In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
Case No. 34 of 2019

BETWEEN:

THE QUEEN

-and-

JAMES ROBERT RUMLEY

Before: **The Hon. Justice Juan P. Wolffe, Acting Puisne Judge**

Appearances: Ms. Cindy Clarke & Tine Tucker for the Prosecution
Ms. Victoria Greening & Archibald Warner for the Defendant

Date of Sentence: 14th December 2020
Date of Reasons: 21st January 2021

SENTENCE

Unlawful Importation of a Firearm (Section 3(1)(b) of the Firearms Act 1973) – Component parts of a firearm – Mandatory minimum sentences

WOLFFE, AJ.

1. On the 26th November 2020 a Jury unanimously found the Defendant guilty of three (3) counts of Unlawful Importation of a Firearm contrary to section 3(1)(b) of the Firearms Act 1973 (the "Act"). Succinctly, the Jury accepted the Prosecution's evidence that on the

3rd June 2019 (Count 1 on the Indictment) and on two (2) occasions on the 14th October 2019 (Counts 2 and 3) that the Defendant imported into Bermuda component parts of a firearm from FedEx facilities located in the State of Pennsylvania of the United States of America. *To wit*: a "Taurus" handgun frame grip with trigger, two (2) top slides and barrels, trigger parts and mechanism, slide parts, a magazine catch, and a locking block assembly (together referred to as "component parts").

2. On the 14th December 2020 I sentenced the Defendant to fourteen (14) years imprisonment for each of the three (3) counts, all to be served concurrently. Herein lies my reasons for doing so.

The Law

3. Section 30A of the Act, as read with Table 2 of Schedule 1 of the Act, provides that a first time offender found guilty of an offence under section 3(1)(b) of the Act shall receive a term of imprisonment not less than twelve (12) years and not more than seventeen (17) years. That is, a <u>mandatory minimum</u> sentence of 12 years imprisonment and a <u>mandatory maximum</u> sentence of 17 years imprisonment.

4. By virtue of the imposition of these mandatory sentences the Legislature laid down sentencing parameters which the Court should consider when sentencing offenders who have committed offences of the same character as those committed by the Defendant. On the face of it, it appears that the mandatory minimum sentence of 12 years imprisonment should only be reserved for those who plead guilty to a relevant firearms offence, have no previous convictions, and who come with reasonable mitigating circumstances. *Ergo*, that the mandatory maximum sentence of 17 years imprisonment for such offences should only be for those who, whether they pleaded guilty or were found guilty after a trial, are repeat offenders and/or have committed the most egregious variety of the relevant offences. Whether the eventual sentence falls at or somewhere between the mandatory minimum and maximum terms of imprisonment would of course be determined by any mitigating or aggravating features of the case. Any sentencing judge would therefore be cautious to

venture outside of those minimum/maximum sentencing guardrails because to do so could reasonably be perceived as acting in a way which is contrary to the Legislature's intent and to standard sentencing guidelines.

5. But the mandatory minimum/maximum sentences require further qualification. Ms. Greening helpfully referred the Court to the Bermuda Court of Appeal authorities of *David Jahwell Cox v. R, No. 22 of 2007* and *Jahki Dillas R, No. 6 of 2008* (heard together on appeal) which addressed the constitutionality and application of mandatory minimum sentences of imprisonment for the specific offence of possession of a bladed article under section 315C(6) of the Criminal Code Act 1907 (the "Criminal Code"). Unlike the issue advanced by Mr. John Perry QC (counsel for Appellant Cox) in *Cox and Dillas*, Ms. Greening in the case at bar did not proffer a strict stand-alone argument that the mandatory minimum sentences set out in Table 2 of Schedule 1 of the Act breached the Defendant's fundamental rights and freedoms under section 3 of the Bermuda Constitution Order 1968 i.e. that *"No person shall be subject to torture or to inhumane or degrading treatment or punishment"*.[1] There is therefore no need for me to directly address the issue as to whether the mandatory minimum sentences under the Act are unconstitutional. However, like Mr. Perry, Ms. Greening did argue that the mandatory minimum sentences under the Act are still subject to section 54 of the Criminal Code which speaks of the application of the fundamental sentencing principle of "proportionality". That is, that the sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender.

6. In *Cox and Dillas*, the Honourable President Justice Zacca concluded: (i) that mandatory minimum sentences are subject to the principle of proportionality, and (ii) that Bermudian legislation, in exceptional cases, implicitly allows for mandatory minimum sentences not to be applied. Highlighting the "Doctrine of Separation of Powers" which ensures that the legislative and judicial branches of government do not encroach upon the core functions of the other, Justice Zacca stated that despite the Legislature's considered wishes to specific mandatory minimum sentences a sentencing judge should not be deprived of their *"power*

[1] Nothing would have prevented her from raising issues as to the constitutionality of Table 2 of Schedule 1 of the Act (*Cox and Dillas*).

to determine the appropriate sentence in each individual case", and, that *"minimum mandatory sentences should not vitiate the other substantive principles of sentencing"* (in this regard Justice Zacca referred to *R v. West (2000) 143 C.C.C. (3d) 129*).

7. Justice Zacca went on to say that:

> *"In determining, therefore, whether the appropriate sentence is a shorter term of imprisonment than the minimum period specified in the legislation, the judge should consider whether there are reasons why the specified term would produce a disproportionate result in the particular case. The judge must apply section 54 as well as well as section 315C(6)."*

8. Therefore, while acknowledging that the Legislature has the power to set mandatory minimum sentences for particular offences *Cox and Dillas* also asserts that a sentencing judge's discretionary power to mete out a sentence in accordance with entrenched sentencing principles, and one which takes into consideration all of the circumstances of the case, should not be diminished or subjugated by the provisions of an act of Parliament. In other words, mandatory minimum sentences should not be designed to handcuff the sentencing judge or lead them to turning a blind eye to the "Purpose and Principles of Sentencing" which are enunciated in sections 53 to 55 of the Criminal Code. It is therefore permissible for the sentencing judge to eventually land on a sentence which may be less than the mandatory minimum sentence.[2]

9. The Legislature's power to set mandatory minimum sentences and the sentencing judge's discretionary power to impose sentences which meets the circumstances of a matter should not be seen as mutually exclusive though. Mandatory minimum sentences could and should still be seen as helpful guidance for the Court to consider because they do, or are supposed to, reflect society's views about a particular offence as channeled through its elected representatives. Therefore, mandatory minimum sentences can be used by the Court as a starting point but with the understanding that they could be adjusted upwards or

[2] *Cox and Dillas* did not explicitly deal with whether it would be permissible for a sentencing judge, after considering all of the circumstances, to impose a sentence which exceeds the mandatory maximum. A safe conclusion would be that it would be impermissible to do so as it would likely be inconsistent with the principle of proportionality and therefore be manifestly excessive.

downwards depending on the circumstances of the case and the application of established sentencing principles (which includes proportionality). Justice Zacca in Cox and Dillas paved such a path to sentencing when he said:

> *"It is incumbent on the sentencing judge, in every case, to determine whether the prescribed minimum sentence would infringe the defendant's right 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."*

10. It is interesting to note that Cox and Dillas concluded that as long as mandatory minimum sentences are subject to section 54 proportionality considerations, and presumably other sentencing principles as well, then the constitutionality issue is resolved. In the words of Justice Zacca:

> *".....this implied limitation provides an 'escape clause' or safety valve' which satisfied the defendant's constitutional right to his liberty (section 1 of the Constitution) and not to be deprived of his personal liberty, except by reason of a (valid) sentence or order of the Court (section 5)."*

11. On this basis, the Court of Appeal in Cox and Dillas went on to hold that section 315C(6) of the Criminal Code was not unconstitutional, and, that the three-year sentence given to Appellant Cox was not disproportionate in the circumstances of that case or of the appellant. The appeal against sentence was therefore dismissed.

12. In respect of sentencing tariffs it does not appear that Bermuda jurisprudence is replete with "importation" of firearm offences[3]. However, guidance as to what factors should be taken into consideration when sentencing those convicted of firearm offences can be derived from two (2) authorities cited by the Prosecution, that of R v. Tony Avis [1998] 1 Cr.App.R. 420 (1997) and R v. Wilkinson et al. [2009] EWCA Crim 1925 (both Avis and Wilkinson were comprised of several appeals heard together). In Avis, Lord Bingham C.J. set out the following questions which the sentencing court should ask itself when dealing with those convicted of firearm offences:

[3] However, there have been a multitude of cases in the Bermuda Courts involving many other offences under the Act, such as the possession and discharge of a firearm.

*"(1) **What sort of weapon is involved?** Genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous then unloaded firearms. Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such as a sawn-off shotgun) will be viewed even more seriously than possession of a firearm which is capable of lawful use.*

*(2) **What (if any) use has been made of the firearm?** It is necessary for the court, as with any other offence, to take account of all circumstances surrounding any use made of the firearm: the more prolonged and premeditated and violent the use, the more serious the offence is likely to be.*

*(3) **With what intention (if any) did the defendant possess or use the firearm?** Generally speaking, the most serious offences under the Act are those which require proof of a specific criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence.*

*(4) **What is the defendant's record?** The seriousness of any firearm offence is inevitably increased if the offender has an established record of committing firearms offences or crimes of violence."*

13. Referring to the Firearms Act 1968 of the United Kingdom Lord Bingham C.J. went on to say that:

"The authorities illustrate (and the available figures may well reflect) the factual and personal diversity of the cases which come before the courts. Any rigid, formulaic approach to levels of sentence would be productive of injustice in some cases. Even offences which on their face appear to be very grave may on examination turn out to be less so. However, given the clear public need to discourage the unlawful possession and use of firearms, both real and imitation, and the intention of Parliament expressed in a continuing increase in maximum penalties, the courts should treat any offence against the provisions referred to above as serious. We share the view expressed by the court on earlier occasions that some of the sentences imposed for these offences in the past, sometimes by this court, have failed to reflect the seriousness of such offences and the justifiable public concern which they arouse. <u>Save for minor infringements which may be and are properly dealt with summarily, offences against these provisions will almost</u>

invariably merit terms of custody, even on a plea of guilty and in the case of an offender with no previous record......[my underline]"

14. *Wilkinson* follows and further amplifies *Avis*, but it also specifically addresses the offence of importation of firearms. The Lord Chief Justice of England and Wales Mr. Justice Butterfield equates importation of firearms offences with that of the importation of drugs offences and the inevitable risk to life that flows from such offences. He stated:

> "*We respectfully suggest that the offence of importing firearms, or being in possession of firearms with intent to supply them, whether manufactured by someone else or not, is not less criminally reprehensible than the importation of drugs or possession of drugs with intent to supply them. It is indeed difficult to anticipate many such cases where an imminent risk to life is not an inevitable concomitant of the offence* [my underline]....."

15. *Avis* and *Wilkinson* seemingly mirrors the spirit and intent of the statutory mandatory minimum sentence for importation of firearm offences under the Act as well as society's disdain for such offences. That is, that a period of incarceration is inevitable and that the only question which should trouble the Court is for how long that term of imprisonment should be.

Counsels' Submissions

16. Relying on *Avis* and *Wilkinson* the Prosecution submit that the appropriate sentence in the case at bar should be incarceration for a period between 14 years and 15 years, and in this regard the Prosecution say that:

- There are no mitigating factors to be considered.
- The offences for which the Defendant was found guilty were serious.
- The component parts would have caused immeasurable harm to the community had they not been intercepted by the Bermuda Customs Department and/or the Bermuda Police Service.

- Any sentence should deters other from committing like offences.

- While there are no statutory aggravating features there are aggravating circumstances which should be considered, such as: the Defendant intended the firearm to be used for a criminal purpose; attempts were made by the Defendant to conceal the component parts by the removal of serial numbers and the secretion of them in innocuous packaging; the Defendant exploited innocent persons by the sending the component parts to them; and, the degree of planning carried out by the Defendant to import the component parts into Bermuda was sophisticated.

17. Ms. Greening submitted that the appropriate sentence for the Defendant, when taking into account the circumstances of the case and the principle of proportionality, should be a term of imprisonment for a period between 11 years and 12 years i.e. less than the mandatory minimum sentence prescribed under Table 2 of Schedule 1 of the Act. She also points to the Defendant being a first time offender.

Sentence

18. Over approximately the past ten (10) years firearms related offences have unfortunately become all too prevalent in Bermuda, but it is not just the prevalence of the offences which is deeply concerning. The nature and type of the offences are also extremely disturbing with offences ranging from the possession of firearms, to the discharging of firearms, and unfortunately to murder by firearm. Such offences have shaken the community to its core and a palpable cloud of fear has descended over our Island. It is therefore imperative that the Courts send a crystal clear message to those who commit offences under the Act that they will be treated severely whether they imported or possessed component parts of a firearm or whether they brandished and discharged a fully functioning firearm. Harsh sentences would not only be reflective of the Legislature's desire to deal with such offences seriously but it would also be an explicit expression of (i) society's revulsion for such

offences and (ii) of the overwhelming need to protect the community from those who commit such offences (a compelling thread which runs through the Act, ***Avis*** and ***Wilkinson*** is public protection).

19. I have heard and considered all that has been advanced by Counsel in their respective submissions and I cannot extract any compelling mitigating features from the factual matrix of this case other than the fact that the Defendant appeared before the Court as a first time offender.[4] The Defendant being of erstwhile good character will of course be factored into my sentencing decision, but it is dwarfed by a multitude of other pertinent considerations which irresistibly leads me to conclude that the application of the mandatory minimum sentence of 12 years imprisonment as a starting point would not only be proportionate in the circumstances but that it would be equally proportionate to even adjust my final sentence upwards from the mandatory minimum sentence i.e. not downwards as submitted by Ms. Greening. In this regard, I rely on the following:

The Defendant pleaded not guilty to the offences, went through a full blown trial, and was unanimously found guilty by a Jury: Therefore, and obviously, the Defendant cannot take advantage of the normal discount in sentence which would have been afforded to him had he pleaded guilty. The unanimous finding of the guilt of the Defendant registers the Jury's wholesale rejection of the Defendant's apparent defence that he had no knowledge of the component parts and that someone from a FedEx facility in the United States, or a FedEx worker in Bermuda, or a Bermuda Customs officer, or a member of the Bermuda Police Service, had tampered with each of the three (3) FedEx packages and put the component parts in them.

The Defendant expressed no regret or remorse, nor made any apologies to anyone for his criminal conduct: In his allocutus the Defendant said that he had nothing to say. Whilst it is accepted that the Defendant may, for strategic reasons, wish to reserve any comments about the outcome of the case but by saying nothing whatsoever deprives him

[4] The Defendant's Antecedent History indicates that he had a conviction for theft on 31st May 1995 when he was a juvenile. Such conviction should therefore not be taken into consideration when sentencing the Defendant.

of any discount in sentence had he expressed some modicum of regret or remorse, or even apologized for dragging unsuspecting and innocent persons into his vortex of criminality i.e. the mother of his child and the childhood friend whose addresses he used to ship the FedEx packages which concealed the component parts. At the very least, the Defendant could have apologized to the mother of his child who as a result of being arrested and held in police custody for the offences committed by the Defendant missed their daughter's birthday.

The Defendant imported component parts of firearms: Ms. Greening submitted that the importation of component parts of a firearm should be seen as less serious than the importation of a fully functioning firearm. There would have been some credence in Ms. Greening's submissions had the Defendant imported component parts on only one occasion (if one were to apply the *Avis* distinction between genuine and imitation firearms, or loaded and unloaded firearms). However, this case involves the importation of functioning component parts of two (2) firearms on three (3) separate and distinct occasions. This, I find, makes this case as serious as the importation of a fully functioning firearm on one (1) occasion, and quite possibly even more serious.

I say this because the degree of planning in this case was highly sophisticated, specifically: the Defendant employed intricate means to secrete the component parts in otherwise innocuous packages (the "Powerbuilt" tool case was fabricated to accommodate the component parts); the Defendant was fully knowledgeable about the FedEx shipping and delivery processes and the Bermuda Customs inspection processes and he manipulated this knowledge so that he may import the component parts in Bermuda; that on each of the three (3) occasions the Defendant shipped different but related component parts of a firearm which when constructed together made up two (2) fully functioning firearms i.e. the Defendant shipped fully functioning firearms in piecemeal fashion; and, the Defendant or someone else with the Defendant's knowledge removed the serial numbers on the component parts so as to avoid detection and tracing.

Additionally, the degree of responsibility of the offender is extremely high. While there were other persons featured with the Defendant in the CCTV footage of the overseas FedEx facilities it is clear from that footage that the Defendant was the main person interacting with the FedEx employees and that he was very much behind the offending packages being sent to Bermuda via FedEx. There is insufficient evidence for me to conclude that the Defendant was the "mastermind" behind sending the component parts to Bermuda, but there was a preponderance of cogent evidence to conclude that he played a major role in the enterprise. Not only did he cause each of the three (3) packages to be imported into Bermuda, but there was also credible evidence led at trial that he would have been on the receiving end of the component parts after they arrived into Bermuda (such as making arrangements to collect one of the packages that was sent to the mother of his daughter).

The component parts of the firearm, when constructed into fully functioning firearms, must have been intended for a criminal purpose: The Prosecution submitted that the Defendant intended for the component parts to be used for a criminal purpose or that he was reckless as to whether they would be so used. There was insufficient direct evidence adduced at trial for me to definitively conclude that the Defendant intended for the component parts to be used for a specific criminal offence. However, in the absence of a firearms license granted, and given that the component parts were consistent with the make-up of a fully functioning Glock-type firearm, a convincing inference can be drawn that the Defendant knew or was reckless as to the possibility that the component parts would be constructed into fully functioning firearms and then be used for a criminal purpose by himself and/or someone else.

To be clear, I do not hold such intention to be as serious as a fully functioning firearm actually being used for a criminal act. However, had the component parts not been intercepted by members of the Bermuda Customs and the Bermuda Police and had they been erected into fully functioning firearms, extensive harm and havoc could have been inflicted onto the community. Because of this, the importation of the component parts worrisomely posed the imminent risk to life spoken about in ***Wilkinson***.

20. In consideration of the above paragraphs, and having complete regard to sections 53 to 55 of the Criminal Code (which includes the fundamental principle of proportionality in section 54), I see no viable avenue for me to not apply the mandatory minimum sentence of 12 years imprisonment for the importation of the component parts. I also see no persuasive reasons why the Defendant should be sentenced to a shorter term than the mandatory minimum sentence of 12 years imprisonment. Indeed, as shown heretofore there are several compelling reasons for me to sentence the Defendant more than the specified mandatory minimum sentence. In particular: he pleaded not guilty; he had a fully ventilated trial; the jury unanimously found him guilty of all three (3) counts on the Indictment; he showed no regret or remorse, and was not apologetic to anyone; he used intricate and sophisticated means to commit the offences; and, he must have known or should have known that the component parts were intended for a criminal purpose.

21. Even if the Defendant had pleaded guilty to the offences my decision to apply the mandatory minimum sentence and to not shorten the mandatory minimum sentence would have been the same given all of the other surrounding circumstances of the offences. The only possible difference may have been a lesser term of imprisonment than the one which I ultimately gave him.

Conclusion

22. In consideration of the above paragraphs, I reiterate the sentence which I handed out to the Defendant on the 14th December 2020, that being a term of imprisonment of fourteen (14) years on each Count on the Indictment, and that all sentences are to run concurrently with each other.

Dated the 21st day of January , 2021

The Hon. Acting Justice Juan P. Wolffe