

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(ANGUILLA CIRCUIT)
(CRIMINAL)
A.D. 2020**

AXAHCR 2019/0016

BETWEEN:

REGINA

v

D'QUAN MARTIN

Appearances:

Mrs. Nakishma Rogers-Hull, Senior Crown Counsel, Attorney General's Chambers
of Counsel for the Crown

Mr. Thomas W.R. Astaphan, Q.C., with him Mrs. Tona Simpson of Counsel for
the Defendant

2019: November 29;
2020: January 14; 22.

Sentencing – Possession of firearm and ammunition without a permit – Sections 20 (1) (b), 20 (4) and 50 of the Firearms Act, R.S.A c. F30 – Importation of firearm and ammunition – Section 4 Firearms Act, R.S.A. c. F30 – Custodial or non-custodial sentence – Fine – Alternative sentencing – First offender – Whether sentence of imprisonment appropriate – Whether the permissible aims of punishment can be met by a non-custodial sentence – Suspended sentence – Plea in mitigation – Whether fear of physical harm or danger to close relative a mitigating factor in the commission of the offence – Subjective factors influencing the defendant in the commission of the offence – Permissible aims of punishment – Deterrence – Punishment proportionate to the degree of culpability and degree of harm

JUDGMENT

[1] **INNOCENT, J:** The defendant, D'Quan Martin ('Mr. Martin') was indicted for the offences of possession of firearm without a Firearms User's Licence (count one), possession of ammunition without a Firearms User's Licence (count two), importation of a firearm without a permit (count 3) contrary to sections 20 (1) (b) as provided for by section on 20 (4) and importation of ammunition without a permit

(count four) contrary to section 4 (1) of the Firearms Act, R.S.A. c. F30 (the 'Firearms Act') respectively.

- [2] Upon his arraignment, Mr. Martin entered guilty pleas in respect of counts one, two and three on the indictment. He entered a plea of not guilty to count four. The plea was accepted by the Crown and the Crown withdrew counts three and four on the indictment.
- [3] The agreed facts are that on 23rd March 2019, Mr. Martin was a passenger onboard a vessel that arrived at Blowing Point, Anguilla, a designated port of entry, from Saint Maarten, Dutch Antilles. On arrival at the Department of Customs located at the Ferry Terminal at Blowing Point, Mr. Martin was directed to a customs officer for examination. While conducting a search of Mr. Martin's baggage, the customs officer questioned Mr. Martin concerning the contents of his left trouser pocket. Mr. Martin responded that he did not have anything else in there.
- [4] A further search was conducted on Mr. Martin's person by a customs officer. During this procedure, Mr. Martin attempted to exit the search area but was restrained from so doing by one of the customs officers.
- [5] A search of Mr. Martin's person revealed an unloaded 9 mm handgun concealed in the waist band of his pants. A search of Mr. Martin's left pants leg revealed 16 rounds of 9mm ammunition concealed there. Mr. Martin acknowledged that the items were "bullets".
- [6] Mr. Martin was arrested for the offences of possession of firearm and ammunition and importation of firearm and ammunition. When he was questioned about the possession of the firearm, Mr. Martin indicated to the customs official that "it was for his protection". Mr. Martin also indicated to the customs official that it was his intention to plead guilty to the subject offences.

- [7] In determining the appropriate sentence to impose on Mr. Martin for the commission of the subject offences, the court will adopt a benchmark of 5 years imprisonment. This benchmark is based on the court's assessment of the seriousness of the offences having regard to Mr. Martin's degree of culpability in the commission of the offence and the degree of harm caused.
- [8] In assessing Mr. Martin's level of criminal culpability in the commission of the subject offences, the court took the following matters into account, namely: -
- (a) Mr. Martin was in unlawful possession of a lethal weapon whilst not being the holder of a valid permit to keep or hold the same.
 - (b) There is no indication that Mr. Martin was in possession of the firearm and ammunition for any lawful purpose or for any lawful purpose or reason contemplated by the Firearms Act.
 - (c) Notwithstanding that the Crown withdrew count 4 in relation to the importation of ammunition charge, the court must take cognizance of the fact that Mr. Martin possessed these illicit items in a place that is designated as a port of entry. Clearly, it could have only been Mr. Martin's intention to take advantage of the seemingly weak border patrol protocols that exist within the island of Anguilla with its porous borders.
 - (d) Mr. Martin's intention appeared to have been to smuggle the prohibited weapon and ammunition into Anguilla undetected by the relevant authorities.
 - (e) The court is also mindful of the fact that offences of this nature have a tendency to undermine national security and is a veritable threat to border control and the safety of citizens of Anguilla. The commission of the subject offences by Mr. Martin also involved the contravention of several other provisions of the Firearms Act for which although he does not stand

charged reinforces the point that the court makes in relation to this aspect of Mr. Martin's degree of criminal culpability.

- (f) The commission of the present offences would have involved some degree of planning and premeditation on Mr. Martin's the part.
- (g) The prohibited weapon and ammunition were concealed and it was Mr. Martin's intention to avoid detection.

[9] Therefore, the court is of the considered view that the offences committed by Mr. Martin are indicative of a high degree of criminal culpability.

[10] The degree of harm involved in the commission of the subject offences can properly be regarded as moderate. There was no indication of the use of the firearm in the commission of any offence involving violence or the use of the weapon to threaten or endanger life.

[11] The degree of harm however, is reflected in Mr. Martin's conduct having the tendency to erode the trust and confidence which the general public ought to have in those entrusted in securing Anguilla's borders from incursion by the importation of prohibited items from overseas. The Firearms Act imposes a specific set of obligations on the part of persons who are in possession of firearms and ammunition upon arrival in Anguilla. These obligations are tailored to suit the objectives of national security¹.

[12] By adopting a benchmark of 5 years imprisonment the court took into account the fact that the statutory penalty prescribed for the subject offences is 14 years imprisonment and or a fine in the case of possession of a firearm and ammunition. In the case of an offence under section 4 of the Firearms Act a similar statutory penalty is applicable².

¹ Sections 5, 6 & 7 Firearms Act R.S.A. c. F30

² Section 50 (2) Firearms Act

- [13] Notwithstanding, that the prescribed statutory penalty for the commission of these offences is not necessarily the benchmark or starting point sentence, the court is mindful of the fact that, the seriousness of the offences with which Mr. Martin stands indicted is reflected in the prescribed statutory penalty. It is also not in dispute that the court in passing sentence for any offence has the discretionary power to impose a sentence or penalty lesser than that prescribed by statute.
- [14] When arriving at the present benchmark sentence, the court also considered the range of sentences for firearms related offences in Anguilla. It appears from the authorities presented to the court by Counsel that the sentences for the subject offences range from a suspended sentence to 7 years imprisonment and in some instances a fine was imposed in addition to the custodial term.
- [15] However, there appears to be a great disparity in the length of custodial sentences and type of punishment meted out for the commission of these classes of offences in this jurisdiction. This disparity may very well be accounted for by the lack of a consistent and structured approach to sentencing that hitherto existed.
- [16] In the absence of distinct sentencing guidelines, for this class of offence, it becomes desirable to apply a structured approach based on general sentencing principles in order to arrive at a sentence that is commensurate with the seriousness of the offence and one that is proportionate in all the circumstances of the case.
- [17] In the circumstances, the court is not minded to pay strict adherence to the length of the custodial sentences and the type of sentences imposed in the decided cases emanating from this jurisdiction. However, the court will look to these decisions to determine whether, having regard to the factual circumstances of these decided cases, the sentence imposed in the present case is likely to result in disproportionality.

[18] Having arrived at what the court considers to be a suitable benchmark of 5 years imprisonment, the court has made the determination that this benchmark should be scaled upwards slightly by 1 year to take account of the fact that the aggravating factors inherent in the commission of the offences outweigh the mitigating factors, although not significantly.

[19] The court has distilled the following aggravating factors in the present case: -

- (a) Notwithstanding, the fact that the interdicted firearm was not loaded at the material time, Mr. Martin nevertheless, had a significant amount of ammunition in his possession which leads one to the ineluctable conclusion that this ammunition, totaling 16 rounds of 9mm ammunition, were intended for use with the firearm also found in his possession.
- (b) The matters upon which Mr. Martin rely as justification or excuse for his unlawful possession of the interdicted items may very well serve as a double edge sword. Mr. Martin claims that he obtained the firearm for the noble and glorious purpose of protecting himself and his family from the continued imminent threat of bodily harm and danger from a known assailant who had previously terrorized his family and burnt their dwelling. Mr. Martin's explanation clearly connotes an intention to take the law into his own hands if the opportunity arose. The court is of the view that quite distinct from providing any meaningful mitigation, this explanation exemplifies an intention to use the illegal items for an unlawful purpose, the infliction of bodily harm or injury should the need arise.
- (c) The quantity of ammunition that Mr. Martin had in his possession is surely a matter that equates an aggravating feature of the case.

[20] In making its assessment of the notional sentence to be imposed, the court identified the following mitigating factors present in the instant case, namely:

- (a) The firearm was not loaded.
- (b) The firearm was not used in the commission of any other offence; and was not involved in the infliction of harm or the instilling of fear or apprehension or fear of harm in others.
- (c) Mr. Martin has no previous convictions for any or any similar offence.
- (d) Upon being detected Mr. Martin cooperated with the relevant authorities. This mitigating factor, in any event, may not necessarily carry a significant amount of weight since Mr. Martin would inevitably have had very little choice other than to cooperate with the relevant authority given that he was caught 'red handed' by the customs authorities.
- (e) Mr. Martin, separate and apart from having no antecedents, is a person of good character and reputable standing in the community.

[21] Having arrived at the notional sentence of 6 years imprisonment, the court considered whether there were any factors present in the instant case that warrants a discount from the notional term. The only feature of the present case, which the court discerns as warranting a discount from the notional term, is Mr. Martin's plea of guilty at the earliest available opportunity.

[22] In the circumstances, a period equivalent to 1/3 of the notional sentence will be discounted from the notional term. Therefore, the period of 2 years imprisonment will be discounted from the notional term of 6 years imprisonment; the remainder of the notional term being 4 years imprisonment.

[23] In deciding the type of sentence that the court ought to impose in the circumstances, the court has taken into account the permissible aims of punishment and the subjective factors that might have influenced Mr. Martin in the commission of the subject offences. The court has considered whether the permissible aims of punishment would be adequately and meaningfully served by

the imposition of a custodial sentence as opposed to the imposition of some alternative form of sentencing, which is non-custodial in nature.

[24] Mr. Astaphan, Queen's Counsel has urged the court not to impose a custodial sentence on Mr. Martin. In considering Mr. Astaphan's argument in favour of a non-custodial sentence, the court is mindful of the fact, that offences of this nature usually attract a custodial sentence save in cases where there exist exceptional circumstances that would constitute significant mitigation.

[25] The court is minded to impose a sentence that is commensurate with the seriousness of the offence and reflects society's abhorrence for the commission of the offences. Thereby the fulfillment of the permissible aim of punishment or retribution is achieved. The offences committed by Mr. Martin are indeed serious offences.

[26] The court is well placed to assess the level and frequency of gun related offences occurring in Anguilla in light of the number of cases of a similar nature that come before the court. The spate of calculated and sometimes wanton gun related offences in Anguilla is indeed alarming. The court is also aware of the influx of illegal firearms into Anguilla from overseas sources, which occurs as a result of Anguilla's porous borders and the inability of the local authorities to adequately or at all police a vast unsecured coastline.

[27] The offences committed by Mr. Martin have the tendency to undermine public trust and confidence in those charged with the duty to secure the country's borders. The court is of the view that the punishment meted out to Mr. Martin must be such that the punitive aim of sentencing is achieved. However, the court has considered whether this permissible aim of punishment can only be achieved by the imposition of a custodial sentence.

[28] The court has already alluded to the prevalence of these kind of offences in the jurisdiction. Consequently, the court is mindful of the need to fulfill the permissible

aim of deterrence when sentencing offenders for this category of offence. In the present case, the court does not find the need to impose a sentence that reflects the need for specific deterrence in Mr. Martin's case. Mr. Martin is a first offender. The Pre-sentence Report (the 'PSR') does not disclose the need to incarcerate Mr. Martin for the purpose of achieving the permissible aim of deterrence or to reflect the need to protect the public from serious harm from Mr. Martin.

[29] Notwithstanding the court's findings in relation to specific deterrence, the court is of the view that there is a need to send out a strong message to would be offenders. Therefore, the punishment imposed must reflect the need for general deterrence. A strong message must be sent to discourage others from similar conduct.

[30] The PSR supports the court's view that there is no need to incarcerate Mr. Martin for the purpose of achieving the permissible aim of rehabilitation. The court is of the view that this is not a case where a period of incarceration is necessary to achieve rehabilitation. Mr. Martin is not a recidivist and he does not appear to impose any imminent threat to the public in light of the absence of any risk of his reoffending.

[31] Mr. Astaphan, in his plea in mitigation, implored the court to consider the circumstances surrounding the commission of the subject offences and the subjective factors and or reasons that influenced Mr. Martin to commit the offences. According to Mr. Astaphan, the circumstances that led to Mr. Martin's acquisition of the firearm involved the threats to his mother by an acquaintance whose advances she rejected. It appears that this acquaintance had attempted to burn down Mr. Martin's family home and was convicted and subsequently incarcerated for the same. Upon the individual's release from prison, he resumed his threats and campaign of intimidation against Mr. Martin and his family. A report was made to the police who rather than commencing proceedings, directed Mr. Martin and his family to seek legal counsel in the matter. Despite this, the threats

and intimidation continued unabated. For all intents and purposes, Mr. Astaphan says, Mr. Martin and his family apprehended real and present danger for their safety. It was as a result of these circumstances that Mr. Martin sought to protect his family and himself by obtaining a firearm and ammunition.

[32] As valiant and well intentioned Mr. Martin's reasons may have been, he intentionally took it upon himself to break the law. The reasons proffered by Mr. Astaphan, for Mr. Martin's infraction hardly amounts to any justification or lawful excuse. Furthermore, the court cannot overlook his confessed intention to take the law into his own hands, if the need arose. However, these matters do place the commission of the subject offences within a certain context, which places the court in a position to understand the motive for Mr. Martin's illegal conduct.

[33] When interviewed by the Probation Officer, Mr. Martin said that:

"I take full responsibility for what I did. I know what I did was wrong, but at the time I was not even thinking about wrong or right. I was just thinking about my mother's and my sister's safety and them feeling traumatized".

These sentiments appeared to have been expressed within the context of the discharge from prison of the individual who had burnt his mother's house.

[34] Mr. Martin was 21 years old on the date of the commission of the subject offences and 21 years old at the date of sentencing. The PSR does not speak to Mr. Martin displaying any deviant conduct in the past. Mr. Martin successfully completed his Secondary School education and was gainfully employed at the time of the commission of the offences for which he is to be sentenced. Mr. Martin has shown remorse for the commission of the offences and this is reflected in the PSR. He has recognized and accepted that his actions were unlawful and took full responsibility for the same. There clearly appears to be contrition on his part.

[35] It is the court's view that Mr. Martin, notwithstanding his recent offending, is not a prime candidate for incarceration. The commission of the subject offences

compared to offending by other defendants in recent times places Mr. Martin at a comparatively lower end of the scale of criminal culpability, notwithstanding the seriousness of the offences committed by him. The court has formed the opinion that any period of incarceration is likely to derail Mr. Martin in his future prospects. For these reasons the court is not minded to impose a custodial sentence. However, this is not to say that the commission of these offences should not attract stringent punitive measures lest the message be conveyed that offences of this nature can merely be treated with a proverbial slap on the wrist.

- [36] In the circumstances, the court will impose a sentence of 2 years imprisonment on each count to run concurrently. The sentence of 2 years imprisonment shall not take effect unless, during the period of 2 years from the date of this order, Mr. Martin commits in Anguilla another offence punishable with imprisonment.
- [37] Having passed a suspended sentence, the court has considered that the circumstances of the present case, including the notional sentence that the court has determined appropriate for the commission of the offences, warrants the imposition of a fine. Therefore, Mr. Martin is fined the sum of \$15,000.00 only in relation to counts one, two and three to be paid in six (6) months in default 1 year imprisonment. The firearm and ammunition are forfeited and are to be destroyed.
- [38] The court is of the opinion that the sentence imposed is appropriate to reflect the totality of Mr. Martin's offending.

Shawn Innocent
High Court Judge

By the Court

Registrar