In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2015: 36

TERRY LANE JASPER

Appellant

V

THE QUEEN

Respondent

EX TEMPORE JUDGMENT

(in Court)

Date of hearing: February 12, 2016

Mr. Vaughan Caines, Marc Geoffrey Barristers & Attorneys Ltd., for the Appellant
Mr. Alan Richards, Department of Public Prosecutions, for the Crown

Introductory

1. In this matter, the Appellant appeals against a sentence of 10 days' imprisonment imposed on him on October 12, 2015 in the Magistrates Court (the Worshipful Khamisi Tokunbo), for having in his possession a prohibited weapon, namely a Colt .38 revolver pistol. The offence occurred when the Appellant, an American, was leaving Bermuda after a 35th wedding anniversary vacation with his wife. When his checked baggage was put through the X-ray machine at the LF Wade International Airport, the front outer pouch of his bag was found to contain a revolver with six rounds of ammunition.

2. The Appellant pleaded guilty and a necessary factual element of that plea was an admission that he had the requisite knowledge that an offence had occurred. Or, to put it more precisely, his plea involved an admission that he knew he had a firearm in his possession. It is true that he would have found it difficult to contest the charge at trial in that the Firearms Act contains a presumption, similar to that found in the Misuse of

Drugs Act 1972, that when you are found in possession of an article containing a firearm it is presumed that you know that the firearm is in the container. Be that as it may, the Appellant pleaded guilty and the Record records a very sparse apology with no elaborate explanation.

The merits of the appeal

3. Mr Caines on appeal has complained that the sentence was harsh and excessive because this case was comparable to that of *Dubell-v- Barry Richards (Police Sergeant)* [2009] Bda LR 63 where Ground CJ quashed a short custodial sentence and substituted a conditional discharge for a 61 year old woman who was convicted of possessing a firearm in the form of an empty magazine.

4. The circumstances in *Dubell*, Mr Richards for the Crown rightly argued, were quite different. In *Dubell* the appellant deliberately left her firearm in the United States and on board her flight to Bermuda she discovered that she had the magazine with ammunition in it. Her response was to dispose of the ammunition in the lavatory of the plane, which Ground CJ acknowledged (to use his words at page 3) "*were not very sensible steps*". But as he went on to say:

> "*That can only mean that the prosecution accepted that she did not have the necessary intent to import it. Had they thought that she was part of some conspiracy to import ammunition by the ruse of hiding it in the bin, then they should have charged her with it. But they did not.*"

5. He then went on to say that Dubell should have been sentenced on the basis that she had "*no ulterior intent*".

6. I accept in the present case that the Record is somewhat unclear as to precisely what the Appellant's intent was. He said when interviewed that he knew at one time that the firearm was there, but had forgotten about it. And, when cautioned, he denied knowing that the firearm was there. If he had wished to maintain that factual averment, which would have amounted to a defence, he ought to have pleaded not guilty.

7. I was concerned about the risk that the Appellant had not been properly advised before he entered a plea and might perhaps have been persuaded to plead guilty by reason of anxieties about the need to return home. However, Mr Richards explained that Mr Daniels, one of Bermuda's most able criminal counsel, appeared for him and that in fact the Learned Magistrate gave an indication of the likely sentence before the plea was entered. That, to my mind, makes it highly improbable that the Appellant only entered a guilty plea, feeling that he had a good defence, because he felt he might receive a non-custodial sentence and would be able to immediately return home.

8. Further and in any event, it seems to me that even without there being clear evidence as to precisely what the Appellant's state of mind was at the time of the offence and in the days preceding his arrest, there is a material difference between possession of a loaded firearm and possession of an empty magazine. There may well be cases where the mitigating circumstances are very unusual and in my judgment the facts of *Dubell* present an example of just such a case. Here, this was according to the Record a fairly standard case of somebody who, when charged with an offence, pleads guilty and issues a simple apology, saying that they did not intend to commit an offence.

Disposition of appeal

9. Mr Richards in paragraph 19 of his written submissions concludes as follows:

> "*It is true that the Appellant intended no harm and that, as it happened, his actions mercifully did not facilitate any. In all the circumstances, however, the learned Magistrate was fully entitled to emphasise the element of deterrence and conclude that these factors were not so exceptional as to merit a departure from the general rule that an immediate custodial sentence ought to be imposed on conviction for this offence.*"

10. I agree. The appeal against sentence is accordingly dismissed.

Dated this 15th day of February, 2016 _____

IAN RC KAWALEY CJ