In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2006: No. 9

B E T W E E N:

ANGELA COX
(Police Constable)
Appellant

-v-

CLIFTON GEORGE POWELL ROSS

Respondent

JUDGMENT

Date of hearing: August 27, 2009
Date of judgment: September 18, 2009

Ms. Cindy Clarke, Office of the Director of Public Prosecutions, for the Appellant

The Respondent did not appear

Introductory

1. On February 23, 2006, following a no case submission, the Respondent was acquitted by the Magistrates' Court (Worshipful Archibald Warner, Senior Magistrate) of a single offence of possessing a bladed article contrary to section

315C(1) of the Criminal Code. The particulars alleged that he was in possession of "*a black handled lock knife, with a cutting edge of 2.5*".

2. On March 6, 2006, the Informant appealed this decision on the grounds that the Learned Senior Magistrate erred in law in (a) ruling that a lock knife with a blade of less than 3" in length was a "folding pocketknife" and therefore not caught by section 315C (3) of the Act; and (b) declining to treat as persuasive English authorities relied upon by the Crown. In counsel's May 28, 2009 'Submissions for the Appellant', an undertaking was given not to seek a retrial if the appeal was allowed.

3. Accordingly, although the Respondent initially appeared in person at the hearing, he took no further part in the appeal once it was made clear that his acquittal was not being challenged in substantive terms. The less than ideal result is that the Crown are seeking in an unopposed appeal hearing to challenge on legal grounds a conclusion reached in the Court below following a fully argued contested hearing at which counsel appeared for both the Informant and the Defendant.

The evidence, submissions and judgment at trial

4. At about 1.15 am on January 29, 2006, the Police carried out a search for weapons at a Hamilton night club. The Respondent was found to be in possession of a knife which was produced in evidence as Exhibit 1. He only came to the attention of the searching officers because he appeared to be concealing what turned out to be a bottle of champagne. His employer confirmed that the Respondent was a technician who was required to use such a knife daily with his work and was a very reliable employee.

5. Ms. Elizabeth Christopher for the Respondent submitted that the knife in question was a folding pocketknife and that it was not caught by section 315C (3) because the blade was less than 3" long. It was accepted by Ms. Vaucrosson for the Crown that the blade was 2 ½" long, but contended (in reliance on English authorities considering an identical statutory wording) that the knife in question fell outside the exception because its blade was fixed (once opened) and would only fold if a button was pushed. The authorities cited were Archbold 2006, Chapter 24 paragraph 128; *R-v-Deegan* (1998) 2 Cr. App R 121; *Harris-v-DPP*, *Fehmi-v-DPP* (1993) 96 Cr. App. R 235. Ms. Christopher responded by arguing that the Bermuda statutory provisions ought to be interpreted differently because their far more severe penalty provisions. This required any ambiguities to be resolved in favour of the accused.

6. In his careful Judgment, the Learned Senior Magistrate concluded in material part as follows:

"*Crown counsel has referred me to 2 authorities on the English legislation (1) Harris v DPP; Fehmi V DPP; and (2) Desmond Garcia Deegan (Deegan) in which (Harris and Fehmi) were dealt with.*

In Deegan it was held that to be a folding pocket knife within the exception provided by S. 139 of the Criminal Justice Act 1988 (see Sec 315C (1) in 'the blade had to be readily and immediately foldable at all times simply by the folding process'. Notwithstanding this finding above by the Court of Appeal Waller, L.J. said about S 139 of the Criminal Justice Act 'I also believe that the legislation is ambiguous and that the liberal interpretation is liable to lead to an absurdity.'

I note that Harris and Fehmi is an English Divisional Court decision and Deegan is an English Court of Appeal decision. Thus both of these Courts are persuasive only in the Bermuda Courts.

In my view this S 315C (1) (our legislation) lends itself to more than one interpretation. In the circumstances of this case at bar and Waller, L.J.'s comments mentioned earlier, this case (this legislation) cries out for the applicants interpretation of "the principle against doubtful penalization".

This principle states, 'It is a principle of legal policy that a person should not be penalized except under clear law.' The Court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which penalizes a person where the legislator's intention to do so is doubtful, or penalizes him in a way which was not made clear. [Bennion]

As in the mirrored English legislation, I am of the view that the intent of Bermuda legislation is to prevent the carrying of fixed blade knives, not knives like the one in this case which I describe as pen knives which have devices for folding blades for reasons of safety.

In my construction I must also be careful to balance any criteria in our legislation favoring the public good against the principle of doubtful penalization. There is no evidence before the Court regarding the public good benefit to the community as a whole of S 315C (1).

It should be noted that there is no statutory definition of a folding pocket knife in our legislation nor in the English Legislation. Like Waller, L.J. in Deegan I am of the view that this S 315C (2) is ambiguous and a strict interpretation would lead to absurdity. (I will therefore employ the principle against doubtful penalization in the interpretation of S 315C (1)).

I am further fortified in my interpretation by [Bennion] *at page 572. 'Whenever it can be argued that an enactment has a meaning required infliction of a detriment of any kind, the principle against doubtful penalization will come into play. If the detriment is minor the principle will carry little weight. If the detriment is severe, the principle will be correspondingly powerful.' Under S 315C (2) the penalty for carrying a bladed weapon is a mandatory minimum 3 years imprisonment.*

Thus in all the circumstances I am not bound, nor am I persuaded, by the English authorities cited. On interpretation of S 315C (2) of the Criminal Code Amendment Act, I rule that the knife Exhibit #1, the subject of this charge, is a folding pocket knife within the exception of S 315C (1) of the Criminal Code Amendment Act 2005. There is a major distinction between folding pocket knives such as Exhibit #1, i.e., pen knives which carry locking devices for safety and other knives with blades, which slide out, or flick or operate on centrifugal force, and which locks in the fixed position."

The Crown's submissions on appeal

7. Ms. Clarke for the Appellant essentially relied upon the same authorities relied upon at trial. She submitted that whether a particular item is a bladed article for the purposes of the statute was a question of law for the judge to decide. The Bermudian statute, save for the penalty provisions, mirrored section 139 of the UK Criminal Justice Act 1988. In the absence of a statutory definition in either provision, reference to the common law was required. In the absence of contrary authority, the English case law's definition of what constitutes a "folding pocket knife" should be followed in Bermuda. The essence of this reasoning was that an exempted knife must be able to fold manually without recourse to any locking mechanism such as a button. She accepted that while the legislative history in the UK had been referred to in one of the English cases, no comparable legislative history existed in Bermuda.

8. Counsel also submitted that no evidence was led in relation to the locking mechanism of the knife at trial. This is correct as far as oral testimony recorded in the notes is concerned. However the knife in question was produced in evidence at trial; it also (a point which I did not appreciate until after the conclusion of the appeal hearing) formed part of the appeal file. It is clear from a simple examination of Exhibit 1 that the knife does in fact open manually into a locked position but will only fold into a closed position if a metal strip is first pressed.

9. Ms. Clarke conceded that the penalty scheme of the Bermuda legislation was quite different to its UK counterpart. However, she argued that even if the Senior Magistrate's approach was correct in 2006 when three years imprisonment meant

literally three years actual incarceration, it was now clear that such a penalty was not inevitable: *David Jahwell Cox-v- Angela Cox (Police Constable)* [2008] Bda LR 65 (Court of Appeal for Bermuda).

The interpretation of section 315C of the Criminal Code

10. Section 315C of the Criminal Code provides in material part as follows:

> "***Offence of having article with blade or point in public place***
>
> *315C (1) Subject to subsections (4) and (5), any person who has an article to which this section applies with him in a public place shall be guilty of an offence.*
>
> *(2) Subject to subsection (3), this section applies to any article which has a blade or is sharply pointed except a folding pocketknife.*
>
> *(3) This section applies to a folding pocketknife if the cutting edge of its blade exceeds 3 inches.*
>
> *(4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place.*
>
> *(5) Without prejudice to the generality of subsection (4), it shall be a defence for a person charged with an offence under this section to prove that he had the article with him—*
>
> *(a) for use at work;*
>
> *(b) for use at organized sporting events;*
>
> *(c) for religious reasons; or*
>
> *(d) as part of any national costume.*"

11. According to the version of the Criminal Code published online, section 315C was enacted with effect from July 27, 2005. This was over 15 years after section 139 of the British Criminal Justice Act 1988-on which section 315C is clearly based-was enacted. The Bermuda enactment was made some 12 years after the English Court of Appeal in a reported case first assigned to the term "*folding pocketknife*" the meaning upon which the Appellant relied. Absent compelling reasons for adopting a contrary interpretative approach, this suggests that the

English case law relied upon by the Crown in the present case is highly persuasive and should be followed by the Bermudian courts.

12. Where the Bermudian legislature enacts legislation based substantially on foreign statutory provisions, judicial precedents from the overseas forum on the interpretation of the provisions on which the local statute is based will ordinarily be accorded considerable deference in the Bermudian courts. In the present case, however, the Learned Senior Magistrate in the Court below accepted the submission that this traditional approach should be departed from because of the far more severe penalties adopted under the Bermudian legislative scheme. This decision was not solely based on a simplistic comparison between the maximum sentences adopted in Bermuda as compared to Britain. It was also based on the more subtle interpretative analysis that the more severe the penalty, the clearer a punitive provision had to be.

13. Does the mere fact that a different approach to penalties for bladed weapons offences was adopted by the Bermudian legislature create a distinctive wider statutory context here, distinguishing the interpretative task from that which would be undertaken when an entire overseas statutory scheme has been borrowed with no or no substantial modifications? It is implicitly contended by the Appellant in the present case that the provisions constituting the relevant offence constitute a sufficiently self-contained code to render any differential sentencing provisions irrelevant to how one construes the constitution of the offence. In the ordinary case, if Bermuda's legislature creates an offence based on a Commonwealth statutory precedent, the starting assumption would invariably be that our courts should be slow to construe such an offence in a way which conflicts with the established view of the meaning of the enactment in the jurisdiction whose precedent our Parliament has chosen to follow. It will still be a matter of judgment in each case to decide whether the relevant foreign precedent was sufficiently persuasive in reasoned terms to be followed.

14. So two questions arise for determination in deciding whether the Senior Magistrate erred in law in declining to follow one Divisional Court and one English Court of Appeal decisions on corresponding UK statutory provisions on which our section 315C was clearly based. The first and narrower question is whether the different approach on penalties impacts on the rule against doubtful penalisation in such a way as to render ambiguous what the English courts have concluded is sufficiently clear. The second and broader question is whether, assuming the first question is answered in the negative, the English authorities are sufficiently persuasive to be followed in any event.

The impact of the Bermudian sentencing scheme on the interpretative rule against doubtful penalisation

15. Section 315C of the Criminal Code makes it an offence for a person to have in a public place "*any article which has a blade or is sharply pointed except a folding pocketknife*". Section 315C(6) of the Criminal Code provided as follows:

> "*(6) A court which finds a person guilty of an offence under subsection (1) shall -*
>
> *(a) on summary conviction, impose a term of imprisonment of not less than three years and not more than five years, and may in addition to the prison sentence, impose a fine of $5,000;*
>
> *(b) on conviction on indictment, impose a term of imprisonment of not less than five years and not more than seven years and may in addition to the prison sentence, impose a fine of $10,000.*"

16. Section 315C not only provides for a mandatory minimum of three years imprisonment on summary conviction and five years on indictment. It contains a reverse onus provision requiring a person found in possession of a bladed article to prove that he had the article in his possession for a permitted purpose. In effect, the legal position as it presented itself to the Learned Senior Magistrate at trial was that a person guilty of an offence under section 315C, which could be tried either way, had to be sentenced to three years imprisonment, albeit a sentence which could be suspended in exceptional circumstances[1]. The seriousness of the offence was accordingly radically different to its British counterpart, which was a summary offence punishable only by a fine. Section 139(6) of the UK Criminal Justice Act 1988 provides as follows:

> "*A person guilty of an offence under subsection (1) above shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale.*"[2]

[1] *The Queen v Millington Johnson* [2004] Bda. L.R. 63.

[2] It is unclear if a different maximum penalty applies for conviction on indictment, or whether such conviction is only possible if the accused is charged with other indictable offences. An absolute discharge was imposed by the Crown Court in *Deegan* (1998) 2 Cr. App. R. 121 at 122.

17. The wider sentencing framework in Bermuda is also different to its UK counterpart, as Ms. Clarke fairly pointed out. Section 315 creates the older offence of possession of offensive weapons, which are defined in subsection (4) as "*any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use by him or by some other purpose.*" This offence, which requires proof of criminal intent, attracts a lower non-mandatory term of imprisonment and fine than is provided for in respect of what objectively viewed is a less serious section 315C offence. A section 315C offence does not require proof that the bladed article was intended for violent use.

18. Even more striking still is the fact that section 315A permits the Governor to prohibit certain offensive weapons while section 315B provides that the same penalties applicable to offensive weapons under section 315 apply to the possession of prohibited weapons (without limiting the offence to public places). Those penalties are two years imprisonment and a fine of $1500 (on summary conviction) and four years imprisonment and a fine of $5000 (on conviction on indictment). Objectively viewed, it is obviously more serious criminal conduct to be in possession of a prohibited article in a public place (or indeed a non-prohibited article intended for illicit use) than to be in possession of an article the possession of which is generally lawful and which may not be intended for use to cause injury. The UK sentencing scheme for bladed articles, offensive weapons and prohibited weapons respectively treats the bladed article offence as the least serious offence because it requires no proof of criminal intent or possession of an article which one is never lawfully entitled to possess. It is an offence which is only punishable by a fine.

19. Nevertheless the current legal position is not quite as stark as it was when the present case was tried before the Magistrates' Court. As a result of the landmark constitutional ruling of the Court of Appeal for Bermuda in *David Jahwell Cox-v-Angela Cox (Police Constable)* [2008] Bda LR 65, 'mandatory' sentences of imprisonment enacted by Parliament no longer deprive the Courts of their discretion under section 54 of the Criminal Code to impose proportionate sentences. As Court President Zacca (giving the judgment of the Court) concluded:

> "*24. For these reasons, we hold that the minimum term provisions of section 315C (6) are subject to the proportionality requirement of section 54, and to that extent the Appeals against sentence are allowed. It is incumbent on the sentencing judge, in every case, to determine whether the prescribed minimum sentence would infringe the defendant's rights under section 54, taking account both the statutory*

guidelines set out in section 55 and of the minimum term requirement which, subject to section 54, itself has the force of law. We further hold that the provisions so interpreted are not unconstitutional, and in that respect the Appeals are dismissed."

20. The position remains that an offence under section 315C is a far more serious offence than possession of an offensive or prohibited weapon; the Bermuda penalty tariff is not simply higher than its British equivalent. The British tariff system has been stood on its head for reasons which are, in the absence of evidence as to the legislative history of section 315C, unclear. It remains to consider how these distinctions and the rule against doubtful penalisation impact on the interpretation of the phrase "*folding pocketknife*" in section 315C.

21. The doubtful penalisation rule is only engaged when a statutory provision with penal consequences is found by the Court to be ambiguous or unclear. In *Harris – v- DPP; Fehmi -v- DPP* (1993) 96 Cr. App.R. 235, McGowan LJ implicitly rejected the argument that "*this is a penal statute and, accordingly…clear words are required. They are not…*"[3] His Lordship rejected the appellants' contentions that the mere fact that a folding knife when opened locked into position and required some mechanism to allow it to be closed did not take the article outside of the "folding pocket knife" exception on the following grounds:

> "*In my judgment, the right approach to the matter is this. To be a folding pocket knife the knife has to be readily and indeed immediately foldable at all times, simply by the folding process. A knife of the type with which these appeals are concerned is not in this category because, in the first place, there is a stage, namely when it has been opened, when it is not immediately foldable simply by the folding process, namely the pressing of the button.*"[4]

22. The doubtful penalisation argument was even more indirectly rejected in *R-v-Deegan* (1998) 2 Cr. App. R 122 where the *Harris and Fehmi* decision was challenged on the grounds that the legislative history of the statutory provision did not support the Divisional court's interpretation. The primary basis of the Court of Appeal decision to dismiss the appeal based on what the legislative history behind section 139 of the 1988 Act was the fact that the Parliamentary statements relied upon were not sufficiently clear, even though two ministers "*undoubtedly thought that they were excluding from the section not just pocketknives that fitted the Divisional Court's interpretation of 'folding', but some which 'locked' when the blades were open*"[5]. Accordingly, a fundamental precondition for referring to the legislative history as an aid to interpretation was not met. Only one sentence in

[3] At page 239.
[4] At pages 239-240.
[5] At 128C.

Waller LJ's judgment explicitly dealt with the merits of the Divisional Court's decision:

> "*...However, it seems to us that 'folding' in its ordinary meaning, means foldable at all times without the intervention of some further process, namely the pressing of a button or release of a catch, and that if some form of 'lock knives' are to be brought outside the legislation, that will need further definition.*"[6]

23. This finding was in my judgment technically *obiter,* with the reference to 'lock knives' an allusion to the legislative history which made numerous references to knives that locked. Section 139 as enacted makes no reference to lock knives at all and the legislative history was considered but formally ruled inadmissible. It is true that that the Crown Court judge in *Deegan* seemingly certified two questions as fit for appeal, (a) the legislative history point, and (b) the ambiguity point. But the scope of the argument on the actual appeal (as described by Waller LJ at page 123F-G) was clearly limited to the contention that the legislative history clearly contradicted the Divisional Court's interpretation of section 139 in *Harris and Fehmi*[7]. The concluding portion of the English Court of Appeal's judgment in *Deegan* is reflects lingering doubts about the correctness of the Divisional Court's interpretation of "folding pocketknife", albeit doubts which were insufficient to justify a different judicial approach in the UK statutory context:

> "*The final point to make will be said to be a slightly unfair one in the light of the difficulties in finding the time to put forward legislation. But the decision of the Divisional Court was in July 1992. There does not appear to have been any move to amend the legislation. That may demonstrate either that there is no great pressure to amend the legislation and not the perceived unfairness on the part of carriers of pocketknives whose blades can be locked as above described. Alternatively, it may demonstrate that there are real difficulties in defining precisely that form of pocketknife with a locking device which should fall outside the section, and, that the better view is, that albeit the present legislation will place an onus on some persons to provide a reason for carrying a knife which at first sight may seem unreasonable, that is an inconvenience which the few should suffer for the benefit of the community as a whole.*"

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[6] At 128E.

[7] What was found by Waller LJ in *Deegan* to be ambiguous were the Ministerial statements made in relation to earlier drafts of section 139, not (as the Senior Magistrate's judgment suggests) the final wording of section 139 as enacted in the UK.

24. In my judgment, being exposed to the risk of conviction and incarceration under section 315C unless an accused person can justify his possession of a locking pocket knife cannot be justified as "*an inconvenience which the few should suffer for the benefit of the community as a whole*" absent very clearly expressed legislative intent. The position might well be entirely different if the penal consequences were (as is the UK position) equivalent to minor traffic offences, in which case the engagement of fundamental rights such as the presumption of innocence, freedom of movement and personal liberty would be comparatively minimal.

25. In summary, the doubtful penalisation point which formed the basis of the decision below in the present case was only directly rejected by the Divisional Court in *Harris-v-DPP*, *Fehmi-v-DPP* (1993) 96 Cr. App. R 235 in relation to a statutory provision which contained the same wording as in our section 315C but in relation to an offence which was not punishable by imprisonment. The threshold of clarity required in relation to such a penal provision is far lower than required for an offence for which the starting assumption is a three (or five) year sentence of imprisonment. The Learned Senior Magistrate's rejection of the Divisional Court's analysis of what constituted a "*folding pocketknife*" was pivotally based on the following dictum from *Bennion*:

> "*Whenever it can be argued that an enactment has a meaning requiring infliction of a detriment of any kind, the principle against doubtful penalisation will come into play. If the detriment is minor the principle will carry little weight. If the detriment is severe, the principle will be correspondingly powerful.*"[8]

26. This principle was not challenged on appeal, save to suggest that its application was now muted in light of the *Cox* decision. It was not vigorously argued that the decision below was wrong when made. In my judgment the risk of immediate incarceration under section 315C (in cases where such a penalty is considered appropriate) still requires a far higher degree of certainty for concluding that a particular article is caught by the statute than is required in relation to the UK offence which carries no risk of incarceration at all. The decisions *R-v-Deegan* (1998) 2 Cr. App R 121; *Harris-v-DPP*, *Fehmi-v-DPP* (1993) 96 Cr. App. R 235 are of only marginal persuasive value having regard to the starkly different penal consequences which flow from the British statutory provisions which correspond

[8] '*Bennion on Statutory Interpretation*', 5th edition (LexisNexis: London, 2008), page 827.

to those of the Bermudian Act. Moreover, *obiter dicta* in the English Court of Appeal case of *Deegan* support rather than undermine the view that the crucial statutory words would benefit from legislative clarification.

27. I find that the Learned Senior Magistrate was correct to decide that the pocketknife in the present case, with a blade of less than 3" long and which (a) folded open and locked into position, and (b) folded closed after a button was pressed, should be construed as falling within the statutory exception of "folding pocket knife" under section 315C, applying the interpretative rule against doubtful penalisation.

Persuasive value of the English authorities generally

28. Apart from the rule against doubtful penalisation, I would decline to allow the appeal in any event on the grounds that the English authorities are not sufficiently clearly persuasive to be followed, particularly in the context of an appeal on a difficult point which has only been argued on an unopposed basis. I find the interpretation of the Divisional Court difficult to extract from the bare words "*folding pocketknife*" in their context in section 315C. The crucial provisions, it is helpful to remember, simply state as follows:

> "*315C (1) Subject to subsections (4) and (5), any person who has an article to which this section applies with him in a public place shall be guilty of an offence.*
>
> *(2) Subject to subsection (3), this section applies to any article which has a blade or is sharply pointed except a folding pocketknife.*
>
> *(3) This section applies to a folding pocketknife if the cutting edge of its blade exceeds 3 inches.*

29. In *Harris-v-DPP*, *Fehmi-v-DPP* (1993) 96 Cr. App. R 235, McGowan LJ appears to have accepted the submission of Prosecuting counsel that the intent of the legislation was to prohibit the carrying of fixed blade knives. Based on this premise, he arrived at the secondary conclusion that a folding pocket knife was to be distinguished by the fact that it could easily be folded closed. Prosecuting counsel below and on the hearing of the present appeal did little more than to

submit that the conclusions of the English Divisional Court should be followed without really supporting the reasoning upon which these judicial conclusions were reached. This is probably because, somewhat like Waller LJ in the *Deegan* case, counsel found it impossible to add flesh to the bare bones of McGowan LJ's skeletal analysis. In light of the provisional reference to the Parliamentary history of section 136 of the UK 1988 Act which took place in Deegan, it is quite possible that (although this does not appear in the comparatively short report of the *Harris-v-DPP*, *Fehmi-v-DPP* case) that McGowan LJ was also privy to the legislative concern about locked knives which seems to have prompted the UK enactment.

30. Taking judicial notice of the notorious fact that the enactment of section 315C in Bermuda was motivated by concerns about the rising use of bladed articles as weapons in public places, it is only clear that the articles intended to be caught by the statute were ones which had " *a blade or* [were] *sharply pointed*" as section 315C (2) provides. Reading subsections (2) and (3) together, no legislative intent to exclude folding pocket knifes altogether is manifested, although a primary focus on fixed blade knives can be inferred from the fact that folding pocketknives are cited as an exception to the general rule. Nevertheless, it is only folding pocketknives with blades below the specified length that are excluded, presumably on the basis that this type of bladed article is commonly carried about in public for lawful work and/or leisure purposes. To my mind the natural and ordinary meaning of the words "folding pocketknife" suggests equally knives which fold open or closed with or without the intervention of a locking and/or an unlocking mechanism. What the phrase appears clearly to exclude, as noted by the Senior Magistrate, is a knife which opens and/or closes automatically, features which are admittedly absent from Exhibit 1 in the present case.

31. Without evidence as to the drafting history of section 315C, or perhaps Police testimony as to any 'street' practices in terms of the illicit use of bladed articles, it is difficult to see why a folding knife with a blade of less than 3" long should be criminally exempt if it folds open into a locked position and can be folded closed without engaging some mechanism like a button, but is caught if some unlocking mechanism has to be deployed. This analysis is particularly difficult to follow in the case of knives such as Exhibit 1, which upon examination is as easy (if not easier) to unlock and fold closed than it is to fold and lock open. Most importantly, there is nothing in the language of section 315C which clearly suggests that the term "folding" is not intended to apply to a folding knife which locks and only unlocks if a button-type mechanism is depressed. Moreover, the dramatically different approach taken as regards sentencing by the Bermudian legislature neutralizes the starting assumption that a conscious decision was taken to re-enact the UK legislative scheme as a whole. The difference of approach is more than simply a more severe sentencing tariff; rather, the entire character of

the English summary offence has been changed (a) by creating an offence triable both summarily and on indictment and (b) by creating an offence graver than any other freestanding weapons offences save for offences under the Firearms Act 1973.

32. Accordingly, if I were not entitled to uphold the decision of the Learned Senior Magistrate on the grounds of applying the rule against doubtful penalisation to an ambiguous provision, I would still dismiss the present appeal and leave the point open for future determination in a case where this difficult point of construction could be more extensively explored on a fully contested basis.

Summary

33. For the above reasons, I would dismiss the appeal against the March 6, 2006 decision of the Magistrates' Court (Wor. Archibald Warner, Senior Magistrate) to decline to follow the decisions *R-v-Deegan* (1998) 2 Cr. App R 121; *Harris-v-DPP*, *Fehmi-v-DPP* (1993) 96 Cr. App. R 235. The Senior Magistrate correctly had regard to the rule against doubtful penalisation when construing section 315C of the Criminal Code, which carries a 'mandatory' sentence of three years imprisonment upon summary conviction and 5 years imprisonment for convictions on indictment. He also correctly held that this enactment does not clearly prohibit the public possession of folding pocketknives with blades of less than 3" in length if they lock open and can only be folded closed by disengaging such lock by depressing a button or a similar mechanism.

34. The crucial canon of construction was not explicitly considered by the Divisional Court in *Harris-v-DPP*, *Fehmi-v-DPP* (1993) 96 Cr. App. R 235. Although the English Court was considering identical statutory wording, the rule against doubtful penalisation had far less force because the counterpart offence was punishable only be a fine. Indeed, the Bermuda legislative scheme in sentencing tariff terms turns the UK scheme on its head, imposing the most severe penalties for what logically appears to be the less serious criminal conduct. While the English Court of Appeal in *R-v-Deegan* (1998) 2 Cr. App R 121 formally upheld the earlier Divisional Court interpretation upon which the Appellant in the present case relied, it explicitly acknowledged how difficult section 139 of the Criminal Justice Act 1988 (UK) was to interpret in relation to articles such as Exhibit 1 in the present case. Moreover, although the legislative history of section 139 was held to be not sufficiently clear to be used to overturn the Divisional Court's interpretation, it tended more to undermine than to fortify this interpretation.

35. The Learned Senior Magistrate was accordingly correct in declining to follow the English authorities which were relied upon as supporting the conclusion that the Respondent's pocketknife was not excluded from the operation of section 315C of the Criminal Code. These authorities were considering a similarly worded summary offence. Section 315C creates an offence which is not only triable on indictment; it is the most serious freestanding weapons offence under the Criminal Code with mandatory penalties exceeded only by those applicable to firearms offences. The ambiguity of this provision's scope of application (as regards folding knives with locking blades less than three inches long) raises interpretative doubts which must be resolved against the Crown and in favour of the accused.

Dated this 18th day of September, 2009 _____

KAWALEY J