justice or Right.”

40. Counsel further submitted that as, the Constitution is delegated legislation under the *West Indies Act*, it is necessary to look at the empowering Act in order to determine the powers conferred and the extent of those powers. He contended that the Crown cannot confer powers in the Constitution which are not set out in section 5 of the *West Indies Act*. He argued that there are no provisions which empower the Legislature to pass retroactive legislation. In the absence of any express provision to create a power to pass retroactive legislation, it is submitted that there is a presumption that the legislature was incompetent to enact such legislation.

41. Counsel for the respondent took issue with the characterization of the 2005 Law as being retroactive. Counsel contended that the imposition of a mandatory component of the sentence for the offence of possession of an unlicensed firearm did not create retroactive legislation which would be inconsistent with Article 7 of the European Convention. It was further submitted that under Article 7 the prohibition relates to a change in the maximum penalty which the court could impose.
42. The Constitutional Instrument is contained in the *Cayman Islands (Constitutional) Order 1972, Statutory Instrument No. 1101 of 1972* which is made by Her Majesty the Queen pursuant to powers conferred upon Her by section 5 of the West Indies Act which states:

“5-(1) Her Majesty may by Order in Council make such provision as appears to Her expedient for the government of any of the colonies to which this section applies, and for that purpose may provide for the establishment for the colonies of such authorities as she thinks expedient and may empower such of them as may be specified in the Order to make laws either generally for the peace, order and good government of the colony or for such limited purposes as may be so specified subject, however, the reservation to Herself of power to make laws for the colony for such (if any) purposes as may be so specified.”

43. Her Majesty is given power under section 5 of the West Indies Act to make provision for the establishment of such authorities which are empowered to make law for the peace order and good government of the colony. Pursuant to

this power, *The Cayman Islands (Constitution) Order 1972* was issued. Section 29(1) of the Constitution states:

“29(1) Subject to the provision of this Constitution, the Governor with the advice and consent of the Assembly may make law for the peace order and good government of the Cayman Islands.”

44. The gravamen of the appellant’s submission is that, in the absence of an express provision in the *West Indies Act*, to create a power to pass retroactive legislation, it is presumed that the legislature has no such power. Reliance is placed on a statement contained in the judgment of the Court of Appeal in **Waddington v Miah 1 WLR 683** at p. 690 where it is states:

“The general rule is that all statutes, other than those which are mainly declaratory, or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. The presumption against retrospectivity applies in general to legislation of a penal character such legislation is, in general, forbidden by convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (1953 Cmd. 8969) article 7 and by the Universal Declaration of Human Rights approved by the General Assembly of the United Nations of 1948 (1949 Cmd. 7662, article 11(2).”

45. In respect to the submission that the *2005 Law* is retroactive and therefore breaches the appellant’s right, counsel for the appellant prayed in aid Article 7(1) of the Convention which provides:

“No punishment without law
(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor

shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

46. The provision of this Article in so far as it relates to whether a heavier sentence was imposed relative to the sentence available at the time of the commission of the offence engaged the attention of the Privy Council in **Flynn v H M Advocate 2004 S.C. (P.C.) 1** and the House of Lords **Regina (Uttley) v Secretary of State for the Home Department [2004] 1 W.L.R. 2278**. It is sufficient for the purposes of this judgment to deal with **Uttley's** case.
47. **Uttley** alleged that there was a violation of his rights under Article 7 of the Convention as a heavier sentence had been imposed on him than that which was applicable when the offences were alleged to have been committed. This argument was based on a comparison of the relevant legislation which would have permitted him an earlier release from prison under the legislation in force when the offences were committed. In rejecting this submission, Lord Rodger of Earlsferry said at para. 38:

“38 The respondent’s arguments are misconceived. For the purposes of article 7(1) the proper comparison is between the penalties which the Court imposed for the offences in 1995 and the penalties which the legislature prescribed for those offences when they were committed around 1983. As I have explained, the cumulative penalty of 12 years’ imprisonment that the court imposed for all offences in 1995 was not heavier than the maximum sentence which the law would have permitted it to pass for the same offences at the time they were committed in 1983. There is accordingly no breach of article 7.”

48. Later, His Lordship concluded at para. 41 of his judgment:

“41 The European Court of Human Rights has therefore been able to give proper effect to the article while interpreting its wording in a straightforward fashion. In *Co. v. Belgium* Reports of Judgments and Decision 2000-VII, p. 75 the court held at para. 145:

“The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision.....”

One has to identify the legal provisions which made the act punishable at the time it was committed and make sure that the punishment which the court imposes does not exceed the limits fixed by that provision. Although the decision of the European Court was not cited to the Privy Council in *Flynn v H M Advocate* 2004 S.C.C R281, Lord Carswell encapsulated the same interpretation when he said, at pp.315-316 para. 109:

“It seems to me difficult to escape the conclusion that the meaning of the provision is that the penalty which is “applicable” at the time when the criminal offence was committed is that which a sentence could have imposed at that time, i.e. the maximum sentence then prescribed by law for the particular offence.....The object of the provision appears to have been to prevent a sentence being imposed which could not have been imposed at the time of the offence, because the maximum was the lower.”

49. In delivering his judgment Lord Carswell said at para. 58:

“58 The wording of article 7(1) of the Convention has its origins in the early constitutional documents of the human rights movement. It was purposely framed so as to follow closely the terms of article 11(2) of the Universal Declaration of Human Rights, approved by the General Assembly of the United Nations in 1948, save that in the English version of the Convention the phrase “penal offence” became criminal offence. In the International Covenant on Civil and Political Rights (1966) the first two sentences of article 15(1) are identical in wording to article 7(1) of the Convention. A third sentence, however, was added which is of significance for the present purposes. “If, subsequent to the Commission of the offence, a provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby. This sentence gives support for the interpretation propounded on behalf of

the appellant, that in the previous sentence in article 15(1) of the International Covenant on Civil and Political Rights, like, the second sentence of article 7(1) of the Convention, the word “applicable” was intended to refer to the maximum sentence which could be imposed by law. That interpretation is also borne out by the references in the travaux préparatoires to a penalty “authorised by the law” and the maximum penalty under the law in force at the time.”

50. Adopting the approach of the House of Lords, it is necessary to look at the maximum penalty which the court could have imposed on a person who either pleaded guilty or was found guilty by a jury after trial under section 15 of the *Firearms Law (1998 Revision)*. The maximum sentence which the court could have imposed is imprisonment for twenty years. Under the *2005 Law* the maximum sentence which the court could have imposed remained unchanged – imprisonment for twenty years. The *2005 Law* introduced a new element in the imposition of punishment. It required the court to impose a minimum term of imprisonment of ten years. As the maximum sentence was not increased, it could not be said that a heavier penalty could have been imposed than the penalty which was applicable when the offence was committed. Consequently, the *2005 Law* cannot be said to be a retroactive penalty and thus in breach of Article 7(1) of the Conventions. In any event, as stated earlier, the Convention does not apply to the Cayman Islands as the provisions of the Convention have not been enacted into the domestic law of the Cayman Islands. In addition, the Constitution does not contain any provisions dealing

with the fundamental rights and freedoms usually found in the Constitution of other countries in the Caribbean.

GROUND 3 – HUMAN RIGHTS ACT 1998

51. Under Ground 3, the appellant is seeking to have the Court extend to the Cayman Islands the provisions of the *Human Rights Act 1998* of the United Kingdom. The *Human Rights Act* was passed by the Parliament at Westminster and brought into force on 2 October 2000. The purpose of the *Human Rights Act* was to introduce into the domestic law of the United Kingdom the provisions of the Convention. The Convention had been ratified by the United Kingdom on 8 March 1951 and was binding in international law on the United Kingdom since 3 September 1953. However until the *Human Rights Act*, was brought into force, there was no legislation enforcing the Convention in the United Kingdom. The *Human Rights Act* is expressly stated to apply to Northern Ireland.

52. The appellant submitted that the laws enacted in the Cayman Islands must be interpreted in a way which is compatible with the rights guaranteed under the Convention and the *Human Rights Act*. In short, the appellant was contending that the *Human Rights Act* of the United Kingdom applied to the Cayman Islands and, this being so, the *2005 Law* was in breach of the Act. Counsel for the respondent disagreed with this submission and contended that the *Human Rights Act* did not apply to the Cayman Islands.

53. The issue therefore which this Court has to determine is whether the *Human Rights Act* extends to the Cayman Islands. Before setting out our conclusion in this matter we think it necessary to make a few observations.

54. Section 3 of the *Human Rights Act* states:

3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section-

(a) applies to primary legislation and subordinate legislation whenever enacted.

The Act provides that the court is under an obligation to read and give effect to primary and secondary legislation in a way which is compatible to the rights set out in the Convention.

55. Section 6(1) of the Human Right Act provides:

6(1) "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

In subsection (3), public authority is defined as including a court or tribunal and any person whose functions are functions of a public nature. It should be noted that neither the House of Lords nor the House of Commons at Westminster are included.

56. In *Secretary of State for Defence v. Al-Sberni, Ors* [2007] UK HL 26 the House of Lords had to consider whether the maltreatment inflicted by members of the British armed forces in Iraq entitled the relatives of the deceased persons to apply to the High Court in London for an order of judicial

review against the Secretary of State for Defence, thereby seeking to challenge his refusal to order an independent inquiry into the circumstances surrounding the alleged maltreatment. The action in London was founded on the *Human Rights Act*. It was accepted, that in order to succeed in their challenge, it had to be shown that a public authority in England had acted unlawfully in the sense that the conduct was incompatible with a Convention right of the claimants or deceased. One of the issues that arose was whether the *Human Rights Act* applies to acts done outside of the United Kingdom.

57. Lord Rodger of Earlsferry, in his judgment, stated *inter alia* at para. 53, 54 and 59:

“53....where a public authority has power to operate outside of the United Kingdom and does so legitimately.....in the absence of any indication to the contrary, when construing any relevant legislation, it would only be sensible to treat the public authority, so far as possible, in the same way as when it operates at home.”

“54 The purpose of the 1998 Act is to provide remedies in our domestic law to those whose human rights are violated by a United Kingdom public authority.....There is therefore nothing in the wider context of international law which points to a need to confine section 6 and 7 of the 1998 Act to the territory of the United Kingdom.”

“59.....section 6 should be interpreted as applying not only when a public authority acts within the United Kingdom but also when it acts within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention, but outside the territory of the United Kingdom.”

58. In delivering his judgment Lord Brown of Eaton – under Heywood said at para 139:

“139 Section 6 of the *Human Rights Act* makes it unlawful for a “public authority” to “act” in a way incompatible with “a Convention right”. There can be no doubt that a “public authority” means a public authority of Great Britain and Northern Ireland, just as the “legislation” referred to in section 3 and 6 of the Act means legislation enacted in Great Britain and Northern Ireland. It is not, however, suggested that the claimant (the alleged victim) need be present in the UK (let alone a British citizen) nor that the decision complained of need have been taken in the United Kingdom (Consider, for example, a decision taken by a minister travelling abroad).”

59. Section 6(1) of the *Human Rights Act* applies to public authorities of Great Britain and Northern Ireland. The appellant complains of a breach guaranteed under the *Human Rights Act*. This breach would have occurred when the Legislature of the Cayman Islands enacted the *2005 Law*. In so doing, the appellant is contending that the Legislature of the Cayman Islands is a public authority in Great Britain whose conduct was unlawful under section 6 of the *Human Rights Act*.
60. The question whether the *Human Rights Act* applies to the Cayman Islands is one of construction of the Act itself. Such construction, in our view, falls to be determined by the Courts in England not in the Cayman Islands. The *Human Rights Act* is not an imperial Act which Parliament at Westminster has expressly stated is applicable or is extended to the Cayman Islands. To attempt any construction as to the scope of the Act would in our view involve trespassing on the exclusive jurisdiction of the Courts of the United Kingdom. In *Al-Skeinni's case*, Baroness Hale of Richmond distinguished between the task of

the European Court of Human Rights in Strasbourg and that of the House of Lords. Strasbourg, her Ladyship said, has the duty to interpret the European Convention while it was the responsibility of the House of Lords to interpret the *Human Rights Act*. It would therefore be outside the competency of this Court to embark on an attempt to construe the provisions of the *Human Rights Act*.

61. In any event, this Court observes that the Legislature of the Cayman Islands cannot be said to be a public authority of the United Kingdom. The Legislature of the Cayman Islands operates within the constraints of the Order in Council by which the Constitution was established and the West Indies Act. We restate what was said by the Court of Exchequer Chambers in **Phillip v Eyre (1870) LR6 QB1, 20**:

“We are satisfied that it is sound law, and that a confirmed act of the local legislature lawfully constituted, whether in a settled or conquered colony, has, as to matter within its competence and limits of its jurisdiction, the operation and force of sovereign legislation, though subject to control by the imperial parliament.”

62. Speaking of the power of a colonial legislature, the Privy Council, in **R v. Burah (1878) 3 App. Cas. 889**, at 904 had this to say:

“904 The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and its case, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have, plenary powers of legislation, as large, and of the same nature as those of Parliament itself.”

So that it may be deduced that a colonial legislature, when it is acting within the powers granted to it by an Act of the Imperial Parliament, has full powers to legislate. It is clear that, within the context of the Constitution the Legislature of the Cayman Islands, is free to enact such legislation as it deems fit for the peace, order, and good government of the Islands.

GROUND 5 - VIOLATION OF PRINCIPLE OF SEPARATION OF POWERS

63. The appellant submitted that when it prescribed a mandatory minimum sentence of imprisonment for ten years, the Legislature was in fact usurping the functions of the Court. It was argued that the question of the length of a sentence was a matter for the court in the exercise of its judicial functions. Consequently, it was contended the provisions of the *2005 Law* were unconstitutional as offending the doctrine of the separation of powers articulated by Montesquieu (*D L'esprit des lois*; 1748) which is enshrined in the Constitution. Reference was made to the judgment of this Court in **Hydes v The Queen. Court of Appeal No. 20 of 2006** where Forte, JA said at p.7:

“For the avoidance of doubt, we should state that the Cayman Constitution is based on the Westminster Model, having as the foundation the principle of separation of powers.”

64. Counsel for the respondent submitted that it was open to the Legislature to prescribe a fixed punishment and, in so doing, it did not usurp the function of

the judiciary. We agree with this submission which finds support in the judgment of Lord Diplock in **Hinds v The Queen [1977] AC 195** where at p.

226 His Lordship said:

“In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of defined offences as, for example, capital punishment for the crime of murder. Or, it may prescribe a range of punishment up to a maximum in severity either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.”

65. Later, Lord Diplock adopted without, as stated by him, attempting to make any improvement thereon, what was said by the Supreme Court of Ireland in **Deaton v Attorney General and the Revenue Commissioner [1963] I.R. 170, 182 – 183:**

“There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation. This is wholly different from the selection of a penalty to be imposed in a particular case....The legislature does not prescribe the penalty to be imposed in an individual citizen’s case; it states a general rule, and the application of that rule is for the court....the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive....”

66. In this statement, Lord Diplock recognised the power of the legislature to prescribe a range of punishment including a minimum sentence. In providing a minimum sentence of imprisonment for ten years in the *2005 Law*, the

Legislature was acting entirely within its province to legislate punishment for the commission of the offence of possession of an unlawful firearm. The sentence was intended to apply to all persons who either pleaded guilty or were convicted by the jury after trial. It was not a sentence fixed by the legislature for the appellant. Consequently, the appellant's submission to us under this head is rejected.

GROUND 6 - PEACE, ORDER AND GOOD GOVERNMENT

67. Under section 5(1) of the West Indies Act, Her Majesty was given power by Parliament in Westminster to promulgate a Constitution for the Cayman Islands by way of Order in Council. The Legislature is established under the Constitution. It is given power to legislate "for the peace, order and good government" of the Islands. The formula "peace, order and good government" has been the subject of judicial consideration in many cases. In dealing with the Constitution of Guyana, Massiah C in **Attorney-General v Alli [1989] LRC (Const.) 474** at 489 said:

"....the words 'peace, order and good government' do not define and delimit the categories of legislation which Parliament may properly enact, but merely state in compendious formulation the repleteness of Parliament's legislative authority. Our Parliament is sovereign and may make such laws as it chooses provided it makes none that the Constitution forbids, for then it would be acting *ultra vires*. It is therefore, to borrow a phrase much in use, 'sovereign within its powers'."

68. In **Bribery Commissioner v. Ranasinghe** [1964] 2 All ER 787 Lord Pearce, speaking of the power of a legislature in a colony, said at p. 791:

“Any laws could be made for ‘the peace, welfare and good government of the Colony’, the phrase habitually employed to denote the plenitude of sovereign legislative power, even though that power be confined to certain subjects or within certain reservations. The Constitution thus established placed no restrictions on the manner in which or the extent to which the law-making power could be exercised, either generally or for particular purposes, except for the provisions, then customary, as to reservation and disallowance of bills...”

69. This formula came before the Court in England in 2001 in **Regina (Bancoult) v. Secretary for Foreign and Commonwealth Affairs and another** [2001] QB 1067. In delivering the judgment of the Court, Laws L.J. had this to say about the formula of “peace, order, and good government” at p. 1102:

53 “**Riel v The Queen (1885) 10 App Cas 675** concerned an Act of the Imperial Parliament authorising the Canadian Parliament to make laws “for the administration, peace, order, and good government of any territory”. Their Lordships in the Privy Council stated at p. 678:

“it appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order, and good government cannot, as matters of law, be provisions for peace, order, and good government in the territories to which the statute relates, and further that, if a court of law should come to the conclusion that a particular enactment was not calculated as a matter of fact and policy to secure peace, order, and good government, that they would be entitled to regard any statute directed to those objects, but which a court should think likely to fail of that effect, as *ultra vires* and beyond the competency of the Dominion Parliament to enact. Their Lordships are of the opinion that this is not the least color for such a contention. The words of the statute are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to.”

54 I have already referred in paragraph 40 to what was said in *Ibrelebbe v The Queen* [1964] AC 900, 923: the words peace, order and good government “connote, in British constitutional language, the widest law-making powers appropriate to a sovereign”, This was approved in *Winfat Enterprise (HK) Co. Ltd. v Attorney General of Hong Kong* [1985] AC 733, 747.....

55 The authorities demonstrate beyond the possibility of argument that a colonial legislature empowered to make law for the peace, order and good government of its territory is the sole judge of what those considerations factually require. It is not obliged to respect precepts of the common law, or English traditions of fair treatment. This conclusion matches with the cases on the Colonial Laws Validity Act 1865, and I have dealt with that. But the colonial legislature’s authority is not wholly unrestrained. Peace, order and good government may be a very large tapestry, but every tapestry has a border. In *Trustees Executors and Agency Co. Ltd. v Federal Comr of Taxation* (1933) 49 CLR 220, 234-235, Evatt J in the High Court of Australia stated:

“The correct general principle is....whether the law in question can be truly described as being for the peace, order and good government of the Dominion concerned....The judgment of Lord Macmillan [in *Croft v Dunphy* [1933] AC 156] affirms the broad principle that the powers possessed are to be treated as analogous to those of ‘a fully sovereign state’, so long as they answer the description of laws for the peace, order, and good government of the constitutional unit in question...”

70. It is for the Legislature of the Cayman Islands to enact legislation for the peace, order and good government for the Cayman Islands. It is for the Legislature to determine whether, in view of social conditions which existed in the Cayman Islands it was necessary to enact the *2005 Law*. It is not within the province of the Court to second guess the legislature and to substitute its views as to whether the conditions in the Cayman Islands required the *2005 Law* to be passed with a minimum sentence for unlawful possession of firearm. Laws L.J. pointed out that in enacting legislation for the peace order and good

government, the Legislature “is not obliged to respect precepts of the common law or English traditions of fair treatment”.

71. Indeed Lord Bingham of Cornhill, in **Reyes** case reminded that:

“It is open to the people of any country to lay down the rule by which their wish they state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in a different society.”

72. In **James v United Kingdom [1986] 8E.H. RR 123** the Court at Strasbourg had observed at para. 85:

“85 The Convention is not part of the domestic law of the United Kingdom, nor does there exist any constitutional procedure permitting the validity of laws to be challenged for non-observance of fundamental rights. There thus was, and could be, no domestic remedy in respect of the applicant’s complaint that the leasehold reform legislation itself does not measure up to the standards of the Convention and its Protocols. The Court, however, concurs with the Commission that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State’s laws as such to be challenged before a national authority on the ground of being contrary to the Convention or to equivalent domestic legal norms. The Court is therefore unable to uphold the argument to this effect advanced by the applicants.”

73. Until such provisions are made in the Constitution or Legislation is enacted giving effect to the European Convention in domestic law, this Court is obliged to give effect to the unambiguous law as it stands without invoking international law. Whether this is done is a matter of policy of the Legislature and not for the Court.

For these reasons the appeal is dismissed and the sentence is affirmed.

Zacca, P.

Forte, J.A.

Mottley, J.A.

