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IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A (Criminal) # 30/95
11-12/96

- Criminal

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See JA.
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AB

BEFORE: THE RT. HON. MR. JUSTICE E. ZACCA P.C., O.J., PRESIDENT
THE RT. HON. MR. JUSTICE T. GEORGES P.C., J.A.
THE HON. MR. JUSTICE G. D. M. COLLETT J.A.

BETWEEN JEFFREY A. DaCOSTA
and
JOSE CRUZ ECHENIQUE APPELLANTS
AND REGINA RESPONDENT

Mr. Howard Hamilton Q.C. instructed by Mr. John Furniss
of Collins, Broadhurst & Furniss for DaCosta

Mr. Graham Hampson of Quin & Hampson for Echenique

Mr. Sam Bulgain for the Respondent

The 15th and 16th April 1996

REASONS FOR JUDGMENT

The appellant, Jeffrey A. DaCosta, and the appellant, Jose Cruz Echenique, were charged together on a number of counts relating to the possession of ganja on 8th November 1994. The appellant, DaCosta,

pleaded guilty to possession with intent to supply and, the appellant, Echenique to being concerned in the possession of ganja with intent to supply. The quantity of the drug involved was 22.13 lbs. The pleas were taken on 24th October, 1994. There was an extensive hearing on sentence in the course of which a number of witnesses gave evidence as to good character. On 3rd November 1995 DaCosta was sentenced to a term of 2 years imprisonment of which 9 months were suspended and a fine of \$1,000.00 or 3 months imprisonment in default. Echenique was sentenced to a term of 18 months imprisonment of which 6 months were suspended and fined \$750.00 or 2 months imprisonment in default.

On 15th December 1995 the appellant, Echenique, appeared before the Grand Court and pleaded guilty to two charges of unlawful possession of an unlicensed semiautomatic pistol and 19 rounds of ammunition which could be fired from the pistol. His co-accused on that charge was Waldo Harrison Parchment who pleaded guilty to unlawful possession of the same unlicensed gun and 19 rounds of ammunition. Echenique was sentenced to 3 years imprisonment on each count concurrent but consecutive to the terms of imprisonment for the possession of ganja he was then serving.

Echenique has appealed against the terms of imprisonment imposed on him on all the charges - a total of 4 1/2 years imprisonment with 6 months suspended. DaCosta has appealed against his term of 2 years with 9 months suspended. Both appeals were heard together.

The facts revealed that the investigations began on 8th November, 1994

when a Cayman Airways Clerk found an unclaimed bag at Miami Airport. On examination by Customs it was found to contain ganja and clothing. Enquiries revealed that Echenique and DaCosta had packed the ganja in a suitcase which belonged to Echenique's sister on 6th November 1994. On 8th November 1994 the ganja packed suitcase was transferred from DaCosta's car to a car driven by Echenique. Echenique drove the car with DaCosta as a passenger to Owen Roberts International Airport. There, with the help of a Cayman Airways customer service agent, the bag was checked on a flight to Miami. DaCosta also travelled on that flight. It would appear that the bag was not picked up as intended, and thus was later found and opened.

The police, in the course of investigations, carried out a search of Echenique's house. Concealed in the attic they found the semi-automatic pistol and the 19 rounds of ammunition. The enquiries led to the co-accused, Parchment, who stated that while checking in at Miami Airport for Cayman he was asked by someone to check in a parcel which contained a comforter. He was given documents which supported this. He suspected this was not so and was later told that it was a tool. He brought the parcel to Cayman, took it home with his luggage and opened it. It contained a pistol and ammunition. He was scared and immediately took it Echenique to whom he had been asked to deliver it.

DaCosta was a senior officer in the Cayman Islands Fire Service. He had been awarded a scholarship to study for a degree as a paramedic. He had completed a part of the course and started another. He comes

from a very good family and was considered trustworthy, ambitious and hardworking. He had gone through a failed marriage and was picking up the pieces. He had pleaded guilty and co-operated with the police.

Echenique was also in the Fire Services and was previously considered respectable, courteous and honest. He was hardworking.

The appellants appealed the sentences imposed in the Magistrate's Court to the Grand Court. The Chief Justice dismissed those appeals. At this hearing the Court heard the appeal from those dismissals as well as the appeal from the sentence imposed by the Chief Justice of the possession of unlicensed firearm charges which had been heard in the Grand Court.

Mr. Hampson, for Echenique, submitted that the term of 3 years imprisonment for the firearm offences were unduly severe and were out of line with sentences which had been imposed by the Grand Court for these offences since the law had been amended to increase the maximum term of imprisonment for unlawful possession of a firearm to 20 years. He summarised three of these case.

In McNeese Indictment 7/95 the accused who pleaded guilty to unlawful possession of ^{wrong!} a shot gun and cartridges had been sentenced to 18 months imprisonment suspended for 2 years and fined \$5000.00.

In Norman Alan Clarke Indictment 32/95 the accused pleaded guilty to

four charges - possession of an unlicensed firearm, unlawful discharge of a firearm, carrying a loaded firearm and carrying a firearm with intent to commit an indictable offence. It was alleged that he had discharged the firearm at a car occupied by 2 people. Mr. Hampson stated that there was an element of provocation. While this is of relevance perhaps to the discharge of the firearm it can have no bearing on the charge of unlawful possession of an unlicensed firearm. He was sentenced to 18 months imprisonment 12 of which were suspended.

In Kerry Whittaker, Indictment 62/95, the accused was charged with carrying a firearm in a public place. The firearm, a pistol, had gone off in a car in which the appellant and a friend were travelling. The friend was shot in the buttock. He was sentenced to a term of 2 years imprisonment one year of which was suspended.

At this session we heard the appeal of Neil Thomas CICA 28/95. He was charged with possession of two sawn off shot guns. He was sentenced to a term of 18 months on each count to run concurrently. We dismissed the appeal and noted that it erred on the side of leniency bearing in mind that the sawn-off shot gun was frequently used in the commission of armed robberies.

There has also been the case of Parchment, C.I.C.A 8/96, which we heard immediately before the hearing of this appeal. He was charged with possession of an unlicensed firearm and sentenced to 2 years imprisonment 18 months of which were suspended on each count. He was also fined \$2,500 on each count. The facts indicated that he may

have been deceived in agreeing to check in the package containing the pistol and ammunition to Cayman. Later his suspicion was aroused. He opened the package on arrival here and promptly delivered it to Echenique. We reduced the fines to \$1,250.00 on each count. His possession was for a short period. He had undertaken the task because of deception and there was no indication of financial benefit to him. In our view the difference in culpability between Parchment and Echenique justifies the disparity between the sentences. In our considered view the penalty in Neil Thomas erred on the side of leniency. On the facts given to us the sentence in the case of Norman Clarke is surprisingly low.

There is no evidence that Echenique intended to use the gun for unlawful purposes. There are indications that he was interested in firearms and had applied for permission to hold a shot gun.

The number of cases arising since the raising of the maximum penalty supports the inference that the crime is on the increase. Giving full effect to Echenique's good character and the damage to his career we do not think that the sentence of 3 years imprisonment is unduly severe.

In relation to the ganja charges Mr. Hampson stressed that the Court had taken into account a statement by another accused person involved in the scheme. The statement was that Echenique was to be paid for participating. Mr. Hampson had not seen that statement and had not had an opportunity to deal with it. This should not have been

allowed. Nonetheless it would be a reasonable inference that anyone engaged in a plan to move 22.13 lbs of ganja from Grand Cayman to Miami for disposal there would have been acting on the expectation of reward.

The sentence imposed - 18 months imprisonment 6 months of which were suspended and a fine of \$750.00 or 2 months imprisonment in default of payment is by no means unduly severe.

Mr. Hampson submitted that even if both sentences could be said to be unexceptionable there should be some reduction since the aggregate of the sentences is too high. He relies on the principle of totality of sentencing as stated in Thomas Principles of Sentencing A5-3A01 -

"A sentencer who imposes a series of consecutive terms of imprisonment should review the aggregate and make such reduction as may be necessary if the aggregate of the consecutive terms does not appear just and appropriate."

Having regard to the fact that his previous conduct appears to make it unlikely that Echenique will again transgress, his age and prospects are such that an over lengthy term of imprisonment may be harmful. On that basis the appeal against sentence on the firearm charges is allowed. The sentences are quashed and a sentence of 2 years imprisonment substituted. This will be consecutive to the effective term of 1 year imprisonment on the ganja charges making a total of 3 years imprisonment.

Mr. Hamilton, for DaCosta, stressed that he had one main point. The

trial Magistrate had stated that in Mr. DaCosta's case the view that the correct tariff for the offence of possession of ganja with intent to supply 22.13 lbs was 2 years imprisonment. Against that he had set all the mitigating factors - the most significant of which was the guilty plea and arrived at the sentence imposed. Mr. Hamilton submitted that the tariff stated was wrong. He cited the case of Aramah (1983) 76 Cr. App R. 190 where a range of 18 months to 3 years was considered an appropriate tariff for possession of 20 kg. marijuana with intent to supply.

The difficulty arises from the fact that the tariff was stated as a fixed figure. It should always be thought of as a range as it was stated to be in Aramah (Supra). A 2 year sentence falls well within that range. This was a carefully planned exercise. Pepper and detergent were packed in the suitcase with the drugs for the purpose of misleading dogs if the suitcase was examined that way.

Mr. Bulgin submitted that the suspension of 9 months of the sentence indicated the sentencer's awareness of the issues of character and loss of career.

Accordingly, DaCosta's appeal against sentence is dismissed and the sentence affirmed.

