

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 75/2008

**BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MR JUSTICE MORRISON JA
THE HON. MR JUSTICE BROOKS JA (Ag)**

MICHAEL BARNES v R

L. Jack Hines for the applicant

Jeremy Taylor and Mrs Nadine Atkinson-Flowers for the Crown

28 July 2010

ORAL JUDGMENT

PANTON, P.

[1] Mr Michael Barnes was convicted and sentenced in the High Court Division of the Gun Court held at the Western Regional Gun Court in Montego Bay on 13 June 2008. He was convicted of the offence of illegal possession of ammunition, in that, he was found in possession of 19 unexpended cartridges in a suitcase which he had as part of his luggage. He had been travelling from Belfair in the United States of America to Kingston via the Donald Sangster International Airport in Montego Bay. Although he had been through security checkpoint in

Philadelphia, the ammunition which were found in his suitcase were not discovered until the suitcase went through the security checkpoint at the Donald Sangster International Airport. There the ammunition was found by an alert Constable David Sullivan attached to the Narcotics Division who found the rounds of ammunition in a secret compartment in the suitcase. According to Constable Sullivan, when the ammunition were discovered, the applicant reacted using Jamaican expletive and adding "Anything you can do even money, mi nuh waan guh a jail for mi career a guh dun".

[2] The applicant is acknowledged to be an entertainer but his counsel describes him as one that is "small time". Notwithstanding the clear evidence that was presented against him, the applicant thought it fit to give evidence denying knowledge of the contents of the suitcase and as happens in several cases of this nature, he said that he had borrowed the suitcase and did not know of the ammunition found in it.

[3] The learned trial judge quite rightly was not impressed and duly convicted him. Witnesses were called in respect of the applicant's character, with a view to assisting the learned trial judge in determining the appropriate sentence. Among the persons called were a business operator and a political caretaker. They all gave evidence indicating what a wonderful person this applicant is, in respect of his activity in the community. One described him as "a very jovial person. Quiet, he doesn't keep much friends. He also does community service

by keeping treats for the elderly, treats for the children. He is always active in the community". Those words came from business operator Bunny Lee. He operates a wholesale and betting shop in Christian Pen, Gregory Park, St Catherine. He said that he has known the applicant since his birth. They all grew up in the same area.

[4] The applicant was born on 27 July 1969. There was evidence given by Sybilene Donaldson, a police officer who, in respect of the antecedents of the applicant, said that the applicant launched out on a professional level in the entertainment business in 2004 and that his career would take him outside of Jamaica. It was on one of these trips from the United States, that he was arrested and charged. The applicant himself has said that "his career takes him outside of the country approximately twice per year".

[5] In sentencing the applicant, the learned trial judge said that the applicant had given absolutely no indication of any remorse. That there was no attempt on his part to seek forgiveness. The judge commented on the fact that he had gone into the witness box to give false evidence on oath. The learned trial judge indicated his disquiet and unhappiness with the testimony given by those who were called in mitigation. He said there had been no repentance, no question of forgiveness, no remorse and to quote him:

"Nothing that should impel me not to send you to prison for a long time. And that I told Mr. Bunny Lee being lenient is something which I do give true. There are those who might not agree but I think that in a

case like this, you ought to go to prison for a very long time. Particularly because of the fact that I have said before that you are a frequent traveler because the bullets were concealed in the suitcase and it is only through, whether luck or astuteness, that they were recovered and detected. And then too, there is no need saying you come from a very volatile community, one which is plagued by guns and gunmen and killings with guns. And everybody that comes here and pretends that this is not so, none of these people have ever seen a gunman before. Even where I live, I have seen gunmen."

Notwithstanding those remarks, the learned trial judge went on to say that he was going to accede to the lawyer's request by imposing a fine which is not something that he would normally do, where there is no guilty plea. He then proceeded to impose a fine of \$6,000,000.00 or four years imprisonment at hard labour. He added "... that will give you a chance to see if your community really loves you. Trust me, if they come together and put them money where them mouth is, then you will know that they love you, if they don't then you know is pure talk".

[6] From the judge's words and the fact that the applicant has not paid the fine, it would appear that he is not really loved. However, we have thoroughly examined the facts here and the remarks of the learned trial judge and we have considered the submissions of Mr Hines, who appeared for the applicant, particularly where he has said that the learned trial judge took into consideration the wrong principles in respect of this sentence. Mr Hines has made the point that the learned trial judge having decided not to impose a term of imprisonment

ought to have given serious consideration to the means of the applicant before imposing such a huge fine - a fine which is huge by any standard. Mr Hines has also taken issue with the fact that the learned trial judge has imposed a fine expecting members of the community to pay same, if the applicant cannot pay. In this regard, he has referred us to D A Thomas' well-known ***Principles of Sentencing*** (2nd Edition). Mr Hines quoted the following passage:

"It is axiomatic that where it is decided not to impose a custodial sentence the court should be careful in imposing a fine not to fix that fine at such a high level that it is inevitable that that which the court has decided not to impose namely a custodial sentence will almost certainly follow."

[7] Mr Hines has put before us a document which he has entitled "statement as to means," where he has put certain figures as being the earnings of the applicant and indicated that the applicant has no savings and indeed is unable to save. In fact, he has set out his dependents and has added that apart from being a small time musician, the applicant is a roaster of fish which he sells making a net profit of \$2,000.00 per week.

[8] In all the circumstances, we are satisfied that the sentence imposed in this case, is clearly manifestly excessive and that the learned trial judge applied wrong principles in imposing the fine. Having decided not to impose a sentence of imprisonment, he ought not to have imposed a fine which would inevitably, by a side wind, result in the applicant being incarcerated. In taking all that has been put before us by Mr Hines, even though unverified, we are granting the

application and treating this application for leave to appeal against sentence as the hearing of the appeal against sentence and we allow the appeal, quash the sentence that has been imposed and substitute therefor a fine of \$200,000.00 with an alternative of six months imprisonment, if the fine is not paid.