

IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeal No **CACR009/2013**

Ind 0107/2012

C#06138/2012

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

Michael Hugh Powell

Appellant

The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Ian Forte, Justice of Appeal

Mr Trevor Burke QC instructed by Ben Tonner of Samson & McGrath appeared for the Appellant. **Ms Candia James** instructed by the Director of Public Prosecutions appeared for the Crown

Hearing: 29 July 2013

Transcript released: 2 September 2013

JUDGMENT

Revised from transcript and Approved

Sir John Chadwick, President:

1. On 4 January, 2013, the appellant, Michael Hugh Powell, pleaded guilty to the charge of possession of an unlicensed firearm contrary to sections 15 (1) and 15 (5) of the Firearms Law (2008 revision). The judge sentenced him to a term of imprisonment of seven years, as he was bound to do pursuant to section 39(2)(a) of the Firearms Law (2008 revision), unless he were of opinion that there were exceptional

circumstances relating to the offence or to the offender which justified him in not doing so. The judge, as he was bound to do, asked himself whether this was such a case. For the reasons which he set out in his ruling delivered on 20 May 2013, he found that it was not. It is from that part of his decision that the appellant appeals to this Court.

2. The circumstances of the offence can be stated shortly. As charged, the defendant had in his possession on 19 November 2012 a firearm - namely, a .22 Longhorn revolver - except under and in accordance with the terms of a Firearm User's (Restricted) Licence. The facts, as opened by the Crown, were that on that day the defendant was arrested in relation to an unconnected incident; and that, following that arrest, the police obtained a search warrant enabling them to search the appellant's home address at apartment 2065, Breakers, Bodden Town. During the course of that search, the appellant directed a police officer, Detective Constable Neblett, to his bed. He dragged a towel from under the night stand in the bedroom with his foot and invited the officer to look at it. In the towel was the Longhorn revolver. It was found to contain nine live rounds of .22 ammunition.
3. In the course the interview which followed, the appellant admitted to possession of the firearm, He stated that he had found it in the bushes while working on the road in the Prospect area. He said that, whilst on a job in the course of his employment as a Caribbean Utilities Company linesman in that area, he went over to an area of bushes to relieve himself. While there, he noticed a bucket and a crate. He saw the revolver under the crate. He did not move it; but put the crate back over the revolver, left the area and returned to the site at which he had been working. At some time during the same night he returned and took possession of the revolver. He told police that he had kept it from some time in early September until mid-November; when it was discovered at his home address in the circumstances that I have

mentioned. He accepted that he knew that the revolver was loaded with ammunition because he had opened it: he had had a firearms licence in the past; and so had some familiarity with them.

4. When asked in the course of his interview why he kept the firearm, he said this: "Being stupid not thinking I took it home. I wrapped it up in a towel and it was there under the night stand from then." He went on: "I guess with a lot of stuff happening in Cayman and it's just been stupid". He explained that, had there been an amnesty in relation to the return of firearms, he would have taken advantage of it; and that he sought to make contact with a police officer whom he knew (and named) but was unable to do so because that officer had left the island.
5. It was accepted by the Crown and by the judge that the appellant was, prior to this incident, a person of exemplary character. He was held in high regard by his employer, who was content to have him back as an employee, by members of his family and by his community.
6. In the course of his submissions in the court below and in this court, Mr. Burke, QC emphasised that the appellant was a man of hitherto good character; that he had made an immediate and full and frank admission to the police and was co-operative throughout; that he examined the firearm twice but apart from those examinations the firearm had remained hidden (although not secure) at his home: and that, in keeping the firearm, the appellant had effectively removed it from criminal circulation on the island. Mr. Burke pointed out that the appellant could easily have left the firearm where he found it in the bushes; but he decided to take it home even though he had no intention of using it.
7. I interpose to say that not only could the appellant easily have left the revolver in the bushes, that is, in fact, what he did at the time when he found it. The offence arose not when the appellant found the revolver;

but when he went back in the course of that night to take possession of it. This was not a case in which the firearm came into his possession involuntarily or accidentally. He made a deliberate choice to take possession of the firearm, in the circumstances which I have described; and, thereafter, he made a deliberate choice to keep it in his possession, until, in the course of the execution of a search warrant, he must have appreciated that it was bound to be found.

8. As I have said, the judge considered the question, as he was obliged to do, whether there were exceptional circumstances relating to the offence or exceptional circumstances relating to the offender such as, would justify not giving effect to the mandatory minimum sentence which the legislature has indicated should be passed in cases of possession of this kind. The judge held that there were no exceptional circumstances in relation to the offence: and he rejected the submission that the appellant's previous exemplary character should be regarded as an exceptional circumstance in relation to the offender.
9. In addressing this appeal, it is pertinent to have in mind the observations of this Court (sitting in a constitution of which Justice Forte and Justice Mottley were members) in *Chavarría-Atily v The Crown*, reported at [2009] CILR 119. That was also case to which section 39(2)(a) of the Firearms Law applied. The trial judge had concluded that there were exceptional circumstances: in that the offender was not aware that the air rifle in his possession was a firearm within the Law. He had sentenced the offender to a term of two years' imprisonment: applying the exceptional circumstances' proviso to the section. The defendant appealed on the ground that, in the circumstances of that case, a sentence of two years was manifestly excessive.
10. At paragraph 12 of its judgment this Court observed:

“We would say; however, that the section makes it clear that it is the opinion of the court that is critical as to what constitutes

exceptional circumstances. Consequently, unless the judge is clearly wrong in identifying exceptional circumstances when they do not exist, or clearly wrong in not identifying exceptional circumstances when they do exist, this court will not readily interfere.”

The Court referred to the observation of Lord Woolf, Chief Justice, in *R v Rehman* [2005] EWCA Crim. 2056, [2006] 1 Crim. App. R (S) 77:

“The starting point therefore is that this court should not interfere with the judge’s decision in relation to exceptional circumstances unless persuaded that the judge was clearly wrong in finding that those circumstances did not exist in this case”.

11. The judgment in *Rehman* contains a helpful review of the factors that need to be taken into account. The Court emphasised the focus of the equivalent provision in section 51 A of the United Kingdom Firearms Act 1968:

“So far as we can determine the rationale of Parliament, the policy was to treat the offence as requiring a minimum term unless there were exceptional circumstances, not necessarily because the offender would be a danger in the future but to send out the deterrent message to which we have already referred. The mere possession of firearms can create dangers to the public. The possession of a firearm may result in that firearm being in circulation. It can then come into possession of someone other than the particular offender, for example, by theft, in whose hands the firearm would be a danger to the public. Parliament has therefore said that usually the consequence of merely being in possession of a firearm would in itself be a sufficiently serious offence to require the imposition of a term of imprisonment of five years under the United Kingdom statute irrespective of the circumstances of the offence or of the offender unless they pass the threshold to which the section refers”.

12. The court went on to address the question of exceptional circumstances in relation to the offender at paragraph 15 where it said this:

“The reference in the section to the circumstances of the offender is most important. We have no doubt that the fact

that an offender is unfit to serve a five-year sentence may be relevant, as is the fact that he or she is of very advanced years. This is necessarily to be read into the words used, otherwise a sentence may be inappropriately passed or even fall within the language of article three of the European Convention”.

13. In *Rehman* the judge had found that Mr. Rehman had every reason to believe that the firearm was not one which it was illegal to possess. The firearm in question was a replica of a handgun; and, as the judge found, Mr Rehman did not appreciate that, although a replica, it could easily be altered so as to be capable of firing live ammunition and so was within the statute. Mr. Rehman was a man of exemplary character who had an interest in collecting replica firearms. The judge had asked himself whether there were exceptional circumstances in that case. There had been much by way of mitigation. Mr Rehman had entered a guilty plea at the earliest opportunity and he had been co-operative and helpful with the police. But the judge thought that exemplary character was not the same as exceptional circumstances. The Court of Appeal disagreed: it thought the background of Mr. Rehman was particularly important; but, as it said at paragraph 30 of its judgment, “so is the fact that he had no knowledge of the unlawfulness of the one weapon that he had in his possession which contravened the provisions of the Act”. Looking at all the matters relied upon, the Court of Appeal felt able to take the view that the case fell on the “exceptional circumstances” side of the line.
14. Further consideration was given to the proviso by the Court of Appeal of England and Wales, more recently, in *Attorney General's Reference (No. 23 of 2009)*, [2009] EWCA Crim 1683, reported at [2009] WL 2207494. In that case, the judge had found the “exceptional circumstances” test satisfied. The Court of Appeal disagreed. It said this, at paragraph 12 of the judgment delivered by Lord Justice Thomas:

“It is clear from the decision of this court in *Rehman and Wood* [2005] EWCA Crim. 2056, [2006] 1 Crim. App. R (S) 77, that the court must have at the forefront of its mind that Parliament has decided that deterrent sentences be passed to ensure that the possession of guns is strictly controlled and guns are not brought into this country unlawfully. It is well known what a scourge guns are to any society and the Courts must, in accordance to the will of Parliament, make sure that the policy of Parliament is carried out in the sentencing of offenders, even though in a particular case, apart from the minimum term, an offender might not merit a sentence of such severity. It is in circumstances such as those before the judge that the Courts must be very, very careful to have regard to this policy”.

Lord Justice Thomas then cited the passage in the judgment of Lord Woolf, Chief Justice, in *Rehman* which I have already set out; and went on to say this:

“We have no doubt in this case that the learned judge was in error in treating this case as one amounting to exceptional circumstances where there were none. This was a case where the offender had deliberately attempted to bring a weapon into this country. It is, in our judgment, not a case where there is any doubt but that the conduct was deliberate, that his previous good character, (although relevant in not increasing the sentence beyond the minimum) cannot amount to exceptional circumstances, nor can the fact that he did not intend to use the pistol or any of the guns held unlawfully for criminal purposes. All the circumstances identified by the judge were irrelevant. A minimum sentence of five years should have been imposed”.

In the event, the Court allowed the appeal and imposed a lesser sentence of three years. But it did so, not because it thought this was a case in which, on the material before the judge, it had been appropriate to find that there were exceptional circumstances; but because of an additional circumstance, peculiar to the offender, which led them to think that a court could properly take the view that the matter fell within the proviso. The additional circumstance, peculiar to the offender in that case, was that one his children was suffering from a very aggressive illness. That put immense pressure on the family, And that peculiar and unusual circumstance affected this

offender so as to make it a matter which could be taken into account. But the Court cautioned against applying that approach widely. It said this:

“Those who in any way contravene the Firearms Act, must for the good of society, whatever the consequences are to their family, expect to receive the minimum sentence from Parliament. Judges must not feel sorrow or sympathy for any offender. The protection of the public demands nothing less than the imposition of minimum sentences. It is only in exceptional circumstances of the kind that have occurred in this case, rare as it is, that the court can exercise a degree of mercy”.

15. We turn then to ask whether it has been shown that the judge was clearly wrong: either in his conclusion that the circumstances of the offence were not exceptional circumstances within the proviso, or in his conclusion that the circumstances of the offender were not exceptional circumstances took the matter out of the minimum sentence regime.
16. Mr. Burke, who presented the appeal with his usual care and skill, placed little reliance on the circumstances of the offence; although he did not abandon it. In our view he was right not to emphasise that limb of the appeal. The circumstances of the offence were only unusual in that they displayed quite extraordinary stupidity on the part of the appellant. It is important, in our view, to keep in mind that this appellant deliberately chose to go back to the place where he had found the gun in order to take it into his possession; and having done so, and having appreciated that it was a firearm, deliberately chose not to turn it in to the police. He kept it in the sort of circumstances that were referred to in *Attorney General's Reference (No. 23 of 2009)*: that is to say, wrapped in a towel under his bed where it would have been prone to theft should any ill-intentioned criminal have broken into his apartment. The vice lies not in his intention to use the gun illegally in the future: there was no evidence of him having that

intention. The vice lies in having possession of a firearm which could come into the possession of a criminal who did intend to use it. That is just this sort of case that the statutory minimum sentence is intended to deter. There is nothing exceptional about the nature of the offence. The judge's conclusion cannot be criticised on that ground.

17. The issue really comes down to whether the defendant's previous good character - indeed his exemplary character - is an exceptional circumstance. The judge, in our view, was entitled to take the view which received support from the passage in the judgment of Lord Justice Thomas to which I have referred: that good character - indeed even exemplary character - is not, of itself, to be treated as an exceptional circumstance. The Legislature cannot have thought that good character was to be treated as exceptional. No doubt, despite many disappointments, it took the view that people could be expected to be of good character. Something more than that is required. There are circumstances where the particular family relationships or infirmity or old age in connection with the offender may amount to an exceptional circumstance. But the fact that he has previously not merely kept out of trouble but has been a useful and valuable member of society is not. The judge was entitled to reach the conclusion that there were no exceptional circumstances relating to the offender and this Court cannot say that he was clearly wrong to do so.
18. It is impossible not to have sympathy for the appellant, who has brought upon himself and his family what must be seen as a personal disaster by a very stupid decision in taking possession of this firearm. But that, as it seems to us, is a matter that we must put aside. We are required to give effect to the intentions of the Legislature; and to do so we are required to dismiss this appeal against sentence. We dismiss the appeal and confirm the sentence of seven years passed by the judge.

