

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (CACR) 008/2013

Previously Criminal Appeal No. 22 of 2005 & CICA application 017/2012

(Indictment No. 38/05)

C 1291/05

**The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Right Hon Anthony Campbell, Justice of Appeal**

**ON APPEAL FROM THE GRAND COURT
(Ind 38/05)**

BETWEEN

HM THE QUEEN

Respondent

-and-

MATIO DINNALL

Appellant

Fiona Robertson of Samson & McGrath appeared for the Appellant, Matio Dinnall
Tanya Lobban-Jackson instructed by the Director of Public Prosecutions appeared for the
Crown.

Hearing: 30 July 2013

JUDGMENT

Revised from transcript and Approved

Released 16 January 2014

Sir John Chadwick, President:

1. On 23 November 2005, Matio Dinnall was convicted by judge alone, sitting without a jury, of possession of an unlicensed firearm with intent to commit an offence (Count 1) and with possession of an unlicensed firearm, being ammunition, (Count 3). He was sentenced to 15 years imprisonment for the

- offence under Count 1 and to 10 years imprisonment for the offence under Count 3. Those terms were to run concurrently.
2. Mr. Dinnall appealed against both conviction and sentence. On 6 December 2007 the Court of Appeal gave its judgment on that appeal. The Court dismissed the appeal against conviction; it dismissed the appeal against the 15 year sentence imposed on Count 1; but it allowed the appeal against sentence in respect of Count 3 and reduced the sentence imposed under that count from 10 years to five years, to run concurrently.
 3. Mr. Dinnall appealed again against conviction on the basis of new evidence. That appeal was dismissed by the Court of Appeal on 7 December 2012: conviction and sentence were confirmed.
 4. The present appeal is a further appeal against the sentence imposed for the offence charged under Count 1. It is advanced on the basis that the sentence of 15 years for that offence under Count 1 was manifestly excessive. It is said that the judge erred in applying, retrospectively, the provision in the Firearms (Amendment) Law 2005 by which the mandatory minimum sentence of 10 years imprisonment for offences involving the possession of an unlicensed firearm was introduced. Leave to appeal on that ground was granted by Justice Swift (Acting) on 5 September 2013.
 5. At the date when the offence was committed, in March 2005, the relevant law was found in section 18(6) of the Firearms Law (1998 Revision). That section was in these terms:

“Whoever has with him a firearm or imitation firearm with intent to commit an offence, to resist arrest or to prevent the arrest of another person, in either case, while he has the firearm or imitation firearm with him, is guilty of an offence and liable, on conviction, to a fine of one hundred thousand dollars and to imprisonment for twenty years”

But, by the date of the conviction and sentence in November/December 2005, the Firearms (Amendment) Law 2005 had been enacted. That Law introduced a 10-

year minimum sentence for offences involving possession of unlicensed firearms.

Section.18(6) of the earlier law was replaced by a section in these terms:

“Whoever has with him a firearm or imitation firearm with intent to commit an offence, to resist arrest or to prevent the arrest of another person, in either case while he has the firearm or imitation firearm with him, is guilty of an offence and liable on conviction -

(a) where the offence is in respect of a firearm referred to in subsection (17), to a fine of one hundred thousand dollars and to imprisonment for twenty years, subject to a minimum term of imprisonment of ten years; and

(b) where the offence is in respect of any other firearm or any bullet-proof vest, to a fine of one hundred thousand dollars and to imprisonment for twenty years.”

Those provisions have to be read with section 21(2) in the Firearms (Amendment) Law 2005:

“Where on or after the date of commencement of this Law, an accused person is guilty of or pleads guilty to an offence (irrespective of when the offence was committed), the accused person shall, for the purpose of judgment or sentence in respect of the offence, be dealt with in all respects under the new Law and the provisions of the new Law are to apply accordingly.”

The effect of that section was to introduce the minimum 10-year sentence on conviction for an offence in respect of a firearm within sub-paragraph (a) of section 18(6) of the earlier Law (as amended) with retrospective effect. So, at the time when Mr. Dinnall was sentenced in December 2005, the judge was required to have regard to the minimum sentence of 10 years which had been introduced retrospectively by the 2005 Law.

6. A further change to the law was made by the enactment of the Firearms (Amendment) Law 2008. Sections 6, 7 and 8 of that Law had the effect of providing that where (i) an individual was convicted following a trial or plea of guilty of an offence under s.18(6) and (ii) the offence was committed on or after 15 November 2005, and (iii) the offence was in respect of a machine gun, sub-machine gun, shotgun, pistol or any lethal barreled weapon from which a shot, bullet or other missile could be discharged, then the court, in a case where the individual pleaded guilty, was to impose a sentence of imprisonment for at least

seven years, and, in any other case, was to impose a sentence of at least 10 years, unless it were of opinion that there were exceptional circumstances relating to the offence or the offender which justified the court in not doing so. In particular, section 8 provided that:

“8(1) Where -

- (a) prior to the date of commencement of the Law, an accused person is convicted following a trial or a plea of guilty to an offence (irrespective of when the offence was committed); and
- (b) at the date of commencement of this Law, no judgment or sentence [had] been passed upon him in respect of the offence, the accused person [should], for the purpose of the judgment or sentence, be dealt with in all respects under the new Law and provisions of the new Law [were] to apply accordingly.”

The effect of that section was that, in a case where sentence had not been passed at the time when the 2008 Law came into effect, the retrospectivity introduced by section 21(2) of the 2005 Law did not apply.

7. Those provisions were considered by the Court of Appeal in *R v Manahan* (CA 19/2007): judgment in that appeal was delivered on 14 August 2008. After setting out the provisions of the Firearms Law 1998 and the Firearms (Amendment) Law 2005 amendment, to which I have referred, the Court said this, at para.6:

“The effect of the 2005 amendment and the retrospective provision, albeit that no mandatory sentence existed at the time the appellant committed the offence, [was that] the mandatory minimum sentence of ten years applied and the trial judge was obliged to have regard to the minimum mandatory sentence: see *Allen Garfield Ebanks v The Queen*. CICA 29/06 December 3rd, 2007.”

The Court went on to explain that, following its decision in *Allen Ebanks*, there had been the further amendment introduced by the 2008 Act: which it then set out. The Court pointed out that the appellant in that case had argued, through counsel, that the new amendment sought to remedy the retrospective effect of the mandatory sentencing regime as it had previously applied. But, after referring to proceedings in the Legislative Assembly in January 2008 when the Bill which preceded the new Law was considered, the Court reached the conclusion that the new amendment applied only to offences committed after 25 November 2005;

and that it did not apply in a case (such as the present) where the offence had been committed in March 2005. On a proper understanding of *Manahan*, therefore, this is a case where the judge was correct to have regard to the 10-year minimum sentence at the time when he sentenced Mr. Dinnall in December 2005. The 2008 Law did not affect the position.

8. Nevertheless, it is submitted on behalf of Mr. Dinnall that, following the principles explained in *Manahan*, the appellant should be sentenced with regard to the old law as his offences were committed prior to the commencement of the retrospective amendment introduced in 2005. The maximum sentence was twenty years under the old law. Albeit that the judge was bound to impose a mandatory minimum sentence of 10 years – because that is required by the retrospective amendment – it is said that the application of the retrospective amendment led the judge to adopt a starting point which was too high; given the circumstances of the case and the defendant’s personal mitigation.
9. For the reasons which I have indicated, it seems to us that that submission is based on a misunderstanding of what this Court decided in *Manahan*. But, in the circumstances which give rise to this appeal, it is unnecessary for us to decide that point.
10. It is important to keep in mind that the appellant appealed to the Court of Appeal in December 2007 against both conviction and sentence. As I have said, the appeal against conviction was dismissed; and the appeal against the sentence of 15 years on Count 1, possession of a relevant firearm, was also dismissed. The appeal on Count 3 - that is, possession of the ammunition- was allowed; and the sentence on that count was reduced to five years. No doubt that was because the mandatory minimum sentence did not apply to that type of offence. It can be inferred that, insofar as the judge thought he was constrained to pass a minimum sentence of 10 years pursuant to the Firearms (Amendment) Law 2005 in respect of the offence under Count 3, the Court of Appeal held that he was in error. But, unless we are satisfied that the judge took account of the 10-year mandatory

minimum in determining that 15 years was the appropriate sentence on Count 1, we are not concerned with that constraint in the present context. Unless we are satisfied that, in passing a sentence of 15 years in respect of the offence under Count 1, the judge thought he was in some way constrained by the 10-year mandatory minimum, it is not open to this Court to interfere with the 15-year sentence which has been upheld by the Court of Appeal. To put the point another way, if the judge thought that a 15-year sentence was appropriate under the general sentencing principle, without regard to the 10-year minimum, then the subsequent changes in the law are of no relevance.

11. We turn, therefore, to consider the position under the Chief Justice's Guidelines of 2002 in relation to firearm offences. The guidelines are these:

“The legislation is quite clear that the possession or use of any unlicensed lethal barrel firearm is an extremely serious offence. Under the Firearms Law the maximum penalty for possession of an unlicensed firearm is 20 years and fine of CI\$100,000. The tariff for that offence unless there are very mitigating circumstances will be 10 years. If on the other hand aggravating circumstances exist, for instance, the use of the firearm for the commission of a serious offence, the tariff will be in keeping with decided cases and will be significantly higher.”

It can be seen that, without having any regard at all to the minimum sentence required by the subsequent legislation, 10 years was an appropriate starting point unless there were “very mitigating circumstances”; and aggravating circumstances would lead to an increase above that starting point of 10 years.

12. In the course of his sentencing remarks, the judge referred to the counts under which Mr Dinnall was charged; he referred to the plea in mitigation; he looked at the previous convictions of the offender, which were many; and he had regard to the offender’s family members, and particularly his two-year-old daughter. He went on to say this:

“The law prescribes a sentence in relation to matters of this nature. The maximum sentence which the law prescribes is one of 20 years' imprisonment in relation to each of these counts. The amendment to the Firearms Law is ... such that any sentence which I impose must be at least 10 years in regard to each count. I am also entitled to make any sentence that I impose consecutive, that is, they run one after the other.

I take into consideration, Mr. Dinnall, the fact that you do have this child, and that you do have relatives which are somewhat dependant on you. I take into consideration your age, and the offences for which you have been previously convicted. That is merely one side of the scale. In the system of justice that we practice, it is usually represented by a scale and the scales are supposed to be balanced. So when we take into consideration one side of the scale, we [have] also to take into consideration the other side. And the other side involves the society at large. We have noticed a development in the Caribbean and — in particular I'm dealing now with the Cayman Islands — of a certain level of violence which has come into our society. In some quarters it says it emanates within the Caribbean, but it is my view that a lot of what we are seeing now in the Caribbean emanates from elsewhere and have been imported. It is my view also that such importation ought to be discouraged and society calls for the discouraging of such practices in this island and every other Caribbean country. I have to take that into consideration when I balance the scales. So when I look at all the circumstances I would say to you that you are quite fortunate because you could have been here on a much more serious offence and the consequences would have been much graver.

In striking a balance I think that an appropriate sentence in relation to count 1 is that you be imprisoned for a period of 15 years.”

13. I have read that passage in full, not because we are entertaining an appeal against the judge's reasoning under the general law - that, as I have explained, is not open to us given that an appeal against sentence has already been dismissed by the Court of Appeal in 2007 – but, rather, in order to show that there is nothing in the judge’s sentencing remarks to suggest that, in relation to Count 1, the judge was influenced by the 10-year mandatory minimum sentence. By contrast, he plainly was influenced by the 10-year mandatory minimum sentence in relation to the offence under Count 3 (possession of ammunition), in relation to which he said this:

“In relation to Count [3], that you be imprisoned for a minimum period of 10 years, which is the minimum I can impose.”

And he directed the sentences run concurrently.

14. Had the sentence imposed in respect of the offence under Count 3 not been varied by the Court of Appeal in 2007 - and reduced to five years - the question whether the retrospective provisions introduced by the 2005 Law were applicable in the

present case would have been a relevant question. But, as I have indicated, it seems to us that that question that had already been answered (against the appellant's contentions) in *Manahan*. But, in relation to the sentence imposed in respect of the offence under Count 1 - that is to say, the sentence of 15 years for possession of a firearm – that question is not a relevant question, because the minimum mandatory sentence was not a factor which, on a proper reading of his sentencing remarks, the judge took into account in reaching the conclusion that 15 years was the appropriate term. He set out the factors which he took into account. He reached that conclusion on the basis of those factors. The sentence of 15 years has been already upheld by the Court of Appeal.

15. For those reasons - and notwithstanding the helpful submissions made on behalf of Mr. Dinnall by Ms. Robertson - this is not a case in which we should interfere with the sentence of 15 years passed under Count 1. The appeal must be dismissed.