



The Court of Appeal for Bermuda
CRIMINAL APPEAL No. 17 of 2017

B E T W E E N:

THE QUEEN

Appellant

- v -

DION CHOLMONDELEY

Respondent

Before: Baker, President
Kay, JA
Bell, JA

Appearances: Larissa Burgess, Office of the Director for Public Prosecutions,
for the Appellant;
Charles Richardson, The Legal Aid Office, for the Respondent

Date of Judgment: 6 November 2018

EX TEMPORE JUDGMENT

Possession of a loaded gun and ammunition – level of sentence

BAKER, P

Introduction

1. On the 4th December, 2017 following an earlier plea of guilty, Mr Cholmondeley (“the Respondent”) was sentenced to a total of 10 years’ imprisonment for possession of a firearm contrary to section 2 of the Firearms Act 1972 (“the Act”) and possession of ammunition contrary to section 3 of the Act. The prosecution appeal against the sentence on the grounds that it is manifestly inadequate. It

is unclear whether or not the Crown has been given leave on a previous occasion. We proceed on the basis that the Crown was given leave.

Background

2. The facts of the case are as follows. At about 6:30 p.m. on 16 August 2017, the Respondent was stopped while driving a Honda CRV motorcar by members of the Bermuda Police Service. The Car had been travelling along St. Mary's Road in Warwick Parish. A man called Michael Dill was in the front passenger seat, and once stopped outside Purvis Primary School, officers approached the Respondent and as they did he asked "what's going on?" The police notice that he pulled the right side of his shirt in a downward motion toward his right thigh. He was told that it was believed that he had illegal items in his possession and that he would be searched. He was searched, and was asked if he had anything on his person the police should be aware of, and he said yes. When questioned regarding what he had, he told the police that he had a gun. He told them that it was on his waist. When asked if it was loaded, he answered in the affirmative. It was, as it turns out, a Glock 26 automatic handgun fitted with an oversize magazine, and it was secured in the waistband of his pants.
3. The Respondent was arrested and cautioned to which he replied "I needed it for protection. Guys are trying to kill me." He was taken to Hamilton Police Station and detained. Although the magazine was oversized it fitted the firearm and allowed the rounds to feed correctly. While the ammunition was corroded, the bullets and primers were all intact and, when test fired, found to be in working order.
4. The Respondent was interviewed and in the course of interview admitted that he had the firearm and ammunition in his possession. He also indicated that the passenger was unaware of this. The terms of the interview are of some significance and are revealing as to the Respondent's attitude. In the course of it, he was asked:

Q: Can you tell us where you got that firearm from?

A: No comment. I'm going to plead guilty and will give an explanation later on at a later date.

Q: Okay can you tell us how long you had the firearm for?

A: No Comment

Q: You are saying that you did not know you had a firearm on you...what exactly are you saying about the firearm?

A: I did have a firearm on me and that is about it.

Q: Okay, and was it loaded?

A: I believe so, yes.

Q: Where was the firearm found?

A: On me, it was on my hip...I had put it here.

Q: Okay, is there any reason why you were carrying a firearm?

A: No comment.

Q: Can you tell us your intentions of having it?

A: No comment.

Q: Can you tell us who you were delivering it to?

A: No comment.

Q: ...have you used a firearm before?

A: No comment.

Q: Are you aware of any other firearms maybe?

A: No, I am not into the streets. I am a self-employed plumber. I just take care of my kids. I just got caught up in a bad situation.

Q: Were you offered money to carry that firearm?

A: No comment.

Q: Can you tell us where you picked up the firearm from?

A: *No comment.*”

5. And then he was asked about his passenger Mr. Dill:

Q: *...you stated that he didn't have any knowledge of you having this firearm, right? What time did you pick him up that day?*

A: *I picked him up. I can't remember. I can't recall the exact time.*

Q: *Okay, because he was a little intoxicated when he came in so...*

A: *It was my brother who passed away's birthday, so we were a little intoxicated.*

Q: *Right, so can you tell me where you picked him up from?*

A: *I believe I got him from my brother's house I believe. Yeah my brother's house.*

Q: *...was he drunk at this time? Or had he been drinking?*

A: *No.*

Q: *Okay, where did you guys go to drink that day?*

A: *We was sitting up my brother's house drinking, reminiscing.*

Q: *So you didn't go to any bars or anything like that?*

A: *We did actually go to a bar.*

Q: *And where was that?*

A: *Boat club.*

Q: *Boat club?*

A: *Yeah. Well I just had a couple of drinks and was enjoying myself.*

Q: *Did you have the firearm on you all day?*

A: *No comment.*

Q: ...thank you for being straightforward with, and letting us know that you were in possession of the firearm. You knew that the firearm was real.

A: Yes.

Q: Anything you wish to say to the courts if this is played?

A: Well I am not a street member, I am not a member of no gang. It is just ... I ran into the wrong company I guess. It has just been a bad day for me. It has just been a bad day and that is about it.”

6. It seems plain to me that although the Respondent was seeking to be cooperative with the police in general, he was determined not to give them any explanation at that stage as to how he had come into possession of the firearm, lest that implicated others.

7. It also seems plain that the police would not have stopped the vehicle unless they had information that there was a good reason to stop it. Otherwise, it would simply be a coincidence that they had managed to stop the vehicle and found somebody in there, namely the Respondent, with a gun. This suggests that it was not immediately before the journey that the Respondent came into possession of the gun. But, the next thing that happened of significance, is that the Respondent was interviewed for a social inquiry report, and during the course of that interview, he told the probation officer this:

“ATTITUDE TOWARDS OFFENCE:

Explaining the circumstances of his offences, Mr Cholmondeley reported that on the day of the offence he was with his cousin when he offered a ride to three people known to his cousin, but unknown to him. He said he dropped them off on Cedar Hill in Warwick. He shared that at the time he was under the influence and made no consideration of the individuals whom he was offering a ride. He said that after dropping them off, he

proceeded with his cousin to Mid-Atlantic Boat Club in Devonshire parish. He said he had more alcohol there, which proved to be too much, resulting in him getting sick and vomiting in the bathroom. He said that after leaving the bathroom he went outside to his car to leave, and began to feel sick again. He began to look around in his car for a bag to vomit in. He said it was during this search that he discovered the gun. Mr Cholmondeley said that upon discovering the gun he felt both panicked and excited. He said he showed the gun to his cousin who was with him. He said that not wanting to leave the gun "sitting around in my car," he decided to place the gun in the waistband of the pants he was wearing at the time. He said he and his cousin got back into his car and left to go to Mr Cholmondeley's brother's house to celebrate their deceased's brother's birthday. Before he made it to the house, he was stopped by the police who found the gun on him and he was arrested...Mr Cholmondeley said that he believe his intoxicated state at the time limited his ability to think rationally when he found the gun. He said had he been thinking clearly he may have thought to throw the gun overboard, having been on the North Shore next to the ocean. Mr Cholmondeley said that he has no reason to have a gun in his possession as he has no feuds with anyone and works island wide as a plumber and does not fear for his safety.

The explanation that he there gave to the probation officer, particularly bearing in mind what he had said previously in interview to the police, was inherently unlikely. Guns are carefully guarded weapons and not allowed into the hands of third parties, unless the third party can be trusted, or there is good reason to pass them over. So, on the face of it, it seems inherently unlikely that what he was telling the probation officer was the truth.

The Sentence imposed by the Judge

8. Before she passed sentence the judge asked the Respondent if he had anything to say. His response was:

"...Well first of all I want to apologise to the courts and my family, and you know, life's about choices and that -

- that day, I made a bad choice. So I'm just ready to accept whatever consequences come my way."

9. The learned judge pointed out that the statutory minimum in the schedule to the Act for a first offence is the range of 12 to 17 years in respect of possession of a firearm and in respect of possession of ammunition. She went on to say that:

"The Court proceeds to sentence you on the basis of the facts made by your counsel, because they are consistent with the police statement ah, or otherwise can be inferred from the Record of Interview - - or from the record period - - period all of which is, for the most part, consistent with what you told the Probation Officer, ah, Black who prepared the Social Inquiry Report."

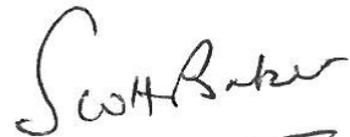
10. The judge then took into account the mitigating circumstances in particular the plea of guilty and the Respondent's previous good character, pointing out that it was an early plea of guilty, although it may be said it was little option for the Respondent in the particular circumstances that he was found in possession of the gun.

The Crown's Case

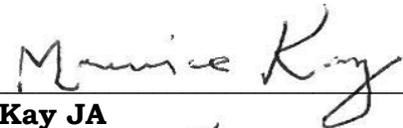
11. Ms Burgess for the Crown argues that the sentence passed of 10 years was manifestly inadequate, and that the appropriate sentence in the circumstances was one of 12 years' imprisonment. She bases her argument on the suggestion that the learned judge took into account two matters. First of all, the explanation that was given to the probation officer; and secondly, the Respondent's suggestion that he was carrying the gun because he was in fear for his life. I cannot read the sentencing remarks in that way. There was, it is true, reference by the judge to the sentencing remarks, but in the context of the previous answers given by the Respondent in interview.

Conclusion

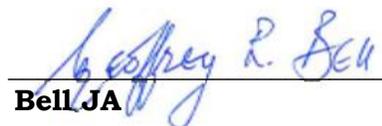
12. In my judgment, the sentence of 10 years' imprisonment might be said to be slightly on the low side, bearing in mind that the Respondent was in possession of a loaded gun, and the inference that he had been plainly given it by some person for a purpose, either of conveying it elsewhere, or some other undisclosed purpose. But, Ms. Burgess is only seeking an increase of two years to 12 years imprisonment.
13. We were referred to authorities, including in particular the case of *Romano Mills v The Queen* [2018] CA (Bda) 22 Crim, where a sentence of 12 years' imprisonment was not only that passed by the learned judge, but also the sentence contended for by the Crown. This Court sees the circumstances in *Mills* as somewhat more serious than those in the present case.
14. Be that as it may, this Court does not interfere with a sentence on an appeal by the Crown, unless it is satisfied that in all the circumstances the sentence was manifestly inadequate. It seems to me debateable, whether the sentence of 10 years rather than the 12 year statutory minimum contended for was inadequate, let alone manifestly so in the circumstances of this case. We do not think that there is any justification for increasing the sentence of 10 years which was in our judgment within the appropriate range. Accordingly, if leave has been granted, the appeal is dismissed. However, if leave has not been granted then leave is refused.



Baker P



Kay JA



Bell JA