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**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE**

INDICTMENT NO: 32 OF 2017

REGINA

v.

RUEBEN HESMER HYDES

Appearances: Mr. Scott Wainwright for the Crown
Mr. Nicholas Dixey for the Defendant

Before: Hon. Justice Marlene I. Carter Actg.

Sentence Hearing: 29th June 2018



HEADNOTE

*Criminal Law – Possession of an Unlicensed Firearm and ammunition – Sentence –
Exceptional Circumstances argued*

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(b) *in any other case, impose a sentence of imprisonment for a term of at least ten years (with or without a fine), unless the relevant court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so; and such exceptional circumstances shall be stated by the relevant court.”*

4. When considering whether a finding of exceptional circumstances can be made, as part of the sentencing exercise, the Court has regard to the well-known guidelines in *R v Avis*¹, and will consider:

- a. the type of firearm involved;
- b. the use, if any, that was made of the firearm;
- c. the intention with which the Defendant possessed the firearm; and
- d. the Defendant’s criminal record.



5. Additionally, in *R. v Zakir Rehman and Gary Dominic Wood*² Lord Woolf, C.J. stated at para 11:

“... [I]t is not appropriate to look at each circumstance separately and then to conclude that it did not amount to an “exceptional circumstance”. A holistic approach was needed. There would be cases where there was one single striking feature, which related either to the offence or the offender, which caused that case to fall within the requirement of “exceptional circumstances”. There could be other cases where no single factor by itself would amount to an exceptional circumstance, but the collective impact of all of the relevant circumstances truly made the case exceptional”

¹ [1998] Cr App R 420. See also *R v Welcome* [2017 (1) CILR Note 1])
² [2006] 1 Cr. App. R. (S.) 77

CROWN'S SUBMISSIONS

6. In the instant case the Crown invited the Court's attention to the authority of *Parsons v. Attorney General*.³

7. In *Parsons*, the Appellant suffered from ADHD⁴ and a depression and adjustment disorder. A psychiatrist was of the view that:

"Incarceration will increase significantly the risk of further depression, damaged self-efficacy and would destroy any hope of rehabilitation of a young man who has shown himself to be inherently hard working, reliable and trustworthy and who at this time in his life could benefit from appropriate intervention not only for cannabis dependence and his adult ADHD but for his depression and social anxiety."

8. On appeal against the Magistrate's decision that "exceptional circumstances" had not been made out on the facts of the case, the learned Chief Justice stated in *Parsons* as follows:

*"Nor, in my view, does the subjectively harsh effect that imprisonment will likely have upon this appellant as described by Prof. Shaw, present exceptional circumstances. Each offender will be implicated in a subjective and unique way by a sentence of imprisonment. The appellant's condition is not such as to make him 'unfit to serve a [7] year sentence' (per Lord Woolf C.J. in *Rehman* (3) ([2006] 1 Cr. App. R. (S.) 77, at para.15). The concern is that due to his proneness to ADHD, paranoia and depression 'incarceration will increase significantly the risk of further depression, damaged self-efficacy and would destroy any hope of rehabilitation...' That kind of prognosis is, in my view, insufficient to found a conclusion now that the appellant is unfit to serve a term of imprisonment."*



³ [2012 (1) CILR 388].

⁴ Attention Deficit Hyperactivity Disorder

1 9. The Crown submits that the Appellant in *Parsons* found himself in a very similar position
2 to that of this Defendant as far as his psychiatric and/or psychological position is
3 concerned. The Crown's submission was this Court should find that there is nothing in the
4 factual background to the case, in terms of which the firearm came to be in the Defendant's
5 possession, which could give rise to exceptional circumstances.

6
7 *DEFENCE SUBMISSIONS*
8

9 10. Counsel for the Defendant submitted that, as it relates to the factors in *R v Avis*⁵, the
10 defence accepts that the firearm in the case at bar was a dangerous weapon. However,
11 counsel for the Defendant asked the court to find:

- 12 a. with regard to (b)⁶: that no use was made of the firearm; and
13 b. with regard-to (c)⁷: that there is no evidence of any criminal intent as to the use of
14 the firearm.⁸
15 c. Finally, as to (d)⁹: that there are no recent relevant previous convictions.
16

17 11. For the Defendant, it was further submitted that the psychiatric and psychological reports
18 in this case, together with the addendums as read alongside the Social Inquiry Report
19 (SIR), lead to the irresistible conclusion that a lengthy custodial sentence will weigh far
20 more heavily on the Defendant than his fellow prisoners, and that, therefore, the imposition
21 of a sentence of 10 years' imprisonment, in such circumstances, would be arbitrary and
22 disproportionate.

⁵ *supra*

⁶ The use, if any, made of the firearm

⁷ The intention with which the Defendant possessed the firearm

⁸ A Court must not speculate in respect of this factor - see *Manahan v R* (CICA 19 of 2007) at paragraph 12.

⁹ The Defendant's criminal record



1 12. Counsel argued that, while the *dicta* of the learned Chief Justice in *Parsons* is of some
2 assistance, that case is *not* authority for the position that exceptional circumstances only
3 exist if the offender is found to be “unfit to serve”, but rather that, in the absence of such a
4 diagnosis, the decision as to whether there are exceptional circumstances remains squarely
5 within the discretion of the sentencing judge, and will not be readily interfered with by an
6 appellate court.

7

8 13. It was further submitted that the reports of the expert witnesses who gave evidence (in the
9 case now before the Court) on behalf of the defence as to the reliability of the confession
10 interview at trial reveal a psychological and psychiatric profile significantly more
11 pronounced than that of the Defendant in *Parsons*.

12

13 14. Counsel for the Defendant invited the court to take care not to attribute responsibility to
14 this Defendant for his aggressive responses and reaction to his circumstances, which are
15 clearly linked to his psychiatric and psychological profile. Counsel also asked this court to
16 consider that the absence of a guilty plea or evidence of remorse in the face of the findings
17 that the court made may be unsurprising and should not carry the same culpability as
18 would be attached to such an attitude in an offender without a major psychiatric disorder.

19

20 15. Counsel also referred to the conditions at HMP Northward: that the prison is chronically
21 overcrowded and, he submitted, wholly ill-equipped to properly attend to the special needs
22 of an inmate with the profile of this Defendant.

23

24

25



1 *AUTHORITIES*

2 16. Apart from the cases referred to above, the Court's attention was also drawn to *Chavarría-*
3 *Atily v. R.*¹⁰ where the appellant was charged with the importation and possession of an
4 unlicensed firearm – an air rifle purchased in the United States and imported into the
5 Cayman Islands. The Grand Court exempted the appellant from the minimum sentence of
6 seven years prescribed by s. 38A of the *Firearms Law (2006 Revision)*, on the ground that
7 there were 'exceptional circumstances'. The Court indicated that these circumstances
8 included that the appellant was a man of good character, that he had taken steps to register
9 the firearm, that he had only been shooting at vermin, that it was only an air weapon, that
10 he was unlikely to commit the crime again and that the conviction had ruined his intended
11 career. Taking into account these exceptional circumstances, the court passed a 'global'
12 term of imprisonment of two years, in respect of both offences together.

13
14 17. On appeal the Court of Appeal held that:

15
16 *“(1) The sentence of two years would be set aside and a sentence of 12 months*
17 *on each count, to run concurrently, would be substituted. It was the*
18 *opinion of the sentencing court that was critical in determining what*
19 *constituted the 'exceptional circumstances' that would exempt an*
20 *individual from the statutory minimum sentence by virtue of s.38A and the*
21 *appeal court would not readily interfere with the court's decision at first*
22 *instance unless it was clearly wrong. In this case, there was no challenge*
23 *to the lower court's decision that the circumstances of the offence and the*
24 *offender, including his previous record and his plans for future studies,*
25 *merited an exception from the minimum sentence. However, the*
26 *circumstances, in particular the nature of the firearm, his antecedents and*
27 *his guilty plea meant the two-year sentence was excessive.”*
28



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¹⁰ [2009 CILR 118]

Sentence Judgment. R v. Hydes (Rueben Hesmer) Ind. 32 of 2017; (Coram: Carter J. (Actg.). Date: 29/08/2018

1 18. Forte, Ag. P., stated, regarding s.38(A) of the Firearms Law (2006 Revision) (now s.29 of
2 the Firearms Law (2008 Revision):

3 (12) *We would say, however, that the section makes it clear that it is the*
4 *opinion of the court that is critical as to what constitutes exceptional*
5 *circumstances. Consequently, unless the judge is clearly wrong in*
6 *identifying exceptional circumstances when they do not exist, or clearly*
7 *wrong in not identifying exceptional circumstances when they do exist, this*
8 *court will not readily interfere (see the judgment of Lord Woolf, C.J. in R*
9 *v. Rehman (Zakir)). In this case, we see no reason to interfere with the*
10 *learned judge's finding in that regard. We do, however, find, given the*
11 *circumstances of the offence – not the least of which is the nature of the*
12 *firearm, the appellant's antecedents, and his plea of guilty – that the*
13 *sentence of two years imposed by learned judge is manifestly excessive.”*
14

15 19. In the case of *Bodden Cordero v. R*¹¹, the appellant appealed against his sentence before
16 the Magistrates Court for the offence of possession of cocaine and possession of ecstasy
17 tablets for the purposes of trafficking. The learned magistrate had said in the course of her
18 reasons that:

19 *“In the course of the plea in mitigation, a medical report was handed up to*
20 *the Court but his medical condition was not a factor in his offending, nor*
21 *did it provide the impetus to it, so it is not a factor I take into account in*
22 *sentence.”*
23

24 20. Henderson J. said this about the report:

25
26 *“Dr. Fulton's report contains a full consideration of what would appear to*
27 *have been a very thorough examination of this defendant. The defendant's*
28 *condition is the result of serious injuries he suffered in a motor vehicle*
29 *accident in 2001. The Learned Magistrate was wrong to exclude this*
30 *report from her consideration of the appropriate sentence.”*
31

32 21. While the Learned Judge accepted that the appellant's medical condition was not a direct
33 cause of his decision to involve himself in the drug trade, he went on to state that:



¹¹ (SCA 11 of 2014)

1 “...it has obvious relevance to the task of arriving at a fit sentence. A
2 person suffering from the degree of cognitive impairment described by Dr.
3 Fulton can be expected to experience additional discomfort and difficulty
4 in prison beyond that which is attributable to the mere circumstances of
5 the incarceration itself. Any mental disorder or disability from which a
6 defendant suffers should be taken into account, provided the sentencing
7 magistrate is satisfied that the evidence has a reasonable degree of
8 reliability. When the evidence is found in the report of a qualified
9 psychologist or psychiatrist it would be wholly exceptional to disregard
10 it.”
11

12 22. The appellant was found to have ‘deficits which were of a severe and persisting nature with
13 significant psychological impact leading to clinically elevated social, occupational and
14 interpersonal limitations on his overall functioning.’ Dr. Lockhart who also examined the
15 appellant stated:

16 *“It is this writer’s opinion with a reasonable degree of medical certainty,
17 after a comprehensive psychiatric examination that the psychological
18 impact of the accident continues to have a pervasive impact on Mr.
19 Bodden’s life. In many respects the systems of pain, memory and mood
20 are now chronically established with personality features of pessimism,
21 self-doubt and hopelessness.”*
22

23
24 23. The Court found, having taken the Doctors’ diagnoses into account, that the sentence of
25 eight years imposed by the Magistrate should be reduced to reflect the particular
26 circumstances of the defendant and the probability that his term of incarceration has and
27 will weigh more heavily upon him than upon his fellow prisoners.



1 24. In the case of *Parsons v. Attorney General*¹², it was held that:

2
3 “(1) The court would not depart from the Summary Court’s conclusion that
4 there were no ‘exceptional circumstances’ for the purpose of s.39(2). The
5 court would consider the collective impact of all the circumstances, both of
6 the offence and the offender; it would not, however, readily depart from
7 the sentencing judge’s assessment unless it was clearly wrong. In the
8 present case, none of the mitigating facts that (i) the shotgun had been
9 acquired; (ii) imprisonment would likely have a detrimental impact on the
10 accused’ mental health (although he was not ‘unfit to serve’); and (iii) the
11 accused had a previously good character constituted ‘exceptional
12 circumstances’. The accused kept the shotgun, aware that taking
13 possession was unlawful, loaded it, test-fired it and intend to use it to
14 defend himself – which was precisely the kind of vigilante attitude that the
15 statute aimed to deter. Further, by keeping the shotgun in his home, he
16 made it accessible to a thief in the event of a further burglary (paras. 15-
17 16; paras. 21-24).”
18

19 25. After referring to the dicta of Lord Woolf, C.J. in *R. v. Rehman*¹³ already referred to above
20 at paragraph 5 of this judgment, the Learned Chief Justice went on to state:

21
22 “14 The tension within all of the foregoing dicta, between the imperative of
23 deterrence and the concern with the rehabilitation of the offender is a
24 stark example of the challenges presented by the exercise of sentencing.
25 Despite that tension, however, the purpose and intent of the statute must be
26 correctly discerned and applied. As was also said in *Rehman* (*ibid.*, at
27 para 4).

28 ...

29 The statute, as explained by the case law, requires, nonetheless, the
30 consideration of whether exceptional circumstances are presented so as to
31 justify the amelioration of the minimum mandatory imprisonment. The
32 exercise is no mere formality. A genuine consideration must be given to
33 all the circumstances in a holistic way so as to ensure that the provisions
34 of the statute are not merely arbitrarily imposed. ...
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¹² [2012 (1) CILR 388]

¹³ [2006] 1 Cr. App. R. (S.) 77 at para 11.



1 It was Dr. McGill's impression, as at that date:

2
3 *"Based on Mr. Hydes past diagnoses, which are chronic problems which*
4 *are unlikely to improve in the short term, it is my professional opinion that*
5 *there is the possibility of worsening cognition and emotional stability*
6 *related to incarceration. The extent of this cannot be predicted, but his*
7 *background of trauma will make him more vulnerable to stress and*
8 *worsening depression. These may lead to excessive acting out, whether*
9 *towards self-harm or aggressive behaviors."*

10
11 28. Dr. Clement Von Kirchenheim submitted a psychological report to this court dated 12th
12 December, 2017. He indicated therein that:

13
14 *"The testing reveals that Mr. Hydes is illiterate. He had trouble reading*
15 *or writing three letter words. His literacy skills therefore, are at a 'pre-*
16 *school' level. However, his score on a non-verbal test of cognitive ability*
17 *places him in the 'Low Average' range. This suggests that he was either*
18 *not given opportunities nor, motivated and encouraged in regards to*
19 *academic achievement, or more likely, that he suffers from significant*
20 *learning disabilities."*

21 ...

22 *"The personality testing suggests that he tends to be amiable and*
23 *dependent, yet often anxious and depressed, this person is inclined to lean*
24 *on others for support.*



1 *Under stress, he may claim that even the simplest of responsibilities are*
2 *too demanding. This patient's response style may indicate a broad*
3 *tendency to magnify the level of experienced illness or a characterological*
4 *inclination to complain or to be self-pitying. On the other hand, the*
5 *response style may convey feelings of extreme vulnerability that are*
6 *associated with a current episode of acute turmoil.*

7
8 *The results of this assessment suggest that at least a moderate degree of*
9 *pathology characterizes the overall personality organization of this man.*
10 *His profile indicates an over-controlled internal cohesion wherein basic*
11 *intentions and interaction with others are framed within a constricted and*
12 *defended mindset. A pronounced distrust typifies his behaviors and*
13 *relationships, creating cognitive-affective immobilization and a distorted*
14 *sense that others and their circumstances are, for the most part,*
15 *malevolent in nature. The inner template on which he relies for*
16 *understanding and interpreting reality is likely to be compromised, and his*
17 *sense of psychic coherence is often precarious. He often projects his own*
18 *negative self-reflections onto others and has a tendency to create self-*
19 *defeating vicious circles and inflexible interpersonal exchanges. Although*
20 *he is typically able to function adequately, periods of marked emotional,*
21 *cognitive, or behavioral dysfunction are likely.”*



22
23 29. The results of this assessment suggest that at least a moderate degree of pathology
24 characterizes the overall personality organisation of this man.

1 30. Dr. Clement Von Kirchenheim, in psychological report of the 12th December, 2017 opined:

2
3 *“Also noteworthy is his blindness to his own unattractive defects, combined*
4 *with a tendency to disown these undesirable traits and motives by expunging*
5 *and attributing them to others. He is accomplished at spotting others' most*
6 *trifling deficiencies. Both directly and indirectly, he points out and*
7 *exaggerates these defects in the people he has learned to despise. His envy*
8 *and hostility rarely subside. He is touchy and irritable, ready to humiliate*
9 *and deprecate anyone whose merits he questions and whose attitudes and*
10 *demeanor evoke his ire or contempt. By a simple reversal, he may not only*
11 *absolve himself of fault but find a justified outlet for his resentment and*
12 *anger.*

13 ...

14 *It is very likely that this man is suffering from a prominent generalized*
15 *anxiety disorder. Widely generalized symptoms--including behavioral*
16 *edginess, apprehensiveness over trivial matters, pervasive social disquiet,*
17 *and worrisome self-doubts--are consistent with his overall personality*
18 *makeup. In addition to his more general anxious state, specific symptoms*
19 *may include fatigue, insomnia, headaches, an inability to concentrate, and*
20 *feelings of sexual inadequacy. Especially sensitive to public reproach, yet*
21 *lacking the confidence to respond with equanimity, he may be experiencing*
22 *more discomfort than usual. This is particularly true if he expressed his*
23 *resentment against someone with whom he would rather have maintained a*
24 *safe distance.*

25 ...



1 *Deeply ingrained and pervasive patterns of maladaptive functioning*
2 *underlie clinical syndromal pictures. The following personality prototypes*
3 *correspond to the most probable DSM-5 diagnoses that characterize this*
4 *patient.*

5 *Personality configuration composed of the following:*

6 *- 301.6 (F60.7) Dependent Personality Disorder*

7 *- 301.0 (F60.0) Paranoid Personality Disorder*

8 *- with Schizoid Personality Type*

9 *- and Avoidant Personality Type.”*

10
11 31. Dr. Von Kirchenheim, saw the Defendant again on the 8th May 2018 and concluded in an
12 Addendum to his psychological report of the 12th December, 2017¹⁴ that:

13
14 *“In summary, there are no significant changes and I am unable to*
15 *comment on the long-term effects of consequences, of his continued*
16 *incarceration.”*



¹⁴ Dated the 8th May 2018

1 *SOCIAL INQUIRY REPORT (SIR)*

2
3 32. A Social Inquiry Report was filed on the 22nd June 2018 for this Court. The Social Worker
4 noted that the Defendant continued to deny that the firearm belonged to him. The Social
5 Worker also noted that he seemed to “minimize” and justify his engagement in these
6 offences and that he blamed his “mental disability” and being bullied over the years for the
7 offences he committed. He was found to be at Very High Risk in relation to re-offending
8 given his criminal history, pro-criminal attitude and orientation, anti-social pattern,
9 companions, family and marital history as well as his education and employment.

10
11 *COURT’S CONCLUSIONS*

12
13 33. I have carefully considered the authorities and submissions advanced by counsel for the
14 Crown and for the Defendant, as well as the various reports submitted for the Court’s
15 consideration which have been very helpful.

16
17 34. I bear in mind the instructive legislative context in which the defence submissions must be
18 viewed.

19 *“While the primary thrust of the statute is deterrence, the legislature is*
20 *understood to be in earnest to avoid arbitrary and thus unduly harsh or*
21 *disproportionate punishment, including as that might turn out to be the*
22 *case having regard to the subjective circumstances, not only of the offence,*
23 *but of the offender as well”.*¹⁵
24



¹⁵ *Parsons* at paragraph 16



1 35. This Court has not been invited to consider that one particular circumstance should cause
2 the Court to find that there are exceptional circumstances and this Court has considered all
3 relevant circumstances laid before it. I accept the defence submissions advanced at
4 paragraph 10 above. However, it does appear that Counsel for the Defendant placed
5 special emphasis upon the details in the medical reports (psychiatric and psychological
6 reports) as well as the SIR, which referenced these reports, in inviting the court to find that
7 there are exceptional circumstances in this case which would cause the imposition of a
8 sentence of 10 years' imprisonment to be arbitrary and disproportionate.

9
10 36. This Court is very well acquainted with the circumstances of the offence and of the
11 offender in this case, having sat as the presiding judge at trial and especially because of
12 submissions advanced during the course of the trial wherein both Doctors McGill and Von
13 Kirchenheim gave live evidence before the court of the Defendant's mental condition.

14
15 37. I do take the defendant's mental disorders and/or disabilities as detailed by the doctors into
16 account in consideration of this application.

17
18 38. I have no reason to doubt Dr. McGill when she related that as far as this Defendant is
19 concerned *that his "chronic problems" "are unlikely to improve in the short term" and*
20 *that: "there is the possibility of worsening cognition and emotional stability related to*
21 *incarceration."* The fact that a lengthy custodial sentence may weigh more heavily on this
22 defendant than on his fellow prisoners is relevant. However, the possibility of worsening
23 cognition and emotional stability related to incarceration, in and of itself, is not a factor
24 that is peculiar to this Defendant.

1 39. Dr. McGill was unable to predict the extent of this worsening condition. However, she
2 was clear that “his background of trauma will make him more vulnerable to stress and
3 worsening depression.” Whilst keeping in mind that this court’s assessment must be of all
4 the circumstances particular to this case, this court does note that the findings of Dr.
5 McGill are not as conclusive as those that the court in *Parsons* or in *Cordero* had to
6 consider on similar applications where the impact of incarceration on the defendants’
7 mental condition were also relevant considerations.

8
9 40. Whilst I am not convinced that a Court must find a Defendant unfit to serve before being
10 able to accord him a reduction in the minimum mandatory term of imprisonment, there
11 must be found, in the circumstances of the offence and of the offender, such matters that
12 would cause a court to find that these, taken as a whole, amount to exceptional
13 circumstances. I do not find these in this case – neither as it relates to a particular factor
14 nor as to all of the factors relevant to this offence or the offender considered in the round.

15
16 41. This Court finds that the Defendant’s case does not present exceptional circumstances.
17 Section 39 of the Firearms Law, 2008 Revision is applicable given the nature of the
18 firearm in the Defendant’s possession. Accordingly, a sentence of 10 years’ imprisonment
19 must be imposed for Count 1.



1 42. For Count 2, having found that the ammunition was within the firearm, accordingly, I
2 impose as sentence of five (5) years' imprisonment - to run concurrent to Count 1.

3

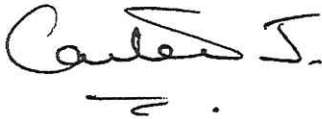
4 43. On the total sentence of 10 years' imprisonment, the time that the Defendant has spent in
5 custody prior to sentence will be deducted from this sentence.

6

7 44. The Indictment also includes a Schedule of offences sent up to the Grand Court contrary to
8 s.88A(1) of the Criminal Procedure Code (2014) Revision. The Court has been advised that
9 the first of these offences was withdrawn and that the Crown will not proceed with the
10 remaining two counts at this time. Accordingly, these counts will be ordered to lie on file.

11

12 **Dated this the 29th day of August 2018**

13 

14

15 **Hon. Justice Marlene I. Carter (Actg.)
Acting Judge of the Grand Court**

