IN THE COURT OF APPEAL

TURKS AND CAICOS ISLANDS **CR-AP 13/2019**

BETWEEN

LAURENSKY LEFRANC

APPELLANT

AND

REGINA

RESPONDENT

Before:

Sir Elliott Mottley	President
The Hon. Mr. Justice Stollmeyer	Justice of Appeal
The Hon. Mr. Justice Adderley	Justice of Appeal

Appearances:

Mr. Keith James for the Appellant

Ms. Tamika Grant for the Crown

Heard: 10th September, 2020

Delivered: 31st December, 2020

J U D G M E N T

1) **Mottley P:** Following a trial before the Chief Justice, Madam Justice Ramsay-Hale, the appellant was convicted on 12 November 2019. The appellant was sentenced on 21 November 2019, to the mandatory minimum sentence of 7 years. The judge found that there were no exceptional circumstances to depart from the mandatory minimum sentence.

2) The prosecution's case was that on 12 September 2017, the police received a report about a firearm being wielded in a fight at Pompey's bar in Five Cays. On arrival in Five Cays, the police were directed to the hospital where the appellant had gone to seek treatment. The appellant informed the police that he found a weapon in Bassy Yard in Five Cays and was on his way to turn it over to the police when a guy named Samuel stopped him and wanted to take the weapon away from him. He fought Samuel to protect the weapon. The appellant told the police he was injured in the fight so he hid the weapon at a friend's (Arthur) house in Five Cays and that he would take them there to hand over the weapon to them, which he did. The police recovered the weapon from the appellant's friend's house. The appellant left the firearm wrapped in his T-shirt at Arthur's house.

3) In an interview with the police, the appellant stated that he had found the firearm and had taken possession of it. Later he took it with him to his mother-in-law's home at Pompey's yard in Five Cays, in order to obtain her advice on how to turn the gun over to the police. In his evidence, the appellant recounted the same story he had given in his interview. However, he stated that he had the gun even longer; he had found the gun the day before and had placed it back where he found it. He retrieved it the next day and he took it to his mother-in-law's home. It is there that he met Samuel and had an altercation with him. Samuel attempted to take the gun from him but he managed to keep possession of the firearm. He then hid it at his friend's house while he went to seek medical treatment.

4) It was alleged that the judge failed to give the jury good character directions, the appellant's good character having been raised in the cross examination of the investigating officer and in the appellant's caution interview, which was read into evidence. It is contended that such failure amounted to an inadequate direction and a material irregularity which denied the appellant's right to a fair trial. It was submitted that the appellant discharged the prerequisite which was required to trigger a good character direction of both limbs being credibility and propensity.

5) It was submitted by counsel for the appellant that **R v Vye** [1993] ALL ER 241 and **R v Aziz** [1996] 1 AC 41, established that a person's previous good character must be given a full direction, covering both credibility and propensity. Further, that direction of credibility is to be given where the defendant is of good character and has testified or given pretrial statements.

6) Counsel for the appellant submitted that in the circumstances the judge was bound to give to the jury a full direction on credibility and propensity and that her failure so to do was a material irregularity violating the appellant's right to a fair trial.

7) Counsel for the appellant stated that given the state of the evidence, the absence of the good character direction would not have made any difference and, in any event, the jury would have come to the same conclusion. However, it was submitted that where credibility is a crucial ingredient of the defendant's case and his good character was thrown into sharper focus, it would stretch the bonds of logic for the jury not to be

directed as to the relevance of the appellant's good character. It was further submitted that it is impossible to say, had the jury been properly directed, what they would have done and that it was not conclusive that the jury would have come to the same conclusion.

8) Counsel for the appellant argued that in **Aziz,** Lord Steyn seems to have suggested that a good character direction engages and concerns the right to a fair trial. Counsel suggested that the appellant's constitutional right to a fair trial was violated by the failure of the judge to give a good character direction and that this failure should not be resolved by applying the Proviso to section 7 of the Court of Appeal Ordinance. Counsel contended that the failure to give a good character direction in the circumstances amounted to a grave miscarriage of justice and it could not be safely concluded that if the direction was given, the jury would have convicted the appellant.

9) Counsel for the respondent conceded that it was not disputed that the appellant was entitled to a good character direction and that the judge had omitted it from her summation. However, counsel argued that the failure of the judge to give good character directions did not automatically lead to the conviction being quashed. He further submitted that the Privy Council has stated that where the facts and issue did not relate to the credibility of the accused, failure to give such direction is not fatal to a conviction where the facts which might be bolstered by a good character direction "are wholly outweighed by the nature and coherence of the circumstantial evidence".

10) Counsel further stated that the appellant's credibility was an issue to be determined by the jury in coming to a verdict. In addition to the witnesses for the prosecution, the appellant's own evidence established the elements of the offence. Counsel argued that the failure to give a direction did not cause a miscarriage of justice as it did not remove a chance of acquittal from the accused, which was fairly open to him. Advising the jury that he is likely to have been truthful when he was describing how he committed the offence could not reasonably be said to offer a properly directed jury on a route to acquittal.

11) The prosecution suggested that the judge did not err in law by advising the jury of what the proper defences were for the offence. The case for the defendant was that he had found the gun which was old, rusted and seemingly useless and the appellant was going to turn it in to the police. Counsel argued that the offence is an absolute one and the reason for the defendant's possession was not relevant to the offence and the appellant is entitled to have any defence open to him in law left to the jury, however weak or frivolous it is. That is, of course, with the caveat that it must be a defence open to him in law.

12) In the case of **R v Aziz** [1996] 1 AC as per Lord Steyn, "*it has long been recognized that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question. That seems obvious. The question might nevertheless be posed: why should a judge be obliged to give directions on good character? The answer is that in modern practice a judge almost invariably*

reminds the jury of the principal points of the prosecution case. At the same time, he must put the defence case before the jury in a fair and balanced way. Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance. Leaving it entirely to the discretion of the trial judge to decide whether to give directions on good character led to inconsistency and repeated appeals. Hence there has been a shift from discretion to rules of practice and Vye the culmination of this development".

13) In **Thompson v The Queen** [1998] UKPC 6, Lord Hutton stated:

"However, if it is intended to rely on good character of the defendant, that issue must be raised by calling evidence of putting questions on that issue to witnesses for the prosecution. See per Lord Goddard C.J. in Rex v Butterwasser [1948] 1 K.B., 4.6. Their Lordships are of the opinion that where the issue of good character is not raised by the defence in evidence, the judge is under no duty to raise it himself: this is a duty to be discharged by the defence and not the judge".

However, in **Bally Sheng Balson v The State of Dominica** (2005) 65 WIR 128, the Judicial Committee of the Privy Council stated:

"[38] There is one final criticism that must be mentioned. Mr. Christopher did not lead any evidence as to the appellant's good character, with the result that a direction to that effect was not given by the trial judge. It is clear that the appellant had no previous convictions. This was an omission on counsel's part for which no satisfactory

explanation has been given. But their lordships are of the opinion that a 'good character' direction would have made no difference to the result in this case……In these circumstances the issues about the appellant's propensity to violent conduct and his credibility, as to which a 'good character' reference might have been of assistance, are wholly outweighed by the nature and coherence of the circumstantial evidence."

The failure to give the good character direction was not, in the particular circumstances in this case, an irregularity.

14) Ground 2 alleged that the judge during her charge to the jury effectively undermined or minimized the appellant's defence which may have led the jury to believe that the appellant had no credible defence.

15) Counsel for the appellant submitted that the failure of the judge to direct the jury on the appellant's good character along with the judge's direction relating to the facts which constituted the offence, amounted to the judge withdrawing the appellant's defence from the jury. Counsel argued that in the circumstances that had the effect of the judge minimizing the importance of the appellant's defence. Counsel submitted that the cumulative effect of the omission of the good character direction and the invitation on the judge's summing up to find the appellant guilty violated the appellant's right to a fair trial. Counsel contended that the judge's summation had the effect of minimizing the importance of the defendant's defence and in the circumstances amounted to a direction that the jury should return a verdict of guilty.

16) The passage of the summing up complained of was as follows:

> *"But I'll say this, even if you believed what he said, even if you accepted that he took the firearm to his mother-in-law's house to ask her advice on how to surrender it to the police, even if you accepted that he found it and only had the intention to surrender to the police, it is an offence to keep a firearm without a license, and he had no license. The only defence to a charge of keeping a firearm, is that you're licensed to keep it. Taking it up, putting it in your possession, and taking it anywhere is keeping, because keeping is possession. An honest and reasonable belief that he could carry it with him to his mother's house to get advice, is not a defence. Good intentions are not a defence. The only intention that matters, is his intention to put that firearm in his waist and walk with it to Pompey's that night, and later concealed it at his friend's house wrapped in a T-shirt with no licence to keep it. How long or how short he had the possession is not relevant. The offence is, as the crown said, absolute. It is an offence to keep a firearm without having a license for it.*

17) Counsel referred to **R v Canny** (1945) 30 Cr. App R 143, which established that, in the interest of justice and fairness to a defendant, a defence, no matter how absurd, should be left to the jury. The Court's attention was drawn to the judgment where it was stated:

> *"What we do know is that the law of this country is that a prisoner is entitled to take his chance of finding a stupid jury and is entitled to put his defence before the jury with a view to persuading them to acquit him. If the appellant was advised by*

his counsel to plead not guilty, or if in spite of the advice of his counsel he said: "I insist on being tried and ongoing into the box to tell my story", he was entitled to do so."

18) In this case, the appellant's position was that he had found the gun and had taken possession of it with the intention of handing it over to the police. In considering the effect of the failure of the Chief Justice in giving a good character direction, regard must be had to the nature of the offence to which the appellant was charged and his defence.

19) The House of Lords in **R v Wang** [2005] 1WLR 661, held:

i. *"That the decision of all factual questions, including the application of the law as expounded by the trial judge to the facts as they found them to be, was a matter for the jury alone and it was for them to decide whether the defendant was guilty or not guilty…"*

20) This Court rejects the submission of counsel for the appellant. In our view, the Chief Justice in her summation, correctly explained to the jury what the law is, in relation to being unlawfully in position of a firearm. The Chief Justice correctly pointed out that once possession is established, the only defence would be that he was the holder of a permit which allowed him to have the firearm in his possession. As stated above, the offence is an absolute offence.

21) The Chief Justice reminded the jury what the defendant had said when he was confronted by the police. The Chief Justice, having expounded on the law left the facts to be found by the jury. The jury found the facts based on the evidence, including the admission of the defendant that he took the firearm into his possession and the jury returned its verdict.

22) In **R. v Rehman,** [2005] EWCA Crim 2056 Lord Woolf of Barnes observed at para 12:

> *"... Parliament has therefore said that usually the consequence of merely being in possession of a firearm will in itself be a sufficiently serious offence to require the imposition of a term of imprisonment of five years, irrespective of the circumstances of the offence or the offender, unless they pass the exceptional threshold to which the section refers. This makes the provision one which could be capable of being arbitrary. This possibility is increased because of the nature of section 5 of the Firearms Act. This is different from most sections creating criminal offences. In the majority of criminal offences there is a requirement that the offender has an intention to commit the offence. However, firearms offences under section 5 are absolute offences..."*

23) Lord Woolf again spoke of the absolute nature of the offence at para 14 when he said:

> *"It is to be noted, as already pointed out, that part of the context is that section 5 of the Firearms Act creates an absolute offence."*

24) Section 30 of the Firearms Ordinance, which is similar to section 5 of the English Firearm Act creates an absolute offence. In the circumstances the judge was right in her summation to the jury. The sole ingredients of an offence under section 30 is possession. Once possession is established, as it was in this case, the only defence available to a defendant is that he had a permit. In this case, the defendant did not allege that he had a permit. The only issue is whether the defendant had possession. The defendant admitted that he found a gun and took possession of it for the purposes of taking it to the police. As the judge correctly pointed out, possession amounts to keeping. It did not amount to a withdrawal of the defence as no defence was actually raised. Then the judge correctly pointed out to the jury that even though the defendant had admitted that he had the gun in his possession, nevertheless, they had to look at the Crown's case to find whether or not the Crown had set aside the burden of proving the offence.

25) It was alleged that the sentence of seven years imprisonment is manifestly excessive in that the judge failed to sufficiently apply her mind or give appropriate weight to facts, which it is alleged, amounted to exceptional circumstances.

26) It is submitted on behalf of the appellant that on the facts on which the jury convicted the appellant it was a proper case for the judge to have exercised her sentencing discretion under section 30 of the Firearms Ordinance in finding that exceptional circumstances existed and that the public interest would have been served in imposing a lower sentence than the mandatory minimum sentence.

27) Counsel relied on **R v Rehman** [2005] EWCA Crim 2056, which he stated established that a holistic approach should be taken when considering whether or not exceptional circumstances exist and that all the relevant circumstances should be considered. Further, that the test to be applied when the Court of Appeal is considering whether to interfere with the sentencing judge's decision that no exceptional circumstances existed, is also found in Rehman' case. Lord Woolf stated:

> *"[11]…A holistic approach is needed. There will be cases where there is one single striking feature, which relates either to the offence or the offender, which causes that case to fall within the requirement of exceptional circumstances. There can be other cases where no single factor by itself will amount to exceptional circumstances, but the collective impact of all the relevant circumstances truly makes the case exceptional.*
>
> *[14]…Unless the judge is clearly wrong in identifying exceptional circumstances when they do not exist, or clearly wrong in not identifying exceptional circumstances when they do exist, this court will not readily interfere."*

28) In support of the submissions that exceptional circumstances existed, the Court's attention was drawn to the following facts:

- there is no credible evidence refuting the appellant's version that he found the firearm in question in the manner he advanced at trial;
- the appellant went to his mother-in-law to seek advice on how to hand over the firearm to the police;

- even though the appellant was told by his mother-in-law that he should not have touched the firearm but should have instead leave it where he found it and call the police, the appellant immediately asked her "how to get the firearm to the police now";
- the evidence of the investigating officer Abdonald Pierre was that the firearm was rusted and appeared to have been exposed to the elements;
- the firearm was without a magazine or ammunition;
- the appellant when approached by the police at the hospital immediately told them about the firearm and took them to where he left it;
- the appellant fought off one Samuel to secure the firearm with the intention of handing it over to the police; there is no suggestion that during the fight the appellant used the firearm or threatened to use it;
- the appellant only had the firearm for a very short period of time (not clear but appears to be less than twenty-four hours);
- although there was evidence that the firearm may have been stolen during the commission of a crime there was no evidence to suggest that the appellant was involved in that crime or knew that the firearm was stolen;
- there was no evidence that the appellant had contact with criminal elements;
- the intention at all times was to hand over the firearm to the police and there is no suggestion that he intended to use it;
- the appellant thought that he was doing the right thing in removing the firearm from where he found it in order to hand it over the police;

- the appellant appears to be a hard worker, working multiple jobs and had no criminal connections whatsoever.

29) In passing sentence, the Chief Justice observed *at page 272 line 3 - end of page 273:*

ii. Now, this defendant, Laurensky LeFranc, says he found the gun; he had no intention of keeping it, or indeed of using it, but intended to surrender it to the police, and that he did so at the first opportunity when the police approach him at the hospital, they responding to a 911 report. Yet it was his evidence that on the night of the 11th of September, he waited until dark to remove the firearm from the place where he had found it and where he said he had left it. He put it in his waist and took it, not to the police, but to his mother-in-law's house in Pompey's yard. It was his evidence that he discussed the fact of his possession with her, the fact that he had found the gun, with her, and apparently discuss it in so open a manner, that a third party became aware that he had the gun and tried to take the gun off of him. He had to fight off this person, and having successfully fought him off, he says he ran, hid the gun in his shirt in a friend's house before going to the hospital. That Mr. LeFranc waited till dark and put the gun in his waist, and took it to the Pompey's yard where someone sought to disarm it take that gun, is the paradigm danger to which Lord Wolf refer in ***Rehman and Wood****. The paradigm danger, if Mr. LeFranc is to be believed, of the gun coming to the possession of someone into whose hands it would then be a danger. Because that is what the defendant would ask the court to believe;*

that he had the gun innocently, having found it, with no criminal intention to keep it for any unlawful purpose. And that he had fought of one Samuel, who wanted the gun for himself for some such purpose. But if Mr. LeFranc had had the gun innocently to return it to the police, why did he wait for cover of darkness to take it up from where it was? Why did he take it to his mother-in-law's house? He need not carry the gun with him to ask her advice. It would have been a simple matter on the first day that he had discovered this gun in the yard, to ask her what he should do. It was his evidence in the trial that when he asked her about the gun she said, you should never have taken it up. You should have called the police.

30) The Chief Justice concluded at p. 274 line 1 to 23.

"In my view, taking the firearm into his possession under cover of night, and taking it to Pompey's yard is simply not consistent with his stated intention that he took it there innocently to seek her advice. Because it was not necessary to do so. And frankly his explanation is not consistent with common sense; that he took the gun under cover of night and concealed it in his waist, took it on the road, suggests to me some other less benign motive for having the firearm with him that night.

In any event, as I have said, the subsequent altercation with this Samuel, makes manifest the danger of keeping a firearm in your possession, which is that, it may go into circulation and be a danger to the public. A deterrent sentence is clearly necessary to deter people from keeping and carrying

unlicensed firearms. In my view, there are no exceptional circumstances warranting the imposition of any sentence less than the mandatory minimum term."

31) The Court is mindful that the Chief Justice presided over the trial and as such was 'well placed to assess the offence and the offender' for the purposes of determining whether exceptional circumstances existed. The Court agrees with and adopts the conclusion of the Chief Justice that no exceptional circumstances existed.

32) The Court finds it necessary to repeat what was said in paras 89 and 90 of the judgment of **Jim Kelly Joseph v R**, CR-AP 18/18 where the Court said:

[89] The Court must have regard to the observation of Thomas LJ (as he then was) when giving the judgment of the court in Attorney General's Reference (No. 23 of 2009) (R v Merrion) [2010] 1 Cr App. R (S) 70 at p471 at [15]:

"Those who in any contravene the Firearms Act must for the good of society, whatever the consequences are to their family, expect to receive the minimum sentence from Parliament. Judges must not feel sorrow or sympathy for any offender. The protection of the public demands nothing less than the imposition of minimum sentences. It is only in exceptional circumstances of the kind that have occurred in this case, rare as it is, that the court can exercise a degree of mercy".

*[90] This Court must be mindful of the observation of Lord Woolf, Lord Chief Justice said in **R v Rehman** at para 4:*

> *"[4] The weapons, with which we are concerned, are ones in relation to which Parliament by section 51A has signalled it was important that there should be imposed deterrent sentences. By "deterrent sentences" we mean sentences that pay less attention to the personal circumstances of the offender and focus primarily upon the need for the courts to convey a message that an offender can expect to be dealt with more severely so as to deter others than he would be were it only his personal wrongdoing which the court had to consider."*

33) It was for these reasons that the appeals against conviction and sentence were dismissed and the conviction and sentence are affirmed.

Sir Elliott Mottley
President

I agree.
Humphrey Stollmeyer
Justice of Appeal

I also agree.
K. Neville Adderley
Justice of Appeal