In The Supreme Court of Bermuda

Appellate Jurisdiction
2009 No. 33

BETWEEN:

LORI DUBELL

Appellant

-and-

BARRY RICHARDS
(POLICE SERGEANT)

Respondent

Date of Hearing: Friday 13th November 2009
Date of Judgment: 20 November 2009

Ms. Christopher for the appellant; and
Mr. McColm for the Respondent.

JUDGMENT

1. Ms. Dubell appeals against the sentence of 10 days' immediate imprisonment imposed upon her in the Magistrates Court on 16th September 2009 in respect of her guilty plea to information 09CR00727. The information contained one charge of importation of a firearm contrary to section 3(1)(b) of the Firearms Act 1973, and another count of possessing a firearm. The appellant pled guilty to the importation charge, and the crown did not proceed with the charge of possession. The Act prohibits not just the importation of complete firearms, but also of parts and ammunition, and Ms. Dubell's plea and sentence related to an empty 9 mm magazine.

2. The brief facts were that Ms. Dubell, an American citizen, arrived in Bermuda as a visitor on a commercial airline at about 3 p.m. on the afternoon of Thursday 10th September 2009. She had completed a Customs form, in which she had declared a piece

of fruit and $304 cash, but was silent about the magazine. She was subjected to an inspection, when the magazine was found in a black 'fanny pack' strapped around her waist. When it was shown to her she acknowledged that it was a magazine for a gun she owned, and pointed out that it was empty. She then stated "it is a magazine to my gun that I have a permit for in the States." She was asked if she had any bullets, to which she replied "No". Upon being told that guns and their components were illegal she replied "I forgot that I had it in there as I used my pack as a bag sometimes."

3. Although the magazine was empty she had had bullets on the flight. Immediately on landing Customs Officers had searched the bathroom trash bins on the plane, apparently as a routine precaution against smugglers using that method of bringing contraband into the country. In the rear bathroom trash bin they found nine live rounds of 9mm Luger ammunition. This discovery was made before the search of the appellant. She was interviewed about all of this. On Friday 10th September she gave a "no comment" interview in the presence of her lawyer and apparently under legal advice. On Saturday 11th September she was again interviewed, and she then admitted that the ammunition and clip were hers.

4. The explanation advanced in interview and in mitigation was that the magazine and ammunition belonged to a gun for which the appellant held a 'concealed weapon licence' in her home state of Florida. She produced the licence to Customs. The 'fanny pack' was for carrying that gun. Although she had left the gun at home, she had forgotten the clip of ammunition until she was on the plane. At that point she panicked, being aware that being in possession of ammunition on a flight might cause security problems, and had disposed of the live rounds in the bin. She had, however, retained the magazine believing it to be innocuous. She says that she had carried the full magazine through two TSA security checks in the USA before boarding the flight to Bermuda without being stopped.

5. The appellant is a 61 year old realtor from Naples, Florida, and she produces a copy of her realtor's licence from the Florida department of Business and Professional regulation.

She expresses a fear that her conviction and sentence might impact on this licence, and hence on her ability to earn a living. She is of previous good character.

6. Her counsel submits that the appropriate sentence was an absolute discharge pursuant to section 69(1) of the Criminal Code, which provides:

> **Conditional and absolute discharge**
> 69 (1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, the court may, if it considers it to be in the best interests of the offender and not contrary to the public interest, instead of convicting the offender, by order direct that the offender be discharged absolutely or on conditions prescribed in a probation order made under section 70A or 70B.

7. That provision apparently derives from a Canadian model, and has been the subject of judicial consideration and interpretation in that country. In R v Fallofield [1973] BCJ No. 559, the British Columbia Court of Appeal said –

> "(2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
> (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
> (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
> (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
> (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions."

8. In R v Moreau (1992), 76 C.C.C. (3d) 181 (Que C.A.) at pp. 185 – 186 Rothman J.A. said:

> "It would be difficult, and probably unwise, to attempt a definition of the categories of cases where an absolute or a conditional discharge could appropriately be granted. But without attempting an exhaustive definition, I believe a discharge under s. 736 should be considered a sentencing option where the conditions of the section are met and where, having regard to the nature of the offence and the age, character and circumstances of the accused, the registering of a criminal conviction, in itself, would have a prejudicial impact on the accused that is disproportionate to the offence he or she committed."

9. The penalty for the offence of importing a firearm is potentially severe, being on summary conviction for a first offence a term of imprisonment not exceeding 5 years or a fine of $10,000 or both. It is not clear from the record why the learned Senior Magistrate imposed the penalty he did. Press reports at the time suggest that he disbelieved the appellant's explanation, but in such a case, if he thought the importation deliberate, a much more severe penalty would have been called for. On the other hand, if the court accepted her explanation, then a sentence of immediate imprisonment for a first time offender would seem inappropriate.

10. In my judgment there was nothing in the case as presented by the prosecution to suggest a deliberate attempt to import a firearm component into Bermuda. Everything points to this being an unfortunate error by a hapless individual. Moreover, while the Customs form which the appellant completed does make it plain that the importation of firearms and ammunition is prohibited, it does not, as her counsel pointed out to the Magistrate, make it clear that a part of a firearm, such as an empty magazine, is similarly proscribed. The appellant took steps to rid herself of the ammunition. They were not very sensible steps – disposing of live ammunition into a waste bin at 40,000 feet is not something to be encouraged – but she was not charged in respect of the ammunition. 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.

11. The appellant should, therefore, 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.

12. The point is now largely one of principle only, as the appellant has already served her full sentence. In the circumstances I accept Ms. Christopher's submission that this was an appropriate case for a discharge. I therefore quash the sentence of ten days imprisonment, and substitute an absolute discharge.

Dated this 20th day of November 2009

Richard Ground.
Chief Justice