

IN THE SUPREME COURT OF THE TURKS AND CAICOS ISLANDS
Criminal Division

CR Case 16 of 2015

THE CROWN
V
DAVID KINGSLEY FRANCIS



BEFORE HON MR. JUSTICE SHUSTER AND A JURY
MS SHATALIA HALL FOR THE CROWN
MR FOR THE ASHWOOD FORBES FOR THE DEFENDANT
SENTENCING DATE 14th JANUARY 2016 @ 09.30

SENTENCING REMARKS

1. On the 25th Nov 2015 the Office of the Director of Public Prosecutions filed an information before the Court; alleging that the defendant **David Kingsley Francis**; on Saturday 14th March 2015 had in his possession a quantity of "ammunition" concealed at his home address in Pond Street; Grand Turk..
2. At the time of his first appearance before the Court there were two specific counts contained on the information; alleging that the defendant unlawfully kept two different calibre / types; of ammunition .357 and .9mm live shells without a licence; which ammunition was found at his home in Pond Street; Grand Turk when police executed a search warrant at his home address.
3. The keeping of ammunition is an offence contrary to section 3 (1) of the Firearms Ordinance; Chapter 18.09. In due course the two [2] counts in the first information were amalgamated into one specific count; by the office of the DPP after the PTR where the case was formally listed for trial on the 01st December 2015 in Grand Turk.
4. It should be noted that the defendant had previously pleaded guilty to an offence of possession of cannabis; committed on the same date the 14th March 2015.

Count two

KEEPING AMMUNITION: – contrary to section 3 (1) of the Firearm Ordinance; Chap 18.09, **Particulars:** - that you **DAVIS KINGSLEY FRANCIS** on Saturday 14th Mar 2015 at Pond Street, Grand Turk; did unlawfully have in your possession, 33 rounds of assorted ammunition namely 13 rounds 357 MAG calibre [Winchester] and 20 rounds 9mm calibre respectively without being the holder of a licence Firearm authorizing you to keep such ammunition.

5. The defendant's jury trial commenced in Grand Turk on the 01st Dec 2015. The trial commenced by hearing evidence from Police Sergeant Michael François. The Officer gave evidence of how he searched the defendant's home address in Pond Street Grand Turk on Saturday the 14th March 2015 under the authority of a JP's Search Warrant and how he found two separate stashes of live ammunition in the defendant bedroom concealed in draws.
6. At the conclusion of Sergeant Francois evidence; Counsel for Mr Francis asked for a short adjournment, so he could speak to his client. The Court granted that request. Shortly afterwards the Court was informed by Counsel that the defendant wished to change his plea to guilty. The Court asked the defendant in open Court if anyone had placed him under any pressure or threat to change his plea. The defendant said – NO.
7. The jury were recalled and in open Court the defendant was re-arraigned. Upon re-arraignment the defendant plead "guilty" to the charge of keeping 33 rounds of live ammunition. At that point he jury were instructed to return a GUILTY verdict, that done, the Court formally convicted the defendant of the second count alleged in our file CR16-2015.
8. In view of the defendants past history of offending the Court ordered a PSR be prepared by the Probation Service to assist the Court when sentencing the defendant. A date was fixed for sentencing the defendant for Thursday 14th Jan 2016 @ 09.30 and the defendant was released on Conditional Bail to that same date.
9. Having received the PSR on Tuesday the 12th Jan 2016 the Court drew Defence Counsel's attention to [1] Item 29 and also [2] to the final paragraph of the PSR; the recommendation of the Social worker recommending the Court order medical and psychiatric reports; as suggested in the PSR. Defence Counsel Mr Forbes indicated to the Court that the defendant had made arrangements for safekeeping of all his animals in anticipation of a mandatory prison term and Counsel believed it was in the best interest of the defendant that; the defendant should start his sentence today.
10. It was suggested that the defendant could receive treatment in HMP if it was thought necessary. The defendant also indicated to the Court that his comment

to the Social worker - relating to paragraph 29 of the PSR; related to his arrest and not to his dealing with the Court or his Counsel. The Court reaffirmed and was reassured by the defendant the fact that the defendant had pleaded GUILTY voluntarily without any pressure being put on him by anyone. The defendant agreed those facts. The defendant also agreed that he had co-operated with the police and the Court by pleading guilty; albeit after the jury had heard evidence of the police search of the defendant's home address under the authority of the JP's Search Warrant.

11. There can be no doubt in my mind; the prisoner David Kingsley Francis is before this Court today to be sentenced; for his involvement in a very serious offence, involving the keeping of unlicensed ammunition.
12. The facts of this case can be summarized as follows: - The prosecution's case is that: - on the date in question shown in the information and at the defendants home address the police executed a JP's search warrant; and found 33, live rounds of ammunition of two different calibres - 357 magnum and .9mm. The defendant is not the holder of a firearms licence, also the police found a small quantity of a controlled drug cannabis on the premises.

Unlawful possession of live ammunition

13. Section 3 (1) of the TCI Firearms Ordinance Chapter 18.03 [as amended] provides the maximum penalty on conviction on indictment for the possession of ammunition— **is for a mandatory term of imprisonment of not less than five years, but not exceeding fifteen (15) years;** and to a fine without limit.
14. Sentencing guidelines for firearm related offences; originate from the well-known English case of *R v Avis* which have been applied by the Eastern Caribbean Court of Appeal in *Kashorn John v Commissioner of Police*.
15. *R v Avis* was decided in December 1997 and in that judgment, Lord Bingham CJ offered guidance to sentencers about the levels of sentence which would be appropriate for a variety of offences taking account of the ambit of the Firearms Act 1968, as amended, by wide ranging statutory provisions of the UK Criminal Justice and Public Order Act 1994.
16. It was suggested in the case of *Avis* by addressing a series of questions the sentencing court could provide itself with appropriate indications of the true extent of the defendant's culpability. What sort of weapon was involved? Genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded firearms. Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such

as a sawn-off shotgun) will always be viewed even more seriously than possession of a firearm, which is capable of lawful use.

- 17.What (if any) use has been made of the firearm / ammunition? It is necessary for the court, as with any other offence, to take account of all the circumstances surrounding any use made of the firearm. The more prolonged and premeditated and violent the use, then the more serious the offence is likely to be.
- 18.With what intention (if any) did the defendant possess or use the firearm? Generally speaking, the most serious offences under the Act are those which require proof of a specific criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, then the more serious the offence.
- 19.What is the defendant's record? The seriousness of any firearm offence is inevitably increased if the offender has an established record of committing firearms offences or crimes of violence. **Approved in R v Wilkinson and others Criminal Case No. 2007/086 (SVG) and R v Shaunlee Fahie**
- 20.The position taken by **Bingham CJ in 1997 in AVIS** has repeatedly been referenced and mirrored throughout Eastern Caribbean Courts. There is a clear need to discourage the unlawful possession and the use of real and imitation firearms and to give effect to the clear intention of Parliament / Legislature to stamp out the burgeoning scourge of gun crime in otherwise peaceful societies.
- 21.In that particular vein the TCI Legislature has it would seem; continually increased the maximum penalties for firearm offences. There can therefore be no doubt in my mind that the offence before this Court today; is a serious one; which warrants an immediate custodial sentence of some length. Bingham LCJ's judgment has been described as a watershed; because it clearly signalled previous sentencing judgments would render little assistance going forward. The Lord Chief Justice observed that "...this Court has no hesitation in stating that henceforth, those cases cannot properly be regarded as guidelines to the appropriate level of sentencing in firearms cases."
- 22.At the present time, here in the TCI the use of firearms is becoming ever / even more prevalent. The courts must not be inhibited from passing sentences designed to deter those minded to use a firearm for whatever purpose and in whatever context. That position was endorsed in the Easter Caribbean case of **Kenrick Marksman v Commissioner of Police** by Sir Dennis Byron C.J. who, in laying down guidelines for sentencing in firearm offences pointed out that; "Firearm offences are on the rise... and it would be rare for any Magistrate / Judge not to impose a custodial sentence for an offence involving the use of an unlicensed firearm / ammunition...."

23. In the case of *R v Terry Smith* the defendant was charged with a three count indictment which included a charge for possession of a firearm with intent to put a person in fear. His original plea of not guilty was later changed to a plea of guilty, but only after the trial commenced. In that case the defendant was sentenced to five [5] years imprisonment for the possession of a firearm with intent to put a person in fear.
24. In *R v Denise Lettsome* the defendant was charged with multiple counts including possession of a firearm with intent to put in fear. Following a trial, the defendant was found guilty and sentenced to 5 years. Mag. Cr. App. No. 41 of 2003 (SVG) 6/12/04 Criminal case No. 21 of 2006, Criminal Case No 4 of 2009
25. In *R v Shaunlee Fahie* on appeal from the High Court in which the trial judge sentenced the defendant to 2 years imprisonment for the offence of keeping an unlicensed firearm (that offence carries a maximum penalty of either a fine of \$10,000.00 or imprisonment for a term of 10 years.) On appeal, the Court considered that notwithstanding the guilty plea and other mitigating factors, the sentence of two years – was manifestly low. In the UK case of *Spence v R* in that case, the Appellant appealed against his conviction of possession of a firearm with intent to endanger life an offence contrary to s. 16 of the FA 1968. He was sentenced to 6 ½ years' imprisonment. His appeal was dismissed.

Aggravating and Mitigating Factors

26. Both prosecution and defence counsel would agree that aggravating features are involved in this case. Applying the guidance in *R v Avis*, the aggravating factors which operate in this case today include **THE FACT THAT –**
- a. (1) Thirty three rounds of live ammunition were found in the defendants bedroom in two different locations;
 - b. (2) Statistics prove firearms offences are on the rise in the TCI; and the use of them are becoming more prevalent. These types of cases warrant the imposition of an appropriate; but also the imposition of a deterrent sentence. He is NOT a man of good character. He has numerous offences involving possession of controlled drugs and he has served prison sentences.
27. In so far as mitigating factors are concerned, both Counsel would agree that the following mitigating factors are relevant:
- (1) Fortunately - there were no "firearms" injuries suffered by anyone
 - (2) Counsel for the defendant submitted the fact that this was the defendant's first offence involving an allegation involving keeping unlicensed ammunition. The Court agrees.

(3) The defendant plead guilty after the Jury heard only one prosecution witness - he changed his plea midway through the evidence but that is his legal right.

The Defendant's Personal Circumstances and his Plea in Mitigation

28. Counsel and the SER have advised the Court that the defendant is a Belonger of the Territory, that he is FORTY EIGHT years of age. He appears to have been a hard worker and he looks after animals on the island of Grand Turk.

29. The defendant comes from a close knit family, he is supported by members of the community who appear to have expressed their absolute consternation and disappointment in his conviction by the jury. Counsel indicated there is nothing in the defendant's personal circumstances which would have indicated a propensity to commit such an offence. The offending is completely out of character.

30. Counsel urged the Court to impose a term which would allow the defendant to have some hope of resuming his life. When he addressed the Court, the defendant indicated his remorse and his clear understanding of the impact which his actions.

31. Towards an appropriate sentence, the Court must compare this case at bar; with cases from this; and from our near neighbouring jurisdictions involving this type of offence, and I certify this has been done. The Court has also to bear in mind the main objectives of criminal sanction – as set out in the case of ***Desmond Baptiste - et al v R***: a decision of the Eastern Caribbean Court

(1) Retribution - in recognition that punishment is intended to reflect society's and the legislature's abhorrence of the offence and the offender

(2) Deterrence - to deter potential offenders and the offender himself from recidivism

(3) Prevention - aimed at preventing the offender through incarceration from offending against the law and thus protection of society; and

(4) Rehabilitation - aimed at assisting the offender to reform his ways - so as to become a contributing member of society.

32. In the Court's respectful view, the defendant David Kingsley Francis has committed a grave offence which merits and which also warrants a custodial sentence of some length. A strong message has to be and needs to be; sent out to members of the public, that crime has no place in this Territory, and those persons who might seek to prey upon others including hard working innocent citizens and tourists; will receive the full brunt of the law.

33. So, in sentencing the defendant today, the Court is conscious of the fact that there is a need to send a clear message to all residents in this Territory, that the possession / keeping of unauthorised firearms / ammunition which might threaten the safety, security and also the well-being of this Territory's or any of its citizen[s] - will not and never be tolerated by this Court. At the same time, the Court is mindful that it must always be prepared to temper justice with mercy.

34. The offence with which the defendant has been charged has been deemed both by Parliament / the Legislature and by the courts to be of a most serious nature. It is therefore clear that the defendant today faces serious penalties. The maximum sentence which I can impose on the defendant today is a sentence of FIFTEEN [15] years imprisonment – together with an unlimited fine.

35. The Court certifies it has taken into consideration the principles of sentencing as cited herein at paragraph 29, and the court has also fully considered the contents of the very helpful pre-sentence report about the defendant. On reviewing the PSR - the Court asks itself the simple question, did the defendant tell the Probation Officer all the facts of this case when he was interviewed.

LENGTH OF SENTENCE.

36. If the court considers that a custodial sentence is justified it must go on to consider how long that sentence should be EXCEPT IN THE CASE OF AN OFFENCE THE SENTENCE TO WHICH IS FIXED BY LAW, the general rules are that a custodial term passed upon a convicted offender

- Must be commensurate with the seriousness of the offence, or as the case may be, of the offence or the offences associated with it.
- May be in the case a sentence for a violent or a sexual offence. For such longer term not exceeding the maximum as in the opinion of the court, is necessary to protect the public from serious harm from the offender.
- In assessing the sentence the Judge/Magistrate is entitled to take into account the prevalence of the offence and the need for a deterrent sentence. See R v Cunningham [1992] 14 Cr. App. R {s} 441.

R -v- HOWELLS AND RELATED APPEALS 'THE TIMES' 21 AUGUST 1998 entitled (JUSTIFYING CUSTODIAL SENTENCES)

34 The U.K's Lord Chief Justice, Lord Bingham in the case of R v Howells, gave the following checklist guidance to courts required to decide in borderline cases whether an offence is so serious that only a custodial sentence is

justified for it: It might be relevant for us to consider using his approach here in TCI.

- 35 Begin usually by considering the nature and extent of the defendant's criminal intention and the nature and extent of any injury or damage caused to the victim. Premeditation is an aggravating factor. An unpremeditated offence, or one that involves an excessive response to provocation, will usually be less serious. Personal injury or trauma, particularly if permanent will make an offence more serious, whereas if the loss is only financial then offences will usually be far less serious.
- 36 An admission of responsibility for the offence, particularly when combined with a timely guilty plea and genuine remorse as shown, for example by an expression of regret or an offer of compensation is mitigation to which the court will have due regard. Where the offence was; fuelled by drink or drugs, any practical genuine and self-motivated efforts by the offender to address his addiction will be looked upon favourably.
- Youth and immaturity will often justify a less severe penalty. Previous good character will usually attract some measure of leniency; the more so if there is evidence of positive good character such as a good employment record and the faithful discharge of family responsibilities. It will sometimes be appropriate to take account of family responsibilities or physical or mental disability. There will be a greater reluctance to impose a custodial sentence on someone who has not previously been so sentenced.
 - Courts must be mindful of maintaining public confidence in the sentencing system. Per the U.K's Lord Chief Justice 'We draw attention to the important observations of the Vice President [Rose LJ in giving the judgement of the court in R -v- Ollerenshaw 1998 Criminal Law Review 515] where he said: "When a court is considering imposing a comparatively short period of custody that is about 12 months or less, it should generally ask itself, particularly where the defendant has not previously been sentenced to custody, whether an even shorter period might be equally effective in protecting the interests of the public and punishing and deterring the criminal. For example there will be cases where for these purposes, 6 months may be just as effective as 9, or 2 months may be just as effective as 4. Such an approach is no less valid, in the light of today's prison over-crowding, than it was at the time of R -v- Bibi in 1980".

R -v- KEFFORD 'THE TIMES' 7 MARCH 2002 (EFFECT OF PRISON POPULATION)

37. The Lord Chief Justice, Lord Wolff, delivered the judgement of the Court of Appeal, and in so doing stated that those who are responsible for imposing

sentences have to take into account the impact on the prison system of the number of prisoners the prison estate is being required to accommodate at the present time. The LCJ said in the present situation, it is of the greatest importance that the Criminal Justice System as a whole and the public who depend upon the Criminal Justice System for their protection against crime, that only those who need to be sent to prison are sent to prison, and that they should not be sent to prison for any longer than is necessary. Nothing that the Court said was intended to deter courts from sending to prison for the appropriate period those who commit offences involving violence or intimidation or other grave crimes. There are, however, other categories of offence where a community punishment or a fine can sometimes be a more appropriate form of sentence than imprisonment. In the case of economic crimes, for example obtaining undue credit by fraud, prison is not necessarily the only form of punishment, particularly in the case of those who have no record of previous offending. The Lord Chief Justice commented that there are limits to what can be achieved during a short period of custody.

Sentence and orders.

- 38 This Court would be failing in its duty to the public; if it did not impose a custodial sentence of some length on the defendant today based on the particular facts of this case, which involved the defendant's unlawful possession of 33 rounds of live ammunition on the date in question together with a small quantity of controlled drugs. The verdict [of guilt] was properly assessed by the defendant's peers [the jury] and the Court over a period of one afternoon at the commencement of the jury trial prior to his pleading Guilty.
- 39 My starting point on a guilty plea would be a sentence of between six and seven years imprisonment based on the facts of the case. The Court recognizes however the fact this defendant pleaded guilty at still an early stage of the proceeding and that said he MUST be given credit for his change of plea. The Court also recognizes the fact that the defendant is NOT a first time offender and also the fact that he cares for his elderly aunt and numerous animals in Grand Turk. The court also recognizes the defendant's age and his prior history of offending and his continuing drug use.
- 40 The Court has however taken into account the defendants apology today and his plea in mitigation, but this is on the facts a very serious case it involved the keeping of a considerable stash of live ammunition.

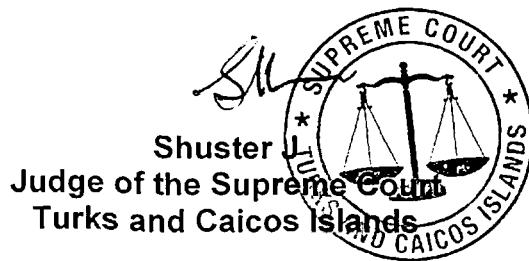
Having considered all the facts of this case. ORDERS

- 41 The defendant is sentenced to **FIVE [5]** years' imprisonment in accordance with the provisions of the mandatory "firearms ordinance. That five year [5] prison sentence starts from today. **HOWEVER** because the defendant pleaded **GUILTY** it is a well-established practice; that the defendant **must** receive a proper discount

for his GUILTY plea albeit that guilty plea was not proffered at the first opportunity at P&D.

- 42 It MUST be accepted judges are independent; and judges over time have used discretion when imposing mandatory sentences for the crime of murder. Modern practice is to provide a tariff sentence; even in respect of the most heinous murder case[s] now in relation to the case at bar; it is a fact that no licensed or unlicensed firearm was found at the defendant home address; which could be associated with the thirty three rounds of live ammunition found by the police.
- 43 The defendant in his record of interview to the police and in his explanation to the Court he said that he found the rounds of ammunition while he was out searching for his missing friend on Grand Turk. There is nothing on file to disprove the defendant's explanation of him finding the ammunition to the police or to this Court. The fact is that the defendant pleaded GUILTY then the Court must reduce the six year tariff it considers appropriate to a sentence of FIVE YEARS Imprisonment in accordance with the law.
- 44 The problem with having in place mandatory sentencing guidelines involving firearms offences reveals having mandatory minimum sentences of five years – will inevitably discourage persons from pleading Guilty. That policy in effect; increases the Courts work load by jury trial, it increases the cost to the Criminal Justice System and it would delay the case at bar. If a person pleads guilty at the first available opportunity then in my respectful view he should obtain full credit when he is sentenced for accepting early responsibility for his offending.
- 45 To that end it is trite law that a suspended sentence is a sentence of imprisonment. It is accepted practice in the Commonwealth that a fixed period of imprisonment coupled with the addition of a suspended sentence upon release from prison is an effective way of dealing with people it involves keeping a sword over their head and prevents a person reoffending, further it keeps the prison population down.
- 46 For the possession of thirty three [33] rounds of live ammunition; the Defendant is sentenced to **FIVE** years in prison; in accordance with the statute - however because the defendant pleaded guilty and he accepted responsibility and he cooperated with the police and this Court - the Defendant will serve **THREE years in prison**; then he will be released with a further **TWO-YEAR** suspended sentence **ATTACHED** to the three year prison sentence which I have just passed, That two-year suspended sentence becomes effective / operative from the date of his release from HMP. This approach makes a total of **FIVE** years imprisonment in accordance with the terms of the statute. It also complies with case law concerning allegations or suggestions of an overcrowded prison population. The defendant is in my view entitled to be given credit for his change of plea because he has saved the Court time and money by him pleading Guilty.

47 The defendant will also serve a concurrent sentence of FOUR [4] months imprisonment for the possession of controlled drugs in Count one, to which the defendant had previously pleaded GUILTY upon arraignment. The drugs and the thirty three [33] rounds of ammunition seized by the police from the defendant's residence are forfeit to the Crown; and they are **ORDERED TO BE DESTROYED** in the presence of either a Justice of the Peace; or a Magistrate.



Shuster J.
Judge of the Supreme Court
Turks and Caicos Islands