In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2015: No 39

BETWEEN:-

JASON ADAM DECOUTO

Appellant

-and-

THE QUEEN

Respondent

EX TEMPORE JUDGMENT

(In Court)

Appeal against sentence – possession of firearm – whether before passing sentence Magistrate should have informed the defence that he did not accept the facts put forward in mitigation – whether exceptional circumstances – whether sentence should have been suspended

Date of hearing: 4th May 2016

Mr C. Craig S. Attridge, Barrister & Attorney, for the Appellant
Ms Cindy E. Clarke, Deputy Director of Public Prosecutions, for the Respondent

1. On 20th November 2015 the Appellant pleaded guilty in the Magistrates' Court to one count of possession of a firearm contrary to section 3(1)(a) of the Firearms Act 1973 ("the 1973 Act") before the Worshipful Archibald Warner and was sentenced to 30 days' imprisonment. He appeals against sentence, which he has already served, on the grounds that it was wrong in principle and/or manifestly harsh and excessive. The appeal is unopposed, although the parties differ as to what the correct sentence should be.

2. I gave a short *ex tempore* judgment at the close of the hearing. At the request of the parties I have reduced it to writing. In so doing I have expanded upon it to address some of the points which were covered during counsels' oral submissions, including some legal research arising from them, and to make it more readily intelligible to the general reader who has no prior knowledge of the case.

3. The facts were not disputed, either before the learned Magistrate or before me. The Appellant served part time as a sergeant in the Royal Bermuda Regiment ("the Regiment") from May 2003 until 24th February 2004 when, upon completion of his term of service, he was honourably discharged. His duties included distributing magazines and ammunition. While in active service, a member of the Regiment may lawfully carry firearms and ammunition. On one occasion the Appellant took two empty magazines home with him from a .223 calibre Ruger Mini 14 Rifle, then put them in a container and forgot about them.

4. On 6th April 2015, more than 11 years later, police officers searched the Appellant's house in relation to another matter and found the magazines in a closet. He was arrested and charged with possession of a firearm. Under section 1(1) of the 1973 Act, a "*firearm*" means a lethal barreled weapon of any description from which any shot, bullet or other missile can be discharged, and includes any component of such a lethal or prohibited weapon, such as a magazine. When interviewed under caution the Appellant acknowledged possession of the magazines and stated "*that is from my Regiment days*". He pleaded guilty to the charge at the earliest opportunity.

5. In his sentencing remarks, the learned Magistrate rejected the Appellant's explanation, stating:

"*I find it inconceivable that a responsible sergeant of the Bermuda Regiment realizing that he had erred in taking the magazines home would treat them in the way the defendant said he treated the magazines, putting them in a container and eventually forgetting about them.*

Moreover, since 2004 to present we have been – not to pun – under the gun with firearm offences. This environment should have triggered the defendant's memory of his possession of magazines. The magazines were never turned in. I do not accept the defendant's story that he simply forgot. This [defendant] had to know and could not have forgotten that he had the magazine[s]."

6. The learned Magistrate was entitled to reject the Appellant's explanation without hearing evidence. The applicable principles are stated in Archbold 2016 at para 101.

"*The cases (including, in a recent restatement in R. v. Cairns* [2013] 2 Cr.App.R.(S.) 73, CA*) establish three situations where although there is a dispute as to the facts of the case, the court is not obliged to hear evidence under the principles laid down in Newton.*

. . . . .

The third exception is the case where the matters put forward by the defendant do not amount to a contradiction of the prosecution case, but rather to extraneous mitigation explaining the background of the offence or other circumstances which may lessen the sentence. These matters are likely to be outside the knowledge of the prosecution: see R. v. Broderick, ante. Where the facts put forward by the defence do not contradict the prosecution evidence, the cases justify the following propositions.

(a) The defendant may seek to establish his mitigation through counsel or by calling evidence. The decision whether to call evidence is his responsibility, and there is no entitlement to an indication from the court that the mitigation is not accepted (Gross v. O'Toole , 4 Cr.App.R.(S.) 283, DC); but such an indication is desirable (R. v. Tolera [1999] 1 Cr.App.R. 29, CA).

(b) The prosecution are not bound to challenge the matter put forward by the defendant, by cross-examination or otherwise (R. v. Kerr , 2 Cr.App.R.(S.) 54, CA), but may do so (R. v. Ghandi , 8 Cr.App.R.(S.) 391, CA; R. v. Tolera, ante).

. . . . .

(d) The court is not bound to accept the truth of the matters put forward by the defendant, whether or not they are challenged by the prosecution (Kerr, ante): see R. v. Broderick, ante.

(e) In relation to extraneous matters of mitigation raised by the defendant, a civil burden of proof rests on the defendant, although in the general run of cases the court would accept the accuracy of counsel's statement: R. v. Guppy , 16 Cr.App.R.(S.) 25, CA."

7. The judgment of the Court of Appeal of England and Wales in Tolera was given by Lord Bingham CJ. The passage to which Archbold refers occurs at page 29 of the judgment and reads as follows:

"*If the defendant, having pleaded guilty, advanced an account of the offence which the prosecution did not, or felt it could not, challenge, but which the court felt unable to accept, whether because it conflicted with the facts disclosed in the Crown case or because it was inherently incredible and defied common sense, it was desirable that the court should make it clear that it did not accept the defence account and why. There was an obvious risk of injustice if the defendant did not learn until sentence was passed that his version of the facts was rejected, because he could not then seek to persuade the court to adopt a different view. The court should therefore make its views known and, failing any other resolution, a hearing could be held and evidence called to resolve the matter.*"

8. As the prosecution in the present case had expressly accepted the facts put forward by the defence in mitigation, in my judgment fairness required that before passing sentence the learned Magistrate should have indicated to the defence that he did not accept them. The defence could then have applied to call the Appellant so that the court had the opportunity of hearing him give evidence as to the mitigating facts. Absent such indication, the learned Magistrate should have passed sentence based on the mitigating facts advanced by the defence.

9. The learned Magistrate omitted to mention in his sentencing remarks that the Appellant fell to be treated as a man of good character. Whereas I shall of course take his good character into account, this is not a case where good character was likely to prove decisive.

10. Like the learned Magistrate, I was referred to two authorities. In Roberts v R [2005] Bda LR 73, Kawaley J (as he then was) set out guidelines for sentencing firearms offences in the Magistrates' Court. He stated at para 22:

> "*In summary then, it seems to me that persons summarily convicted of offences under the Firearms Act 1973 with a maximum penalty of 5 years imprisonment should ordinarily expect to receive an immediate custodial sentence, irrespective of the type of weapon involved, a guilty plea, youth, age and/or previous good character on the offender's part. This flows from the sentencing scheme of the Act, which manifests in unequivocal 'zero tolerance' terms Parliament's legislative intent that all such offences should be treated by the courts and the community as extremely serious.*"

11. Earlier in his judgment, the learned Judge stated at para 19:

> "*What length of imprisonment is appropriate, in a case with no unusual mitigating circumstances where an immediate custodial sentence cannot properly be avoided, will be a question which the sentencing Magistrate has far greater latitude to decide. Extremely short sentences, measured in days or weeks rather than months, may well be appropriate for first time offenders on whom any period of incarceration is likely to have a great punitive impact. It is, however, impossible to categorize the sort of circumstances which will be so exceptional as to justify departing from the general rule that a custodial sentence is required in firearms cases.*"

12. One such exceptional case was Dubell v Richards (Police Sergeant) [2009] Bda LR 63. The appellant was an American citizen who lived in Florida, where she had a "concealed weapon licence" to carry a gun. She took a flight to Bermuda. While on board the aeroplane she realised that although she had left the gun behind she had brought a magazine and nine live rounds of 9 mm Luger ammunition. She panicked and disposed of the ammunition in the rear bathroom trash bin of the aeroplane. However she retained the magazine, not realising that its possession was prohibited in Bermuda. It was discovered by Customs officers during an inspection at the airport on arrival. The appellant pleaded guilty in the Magistrates' Court to a charge of importing a firearm contrary to section 3(1)(b) of the 1973 Act. The charge related to the magazine but not the ammunition. She received an immediate custodial sentence of 10 days' imprisonment.

13. On appeal, Ground CJ quashed her sentence and substituted an absolute discharge. The Appellant had by then already served her sentence. The learned Judge gave his reasons for doing so at para 11 of his judgment:

> "*The appellant should … have been sentenced on the basis that she was a first time offender with no ulterior criminal intent. It is not likely that she is going to offend in this way again, so personal deterrence should play no part in this. I fully accept that in appropriate cases the court should pass severe deterrent sentences to deter criminal elements bringing guns into the country. This is particularly so in the present climate of escalating gun crime, where there is a strong public interest in general deterrence. But no criminal element is going to be deterred by 10 days imprisonment - no doubt they would think it worth the price. Obviously the courts have got to be able to distinguish between the hapless and the wicked, but that is a responsibility they face every day, and it is rarely either good sense or good policy to punish both alike.*"

14. Mr Attridge, counsel for the defence, submitted to me, as he submitted to the learned Magistrate, that the facts of the present case were analogous to Dubell. Like the learned Magistrate, although for different reasons, I disagree. Accepting the facts advanced by the Appellant in mitigation, the Appellant was responsible for the safe return of the two magazines to the Regiment. For so long as they remained at large in the community there was a risk that they would fall into the wrong hands and be used in conjunction with a gun and ammunition to cause injury. The Appellant was aware that he had the magazines, even if he forgot about them afterwards, because he placed them in a container. In my judgment his culpable failure to return them to the Regiment was grossly negligent. The fact that he held a responsible position as sergeant at the time of his initial failure to return them renders his negligence all the more serious.

15. On the other hand, while the Appellant was more than merely hapless, he did not act with malign intent. By the time of his arrest and charge the most culpable aspect of his conduct, namely his initial failure to return the magazines before he forgot about them, was very stale. I also take into account his timely guilty plea and previous good character, and the fact that the prosecution does not seek an immediate custodial sentence. There is no

risk that he will reoffend, and the length of any custodial sentence which was reasonably proportionate to the gravity of the offence would be unlikely to have a deterrent effect upon anyone seeking to use a firearm for criminal purposes.

16. I agree with the learned Magistrate that the case was sufficiently serious to justify a custodial sentence. I therefore reject Mr Attridge's submission that the Court should quash the sentence and substitute an absolute discharge. However I agree with Ms Clarke, who appeared for the prosecution, that the facts are exceptional and that the sentence should have been suspended. Had it not already been served, I should have ordered its suspension. I should also have quashed the sentence of 30 days, which was based on the learned Magistrate rejecting the Appellant's version of the facts, and substituted one of 10 days. However as the sentence has now been served I see no purpose in varying it in this way, notwithstanding that the Appellant is the successful party on the merits. I therefore make no order on the appeal.

17. I also make no order as to costs.

DATED this 4th day of May, 2016

_____

Hellman J