BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 23 of 2000

BETWEEN:

JEROME O'NEAL BOVELL

(Appellant)

AND

THE QUEEN

(Respondent)

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Errol Chase, Justice of Appeal, and the Hon. Colin Williams, Justice of Appeal

2002: February 5 and 19, April 23

Mr. Andrew Pilgrim and Ms. Alicia Archer for the Appellant

Ms. Manila Renee for the Respondent

JUDGMENT

SIMMONS CJ: The appellant was charged before judge and jury on two counts under the Firearms Act, 1998-32 ("the Act"). The first was having possession of a .9mm calibre pistol without a valid licence on February 27, 2000 contrary to Section 3(1)(b)(A) of the Act. The second count charged possession of 17 rounds of ammunition without a valid licence.

[2] The facts of this matter lie within a short and narrow compass. They were that on February 27, 2000, P.C. Victor Brewster and P.C. Ainsley Gittens, about 1.00 a.m., went to Caesar's Shop at Combermere Street in the City of Bridgetown. Sergeant Woodroffe was also with them. They saw the appellant standing at the bar in the shop. They were dressed in plain clothes. P.C. Brewster introduced the other officers to the appellant and told him that they "had occasion to take him into custody". He then took control of [1] him, searched him and Brewster found a .9mm pistol in the right side front pocket of his trousers. P.C. Brewster took possession of the pistol, asked him to account for it and cautioned him. Brewster said that the appellant replied:

"You can't see how it is 'pon the street. I got that there to protect myself."

The officers then took the appellant to the Central Police Station where a thorough search was made of him and, during this search, a black plastic bag containing 8 rounds of .9mm ammunition was found in the right back pocket of his trousers. He was asked to account for the ammunition and cautioned. He made no reply.

[3] Both officers testified that the appellant was informed of his right to consult an Attorney-at-Law and interviewed. During the interview, he made a number of oral statements. For example, when told of his right to consult an Attorney-at-Law, the appellant said:

"Mr. Worrell is my lawyer, but it don't make no sense calling he now. I going talk with he on Monday. If you want to ask me anything, you can."

[4] When the gun was examined it was found to contain 9 rounds of .9mm ammunition and when asked to account for these rounds in the firearm the appellant said:

"You don't know how it is."

The appellant was duly charged at the police station.

[5] Sergeant Husbands, a ballistics expert, gave evidence that the pistol was a firearm within the meaning in the Firearms Act and that the ammunition also satisfied the definition in the Act. Constable Johnson found no evidence in the records of the police that the appellant had a valid licence to have or use either the firearm or the ammunition.[2]

[6] The appellant gave sworn evidence. He represented himself. His account of the events of February 27, 2000 was in direct contradiction of that of the police officers. He claimed that while he was in the bar, five to seven police officers approached him, blocked the doorway of the shop and searched him in the presence of other patrons of the shop. All he had on him was Barbados money. After the search, the officers took him outside and Brewster talked to him about a matter he was investigating. He said that they took him down to the Pondside and Brewster planted a gun in his right pocket while another officer put something in his back pocket. He said the officers radioed for others and eventually they took him to Central Police Station. At the station, he was interrogated about other matters and he says that he told the officers that he had nothing to say unless his Attorney-at-Law, Mr. Worrell, was present. Under cross-examination, he maintained that the pistol and ammunition were planted on him while he was walking between two officers without handcuffs. In effect, he was saying that, while walking with two officers, with his hands free, they put a loaded gun in his right front trouser pocket and ammunition in the back pocket of his trousers.

[7] The appellant called a witness, namely Rae Atkinson. His evidence was that the police came to the shop with guns and searched "Harold Emtage, me and some other fellows." They also searched the appellant and put him to stand up outside. They told the appellant that they wanted to search him and they took him along.

[8] The issue was simple. Two policemen said they searched the appellant and found the firearm and ammunition on him. The appellant, on the other hand, swore that the police planted a loaded [3] gun and ammunition on him. Essentially, the two competing versions were issues of fact for the jury to determine which one they believed.

[9] On July 28, 2000, the jury by a majority of 8:1 convicted the appellant on both counts and he was sentenced to 7 years' imprisonment on each count, the sentences to run concurrently.

The Appeal

[10] The appellant filed 7 grounds of appeal but elected not to pursue the appeal against sentence. We now deal with the submissions on the grounds of appeal against conviction.

Ground 1

[11] This ground alleges that the trial judge did not allow the appellant sufficient time to retain an Attorney-at-Law or to prepare himself for the conduct of his own defence and, further, alleges that the trial judge did not properly address his mind to the matter of certifying the appellant's case as fit for legal aid.

[12] The record shows that the appellant had been previously tried in April 2000 and the jury failed to agree. At the Assizes in July, he was arraigned on July 19th, 2000. He mentioned the name of one Attorney-at-Law who withdrew. He then said he was trying to get the services of Mr. Worrell and trying to raise the fee. The matter was adjourned to July 24th. On that day the appellant said he was not ready and Mr. Taylor for the Crown explained that he had spoken to Mr. Worrell who said that he had not been retained and was not representing the appellant. The case was adjourned to the next day, July 25th when it was further adjourned to July 27th. The accused still said that he was not ready. He had been given a second [4] set of depositions on the 25th. He made an application for a legal aid certificate and the note of the trial judge in the record is this:

"A very straightforward case. Accused educated and intelligent. Application for legal aid certificate refused. Accused was arraigned early in the Assizes and brought up on the 24th and again on the 25th. Application for further adjournment refused."

[13] Mr. Pilgrim submitted that because of the gravity of the penalties under the Firearms Act, the appellant should have been granted legal aid. Secondly, as an unrepresented person, he should have had more than two days to familiarize himself with the depositions. Thirdly, Mr. Pilgrim contended that, where an appellant can show that in a serious indictable offence he was pitted against professional witnesses, the court ought to give consideration to any difficulties which the defence might have and the particular circumstances of the case.

[14] Two cases were cited. The first was Peter Quintyne and Adrian Jones v. R. (Criminal Appeals Nos. 44 and 45 of 1996 unreported). In that case, a capital case, Sir Denys Williams CJ made certain observations where it was argued that Counsel for Quintyne had requested an adjournment on the ground that he had received the depositions only the day before the trial. Sir Denys said:

"It is important to have the business of the courts conducted in an orderly and expeditious manner. But it is also necessary to afford accused persons adequate time and facilities for the preparation of their defence. When an application for an adjournment is made by or on behalf of an accused, it is the judge's responsibility to decide whether in the particular circumstances the refusal of an adjournment would be prejudicial to the defence….In our view the judge should have acceded to the application and granted a short adjournment."

[15] The second case is Richard Hinds v. The Attorney General of Barbados (Privy Council Appeal No.28 of 2000 unreported). This [5] case raised constitutional questions about the denial of free legal representation on a criminal trial in 1991. Both the trial judge and the Court of Appeal had refused to issue the appellant in that case with a legal aid certificate to defend a case of arson.

[16] In the course of his judgment, Lord Bingham first said at p.2:

"The Board cannot now, on the evidence available, be sure what passed between the appellant and the judge. It does not however appear that the judge attempted to investigate the appellant's understanding of the crime charged against him or his capacity to defend himself or the nature of any possible defence he might have wished to advance."

[17] Then, later at p.15, his Lordship observed:

"A case cannot properly be assessed objectively, without taking account of the particular defendant and the difficulties which he or she may face

in cross-examining prosecution witnesses, seeking to exclude evidence, giving evidence, obtaining and calling any necessary evidence and advancing any available defence. A defendant in custody is likely to be at a disadvantage when preparing for trial, particularly if his educational attainments are limited."

[18] His Lordship then advised:

"The matters listed by the Court of Appeal of Nova Scotia in R. v. Wilson (1997) 163 NSR (2nd) 206, quoted above, are very relevant for the trial judge to consider when deciding whether the case is one in which, for its proper determination, legal aid should be granted to an indigent defendant. They are also matters which an appeal court should consider when deciding whether, in a case where legal aid has been denied to an indigent defendant, such denial has deprived the defendant of his constitutional right to a fair hearing."

[19] In the state of the evidence before the Privy Council, the Board declined to make a judgment as to whether the trial judge had erred in denying legal aid to Hinds. But Lord Bingham did remark (p.16) that -

"the lack of enquiry by the trial judge when refusing legal aid would suggest that he failed to take account of the appellant's personal circumstances and any [6] difficulties he might face, and this impression is reinforced by the Court of Appeal's treatment of the case as simple and devoid of difficulty. The prosecution case may well have been simple and devoid of difficulty; the same is not true of the appellant's task in resisting it…"

[20] Our first observation is that there is not an electronically recorded transcript of the proceedings at the trial. The record of appeal is based on the judge's notes, his record of the evidence and the verbatim summation. But we would distinguish both Quintyne and Jones and Hinds v. R on the following grounds.

(i) This was a retrial and the appellant must have been conversant with the evidence to be led against him.

(ii) He had had the benefit of Counsel at the first trial and would have been able at least to listen to the line of cross-examination pursued on his behalf.

(iii) The eye-witness evidence consisted of two witnesses only viz. Constable Brewster and Constable Gittens. It was short.

(iv) Unless he could produce valid licences entitling him to possession of the pistol and ammunition, the formal evidence of Sergeant Husbands could not sensibly be contradicted.

(v) There were statements of Mr. Taylor, Principal Crown Counsel and an officer of the Court, that the appellant had been falsely calling the name of an Attorney-at-Law as his representative.

(vi) Between the date of arraignment (July 19) and the date of trial (July 27) there was an interval of 8 days.

(vii) The appellant was served with a second set of depositions two days before trial.[7]

(viii) To the extent that he was unrepresented, he would necessarily have spoken in court and the trial judge would have been able to make a judgment as to his educational attainment and his ability to understand the evidence and the proceedings generally.

(ix) The depositions themselves were of 20 pages.

(x) The judge was in a position to assess the case objectively taking account of the appellant himself and any potential difficulties in the conduct of the defence based on the depositions in the possession of the judge during the interval of 8 days. Indeed the record shows that the case came before the judge on 3 dates between July 19th and 27th.

[21] Both the request for legal aid and the request for adjournment were matters entirely within the discretion of the trial judge and we cannot say, in the particular circumstances of this case, that such discretion was exercised on wrong principles or was unfair to the appellant. We think that the judge properly addressed his mind to the relevant factors.

[22] The judge's note shows that he had regard to the appellant's educational attainments and found him to be "intelligent". His Lordship also noted the appellant's previous appearances in court and the fact that he was applying for a "further adjournment". This was not a case in the same category as Quintyne and Jones where Counsel had received depositions only one day before the trial.

[23] We do not share Counsel's opinion that because there was a straight contest between the evidence of Constables Brewster and Gittens and the appellant, that, ipso facto, he was at an unusual disadvantage. The experience of this Court is that, at almost every [8] Assize, unrepresented accused persons successfully defend themselves against professional police witnesses and professional prosecutors.

Moreover, the records of trials in the Magistrates Courts are replete with instances of unrepresented accused persons conducting their own defences against police officers. It is by no means an unusual circumstance. In our considered judgment, this ground of appeal fails.

Grounds 2 and 4

[24] These grounds were argued together for convenience. They criticize the trial judge for "allowing questions and comments of a prejudicial nature to be directed to the appellant by the prosecution in the presence of the jury" and they allege that the judge's comment that the case was "straightforward" was improper.

[25] Specifically, complaint is made that the dialogue, as to whether the appellant should be granted a legal aid certificate, should have been conducted in the absence of the jury.

[26] No authority was cited in support of the submission. Mr. Pilgrim urges us to accept that the trial judge's comment as to the "straightforwardness" of the case sent a prejudicial signal to the jury who may well have drawn an inference favourable to the police and believed them.

[27] In the absence of authority, resort must be had to first principles. It is undoubted that a trial judge has a heavy and continuing responsibility to ensure a fair trial. And a body of legal precedents and principles has been built up over the years to protect an accused person from prejudice. Some of these precedents and principles require that arguments and submissions be heard in the absence of [9] the jury lest the jury be prejudiced by what they hear. Others of the precedents and principles do not preclude arguments and submissions from being made in the jury's presence.

[28] It has been the practice in this Island to hear applications for legal aid certificates in open court in the presence of the jury. So far as we are aware, it has never been suggested that this practice is likely to be unfair to an applicant-accused.

We are of opinion that the traditional procedure does not impugn the overriding considerations of fairness that must be accorded to accused persons.

[29] So far as the trial judge's characterization of the case as "straightforward" is concerned, his comment and his note to the same effect seem to us merely to represent his assessment of the uncomplicated nature of the case. He was well placed to make that value judgment. We therefore cannot agree that prejudice and unfairness must necessarily have attended or were likely to attend his comment.

[30] In our view, a judge is entitled to comment on a case provided that he does not breach his duty of impartiality. This is a principle recently reinforced by Simon Brown LJ in R. v. Nelson [1997] Crim.L.R 234 in relation to comments made during a summation.

The case before the trial judge was a simple issue as to whether the jury believed that the appellant had the firearm and ammunition on him or whether the police planted them as he alleged. We do not share Counsel's over-sensitivity that the jury must necessarily have drawn or were likely to draw an inference unfavourable to the accused from the use of a one-word comment.[10]

[31] Moreover, to suggest as Mr. Pilgrim did, that because the jury asked for the evidence of the police officers in cross-examination to be read back proved that the case was not straightforward is a leap in illogic that we cannot accept. Inability to recall a fact is not inevitably the product of a complexity of information.

[32] In our opinion, none of the matters submitted under this ground amounted to a material or any irregularity. These grounds of appeal are misconceived.

Ground 3

[33] Here it is said that "the judge erred in law in failing to warn the jury with regard to the alleged oral statements of the appellant as required by section 136 of the Evidence Act, Cap.121."

This was the direction of the trial judge – p.4:

"Now concerning those oral statements allegedly made by the accused. The accused has denied that he made those statements so you must decide that. You must decide whether or not the accused in fact made those statements. If you are not sure that he did, you must ignore them but if you are sure that he made them, then you must determine what they mean. In doing so you must draw the inference most favourable to the accused."

[34] Counsel says that this is a proper direction at common law. But, since the commencement of the Evidence Act, Cap. 121, on September 2, 1994, it is Counsel's case that a trial judge must now do more. He must give a warning. Counsel submits that oral statements are often vital to the defence case and proof of their falsity is a matter of crucial importance. The judge should have given a direction in compliance with section 136 of the Evidence Act.

[35] The Evidence Act is, in some parts, a very difficult piece of legislation to comprehend. In other parts there are errors; in still [11] other parts, it seems as though such unusual burdens are now put upon trial judges that the legislation has become a virtual minefield. It cries out for urgent amendment.

[36] Section 136 also appears as section 137 in some volumes of the Laws of Barbados. Whatever may be the correct numbering, the substance of the section is as follows:

"136.(1) This section applies in relation to the following kinds of evidence:

(a) evidence in relation to which Division 1 or 3 of Part IV applies;

(b) identification evidence;

(c) evidence the reliability of which may be affected by age, ill health, whether physical or mental, injury or the like;

(d) in criminal proceedings

(i) evidence given by a witness called by the prosecutor, being a person who might reasonably be supposed to have been concerned in the events giving rise to the proceeding; or

(ii) oral evidence of official questioning of a defendant, where the questioning is recorded in writing that has not been signed or otherwise acknowledged in writing by the defendant;

in the case of a prosecution for an offence of a sexual nature, evidence given by a victim of the alleged offence;

(e) in the case of proceedings against the estate of a deceased person, evidence adduced by or on behalf of a person seeking relief in the proceedings, being evidence about a matter about which the deceased person could, if he were alive, have given evidence.

(2) Where there is a jury the Judge shall, unless there are good reasons for not doing so,

(a) warn the jury that the evidence may be unreliable;[12]

(b) inform the jury of matters that may cause it to be unreliable; and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) It is not necessary that a particular form of words be used in giving the warning or information.

(4) This section does not affect any other power of the Judge to give a warning to, or to inform the jury."

Counsel draws our attention to subsection (1) paragraph (d)(ii). He argues that the oral statements recorded by the police officers in their official notebooks "were not signed or otherwise acknowledged in writing" by the appellant. That would indeed appear to be the case.

Counsel submits that the judge was under a duty to warn the jury in compliance with subsection (2).

[37] Before examining the effect of Counsel's submissions, we ought to point out that the phrase "official questioning" is defined in section 2 of the Evidence Act as follows:

"official questioning means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence."

[38] Typically, section 136(1)(d)(ii) will apply to a police officer giving oral evidence of a question and answer exchange between himself and a defendant, which exchange was recorded in an official police notebook. It is not the common practice that these records are signed or even initialed by the defendant unlike the practice in relation to the statement of a defendant recorded on a statement form. Invariably, the police officer will say that he needs to "refresh [13] [his] memory" from his notebook and, if allowed, will give evidence of an oral statement made by the defendant.

[39] This practice of giving oral evidence of a defendant's response purportedly recorded in an official notebook is known as "verballing" in the vocabulary of policing. Where an entry in a notebook is not signed, initialed or otherwise acknowledged by the defendant, the possibility of injustice is real. For such "verbals" are vulnerable to fabrication and may truly be unreliable in the absence of any non-police support of a defendant's account of the nature and content of police questioning.

[40] The policy of section 136(1)(d)(ii) clearly is aimed at providing safeguards against the police inaccurately recording or inventing words allegedly used by a defendant. It is designed to minimise opportunities for "verballing" and to promote fairness in the trial of defendants in criminal cases.

[41] Thus, the section does not exclude the reception of the oral evidence but it casts a duty upon the trial judge to warn the jury that such evidence not signed or acknowledged by the defendant may be unreliable. Further, the judge must explain to the jury why the evidence may be unreliable as we suggest above. The warnings should be in simple, ordinary language, stripped of legalese and the jury should be advised to treat the evidence with caution when they come to weigh and evaluate it.

[42] The section does not identify the stage at which official questioning starts. It is conceivable, however, that what is envisaged is that stage of an interrogation which brings Rule 2 of the Judges' Rules into play. It is at the Rule 2 stage that practice requires a suspect to be cautioned.[14]

[43] In this appeal there are two occasions on which, according to P.C. Brewster, the appellant made oral statements. The first was when he searched the appellant at the shop, found a gun and asked him to account for it. The second occasion was during "the interview" at Central Police Station. We have already referred to these "orals" at paragraphs [2] to [4] of this judgment.

[44] The record of appeal shows that P.C. Brewster only sought the permission of the court to refer to his notebook (pages 63-71) in respect of those statements made during the course of the interview at Central Police Station. – See paragraphs [3] and [4] supra. There was no objection to his application to refer to his notebook nor were the statements challenged in cross-examination. There is, however, no evidence that the officer's notebook was signed or otherwise acknowledged in writing by the appellant.

[45] We can find no evidence also that the jury were warned in accordance with section 136(2) and (3).

[46] The question which therefore arises is what is the effect of a failure to warn? We think that the omission is an error of law but, in so far as the

judge had directed the jury to be sure of the oral statements before acting upon them and, if in doubt, give the benefit of such doubt to the appellant (see paragraph 33 supra), it seems to us that the omission to give the warning in terms of section 136(2) and (3) should not be held to be fatal to the convictions.

[47] Moreover, although the language of subsection (2) is mandatory, provision is made for exceptions to the general rule. If a Judge has "good reasons", it is not obligatory upon him to follow the subsection to the letter. The latitude implicit in the subsection itself suggests to us that the effect of a failure to give a warning has to be [15] evaluated in each case, having regard to the totality of the evidence. It will not be automatic in every case that a failure to comply with subsection (2) will cause a conviction to be quashed.

[48] Without the evidence of the oral statements, there was ample other evidence for the prosecution which could have led to a finding by the jury that the appellant was in possession of the firearm and ammunition. There was the unchallenged evidence of Sergeant Husbands that the appellant had no licences validating his possession of either the firearm or the ammunition. If the jury accepted the evidence of officers Brewster and Gittens, they would have had to find that the appellant was in possession of the firearm and the ammunition. They could have ignored the oral statements and still have come to findings of unlawful possession. It all depended upon what view of the evidence the jury accepted. It seems to us that on the whole of the evidence and with the correct direction, the only reasonable and proper verdict would have been one of Guilty. This is classically a case to which the proviso in section 4 of the Criminal Appeal Act should be applied. We do not construe the omission on the part of the trial judge to be a substantial miscarriage of justice.

Ground 5

[49] The final ground argued was that the trial judge failed to give a proper direction to the jury as to how to return a majority verdict.

The record of appeal discloses that the jury retired at 10.15 a.m. The Judge sent for them at 11.35 a.m. When asked whether they had reached an unanimous verdict, the Foreman answered "No". The trial judge then asked: "Is there any further assistance I can give you?" The Foreman replied: "Yes, sir, we would like the [16] cross-examination of the two police officers Brewster and Gittens by the accused read." The Judge asked if they wished it read back and the Foreman answered "Yes". The Court proceeded to read back the evidence of the officers in cross-examination. Having read it, the Judge again asked if there was anything further he could do. The Foreman said "No".

[50] Thereafter the Judge invited them to reach an unanimous verdict but told them that if they were unable to do so, he was now able to accept a majority verdict on which 7 of them were agreed.

They retired again at 11.35 a.m. and returned at 11.55 a.m. with a majority verdict 8:1.

[51] In this case, Mr. Pilgrim cites Linton Berry v. R. [1992] 2 AC 364. In that case, a secondary ground of complaint to the main grounds of appeal was that the trial judge had failed to deal with the problem which the jury indicated they had on returning to court after an hour's deliberation.

[52] At p.383, Lord Lowry had emphasized the trial judge's duty to assist the jury with an understanding of the law and the facts. To withhold such assistance constitutes an irregularity. His Lordship warned that:

"Failure to clear up a problem which is or may be legal will usually be fatal, unless the facts admit of only one answer, because it will mean that the jury may not have understood their legal duty. The effect of failure to resolve a factual problem will vary with the circumstances…."

[53] Ms. Renee argues that the trial judge executed his duty properly. The facts as revealed by the record are, in our view, clear. The Judge properly asked what was their problem and the jury identified it merely as a request to re-read the evidence of the [17] cross-examination of the two police officers. This was done and the Judge again asked if he could be of further assistance. The jury answered in the negative.

[54] We are satisfied that the judge faithfully discharged his duty. He asked them to identify their problem. They did so and he responded precisely to their problem. This case is clearly distinguishable from Berry on the facts as Mr. Pilgrim was driven to concede in reply.

[55] There is no merit in this ground. The appeal is dismissed, the convictions and sentences are affirmed and shall run from a date 6 weeks after conviction.

Sentences for Firearm Offences

[56] On the 18th and 24th of January this year, the Court of Appeal heard two appeals against sentences imposed under the Firearms Act, 1998-32 ("the Act"). The appellants, Michael Worrell and Ricky Pinder respectively, were unrepresented. The former had been sentenced to 6 years' imprisonment for unlawful possession of a gun and ammunition and the latter was given a 10 year term for similar offences. Each appellant sought a community punishment instead of imprisonment. Both appeals were dismissed but the Court said that it was its intention to issue guidelines for the benefit of the judiciary and the legal profession. We were aware that this appeal was listed for hearing in February and that a number of firearm cases were before the High Court during the January Assizes 2002.

[57] It is now convenient for the Court to set out those guidelines in this judgment. It must, however, be clearly understood that, what we say in the guidelines that follow shall in no way be construed as a comment on the sentence imposed in this case. Indeed, there was no [18] appeal against sentence and our guidance is entirely obiter so far as this appeal is concerned.

[58] This Court is fully conscious of the wide disparities in sentences that have been imposed for firearm offences under the Act. These disparities are likely to have the effect of promoting uncertainty, invoking public criticism of sentencing practice and creating disequilibrium in the administration of justice. It is of paramount importance to ensure that pubic confidence in the sentencing process is maintained.

[59] One of the functions of an appellate court is to give guidance to other courts. That authority is undoubted. In the well-known case of Evans v. Bartlam [1937] 2 AER 646, Lord Wright clearly had guidelines in mind when he said at p.656:

“It is, however, often convenient in practice to lay down, not rules of law, but some general indications, to help the Court in exercising its discretion, though in matters of discretion no one case can be an authority for another.”

Because the sentencing process involves the exercise of judicial discretion there is always the risk of inconsistency and there is always the need to avoid the appearance of arbitrary decision-making.

[60] Parliament, through legislation, correctly leaves sentencing discretion unfettered but the enunciation of guidance from appellate courts is to be seen not as binding principles of law but as a practice to effect consistency in the administration of justice. There will always be exceptional cases and sentencers will be required to deal with such cases as the particular or peculiar facts and circumstances dictate.[19]

[61] In England during the last 25 years, the Court of Appeal has found it necessary to assist courts below in developing a proper approach to sentencing for various types of offence. Thus the reports contain guideline judgments by Lawton LJ in Turner (1975) 61 Cr.App.R 67, Lord Lane CJ in Billam [1986] 1 AER 985 and Lord Bingham CJ in Tony Avis [1998] 2 Cr.App.R.(S) 178, to mention just three.

[62] This Court has no less a responsibility in the public interest. Sentencers are not concerned with the aetiology of crime but the maintenance of law and order and law enforcement are very much their business.

The Statistical Basis

[63] The Royal Barbados Police Force (RBPF) collects, collates and publishes monthly and yearly Criminal Statistics of recorded crime. These statistics do not purport to be an accurate measurement of all crime committed in Barbados because it is well accepted that there exists “a dark figure” of unreported crime. Nevertheless, just like the Criminal Statistics of the British Home Office, they are extremely useful in indicating various trends in criminality, provided always that they are analysed with a critical eye. We make similar use of the statistics of the RBPF as was done by Lord Lane in R. v. Billam (supra) and Lord Bingham CJ in Tony Avis and others (supra) at p.180 in relation to the Home Office statistics. [20]

[64] In Barbados for the five year period 1997 to 2001, the statistics of the RBPF disclose a worrying trend in firearm related offences. The figures for the two most usual offences are as follows:

Firearm Offence

1997

1998

1999

2000

2001

Shooting with Intent

27

35

39

65

36

Possession

33

43

72

83

66

[65] Parliament, in 1998, repealed the then Firearms Act, Cap. 179 which had been first enacted in 1896. It was a short Act of 14 sections and the maximum penalty for possession of an unlicensed firearm was $5 000 or 12 months’ imprisonment on summary conviction. There was no

provision for trial on indictment and the penalties mentioned were set in 1978.

The 1998 Act

[66] It was in direct response to an upsurge in violent crime in the decade of the nineties, that a new Firearms Act was enacted in 1998. This Act came into force after an amnesty was offered for persons to hand in illegal firearms. The Royal Barbados Police Force received 104 firearms under the amnesty.

[67] Parliament obviously felt so strongly about the use and abuse of firearms in this society that it legislated very severe penalties. Thus, for example, possession of a firearm with intent to endanger life or cause serious injury, is punishable on conviction on indictment with a maximum fine of $150, 000 or a term of imprisonment of 25 years or both – (section 18). Similar penalties are liable to be imposed for [21] possession of a firearm or imitation firearm with intent to resist arrest – (section 19) and for possession with intent to commit an indictable offence – (section 20). Possession without a valid licence carries a fine on conviction on indictment of $100, 000 or liability to 20 years' imprisonment or both – (section 3(2)). It is significant that the Act makes no provision for any of these offences to be tried summarily.

[68] Moreover, section 30 provides for mandatory imprisonment in respect of conviction on indictment in certain circumstances. It is enacted as follows:

"30(1) A person found guilty of an offence under this Act other than an offence under section 29 or an offence for which a penalty has been provided, shall

(a) on conviction on indictment

(i) in the case of a first offence, except as provided in sub-paragraph (ii), be sentenced to imprisonment for not less than 5 years and not more than 15 years; and

(ii) in the case

(A) of a second or subsequent offence; or

(B) of a first offence committed by a person who, prior to the commencement of this Act was convicted of an indictable offence, or an attempt to commit an indictable offence, in the course of which or during his flight after the commission of the offence, he used a firearm,

be sentenced to imprisonment for not less than 10 years and not more than 20 years."

Reading the Act as a whole, it is clear that Parliament, as a general rule, intended firearm offences to carry custodial sentences.[22]

[69] These heavy penalties reflect Parliament's view of the seriousness of firearm offences and we should add that the Penal System Reform Act 1998-50 which introduced a new penal philosophy in Barbados also enjoins sentencers to pay regard to offence-seriousness as the criterion for the imposition of custodial sentences – See the observations of this Court in Romain Bend and Rodney Murray (Criminal Appeals Nos.19 and 20 of 2001).

[70] During the last two years an increasing number of cases is being prosecuted indictably with the obvious intention of seeking the High Court's superior powers of punishment. However, it has to be said that sentencing practices in the High Court reveal a disconcerting inconsistency to which we referred earlier. We can do no better than adopt the words of Lord Bingham CJ in Tony Avis (cited supra) at p.185. They exemplify the present situation in Barbados. His Lordship noted that:

"Some of the sentences imposed for firearms offences in the recent past have failed to reflect the seriousness of such offences and the justifiable public concern which they arouse."

We have surveyed the firearm cases dealt with in the High Court for the period 2000 to March 2002. The following are the facts.

Sentencing in the High Court

[71] Forty-eight (48) cases involving possession of a firearm were tried. There were forty-two (42) convictions and six (6) acquittals. In twenty-five (25) of the cases a term of imprisonment was imposed. Fourteen (14) persons were fined and a community punishment was given to three (3). Five (5) of the convictions were for possession of ammunition alone. Two (2) persons were sent to prison for possession of ammunition alone. [23]

[72] When an analysis is made of the terms of imprisonment, it is found that they range from 18 months to 25 years, although it must be said that there was only one sentence of 25 years. A further breakdown of the imprisonment data shows that fourteen (14) persons were sentenced to periods of imprisonment ranging between 5 and 10 years, six (6) persons received 10 years or more, five (5) received less than 5 years and one (1) who was also charged for kidnapping received 15 years. Those who were fined were given as long as 24 months within which to pay the fines which themselves ranged from $1 000 payable in 3 months to $10 000 payable in 2 years.

[73] We believe that the foregoing conspectus of sentencing practices in respect of firearm offences requires us to make some general comments before promulgating guidelines.

General Comments

[74] There is no right for ordinary citizens of Barbados to bear arms. It has been totally against the culture and social norms of this country for persons to have and use unlicensed firearms indiscriminately or at all. Possession of a firearm is only legal if the holder has a valid licence entitling him to use or carry it. The proliferation of gun use and abuse in this country is a comparatively recent phenomenon. Firearms, even imitation firearms, engender a sense of fear in citizens and their fear of crime is heightened sometimes to the point of hysteria.

[75] The unlawful possession and use of firearms is a grave source of danger to society. They can and are used to take life, cause injury and further the commission of other offences. There is unchallengeable evidence that firearms are the handmaiden of the illicit drugs trade and are used wantonly by rival gangs of youth.[24] Their increased proliferation in Barbados is not a singular experience.

[76] Every Commonwealth Caribbean country is reporting similar experiences. So too is the United Kingdom. Indeed, in Tony Avis, Lord Bingham CJ reviewed the statistics for the period 1991 to 1996 and revealed at p. 180 that:

"Those convicted on indictment of possessing firearms with intent to endanger life have risen from 33 in 1991 to 207 in 1996. Those convicted of possessing or distributing prohibited weapons or ammunition have risen from 202 in 1991 to 1002 in 1996."

[77] His Lordship observed that the sharp increase "accords with the subjective impression formed by a number of judges that cases involving the use of firearms come before them much more frequently than was once the case…." The Barbados experience is identical.

[78] It is not in the public interest that sentences do not correlate sensibly with the gravity of the offence and courts must have a range of penalties that reflects proportionality. Of course, there will be exceptional cases above or below the normal range. These can be justly dealt with by a proper exercise of the judicial discretion that is at the centre of our sentencing process. And it must always be remembered that the sentencer is obligated to pay due regard to both aggravating and mitigating factors.

[79] There will be factual and personal diversities in some cases which will summon the judge's attention to the particular situation and the needs or circumstances of the individual offender. However, there is a clear public need to protect society from misguided, callous youth who disregard the sanctity of life and the human persona. There is an [25] equally competing need to use sentences with a view to general and specific deterrence.

Guidelines

[80] Therefore, in future, except in very special circumstances and for very compelling reasons, a custodial sentence should be imposed for offences committed contrary to sections 3, 18, 19, 20 and 21 of the Firearms Act. In the majority of cases, such a sentence of reasonable length will satisfy the test of proportionality inherent in the Penal System Reform Act. The range of sentence for offences involving possession should be between 8 and 10 years. Where a firearm has been used, the range should be between 12 and 15 years. Armed robbery of a bank, commercial business or government agency such as a Post Office should attract a minimum sentence of 15 years. A plea of Guilty is always a strong mitigating factor and should be taken into account by way of a discount on the sentence. Where it is the court's view that a fine would meet the justice of the case, such fine should be very substantial and payable within such short enough period as would bring home to the offender the gravity of the offence and the efficacy of the criminal justice process. We do not suggest any rigid formula but we remind sentencers that in interpreting an Act of Parliament, the court's function is to seek to ascertain the intention of Parliament.

[81] The clear purport and intent of the Firearms Act, 1998-32 is to treat firearm offences as very serious offences and to visit them with severe penalties. We are fortified in this opinion also by the fact that in December 2000, Parliament legislated to deny bail to persons brought before Magistrates on charges under sections 18, 19 and 20 [26]of the Firearms Act 1998 – See The Bail (Amendment) Act, 2000-26.

[82] It seems to us, upon a review of the Acts referred to from paragraph [65] et seq of this judgment, that Parliament was not only marking down its abhorrence to illegal firearms but also sending a clear message that firearm offenders be kept off the streets. A person in possession of an illegal firearm is a potentially violent person and a potential menace to society.

[83] In determining an appropriate sentence within the ranges mentioned, we agree that sentencers should ask themselves the four questions recommended by Lord Bingham CJ in Tony Avis. These are:

(i) What sort of weapon was involved?

(ii) What use had been made of the firearm?

(iii) With what intention did the defendant possess or use the firearm?

(iv) What was the defendant's record?

[84] The guidelines in this case are designed to establish a sentencing pattern for firearm offences. They aim at setting the general tariff without unduly fettering individual judicial discretion. Ultimately, a sentence will reflect the sentencer's subjective rationalization of the complex of considerations involved in the punitive process.[27]

Chief Justice

Justice of Appeal Justice of Appeal