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IN OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
INDICTMENT NO. 61/01

REGINA V. GEORGE GENERAL

Appearance:
For the Crown: André Mon Desir
For the Accused: Douglas Schofield

REASONS FOR JUDGMENT

1.

The accused, George Anthony General ("General") , then aged 17, was on the 21st July 2001, arrested and later charged with possession of a stolen Sturm Ruger .357 Magnum revolver and two rounds of ammunition contrary to Section 15(1) of the Firearms Law(1998 Revision). His arrest took place 4 days after his return to his native Cayman Islands after 1 year's residence in New York. At the trial of this action and after the jury had been sworn but not put in charge, Mr. Douglas Schofield, counsel for General asked me to rule *in limine* whether a witness statement made by General and served on both the Court and the Crown could, in law, amount to a defence to the charge. He indicated that if the answer were to be in the negative his client would plead guilty to the indictment but would require the Court to hear the evidence from both sides in order to establish the factual basis for the eventual sentence of the Court. In other words a Newton hearing (*R. v. Newton* 77 CAR 13, a decision of the English Court of Appeal Criminal Division) would take place. In the event, I decided that the offence charged was an absolute

offence. The version of the accused in his witness statement, if accepted by the Court or not demonstrated to be untrue, would amount to circumstances whereby an absolute discharge or a very small fine would be imposed. I later heard the evidence in the case and decided General's version as to the facts was untrue and contrived and announced my decision. I undertook to give written reasons for my decisions both as to the Law and the facts and I now do so.

2.

The Law

Part (iv) of the Firearms Law (1995 Revision) deals with the possession and use of firearms. Section 15(1) reads:

> *"Subject to subsection (2), no person shall be in possession of any firearm except under and in accordance with the terms of a Firearm User's (Restricted) Licence.*

(2) Subsection (1) shall not apply to –

(a) *the holder of Gunsmith's Licence in respect of any firearm delivered to him for the purposes of effecting any repair or lawful alternations thereof;*

(b) *any person who comes into possession of any firearm in the capacity of executor or administrator of the estate of any deceased person or Trustee in Bankruptcy or liquidator of any insolvent person or of any company in liquidation, during the*

period of thirty days after the day upon which he came into possession of such a firearm;

(c) any servant or agent of any of the persons referred to in paragraphs (a) and (b) in respect of any firearm entrusted to him for delivery to the owner thereof in accordance with this Law;

(d) any constable or customs officer in respect of his possession of any firearm which came into his possession pursuant to this Law during such period as such firearm is so retained by him;

(e) any person in respect of the possession by him of any firearm entrusted to him by any constable for transportation pursuant to section 9 from any place to any other place during such period, not being longer than is reasonably necessary for the transportation of such firearm, as such firearm is contained in a sealed packet; or

(f) any person in respect of the possession by him of any firearm delivered to him in accordance with the provisions of paragraph (c) of section 36(2), during the period of the absence from the Islands of the owner of such firearm and two weeks thereafter, or the departure of such owner from the Islands whichever shall be the shorter.

(3) A person who 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."

The account given by General in his Witness Statement dated the 12th April, 2002 read as follows:-

> *"On the evening of my arrest, I was at Bo Bo's nightclub. When it came time to leave, around 2 a.m., I tried to find a ride. I spoke to a guy who said he was going to the Byron Lee party, which was supposed to be in the parking lot behind the Library in George Town. But he said he wasn't ready to leave yet. I don't know this guy's name.*
>
> *I decided to walk out to the road and see if I could get ride. But I needed to urinate first, so I walked off into the woods next to the roadway by the entrance to the Harquail Theatre. When I went to urinate, I saw something that looked like there was something hidden. There was a plastic plate on the ground and a bottle placed on it like was holding it down. I lifted the plate, thinking someone had hidden some weed. There was a hole in the ground and I saw the gun.*
>
> *The first thing that came into my mind was "money". This was because, in New York, I had seen posters that I thought said you could get $500 for turning in handgun to the police. (I now know I*

was wrong about the exact wording of the poster). I put the gun in my waist, intending to take it to the Central Police Station. My plan was to seek if the guy in Bo Bo's was still there, get him to take me to CPS and hand in the gun.

I came out of the woods and walked back to the club. The guy was there and he said he was ready to go. I asked him if would carry me to the police station in George Town. He said no. He said he was going to the Byron Lee party. I decided I would go with him and then walk though to the police station. I did not tell him I had the gun and he don't know that.

Five minutes later, as we were driving down the Harquail Bypass, I saw blue lights behind us. I asked the guy if he was going to stop. He said no, and he accelerated. I couldn't jump out. He didn't tell me why be wouldn't stop, even though I asked him twice.

I was thinking: I've got this gun and don't know that.

He turned into the road to the dump, and then into a dead end. He crashed the car into a hedge. Before that happened, I threw the gun out the window of the car. The car was till rolling when I threw it out.

The guy jumped out of the car and ran away. I jumped out. The police car ran into the back of the guy's car and I got knocked into the hedge. As I was getting out of the hedge, I heard a gun go off and I heard the shot go through to the top of the hedge. I was very frightened. I ran around the house but then I stopped because the police were all there."

3.
On the face of it, the wording of the section with the list of prescribed exemptions to its rigour, demonstrates that the will of the legislature was to create an offence of strict liability. *In R. v. McCafferty,* [2000] CILR 177 this court decided that Section 3 of the same law which made the importation of a firearm without a permit unlawful was not an offence of strict liability and that *mens rea* was a necessary constituent of that offence. The concepts of importation and possession are very different. Possession, as a concept, is dealt with in *Warner v. The Metropolitan Police Commissioner [1969] 1 A.C. 26 H.L.* where the prosecution proved that where the defendant knowingly had in his possession an article which in fact turned out to be drugs, although without his knowledge, was held to be sufficient possession to establish the guilt of the accused. I note that the punishment section, section 3, also prescribes a penalty of 20 years together with a fine of $100,000. In that judgment I referred to the well-known passage from the judgment of Lord Reid in *Sweet v. Parsley [1970] A.C. 132 H.L.* in which his Lordship said:-

"Our first duty is to consider the words of the act; if they show a clear intention to great an absolute offence that is the end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that parliament did not intend to make criminal persons who are in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of parliament, we must read in words appropriate to require mens rea."

4.

In Re. B, a minor v. The Director of Public Prosecutions [2000] 1 All. E.R. 833 H.L. their Lordships when interpreting Section 1(1) of the Indecency with Children Act (1960) ruled that although the section in question prescribed "any person who commits an act of gross indecency with or towards a child under the age of 14, or who incites a child under that age to such an act with him or another " is guilty of an offence" that *mens rea* was required for the proof of it. The headnote reads as follows:–

"Parliament has not expressly negatived the need for a mental element in respect of the age element of *the offence* (the boy was

> 15 and the girl 13*) nor had the presumption been displaced by necessary implication. On the contrary the application of the presumption was re-enforced by the serious nature of the offence and the broad manner in which it was drawn embracing conduct ranging from predatory approaches by much older paedophiles to consensual sexual experience between precocious teenagers in which the offender might be the younger of the two".*

5.

The decision of their Lordships has received support from Sir. John Smith, one of the learned authors of "Smith and Hogan" but has received very cogent criticism from the current editors of Archbold. Sir John Smith had suggested that a landmark decision had taken place in respect of the mental element of all crimes and in particular, section 1(c) of the Act. Lord Nicholls of Birkenhead, with whom the Lord Chancellor, Lord Irvine agreed, said at page 458 (b) –

> *"If a man genuinely believes that the girl with whom he is committing a grossly indecent act is over 14, he is not intending to commit such an act with a girl under 14. Whether such an intention is an essential ingredient of offence depends upon a proper construction 1."* (My Emphasis)

His Lordship promised that he would return to that issue in the course of his judgment but, with respect, he never did. He did not decide whether the element of knowledge or

recklessness as to age had to be proved but concluded that an absence of a genuine belief that the victim was 14 years or above (page 460 (c)) was sufficient. In other words, as the learned authors of Archbold point out, he has expressed the mental element of the offence in negative rather than in positive terms. Such a definition is contrary to principle. The speech of Lord Steyn fails to answer the question as to what *mens rea* was required to prove the offence under Section 1. Lord Hutton, on the other hand, confined himself, with respect correctly, to deciding that the words of Section 1 did not exclude *mens rea* and that the mental element of intention or recklessness was available as a defence. From this analyis I conclude that, *pace* Mr. Schofield, no new doctrine of interpretation of penal statutes has been laid down and the dictum of Lord Reid in *Sweet v. Parsley* remains the *locus classicus* of the relevant principle of statutory interpretation. A long series of cases interpreting Section 1 of the United Kingdom Firearms Act 1968 demonstrates that an absolute offence was created by that legislation. It reads:

> "1 (i) *Subject to any exemption under this Act, it is an offence for an person (a) to have in his possession, or to purchase or acquire, a firearm to which this section applies without holding a firearm certificate in force at the time or otherwise as authorised by such a certificate; (b) to have in his possession or to purchase or acquire any ammunition to which this section applies without holding a firearm certificate in force at the time or, otherwise then as authorised by such certificate, or in quantities excess of those*

so required. The penalty for infringement for Section 1(i) is five years imprisonment unless the aggravated form of the offence is proved."

In *R. v. Hussein 72 CAR 143,* The Court of Appeal held, (applying *Warner v Metropolitan Police Commissioner* (ibid)), that if the prosecution could show that the defendant knowingly had in his possession an article which in fact was a "firearm" then the offence was committed and the defendant's ignorance that article was a firearm was immaterial. In *Rv. Waller [1971] Crim. Law Rep. 381*, the Court of Appeal upheld a conviction when the defendant was in possession of a firearm in a friend's bag believing that it contained a crow bar and not a firearm. In *R.v. Steele [1993] Crim. Law Rep. 298* the Court of Appeal upheld a conviction even though the defendant could not reasonably have been expected to know that the bag he possessed contained a firearm and in *R v. Hulse [1977] QB 614* the Court of Appeal held that an honest and reasonable belief that a modern reproduction was an antique firearm was not a defence to possessing a firearm contrary to Section 1 (i) (a). See also *Woodage v. Moss [1974] 1 WLR 411* in which the Divisional Court upheld a conviction where the defendant was held to be in possession of a revolver when he was in the process of delivering it to a firearms dealer as a favour for somebody else. Accordingly, and despite the heavy penalty imposed for an infraction of Section 3 of the Firearms Law, I rule that an absolute offence was created by the legislation and that the defendant's account in his Witness Statement could not it any circumstances amount to a defence. If the matter had gone to trial I would have heard the matter as a *voir dire* and withdrawn it from the jury consideration of the jury. The

legislature has, for valid public policy considerations, taken that decision. In hard cases, the Courts, if a prosecution is proceeded with contrary to its expressed suggestion, can do justice by imposing a minimal penalty or even an absolute discharge.

6.

The facts

P.C. Archibold Cowans, a Traffic Officer, was travelling in a marked police vehicle from Bo Bo's night club at about 2:00 a.m. along the Harquail Bypass when he saw a white Nissan Sunny motor car, Registration Number 81-127. He decided to check the documentation of the driver of the motor car. He put on his blue lights and sounded his siren at which stage the vehicle accelerated away at speeds which reached 70 mph. He called for assistance, and as luck would have, it Chief Inspector Brady and P.C. Bechard were in the vicinity. They were involved in a major enquiry as to the theft of a vast quantity of drugs from the Central Police Station and, as a consequence, P.C. Bechard was armed with a shotgun. They overtook P.C. Cowan's motor car and gave chase. As they were in an unmarked vehicle a blue light was put on the roof of the motor car. A sharp turn was taken by the Nissan into Seymour Drive, in the course of which Cowans, Beshard and Brady saw a dark object, about the size of a fist in what looked like a black carrier bag, being thrown from the passenger side of the Nissan to the side of the road. The Nissan turned violently into the Paul Ramoon apartment complex where it collided with a van and then came to rest in a ficus hedge. Beshard saw that both the driver's door and the passenger's door were partly open before the vehicle came to a halt. The passenger, who is admitted to have been General, produced a handgun and emerged from

the now fully opened passenger door. Bechard had partially opened his door as well and he fired his shotgun into the air to frighten General into submission. General then threw the handgun to the ground and the Nissan continued to the rear of the apartment colliding with the van and finally coming to rest in the hedge. As he and Brady approached General, General jumped over the hedge and ran off. Bechard chased him and finally arrested him by tripping him up and handcuffing him. That occurred in the parking lot across from the apartment complex. In the meantime, Brady who had also observed the throwing of the package from the passenger window after the first collision, chased the driver. The driver had got out of his vehicle but the driver's door was closed until the vehicle stopped and the driver ran off. He was unable to catch him, but he was able to say that he was not the registered owner of the vehicle, a man whom he knew. That vehicle had been left parked according to Brady's information and taken without the owner's consent. It had been the owner's intention to sell the vehicle. I attach no significance to the fact that Beshard saw both doors opened at the same time whereas Brady saw only one. Both officers took General to the place where the loaded gun had been thrown out of the vehicle and recovered it in his presence. This was of course at a different location to the place where General says the gun was recovered from. Brady said " that's what you are going to jail for" according to General but he made no reply nor did he give an explanation as to where he had got the gun from. He was under no obligation to give an explanation but from then on he knew what a serious situation he was in. He had not been cautioned at that stage. There then ensued a three-quarter of an hour search of the location where the package had been thrown, allegedly from the passenger's window, using spot lights. That search was not successful. I am asked to

conclude that the failure to find the package, if that is what it was, cast doubt on the credibility of Cowans, Bechard and Brady. But I must ask myself, why should officers invent the story about the package when they had recovered the loaded gun? All that evidence might tend to do was to make them look foolish and incompetent as they had been unable to recover it. If they had been dishonest officers they might have been tempted to omit that part of their evidence. It was suggested to Bechard that he had struck General with the butt of his shotgun in the vicinity of his chin and on the back of the head. Bechard denied that allegation. The accused gave evidence, he is to be treated like any other witness and has the same right to have his evidence considered as that of a prosecution witness. I noted a "streetwise" attitude on his part which may had been engendered by his year in New York and/or his nine months in custody prior to his trial. I specifically warned myself not to hold attitude of that kind against him and I have not. I endeavoured to remind myself that at the time of the incident he was 17 years of age.

7.

General gave evidence largely in accordance with his witness statement. His disagreement with the police evidence was that before the collision with the hedge took place, he had left the vehicle and was unarmed. He had thrown the gun away long before the vehicle came to a halt. He said Bechard had discharged his shotgun when he was unarmed. He ran only a short distance but had stopped "as the police were there". He had stood with his hands behind his neck but he was kicked to the ground whereupon he was assaulted by Bechard. They were a total of nine officers there, two of whom he named, although when the officers were cross-examined no such suggestion was ever

made to them. He claimed to have a cut on his chin and a bump on the back of his head which he reported neither to the police in West Bay, where he was first taken, nor later at Central Police Station. His explanation was that he attached no real importance to the matter, although it had made him very angry. It was his explanation as to why he had made "no comment" answers when interviewed by the police. Whilst I reject his evidence as to the assault, I do not place any reliance upon it in assessing his credibility. I prefer to concentrate on the vital issues of fact between the Crown witnesses and he. I regard that part of his evidence as a mere make-weight perhaps consistent with what may be his general attitude. In any event I do not hold it against him. The only relevance of this assault is to explain his alleged attitude towards the police when he was interviewed at the Central Police Station by Detective Inspector Brady and P.C. Bechard on the following day. The interview took place at 6:30 in the evening so that a considerable time had passed between the events of the early morning and the time of the interview. After the normal caution, which he signed, the first question was as follows:

Q. I propose to ask you some questions relative to the .357 Sturm Ruger revolver you you are charged with unlawful possession of, do you understand.

A. Yea.

Q. Where did you get this gun from.

A. I donnoh.

Q; What do you mean by I "donnoh"

A. I donnoh

Q. What is it you don't know

A. No comments, them blood, that's the best thing

He signed each of those answers. The rest of the interview comprises a series of questions to which he made no comment and in respect of which I draw no adverse inference against him.

8.

Having been cautioned, he was perfectly entitled to say nothing to the police but he chose to reply to the vital question as to where he had got the gun from by the answer "I donnoh" on two occasions. He had been warned of the seriousness of the matter in the early morning of that day by Chief Inspector Brady. Even if he had been angry with the police for having been assaulted by them, he had the perfect opportunity to tell the police that his behaviour was in fact not only innocent, but public spirited. Having seen him in the witness box I am driven to the conclusion that he would have given them his explanation if it had been true.

9.

I conclude that the reason he did not give the explanation he gave in court today was that at that stage he had not concocted that explanation. He did not tell me that the reason for the answers he gave was that he was in fear of someone else or wished to protect the identity of the person who gave him the gun.

10.

I was asked to attend the scene as to where the gun was allegedly found after General gave his evidence in Chief. The Court assembled at the relevant location. General lead

the way from Bo Bo's (now called Insomnia!) and was followed by the Court and counsel. General lead the way out of the very large car park attached to the Island Complex. He proceeded across both carriage ways of the bypass and 50 yards up the road. He then turned into the entrance to the Harquail Theatre and proceeded 40 yards along it at which point a right turn occurs. There, he pointed out to me the place where he claimed he had urinated and saw the plate with a bottle on it. That is what alerted his attention. He removed the bottle and plate and found the gun. He had done so as he "thought it looked as if something had been hidden". He pointed out to me the place which later he was to describe as a hole in the ground. I looked carefully at the spot but saw neither a hole nor an indentation in the ground where a gun could been concealed in the manner he described. He told me in evidence that the condition of the ground was exactly as it had been on the occasion that he had recovered the gun. I observed on walking to and from the alleged place where the gun was found that General had a wealth of opportunities discreetly to urinate without being seen by members of the public. On the nighclub side of the bypass there are series of hedges. He could easily have squeezed himself behind those hedges and urinated in private. He told me that he had walked the distance he did because he had been arrested in New York for indecent exposure when urinating in a public place. I am afraid that a visit to the site renders that explanation as lacking in credibility. When he was asked by Crown Counsel why, on picking up the gun he had put it down the front of his trousers, his reply was that he had done so to hide it as he did not want the driver to see it. When asked if he had handled guns before there was a period of silence before he claimed never having done so. I concluded that he was not telling me the truth.

11.

It appears that General was the victim of two particular forms of misfortune on the night or morning in question. Firstly, he accepted a lift from a man he did not know who happened to be driving a stolen motor car, and then happened to urinate, having walked some distance, at the very point where a deadly weapon was hidden. The driver of the stolen car was sufficiently confident that he would not be detected by parking the stolen car on the car park of Bo Bo's and chatting with some women for a considerable time! Police are usually in the vicinity of these night clubs at closing time and indeed P.C. Cowans, it will be remembered, had originally driven off from Bo Bo's.

12.

I regret to say that I am driven to conclude that the entire account given by General is unworthy of credibility. I make the following findings of fact bearing in mind the burden and standard of proof.

1. General and the driver were involved in some form of criminal enterprise on the night in question. It possibly involved drugs, but there is no clear evidence on the point.
2. On the occasion of the first collision a package was thrown from the passenger side of the vehicle by General. As the driver was involved in eluding the police by fast driving he was too preoccupied by that activity for him to have thrown the package out of the window.

3. The Court rejects General's evidence that he had thrown the gun out of the car window at some time before the car came to a halt.

4. The Court finds that he left that vehicle with a gun in his hand in the hope that, at the very least, he might intimidate the police with it in order to effect his escape.

5. When Beshard discharged his shot gun the accused had the gun in his hand and was leaving the motor car. That discharge unnerved the accused and he then threw the gun away.

6. There is not one word of truth in his account as to the "finding of the gun".

7. The gun was proved by the evidence of Miss Grew to have been stolen in 1982 in Miami, Florida.

8. On the evidence of Miss Grew, this was a deadly and powerful weapon loaded with ammunition which would have had the effect of a Dum-Dum bullet if it had been discharged into a human being.

13.

The most favourable inference that one can draw in respect of General is that he was in contact with someone who was able to provide him with a gun which had been stolen. Accordingly, the accused falls to be dealt with for a very serious crime.

14.

After consideration of a pre-sentence report and details as to the prevalence of gun related crime I sentenced the accused to eight years imprisonment.

26th April, 2002

H.G.D. Graham
Judge of the Grand Court