IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Crim) No 29/2011
(Indictment No. 0046/2011)
C#00973/2011

BEFORE

Rt Hon Sir John Chadwick, President
Hon Elliott Mottley, Justice of Appeal
Hon Abdulai Conteh, Justice of Appeal

ON APPEAL FROM THE GRAND COURT

BETWEEN

ROBERT LEWIS TERRY

Applicant

and

THE QUEEN

Respondent

Lucy Organ of Samson & McGrath for the Appellant
Candia James instructed by the Director of Public Prosecutions for the Crown

Hearing: 20 July 2012
Reasons released: 4 September 2012

REASONS FOR JUDGMENT
Revised from transcript and Approved

Sir John Chadwick, President:

1. On 13 October 2011, Robert Lewis Terry pleaded guilty to two offences arising out of events which had occurred on 1 February 2011. The first of those offences, charged under Count 1, was aggravated criminal trespass, in respect of which he received a sentence of four years imprisonment to be served concurrent to that imposed on Count 2. The second offence, charged under Count 2, was that of possession of an unlicensed firearm, for which he received a sentence of 12 years imprisonment. He

now seeks leave to appeal in this court against the sentence of 12 years passed on Count 2. He does not seek to appeal against the concurrent sentence passed on Count 1.

2. The circumstances in which the offences were committed can be stated shortly. The applicant and four others were seen, in the basement car park of The Caribbean Club, on Seven Mile Beach, to be seeking to remove the license plate of a vehicle. Members of the staff of The Caribbean Club called the police. The five men ran off. The applicant was the last to leave the basement car park; and, when he did so, he was carrying a green Foster's shopping bag, which he threw into nearby bushes. When examined, that bag was found to contain a semi-automatic pistol with a magazine containing eight 9mm rounds. Mr. Terry was charged with the two offences that I have described.

3. Before the applicant was brought to trial there was a *Goodyear* hearing. That took place on 2 September 2011 before Justice Henderson. The purpose of the hearing was to obtain an indicative ruling from the judge as to the maximum sentence that would be passed on Count 2 in the event of a guilty plea. The judge reached the conclusion that a proper starting point in the circumstances of the case would be in the range of 16 to 18 years; and that, from that starting point, he would give a discount of 25 percent. So, if the applicant were to receive a sentence at the lower end of the range, he could expect that to be 12 years after the discount had been applied.

4. Following that indication, the applicant entered guilty pleas to both charges. He was sentenced by Justice Henderson on 9 December 2011. Curiously, the judge was not reminded of the indication that he had given at the *Goodyear* hearing. His mistaken recollection was that he had indicated that he would impose a sentence of 12 to 16 years, less a discount of 25 percent on a guilty plea. But that mistaken recollection would not have had the effect that the applicant was likely to receive a greater sentence that that which had been indicated at the *Goodyear* hearing.

5. In the course of the sentencing hearing, the judge was handed a letter dated 8 December 2011 from the Royal Cayman Islands Police Service. It was submitted by counsel then appearing on behalf of the applicant Mr. Terry that consideration of that letter should take place in private. The judge rejected that submission. He said that he

had read and considered the letter; and that it did not seem to him that it was of significance in the context of the sentencing exercise which he had to undertake. When pressed by counsel that he should take into account, at the least, the public policy considerations of encouraging those who were charged with offences to give assistance towards the reduction or solution of crime, he said that he would take that into account.

6. When he came to sentence, however, it is plain that he did not give the applicant any credit for the information in the letter of 8 December 2011. He stated that, from everything that he had heard and read in the case, the proper sentence, but for the guilty plea, would be imprisonment for 16 years; and that in the light of the guilty plea, he would discount that sentence by 25 percent to arrive at a sentence, on Count 2, of 12 years.

7. 16 years was, of course, the upper limit of the bracket that, as the judge mistakenly recollected, he had indicated at the *Goodyear* hearing would be the appropriate range on a plea of not guilty. The judge took the view that there were a number of aggravating features in the case. Those features included his perception that the weapon had been brought onto the Caribbean Club premises in circumstances strongly suggestive of the fact that the five men were planning to commit an armed robbery in the immediate future. He proceeded to sentence on the basis of that perception: that there was a plan to commit an armed robbery; and that the applicant was an integral part of that plan. If the judge were right in his perception, then clearly the existence of a plan to commit an armed robbery would constitute an aggravating circumstance on a charge of possession of an unlicensed firearm. The judge disregarded the applicant's previous conviction, in 2004, for possession of an unlicensed firearm on the basis, as he thought (wrongly), that, in carrying out the sentencing exercise, he was not permitted to take notice of what would have been a spent conviction.

8. The basis that the judge adopted in reaching his conclusion as to the appropriate sentence in this case - that the applicant was an integral part of a plan to commit an armed robbery in the immediate future - was not an agreed fact; and was inconsistent with an earlier observation of the judge in the course of submissions by defence counsel. The judge had asked whether the applicant wished to tell the court why he

was in possession of, and what he was planning to do with, the loaded handgun in an operating condition. He was told by counsel that he had no instructions on that point. The judge then said this: "I will sentence him on the basis that we do not know that". That pointed, as it seems to me, to an acceptance by the judge, in the course of submissions in mitigation, that there was no material on which to assume that the applicant should be sentenced on the basis that he was an integral part of a plan to commit an armed robbery in the immediate future.

9. Nevertheless, there were a number of aggravating features. The applicant had a previous conviction for possession of an unlicensed firearm; the gun was loaded and was in a position to be used; and the applicant was in possession of the gun while in the course of an aggravated criminal trespass. Against that, it can be said that the firearm was not in fact used - in particular, it was not used, in fact, for the purpose of committing an armed robbery – and that the applicant was only seen to be in possession of the firearm for a short amount of time: that is to say, from time when he had picked the gun off the seat of the vehicle and put it in the green bag until the time when he threw the bag into the bushes. Further, it could be said that the applicant had no previous convictions for violence.

10. Taking those aggravating and mitigating factors into account, the proper starting point in this case, in our view, would have been between 13 and 14 years after conviction on a not guilty plea. That would have been the appropriate sentence before any account is taken either of the assistance which the applicant had provided to the authorities, as set out in the letter of 8 December 2011 or of the guilty plea.

11. In our view, the judge was wrong to hold that the contents of the letter of 8 December 2011 were of no significance; in particular, he was wrong, after indicating in the course of submissions that he would take those contents into account, to fail to do so without further explanation. If the contents of the letter are taken into account, then, as it seems to us, the proper starting point on a not guilty plea is brought down to 12 years.

12. Applying a discount of 25 percent for the guilty pleas to a starting point of 12 years leads to the conclusion that the appropriate sentence in this case, on Count 2, would have been nine years.

13. Accordingly, we give permission to appeal against sentence. We allow the appeal against sentence. We substitute a sentence of nine years for the sentence of 12 years imposed by the judge on Count 2.

14. There is, as I have said, no application for leave to appeal against the sentence of four years passed on Count 1. But we observe that the sentence of four years passed on Count 1 was the maximum sentence for the offence. The judge did not explain why he took the view that the sentence for an offence to which the applicant had pleaded guilty should be the maximum permitted by the law. On any basis, as it seems to us, the applicant could have expected some discount to reflect his guilty plea; even if, which we doubt, this could be regarded as the most serious case of aggravated trespass.

15. Counsel explained to us that there was no application for leave to appeal against the sentence passed on Count 1 because, in practice, a successful appeal against that sentence could make no difference to the time that the applicant would spend in prison. She pointed out, correctly, that the statutory minimum sentence in respect of the offence under Count 2, absent exceptional circumstances (which were not advanced) was seven years following a guilty plea: so a concurrent sentence of four years on Count 1 was not going to make any difference to the length of time that Mr. Terry would actually serve. Nevertheless, as a matter of principle, it seems to us wrong to pass the maximum sentence, without reasons, on the grounds that it makes no practical difference. That is not a principled approach.

16. We confirm that the sentences are to be served concurrently and time spent in custody is to be taken into account.