

COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

MCCrApp. No. 130 of 2023

B E T W E E N

STEPHEN ELLIOT, JR

Appellant

AND

COMMISSIONER OF POLICE

Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
 The Honourable Madam Justice Crane-Scott, JA
 The Honourable Mr. Justice Evans, JA

APPEARANCES: **Ms. Romona Farquharson-Seymour, with Mr. Samuel Taylor,**
 Counsel for the Appellant
 Ms. Darnell Dorsette, Counsel for the Respondent

DATE: **16 April 2024; 30 May 2024**

***Criminal Appeal-Possession of an Unlicensed Firearm- Section 5B of the Firearms Act-
Appeal against sentence - Considerations in sentencing for firearm offences - Mitigating
and aggravating factors - Principle of deterrence - Reasonableness of sentence***

On June 21, 2023, police executed a search warrant at a residence and found a Cobra handgun hidden in a bedroom closet. The appellant, Stephen Elliot Jr was arrested and admitted to owning the unlicensed firearm. He subsequently pleaded guilty to the charge of possession of an unlicensed firearm. The Magistrate, after considering the mitigating factors as well as the aggravating factors, sentenced the appellant to three years imprisonment. The appellant appealed, claiming that the sentence was unduly harsh. The Court, after hearing the parties, reserved its decision.

Held: The appeal is dismissed. The sentence of the Magistrate is affirmed.

The Court will not interfere with a sentence imposed by a lower court unless the sentence is manifestly excessive or wrong in principle. In sentencing for firearm offences, courts must consider factors such as the type of weapon involved, whether and how the weapon was used or intended to be used, the defendant's criminal record, and any relevant mitigating or aggravating circumstances. The principle of deterrence is an especially important consideration given the prevalence of firearm crimes in the jurisdiction. The Magistrate properly weighed the

mitigating factors like the defendant's guilty plea, cooperation, lack of prior record, remorse, and that the firearm was unloaded, against the aggravating factors of the weapon being a semi-automatic pistol capable of causing serious harm. It is apparent that the Magistrate endeavored to adhere to the guidance provided by the decided cases. The three-year sentence imposed by the Magistrate was not unduly harsh or excessive in light of the need for deterrence.

Adderley v R (2017) 90 WIR 19 applied

Commissioner of Police v Brian Botham MCCrApp & CAIS No. 134 of 2015 considered

Dustin Taylor v The Commissioner of Police MCCrApp & CAIS No. 63 of 2014 considered

Galen Forbes and The Commissioner of Police MCCrApp & CAIS No.10 of 2013 considered

Kevin Cooper and The Commissioner of Police MCCrApp & CAIS No. 318 of 2013 considered

Leroy Rolle v The Attorney General [2012] 2 BHS J. No. 42 considered

Prince Hepburn v. Regina SCCrApp. No. 79 of 2013 considered

JUDGMENT

Judgment delivered by the Honourable Mr. Justice Isaacs, JA:

1. The appellant was charged with the offence of possession of unlicensed firearm, contrary to section 5B of the Firearms Act (“the Act”) and taken before Stipendiary and Circuit Magistrate Algernon Allen, Jr. (“the Magistrate”). On 22 June 2023, the appellant and his lawyer, Ms. Ramona Farquharson, appeared before the Magistrate and he pleaded guilty to the charge.
2. I have taken the liberty to reproduce the salient portion of the Magistrate’s record to continue the narrative in this case. It is as follows:

“1. The defendant appeared and pleaded guilty to the following offence:

**i. POSSESSION OF AN UNLICENSED FIREARM -
Contrary to section 5B of The Firearms Act, Ch.213.**

2. Sgt. Harvey appearing for the Prosecution read the facts as follows, “On Wednesday 21 June, 2023 sometime around 5.30am the crew of Xray Falcon consisting of Inspector Armbrister and Inspector Butler with the assistance of Cpl.3587 Brown and Police Reserve dog, acting on information received proceeded to #13 Mount Royal Avenue North where they knocked on the door, upon entry the defendant identified himself and he was shown a search warrant. A search was conducted of the premises, the reserve police dog was lead through the premises and he indicated to officers the presence of something by sitting directly in front of a line closet in a bedroom. Officer’s (sic) searched the closet and discovered between bedsheets a silver and black Cobra handgun

S/NFS096620. The defendant was arrested and cautioned, he was interviewed at CID and admitted to being the owner of the firearm.

3.The defendant admitted to the facts and the court found him guilty and convicted him of the abovementioned offences. Mrs. Ramona Farquharson-Seymour, counsel for the defendant asked the court to consider the following mitigating factors, namely:

- i. The defendant pleaded guilty at the earliest opportunity.**
- ii. The defendant cooperated with the police investigation.**
- iii. No previous convictions**
- iv. Remorseful**
- v. Firearm had no ammunition/no intention to use firearm**
- vi. Father of two (2) children**

4. The court also took into consideration the aggravating factors specifically;

- i. The firearm recovered was a semi-automatic pistol capable of being concealed inconspicuously.**
- ii. The firearm recovered is capable of discharging bullets at a rapid rate and can cause serious harm to multiple persons in its vicinity.**
- iii. The defendant stated that he was in possession of the firearm as a result of a threat to his family therefore the court can infer that if he was threatened he intended to use it to repel the threat.**
- iv. The uncharacteristic proliferation of firearms in this jurisdiction which are used to threaten, injure and kill citizens.”**

3. The Magistrate referred to the cases of Galen Forbes and The Commissioner of Police MCCrApp&CAIS No.10 of 2013 and Kevin Cooper and The Commissioner of Police MCCrApp&CAIS No. 318 of 2013, before making the observation at paragraph 7 of his record that:

“7. The proliferation of illegal firearms in society has become a grave concern and it was the clear intention of Parliament to punish persons convicted of firearms offences by imprisonment. The court is of the view that a custodial sentence is appropriate as a deterrent to other offenders that the possession of an illegal firearm is a grave and serious matter.”

4. The Magistrate then sentenced the appellant to three years' imprisonment at The Bahamas Department of Correctional Services.
5. On 29 June 2023, the appellant filed a Notice of Appeal Against Conviction containing three grounds of appeal:
 - “i) That the Learned Stipendiary and Circuit Magistrate erred in the Law.**
 - ii) That the sentence impose (sic) was unduly harsh.**
 - iii) Any and all other grounds that become apparent from the Record”.**
6. Although intituled “Notice of Appeal Against Conviction” it is clear from the grounds enumerated that the appeal relates only to sentence, a fact confirmed by Counsel during the hearing before us.

Sentence

7. The Court must begin from the position that we will not interfere with a sentence imposed unless it can be shown to have been manifestly excessive or wrong in principle. As Allen P said at paragraph 66 of her judgment in **Adderley v R** (2017) 90 WIR 19:

“[66] We reminded ourselves once again of the guidance of Lord Hewart LCJ in *R v Gumbs* (1927) 19 Cr App Rep 74 that an appellate court never interferes with the exercise of the sentencing discretion by a lower court, unless the sentence is one which is based on some error in principle. That includes where the sentence is so unreasonable as to be outside the realm of sentences which a reasonable court might impose in the circumstances.”
8. It is a fundamental principle of sentencing that a person ought not to be punished over and above what is called for by the circumstances of the offence and the circumstances of the offender.
9. Ms. Farquharson submitted that the Magistrate ought to have had regard to the authority of **Dustin Taylor v The Commissioner of Police** MCCrApp & CAIS No. 63 of 2014, which sets out the guidelines that must be followed in sentencing an offender who contravened the Act. Based on **Taylor**, Ms. Farquharson opined that the relevant considerations are:
 - i. The type of weapon;
 - ii. The use of the weapon;
 - iii. The intention of the weapon; and
 - iv. The defendant's record.
 - v. An early guilty plea;
 - vi. Any remorse expressed;
 - vii. Criminal record;

- viii. Young age;
 - ix. Employment status;
 - x. Possibility of rehabilitation; and
 - xi. Cooperation with the police
10. She submitted further that a mitigating factor in this case was the weapon was unloaded at the time of its discovery and that there was nothing disclosed to show the appellant evinced an intention to use the firearm. However, regard must be given to the appellant's statement that he was in possession of the firearm as a result of a threat to his family. As the Magistrate said, "therefore the court can infer that if he was threatened, he intended to use it to repel the threat". The absence of ammunition in the firearm cannot lead to an inference the appellant did not intend to use it. Moreover, the appellant did not make a complaint to the police about a threat. It is unacceptable for a mature individual such as the appellant to arm himself unlawfully rather than follow the law. He could have applied for a licence to possess a firearm.
11. In **Taylor**, the unrepresented appellant had pled guilty to one count of possession of twenty live rounds of ammunition that had been discovered in a bedroom in his home. He was sentenced to four years' imprisonment. He appealed his sentence as being unduly harsh and excessive. The Court, differently constituted, concluded that in the peculiar circumstances of the appellant's case, to wit, his very early guilty plea, his plea in mitigation, his age, the fact that although this was not his first offence, he had no convictions for some twelve years and appeared to have been rehabilitated, the Court would reduce the sentence to three years' imprisonment.
12. In her judgment, Crane-Scott, JA explained at paragraph 20:
- "20. In particular, there is in this case, no indication whether, in imposing the 4 year sentence, the learned Chief Magistrate took into account, as Mr. Rolle suggests she ought to have, mitigating factors of the offender such as: (i) the appellant's guilty plea; (ii) his plea in mitigation before her; (iii) his age; or (iv) the fact that although this was not his first offence, he has had no convictions for some 12 years and appeared to have been rehabilitated."**
13. It must be noted that at paragraph 3 of his ruling, the Magistrate outlined the mitigating factors in the appellant's favour which largely mirror those mentioned in **Taylor**:
- i. The defendant pleaded guilty at the earliest opportunity.**
 - ii. The defendant cooperated with the police investigation.**
 - iii. No previous convictions**
 - iv. Remorseful**
 - v. Firearm had no ammunition/no intention to use firearm**
 - vi. Father of two (2) children"**

14. It is true that not all of the factors are mentioned, e.g., the appellant's employment status, but the most pertinent matters affecting the Magistrate's sentencing discretion are covered by him and is in substantial compliance with the guidance given by the Court.
15. In **Galen Forbes and The Commissioner of Police** MCCrApp&CAIS No.10 of 2013, the Court, differently constituted, considered the case of an appellant who had been found with a loaded gun in a vehicle. In an oral judgment delivered by Allen, P., the Court took into account the prevalence of firearm offences in today's Bahamas and concluded the objective of deterrence trumped the favourable mitigating circumstances of the appellant. Allen, P stated:

“Counsel for the Appellant submits that when considering the mitigating circumstances of the offender in this case, namely his youth, his previous good character and the fact that he was gainfully employed just prior to the offence, that this court ought to reduce the sentence of four years to time served, which is four months.

It ought to be emphasized that a convicted offender is not entitled as of right to reduction in his sentence for such mitigating factors. Reduction on the basis of mitigation is seen as a matter in the discretion of the court which the court may withhold if it sees fit in order to emphasize some other penal object, such as deterrence.

Notwithstanding that youth and previous good character may have in previous cases resulted in a reduction, nevertheless, having regard to the prevalence of guns, the increasing and alarming incidences of murder, manslaughter and assault with such weapons in the Bahamas today, we think deterrence should be the objective of this court in this case.

We feel it is essential that we send a strong message to the appellant and to others who would offend that possession of firearms is a serious offence and will not be tolerated.”

16. The Court in **Galen Forbes** considered that out of the various factors a court considers when sentencing an offender, deterrence was the most important in their view.
17. In **Kevin Cooper and The Commissioner of Police** MCCrApp&CAIS No. 318 of 2013, the Court, differently constituted, upheld a four years' sentence for an appellant. In an ex tempore judgment, Adderley, JA said as follows:

“We considered all the circumstances and the matters mentioned by the Crown, including the case of Lewis Alex Williams SCCrApp No. 75 of 2014 from this court, and from the record that the magistrate gave a sentence thinking that you had no previous convictions. We also had regard to the fact that, as you admitted, the incident happened in a drug yard and you had the gun by your side for your own protection. When one looks

at the facts as related by the magistrate, it appears that you would have used the gun if you had to. This is the type of situation that leads to murders. This court has been very strict on the possession of firearms, because they are wreaking so much havoc in The Bahamas, and sentences should act as a deterrent.

Having regard to those facts, even taking into consideration a guilty plea at the first opportunity as the magistrate did, we believe the magistrate was well within the range of sentences that was reasonable by giving you four years. For those reasons we do not think that it is a sentence with which we should interfere.

Accordingly, we dismiss the appeal and uphold the sentence imposed by the magistrate.”

18. In **Commissioner of Police v Brian Botham** MCCrApp & CAIS No. 134 of 2015, officers, armed with a search warrant, descended on the home of the respondent and searched it. They discovered a .9mm hand gun and 392 live rounds of ammunition. The four people home at the time the contraband was found were all arrested and arraigned before a magistrate. They all pled not guilty. As the prosecution was about to call its last witness Botham indicated that he wished to change his plea. Thereafter, the charges were read to him and he pleaded guilty to both counts. The charges against the other three persons were withdrawn. The magistrate granted him a discharge on the conditions that he make payments of \$3,500 to the Grand Bahama Home for the Aged, \$6,500 to the Good Samaritan Home in New Providence, that he keep the peace and that he be of good behaviour for two years, failure of which would result in an eighteen months custodial sentence.
19. The Commissioner of Police appealed the magistrate’s “punishment” on the ground, inter alia, that it was unduly lenient. The Court, differently constituted, determined that the failure of the magistrate to convict Botham was unreasonable, The Court quashed the magistrate’s order, substituted convictions for the offences and imposed sentences on each, including a five years’ sentence for the offence of possession of ammunition with intent to supply.
20. Isaacs, JA, with who Allen, P and Crane-Scott, JA agreed wrote at paragraph 64:

“64. We have concluded that in the light of the prevailing climate of firearm and firearm-related offences in this community, that the seriousness of the offences, the object of deterrence and considerations of uniformity of sentences for firearms offences are factors which ought to have weighed more heavily in the scales than the respondent’s personal circumstances.”
21. Once again, deterrence was found by the Court to be an important factor for a court’s consideration in light of the prevalence of the use of firearms wreaking havoc in our society.

I accept that the facts in **Botham** are not on all fours with the appellant's case, but is cited only to illustrate a principle of sentencing.

22. The same may be said for **Leroy Rolle v The Attorney General** [2012] 2 BHS J. No. 42, where the appellant had been charged with the murder of his live-in love interest's twenty-two month old daughter. He was convicted of manslaughter and sentenced to a term of twenty-five years' imprisonment. At the time when the offence occurred the appellant was seventeen; but at the time of sentencing, he was around twenty years old.
23. John, JA delivered the judgment of the Court with whom both Blackman and Conteh, JJA agreed. John, JA recognised that the appellant may well have not been prepared psychologically or be sufficiently mature to take on the role of a father. It was also recognised that **"sentencing is an art; it is a balancing exercise and mercy must not be thrown out of the window when performing the balancing act"**. John, JA said at paragraphs 58 to 60:

"58. As sad as this case is, it is important that we focus on the purpose of a custodial sentence. In Benjamin v R (1964) 7. W.I.R 459 the Court of Appeal of Trinidad and Tobago presided over by Wooding, C.J laid down five principal objects of sentencing. These are (1) retributive or denunciatory, which is the same as punitive; (2) the deterrent vis-a-vis potential offenders; (3) the deterrent vis-a-vis the particular offender then being sentenced; (4) the preventive, which aims at preventing the particular offender from again offending by incarcerating him for a long period; and (5) the rehabilitative, which contemplates the rehabilitation of the particular offender so that he might resume his place as a law-abiding member of society.

59. The court there recognized that in some cases one object will be predominant whereas in others regard must be had more particularly to two or more of them. The Chief Justice went on to say..."that all five objects of sentencing policy, should; if possible, be kept in view although the punishment should at all times fit the crime. 60. In this case there is hardly any likelihood that this appellant will find himself in a similar situation again. While we accept that he must be punished, his rehabilitation is equally important. He has to live with the agony that he was responsible for the death of a 22 month old infant. We are cognizant of the fact that the trial judge took the circumstances of the offence and the offender into consideration. Nevertheless, there is a distinction between apply (sic) principles and overstraining them. This is a case that requires the court to temper justice with mercy. To quote Lord Lane in Attorney General's reference No. 4 of 1989 (1990) 11 Cr. App R 366 "...leniency is not in itself a vice '... that mercy should season justice is a proposition based in law as it is in literature.'" In all the circumstance (sic) we quash the sentence of 25 years and in its

place impose a sentence of 10 years imprisonment. The sentence to begin from the date of conviction."

24. Adderley, JA said at paragraph 36 in **Prince Hepburn v. Regina** SCCrApp. No. 79 of 2013:

"36. In exercising his sentencing function judicially the sentencing judge must individualize the crime to the particular perpetrator...so that he can in accordance with his legal mandate, identify and take into consideration the aggravating as well as the mitigating factors applicable to the particular perpetrator in the particular case. This includes but is not limited to considering the nature of the crime and the manner and circumstances in which it was carried out, the age of the convict, whether or not he pleaded guilty at the first opportunity, whether he had past convictions of a similar nature, and his conduct before and after the crime was committed. He must ensure that having regard to the objects of sentencing: retribution, deterrence, prevention and rehabilitation, that the tariff is reasonable and the sentence is fair and proportionate to the crime. Each case is considered on its own facts."

25. A sentence may be regarded as truly harsh or severe:

"...where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection, regard must of course be had to reported cases and in particular to the guidance given by this Court from time to time in the so-called guideline cases".
(Attorney General's Reference No 4 of 1989 11 Cr. App. R. (S) 517
- Lord Lane CJ)

26. It is apparent that the Magistrate endeavoured to adhere to the guidance provided by the decided cases. I can find no favour with Ms. Farquharson's submission that because certain decisions of the Court subsequent to **Galen Forbes** (supra) and **Kevin Cooper** (supra) tend to lean more toward leniency a court that imposes a sentence the appellant received has crossed the threshold into the realm of unduly severe.

27. I reiterate the caution expressed by Crane-Scott, JA in **Dustin Taylor** (supra), at paragraph 16:

"16. That having been said, the Court is always wary of placing too much weight on sentences passed in other cases not immediately before us. Our cautiousness stems from the fact that we are only too well aware that in considering such cases, we may not be fully seized of all the facts and circumstances of the offence or of the offender which were before a particular sentencer at the time a sentence was passed."

Conclusion

28. Despite the very able arguments employed by Ms. Farquharson, I do not find that the three years' sentence imposed on the appellant in all the circumstances of the case can be regarded as unduly severe.

29. The appeal is dismissed. The sentence of the Magistrate is affirmed.

The Honourable Mr. Justice Jon Isaacs, JA

30. I agree.

The Honourable Madam Justice Crane-Scott, JA

31. I also agree.

The Honourable Mr. Justice Evans, JA