

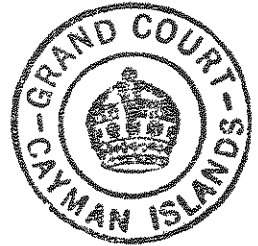
1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CRIMINAL SIDE**
3
4

5 **INDICTMENT NO: 0086/2012**
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7
8 **THE QUEEN**
9

10 **V**
11

12 **RAY KENNEDY SMITH**
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16 **Appearances:** **Ms. Candia James, Crown Counsel, on behalf of the**
17 **DPP**
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19 **Ms. Prathna Bodden of Samson & McGrath on**
20 **behalf of the Defendant**

21 **Before:** **Honourable Mr. Justice Charles Quin**

22 **Heard:** **23rd January 2014**
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24 **SENTENCE RULING**
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27 1. Following on a 3-day trial by Judge Alone the Defendant, on the 15th
28 November 2013, was found guilty of Possession of an Unlicensed Firearm
29 contrary to s.15 of the Firearms Law.

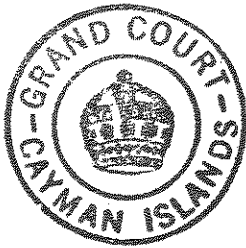
30 2. The particulars of the offence were that on the 31st July 2011 at West Bay,
31 Grand Cayman, the Defendant, Ray Kennedy Smith, had in his possession a 9
32 mm Smith & Wesson model 5906 pistol. It was loaded with five (5) rounds
33 of 9 mm ammunition. The Defendant did not have a Firearm User's
34 (Restricted) Licence and the firearm was found to be in an operable condition.

1 3. Section 15(5) of the Firearms Law states:

2 “15 (5) Whoever contravenes this section is guilty of an offence
3 and subject to section 39, is liable on conviction to a fine of one hundred
4 thousand dollars and to imprisonment for twenty years.”

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6 4. Section 39 of the Firearms Law advises on minimum sentences as follows:

7 “39 (1) This section applies where-



8 a. an individual is convicted following a trial or a
9 plea of guilty, by a court of summary jurisdiction
10 or the Grand Court, of an offence under section
11 3(3), 15(5), or 18(6);

12 b. the offence was committed on or after 15th
13 November, 2005; and

14 c. the offence is in respect of a machine gun, rifle,
15 shot gun, pistol, or any lethal barrelled weapon
16 from which any shot, bullet or other missile can be
17 discharged.

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21 (2) Notwithstanding sections 6(2) and 8 of the Criminal
22 Procedure Code (2006 Revision), the court of summary
23 jurisdiction or the Grand Court before which the individual
24 pleads guilty or is convicted shall-

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27 a. In a case where the individual pleads guilty,
28 impose a sentence of imprisonment for a term of at
29 least seven years (with or without a fine); or

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31 b. in any other case, impose a sentence of
32 imprisonment for a term of at least ten years (with
33 our without a fine.),

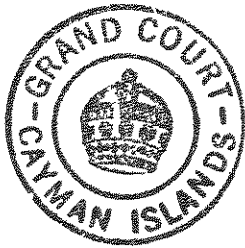
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35 unless the relevant court is of the opinion that there are
36 exceptional circumstances relating to the offence or to the
37 offender which justify its not doing so, and such
38 exceptional circumstances shall be stated by the relevant
39 court.

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41 (3) ”

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THE CROWN'S SUBMISSIONS

5. The Crown refers the Court to *R v. Avis* [1998] 1 Cr. App. R. 420, CA, and the guidelines provided therein for sentencing in firearms cases. In *Avis* the Lord Chief Justice of England and Wales, Lord Bingham, stated that the sentencing Court should usually ask itself four questions:



- “1. What sort of weapon was involved? Genuine firearms were more dangerous than imitation firearms; loaded firearms were more dangerous than unloaded firearms. Unloaded firearms for which ammunition was available were more dangerous than firearms for which no ammunition was available. Possession of a firearm for which there was no lawful use (such as a sawn-off shotgun) would be viewed more seriously than possession of a firearm which was capable of lawful use.
2. What use had been made of the firearm? It was necessary for the court to take account of all the circumstances surrounding the use of the firearm: the more prolonged and premeditated and violent the use, the more serious the offence was likely to be.
3. With what intention (if any) did the defendant possess or use the firearm? The most serious offences under the Act required proof of a specific intent. The more serious the act intended, the more serious the offence.
4. What was the defendant's record? The seriousness of any firearms offence was inevitably increased if the offender had an established record of committing firearms offences or crimes of violence.”

6. In *R v. Avis et al* Lord Bingham went on to state:

“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 court should treat any offence against the provisions of the Firearms Act 1968 as amended, as serious.”

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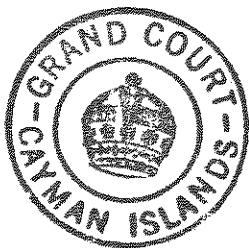
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7. The Cayman Islands Court of Appeal in the case of *Chavarria-Atily v. R* [2009] CILR 118 applied Lord Bingham’s dicta in *R v. Avis et al.* The Acting President Forte JA set out Lord Bingham’s guidelines and added the following words at paragraph 10 of his Judgment:

“In the Cayman Islands, it has been the massive increase in offences under the Firearms Law that has led Parliament to enact the minimum sentences in respect of those offences, while at the same time making special provision for cases of exceptional circumstances. The mere possession of a firearm, even without any intention to use it for a criminal offence, can still be a danger to the public for the reason that it could get into the hands of someone who does have that intent.”

8. In the case before this Court I follow the Court of Appeal in adopting Lord Bingham’s guidelines and ask myself the same questions.



i. What sort of weapon was involved?: The Crown reminds the Court that the weapon, a 9mm Smith and Wesson pistol, was loaded with five (5) live rounds of ammunition and the firearm was found, by toolmark expert, Alan Greenspan, to be operable and a lethally barrelled firearm within the definition of the Firearms Law, that is, capable of causing death or serious injury if discharged with a projectile striking an individual. In addition Mr. Greenspan confirmed that the five 9 mm cartridges were viable and capable of causing death or serious injury if discharged at, and striking an individual. I remind myself that the Acting President of the Cayman Islands Court of Appeal, Forte JA, stated in *Chavarria-Atily v. R*:

"The mere possession of a firearm, even without any intention to use it for a criminal offence, can still be a danger to the public."

9. What use was made of the firearm: The Crown concedes that there is no evidence of when or that the firearm was discharged and that the firearm was found by the police secreted behind the nightclub soon after the Defendant had returned from that area.

10. In relation to the Defendant's intention in relation to his possession of the firearm:

The Crown points to the fact that it is agreed that the Defendant does not have a Firearms Users (Restricted) Licence and therefore his possession of the pistol was unlawful. The Crown adds to that the pistol was found, loaded, after the Defendant had just returned from that area of the premises, along with gloves and a mask. The Crown submits that, finding these items alongside the pistol speaks to the intention to use the firearm, and refers to paragraph 153 of my Judgment which states:

“Policemen and scenes of crime officers wear gloves so that there is no contamination on items found at the crime scene and to eliminate the possibility of DNA being transferred. Criminals wear gloves so that fingerprints and DNA don’t find their way on to an illegal firearm or other incriminating items. The gun in this case was hidden behind the AC unit, with the ski mask on top of it and the gloves on top of the ski mask. I find that it is not a coincidence that the gloves, ski mask and firearm were found together. Not only were the items found together, but, it is common for these items to be used together for an unlawful purpose.”

11. And in relation to the Defendant's record: The Crown states that the Defendant has no previous convictions for firearm offences or crimes of violence.



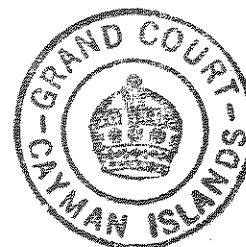
SUBMISSIONS ON BEHALF OF THE DEFENDANT

12. The Defence accepts that the firearm was loaded but points to the fact that there is no evidence as to what use was made of the pistol.

13. On the question of intention: Whilst acknowledging that the pistol was found, loaded along with the mask and the gloves, Defence counsel submits that there is nothing that speaks clearly to the Defendant's intention in relation to the firearm in question.

14. Defence submits that, with no previous convictions of this sort, the Defendant must be deemed of good character.

15. Defence asks the court to consider that the Defendant was only 18 years of age at the time of this incident and that he is now still a relatively young man of 20 years who is in 2-year relationship¹ with his partner with whom he now has a 5-month-old child. Defence submits that the Defendant was employed prior to his incarceration and is sole income earner for his girlfriend and their infant child.



¹ The Defendant's girlfriend stated when interviewed for the SIR that she has been with the Defendant for four (4) years.

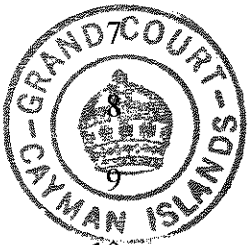


ANALYSIS

16. The SIR prepared by Mrs. Judy Garrahan-Mobley confirms that the Defendant is a young man of 20 years of age who was 18 at the time of the offence. Defendant is the first of two children of Caymanian parents. He had health difficulties from a birth defect with his heart in his childhood which meant that, as a young boy, he travelled overseas often for medical treatment to address health issues. Whilst this problem no longer plagued the Defendant as he grew older and approached in his teenage years, the Defendant told Mrs. Garrahan-Mobley that his parents' marriage was "*plagued with interpersonal difficulties*" and, though his parents lived in same home, his father would "*come and go*". This ruptured the father-son relationship and the Defendant states that he has, in recent times, tried to repair broken relationship with his father.

17. The Defendant's mother states that, though her son was suspended from school a few times, it was "never for bad things" just issues with his uniform, punctuality and attendance.

18. However, this information from the Defendant's mother stands in stark contrast with the fact that the Defendant himself acknowledges in the report that he began using ganja at 13 years of age, was charged for consumption of ganja as a juvenile. In addition, the Defendant himself states very early in the report: "*his father attempted to get him under control when he was a teenager and started getting into trouble.*" In addition it is noted that the Defendant's



1 suspensions and misbehavior resulted in him not being allowed to attend his
2 graduation from John Gray High School and he left without achieving any
3 academic qualifications.

4 The mother's comment also stands in stark contrast with the
5 mother's own acknowledgment early in the report that the Defendant "went
6 out with friends, they got caught with some weed and he was arrested." Ms.
Ebanks' comment also is in contrast with the Defendant's list of prior
encounters as a juvenile with the RCIPS for offences including Common
Assault, Possession of Ganja and Failing to Provide a Specimen of Urine -
10 for which the Defendant was placed on a Probation Order. The Defendant
11 stated that he in fact breached that Order when he submitted positive drug
12 screens for ganja.

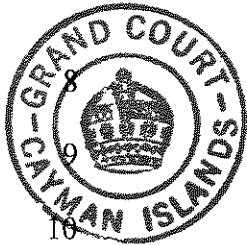
13 It is concerning to the Court that the Defendant's mother, in commenting on
14 the Defendant's troubling past states: "but it wasn't like he was stealing, had
15 a gun or murdered anyone, it's just smoking."

16 19. As an adult the Defendant was again the subject of a Probation Order in
17 August 2012 for one year for the offences of Using Licence Plate with Intent
18 to Deceive, Using Licence Coupon with Intent to Deceive, Using a vehicle
19 without a Certificate of Roadworthiness and Driving without insurance.
20 During the term of that supervision the Defendant was non-compliant with
21 reporting instructions and was in breach of the Order – though a formal
22 breach was never filed with the Court and the Order expired in August 2013.

1 20. The contradicting information in this report from the Defendant and the
2 persons interviewed continues as, a lifelong neighbour states that she had
3 never known the Defendant to be in trouble prior to this offence – even
4 against the background of:

5 a. the Defendant's inability to graduate due to his errant behavior as well
6 as his problems with the law from an early age;

7 b. The Defendant's encounters with the Court as a juvenile;



8 c. The Defendant's admission early in the report that he does have close
9 friends and several have court matters pending or have been before the
10 court.

11 d. The fact that this longtime friend, at the same time, seems
12 knowledgeable of the Defendant's association with the "wrong crowd"
13 as she states: "*The current offence was due to the company he was*
14 *keeping.*"

15 21. The Court notes however that there is no offending history for the Defendant
16 in relation to the use of a firearm or any offences of violence.

17 22. The Defendant has worked for periods of nine (9) and six (6) months in the
18 water sports industry in the Cayman Islands – with his earnings dependent on
19 how many boat trips are made. From his earnings, the Defendant stated that
20 he contributed to the maintenance of his young family without having to turn

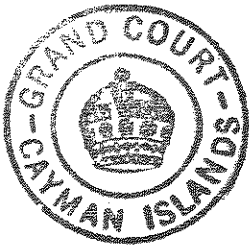
1 to his mother for financial assistance. The Defendant states that he has the
2 promise of employment once released from custody.

3 23. The Defendant is described by his partner as “a great father” but she also
4 stated, “Sometimes the company that you keep is not good.” The Defendant’s
5 mother also regards him as good father and the Court accepts this fact.

6 24. Regrettably the Court notes that the Defendant’s risk of reoffending is rated as high,
7 and this stands in opposition to his good character and is related to the persons with
8 whom he associates rather than to his own behaviour.

9 25. Before arriving at my decision I have also reviewed a number of cases heard before
10 the Grand Court and the Cayman Islands Court of Appeal.:

- 11 i. ***R v. Robert Terry*** Indictment 46/2011 and CICA 29/11: In this case the
12 Defendant, who was 26 years of age, pleaded guilty to possession of a 9
13 mm Glock pistol. He was apprehended, with others in a car park on the
14 Seven Mile Beach trying to switch the licence plates on a vehicle. The
15 car in question contained a suitcase with a mask, a shoulder strap, a
16 holster, a pair of gloves, two straps and one green and brown bag.
17 There is evidence that, in addition to the possession of the unlicensed
18 firearm, based on the paraphernalia in the car, the Defendant was
19 planning to carry out other criminal offences. The Grand Court
20 imposed a sentence of 12 years of imprisonment, which the CICA
21 reduced to 9 years.

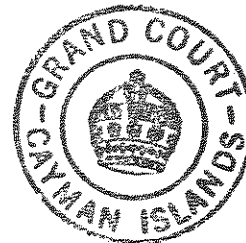


1 ii. ***R v. Rohan Marshall*** Indictment 21/2009: This 29-year old Defendant
2 pleaded guilty, on the 8th March 2010, to possession of a .38 firearm
3 and was sentenced to 7 years imprisonment.

4 iii. ***R v. Leon Hydes*** Indictment 28/2008: This 27 year old Defendant
5 pleaded guilty on the 3rd October 2008 to possession of a Pietro Beretta
6 handgun with magazine and ammunition. The firearm was found
7 hidden in a sock, which was in the Defendant's presence, and the
8 firearm was loaded. A sentence of 8 years imprisonment was upheld by
9 the CICA in CICA #26/2008 on the 2nd September 2009.

10 iv. ***R v. Christopher Kelvin Ebanks*** Indictment 86/2007: This 21 year old
11 Defendant was found guilty, on the 6th October 2007, of possession of
12 an unlicensed firearm, namely a silver handgun, and sentenced to 10
13 years imprisonment.

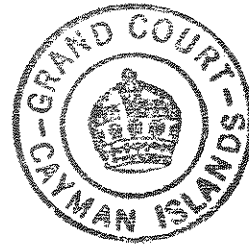
14 v. ***Richard Parsons v. R*** SCA #17/11: This 22 year old Appellant had
15 pleaded guilty in the Summary Court to possession of a 12-gauge
16 shotgun and was initially sentenced to a period of imprisonment of 9
17 years, which was reduced by the Chief Justice to 7 years. Mr. Parsons
18 was cooperative with the police and pleaded guilty.



CONCLUSION

26. The Court has taken the foregoing factors into account and is of the view that there are no factors which compel me to exceed the minimum sentence to be imposed in this case.

27. Accordingly, on the single count of Possession of an Unlicensed Firearm, the Defendant is sentenced to ten (10) years' imprisonment. Time spent in custody is to be deducted.



Dated this the 6th day of February 2014

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a series of loops and a long horizontal stroke extending to the right.

**Honourable Mr. Justice Charles Quin
Judge of the Grand Court**