



IN THE SUPREME COURT  
CRIMINAL DIVISION  
TURKS AND CAICOS ISLANDS

CR 31/2023

BETWEEN:

REX

Vs.

ALEC KEITH NASH

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REASONS

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**Before:** The Hon. Mr. Justice Chris Selochan

**Appearances:** Crown: Ms. Nayasha Hatmin (Via MS Teams)  
(Mr. Clement Joseph unable to attend)  
Defence: Ms. Sheena Mair (in person)  
Defendant present in person.

**Hearing Date:** August 9<sup>th</sup>, 2023

**Venue:** Court Room #1, Supreme Court, Providenciales

**Handed Down:** August 11<sup>th</sup>, 2023



## **BACKGROUND**

1. On 17<sup>th</sup> July, 2023, the Defendant, Alec Keith Nash, was charged with the offences of Possession of Firearm and Possession of Ammunition, both contrary to section 3(1) of the Firearms Ordinance, Chapter 18:09. He was released on police bail on 17<sup>th</sup> July, 2023 to appear in court on 21<sup>st</sup> July, 2023. He was granted bail by this court on 21<sup>st</sup> July, 2023 but was unable to obtain a suitable surety until 24<sup>th</sup> July, 2023, on which date he was released.
2. The undisputed facts are that the Defendant is a 36-year-old resident of Kentucky in the United States of America. He left his home state on 13<sup>th</sup> July 2023 to fly to Charlotte, United States of America and then to the Turks and Caicos Islands for the purpose of vacationing with his girlfriend. Upon checking in with American Airlines in Kentucky, he declared that he had in his possession a firearm and twenty (20) rounds of ammunition which he showed to the airline representative. Rather than advising the Defendant that he could not travel to the Turks and Caicos Islands with these items, the representative completed a declaration ticket, which the Defendant signed. The Defendant was then advised that upon arrival in the Turks and Caicos Islands, he would be required to speak with a representative since he would have to collect his bag from a different area. It should be noted at this point that it is not disputed that the Defendant was in lawful possession of the firearm and ammunition in his home state.
3. The Defendant subsequently entered the Turks and Caicos Islands lawfully via the international airport in Providenciales on an American Airlines flight. What followed was another remarkable event. The Defendant had a conversation with

a representative of American Airlines and advised the representative that he had a firearm in his bag and asked where he could collect it. The representative checked the system and advised the Defendant that the bag could be collected on the normal luggage belt. The Defendant collected the bag and left the airport. He remained in Providenciales on vacation until 17<sup>th</sup> July, 2023. During this time, the firearm and ammunition were stored in a box in the safe of his hotel room.

4. On 17<sup>th</sup> July 2023, the Defendant went to the international airport in Providenciales in order to return to the United States of America and advised an American Airlines representative that he had a firearm and ammunition in his bag. It was at this point that the relevant authorities were alerted and the Defendant was arrested and subsequently charged with the offences of Possession of Firearm and Ammunition.
5. The Defendant then applied for an expedited hearing in this matter. There were no objections to this request by the Crown and on 4<sup>th</sup> August 2023 this Court granted the Application, making the following Orders:
  - a. *The matter is hereby deemed fit for an expedited hearing.*
  - b. *The Court finds that the Sufficiency Bundle relied on by the prosecution has disclosed sufficient evidence to establish a prima facie case that an indictable offence has been committed and to require the Defendant to stand trial.*
  - c. *Indictment to be filed by 4:00 p.m. on Friday 4<sup>th</sup> August 2023.*
  - d. *Defence to file Submissions by 10:00 a.m. on Tuesday 8<sup>th</sup> August 2023.*
  - e. *Submissions by the Crown (if any) by the evening of Tuesday 8<sup>th</sup> August 2023.*
  - f. *The matter is adjourned to 9<sup>th</sup> August 2023 for a Plea and Directions Hearing.*
  - g. *Bail is to continue for the Defendant on the same terms and conditions.*

6. On 9<sup>th</sup> August, 2023 the Defendant pleaded guilty to the offences of Possession of Firearm and Possession of Ammunition, being the two counts of an Indictment which read as follows:

**COUNT ONE**

**STATEMENT OF OFFENCE**

*POSSESSION OF FIREARM contrary to section 3(1) of the Firearms Ordinance, Chapter 18:09 of the laws of the Turks and Caicos Islands as amended.*

**PARTICULARS OF OFFENCE**

*That you on Monday 17<sup>th</sup> day of July 2023 at the Providenciales International Airport, Providenciales, Turks and Caicos Islands, did have in your possession, a grey and black CANIK TP9 ELITE SG 9mm Pistol, serial number T6472-22GB00838 without being the holder of a licence with respect to such firearm.*

**COUNT TWO**

**STATEMENT OF OFFENCE**

*POSSESSION OF AMMUNITION contrary to section 3(1) of the Firearms Ordinance, Chapter 18:09 of the laws of the Turks and Caicos Islands as amended.*

**PARTICULARS OF OFFENCE**

*That you on Monday 17<sup>th</sup> day of July 2023 at the Providenciales International Airport, Providenciales, Turks and Caicos Islands, had in your possession, twenty (20) SIG SAUER 9mm*

*rounds of ammunition without being the holder of a licence for a firearm which takes that ammunition.*

7. In accordance with my Order of 4<sup>th</sup> August 2023, counsel for the Crown and the Defendant filed Submissions on the issue of sentencing on 8<sup>th</sup> August, 2023.

### **THE LAW**

8. Section 3(1) of the Firearms Ordinance (as amended) (“the Ordinance”) provides as follows:

*No person (other than a licensed gunsmith in the course of his trade) shall have in his possession, discharge or use any firearm or ammunition unless he is the holder of a firearm licence with respect to such firearm, or in case of ammunition he is the holder of a licence for a firearm which takes that ammunition.*

Section 3(4) of the Ordinance provides:

*A person who contravenes subsection (1) or (2) commits an offence and is liable on conviction on indictment to a mandatory term of imprisonment of not less than twelve years but not exceeding fifteen years and a fine without limit.*

9. As such, upon being found guilty of an offence under section 3(1), the court is mandated to impose a custodial sentence of at least twelve (12) years.

10. However, section 30 of the Ordinance gives the court a discretion to impose a sentence of less than the mandatory minimum sentence if the Court finds that there are exceptional circumstances. Section 30(2)(b) provides as follows:

*(2) The court shall impose a term of imprisonment of at least the required mandatory minimum term unless:*

*(b) the court is of the opinion that there are exceptional circumstances relating to the offence or the person convicted of the offence which justify its not doing so.*

11. Section 30(3) of the Ordinance goes on to provide:

*The court, in considering for the purposes of subsection (2) whether a sentence of less than the mandatory minimum term is just in all the circumstances, may have regard, in particular to –*

*(a) whether the person convicted of the offence has a previous conviction for an offence under this Ordinance.*

*(b) whether the public interest in preventing the unlawful possession or use, manufacture, transfer, sale or acquisition of firearms would be served by the imposition of a lesser sentence.*

12. Section 30(4) of the Ordinance provides:

*The following shall not constitute exceptional circumstances, for the purposes of subsection (2), justifying the imposition of a lesser sentence –*

*(a) whether the person pleaded guilty to the offence; or*

*(b) whether the person materially assisted in the investigation of the offence.*

## SUBMISSIONS ON BEHALF OF THE DEFENDANT

13. The Submissions on behalf of the Defendant are quite simple. It is contended that the factual matrix in this case is very similar to two recent matters which came before the court in the Turks and Caicos Islands: *R v David O'Connor (CR12/2023)* and *R v Guzman (CR 20/23)*.
14. In both *O'Connor* and *Guzman*, the court considered the fact of a Defendant who was in lawful possession of a firearm and ammunition in the United States of America and who entered the Turks and Caicos Islands with these items, having voluntarily declared and been allowed to travel with them, as amounting to exceptional circumstances and utilized what it considered to be its discretion under section 30(2) of the Ordinance to impose non-custodial sentences.
15. Counsel for the Defendant, Ms. Sheena Mair, at paragraph 11 of her Submission, also referred to the following extract from the judgment in *R v Zakir and Rehman and Gary Dominic Wood*<sup>1</sup> at page 411:

*“It is not appropriate to look at each circumstance separately and to conclude that it does not amount to an exceptional circumstance. 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.”*

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<sup>1</sup> (2006) 1 Cr. App. R 77

16. Reference was also made by counsel for the Defendant to the *England and Wales Sentencing Guidelines* as it relates to exceptional circumstances in firearms offences and the following extract was quoted:

*'Circumstances are exceptional if the imposition of the minimum term would result in an arbitrary and disproportionate sentence.'*

17. The Defence has advanced the following as amounting to exceptional circumstances:

- a. The defendant possessed the firearm legally in his home state of Kentucky and the firearm is registered to him.
- b. He purchased the firearm and ammunition approximately 2-3 years ago, it is normally secured in its box in his home and it has never had to be used.
- c. The defendant declared the firearm and ammunition on his departure from Kentucky and again on his arrival at Turks and Caicos Islands.
- d. The defendant kept the firearm and ammunition secured in its box in a safe in his accommodation whilst in the Turks and Caicos Islands.
- e. The firearm was not loaded.
- f. The defendant declared the firearm and ammunition on his departure from the Turks and Caicos Islands.
- g. There was no criminal intent to commit any offence by the Defendant and there was no possession for a criminal purpose.
- h. There is no suggestion that the firearm or ammunition were used in any crime.
- i. The Defendant is a 36-year-old father of two children in full time employment as Manager in the medical field and is a visitor to the islands.
- j. The Defendant has no previous convictions in the USA, Turks and Caicos Islands or elsewhere.
- k. The Defendant is of extremely good character.



## SUBMISSIONS ON BEHALF OF THE CROWN

18. In summary, the Crown's submission is that the mandatory minimum sentence should be imposed because the factual matrix does not fall within the ambit of exceptional circumstances, but that, in the event that the court finds that there are exceptional circumstances, a custodial sentence less than the mandatory minimum should be imposed.

19. Lead counsel for the Crown, Mr. Clement Joseph, has respectfully submitted at paragraph 15 of his Submission that the non-custodial sentences (fines) which were handed down by Loban-Jackson J. in *R v O'Connor* and *R v Guzman* were, in his words, "unduly lenient", as the intent of Parliament could not have meant that 'exceptional circumstances' could totally eviscerate a period of incarceration.

20. Whilst on his legs, counsel for the Crown also advanced the argument that even if the factual matrix amounted to exceptional circumstances in the past, it could no longer fall within this ambit due to the relatively frequent occurrence of matters of this nature.

21. In support of his argument that there are no exceptional circumstances, counsel for the Crown referred to the decision in the case of *R v Smith (Shaun Daniel)*<sup>2</sup> where the court found no exceptional circumstances where the Appellant was a paraplegic and had married into a gangster family, was offered police protection, was informed by the police of a 'hit' on his life, had a firearm discharged at him, and was advised to wear a bulletproof vest by the police. He was later found to

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<sup>2</sup> (2007) WL 1685269

possess a firearm and ammunition without a licence and was convicted and sentenced to the mandatory minimum of five years imprisonment on each count to run concurrently, a sentence which was upheld by the Court of Appeal.

22. Counsel for the Crown also made reference to the case of *Laurensky Lefranc v R*<sup>3</sup>, where the Court of Appeal refused to interfere with the finding of the trial judge that there were no exceptional circumstances. He quoted what Mottley P. said in the Court of Appeal:

*“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 p 471 at [15]:*

*“Those who 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.”*

23. On the issue of there being no discretion to order a non-custodial sentence, at paragraph 10 of his submission, counsel for the Crown submitted as follows:

*“The intention of the Legislature has been consistently and abundantly clear – there is no room for non-custodial sentence pursuant to sub-section 3 of section 3 quoted in the preceding paragraph 15. Consequently, the Court does not seem to have the power to*

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<sup>3</sup> CR-AP 13/2019 [2020] TCACA 21

*sentence an accused person guilty of the offence created under section 3(1) and (2) to a non-custodial sentence. Indeed, the penalty sub-section clearly envisages that besides the custodial sentence, a fine should also be imposed in addition. The subsection 3 speaks of 12 years **and** fine without limit (and not 12 years **or** fine without limit **or both**). The sentencing is meant to send a zero-tolerance and deterrent message as judicial authorities, including the TCI Court of Appeal, have consistently held... ”*

24. As support for this argument, counsel for the Crown quoted from paragraph 23 of the judgment of the Court of Appeal in *Stan Forbes CR-AP 6/2019* where Mottley P., in affirming the findings of the sentencing judge, said as follows:

*“The judge correctly stated that these factors were relevant in deciding whether exceptional circumstances existed which would permit the Court to impose a sentence shorter than the mandatory minimum sentence of seven years. The judge was therefore correct in rejecting the appellant’s submissions...” (Emphasis added by counsel for the Crown).*

25. Counsel for the Crown further submitted at paragraph 13 of his Submission:

*“It appears therefore that even where a court finds that exceptional circumstances, it can only impose a sentence of imprisonment that may be less than the mandatory minimum sentence, depending on the nature of the exceptional circumstances (see the wordings of section 30(3)). The Court, it is submitted, does not, even in exceptional circumstances seem to have any power to impose only a sentence of fine; it should, by the terms of the Ordinance, be accompanied by a custodial sentence, although less than the mandatory minimum.”*

## ANALYSIS OF THE COURT

26. Essentially, there are two main issues on which the court must decide before proceeding to sentence:
- i. Are there exceptional circumstances in this matter?
  - ii. If so, is the court still mandated to impose a custodial sentence?

### **Exceptional Circumstances**

27. The issue of what can amount to exceptional circumstances has arisen and the following authorities (the first from the Turks and Caicos Islands and the others from the United Kingdom) provide some degree of guidance:
- a. In *R v Aloysius Ebner CR 45/19*, then Chief Justice Ramsey-Hale found exceptional circumstances where the Defendant, a 73-year-old decorated US Marine, a Navy seal and gun collector, who was on 80 percent disability, was in his vessel which had run aground on an uninhabited cay with 7 pistols, a shotgun and 8000 rounds of ammunition. The court considered the fact that he had lawfully acquired the firearms and ammunition in the United States and that there was no criminal intent.
  - b. In *R v Merrion (Desmond Peter) (A-G Ref: 23 of 2009)*<sup>4</sup>, the Court of Appeal treated the fact that one of the children of the Defendant was suffering from a very aggressive illness which had put immense pressure on his family as an exceptional circumstance which merited the reduction of the sentence to three years from the mandatory minimum of three years. Paragraphs 12 to 15 of the judgment are instructive:

*“12. We have no doubt in this case that the learned judge was in error in treating this case as one amounting to exceptional circumstances. There were none. This*

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<sup>4</sup> [2009] EWCA Crim 1683

*was a case where the offender had deliberately attempted to bring a weapon into this country. It is, in our judgment, not a case where there is any doubt but that the conduct was deliberate, that his previous good character (although relevant in not increasing the sentence beyond the minimum) cannot amount to exceptional circumstances, nor can the fact that he did not intend to use the pistol or any of the guns held unlawfully for criminal purposes. All the circumstances identified by the judge were irrelevant. A minimum sentence of five years should have been imposed.*

*13. However, the position before us is changed in one respect. We have been provided this afternoon with a letter from a consultant at the Leeds teaching hospitals. It identifies (we need say no more than this) that one of the children of the offender is suffering from a very aggressive illness and this has put immense pressure upon the family. The aggressive illness is one that could be fatal, but it is hoped that, with treatment, it may not be in this case, although it will be very debilitating, during the course of the treatment, for the child.*

*14. It seems to us that those properly could, if they had been before the judge, have been characterised as exceptional circumstances because they go to particular and unusual circumstances that affected this offender, given the severe nature of the illness and the strain which it imposed upon the family.*

*15. In those circumstances, we have considered the offender's wish to put these matters before us as an application to take these facts into account on a cross-notice for permission to appeal in relation to the five-year sentence that would otherwise have been appropriate. In those circumstances we think we can properly reduce the sentence to one of three years, but beyond that we cannot go. Those who in any way 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..."*

c. In *R v Nancarrow (Sean)*<sup>5</sup>, the Court, at paragraphs 17 to 19, examined sections 51(A)(a) and 51A(2) of the Firearms Act 1968 and looked at the principles which are application to determining whether exceptional circumstances arise:

*"17. Under section 51(A)(a) of the Firearms Act 1968, a person commits an offence if he has in possession or purchases, acquires, sells or transfers a firearm which is disguised as another object.*

*18. Under section 51A (2) of the Firearms Act 1968 the court must impose a minimum term of five years' imprisonment for an adult offender convicted of such an offence, unless "the court is of the opinion that there are exceptional circumstances relating to the offence or the offender which justify its not doing so".*

*19. The authorities in this court establish the following principles as to the application of section 51A (2):*

*(1) The purpose of the mandatory minimum term is to act as a deterrent (R v Zakir Rehman and Wood) [2005] EWCA Crim 2056; [2006] 1 Cr App R 77 at paragraph 12.*

*(2) Circumstances are exceptional for the purposes of subsection (2) if to impose five years' imprisonment would amount to an arbitrary and disproportionate sentence (Rehman at paragraph 16).*

*(3) It is important that the courts do not undermine the intention of Parliament by accepting too readily that the circumstances of a particular offence or offender are exceptional. In order to justify the disapplication of the five-year minimum, the circumstances of the case must be truly exceptional (R v Robert Dawson [2017] EWCA Crim 2244 at paragraphs 12 and 19).*

*(4) It is necessary to look at all the circumstances of the case together, taking a holistic approach. It is not appropriate to look at each circumstance separately and conclude that, taken alone, it does not constitute an exceptional circumstances.*

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<sup>5</sup> [2019] EWCA Crim 470

*There can be cases where no single factor by itself will amount to exceptional circumstances, but the collective impact of all the relevant circumstances makes the case exceptional (Rehman at paragraph 11).*

*(5) The court should always have regard, amongst other things, to the four questions set out in R v Avis [1998] 2 Cr App R (S) 178, namely: (a) What sort of weapon was involved? (b) What use, if any, was made of it? (c) With what intention did the defendant possess it? (d) What is the defendant's record? (See, for example, R v McCleary [2014] EWCA Crim 302 at paragraph 11.)*

*(6) The reference in the section to the circumstances of the offender is important. It is relevant that an offender is unfit to serve a five-year sentence or that such a sentence may have a significantly adverse effect on his health (Rehman at paragraph 15; R v Shaw 2011] EWCA Crim 167 at paragraphs 6-7).*

*(7) Each case is fact-specific and the application of the principles dependent upon the particular circumstances of each individual case. Limited assistance is to be gained from referring the court to decisions in cases involving facts that are not materially identical (see, for example, R v Stoker [2013] EWCA Crim 1431 at paragraph 22).*

*(8) Unless the judge is clearly wrong in identifying exceptional circumstances where they do not exist or clearly wrong in not identifying exceptional circumstances where they do exist, this Court will not readily interfere (Rehman at paragraph 14)."*

*d. In R v Evans<sup>6</sup>, the Defendant purchased a firearm thinking that it was a replica. At paragraphs 12 to 15 of its judgment, the Court considered whether the case fell within the ambit of "exceptional circumstances":*

*"[12] The matters which have been put forward as exceptional circumstances in the present*

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<sup>6</sup> [2006] EWCA Crim 87

case are, as in the case cited to us of Mehmet, a combination of matters. They are in relation to the offences, first, the fact that the judge was satisfied that the Applicant believed the Beretta to be only capable of firing blanks; secondly, the circumstances which clearly demonstrated this to be an offence of inadvertence, in particular the fact that, when sending it through the post, the Applicant had put his own address on the parcel; thirdly, the revolver barrel was only a part of a lethal weapon and the circumstances of its purchase were innocent, although of course the Applicant had admitted that he knew when he discovered what it was that he would not be able to get that item licensed.

[13] In relation to the offender, counsel relied upon his lack of previous convictions, his character as described in the references and the confirmation of a firearms officer that there had never been any problems or concerns about the Appellant's licensing and certification in the past or his security arrangements. Counsel also drew attention to the impact of the sentence upon his wholesale business and its employees and also his own dependants.

[14] We have given these matters very careful consideration. We are particularly concerned that the offence which the sentencing judge treated as the most serious one was, as he himself found after a hearing, an offence of inadvertence. The offence involving the Smith & Wesson barrel cannot, we acknowledge, be described as a crime of complete inadvertence, but the judge recognised it as being less serious and the Applicant's acquisition of that weapon was accepted as being unintentional. What he should have done, undoubtedly, was to take the barrel to the police straightaway, but he did not. These offences were committed by a man with a blameless past, a man who ran a respectable business and on whom a significant number of family members were dependent, and a man who it can now be said is clearly setting a shining example in prison. We believe that the judge was wrong to say, as he clearly did, that he could not find the circumstances to be exceptional. He was wrong in principle to say so because, from his other sentencing remarks, he clearly regarded the effect of the legislation as an effect which would yield in this case an arbitrary and disproportionate sentence.

[15] That leaves us with the opportunity to reconsider the matter. We are just persuaded that the combination of circumstances in this case was exceptional. The case is still a bad one. It is conceded that it should attract a term of imprisonment. In our judgment that



*term should be a significant term. The term that we have concluded is appropriate in this case is a term of three years. We propose to treat the circumstances of this case as being exceptional and to substitute for those counts where a five-year sentence was imposed a sentence of three years. We will grant leave and allow this appeal to that extent."*

e. In *R v Rehman; R v Wood*<sup>7</sup> the Defendant was sentenced to five years imprisonment, being the minimum sentence required by the legislation, because the judge considered that there were no exceptional circumstances. The Court of Appeal summarized the facts at paragraph 19 of its judgment:

*"The facts are very straightforward. The Appellant Mr Rehman is aged 24. He was a collector of models. He purchased the replica firearm via a French internet site. He did so in his own name; he used his own credit card and had it delivered to his home address which he shares with his parents. He intended to display it. He decided not to. He put it into a box under his bed and left it there. It was there when the police arrived on 5 November 2004. They had obtained a search warrant because they had information that Mr Rehman had ordered the firearm in question over the internet. Mr Rehman was clearly very easy to trace. He showed them where the gun was. He told the officers that he did not think it was illegal to own the gun. That is no defence, but it is very relevant when considering whether there are exceptional circumstances. In this case it was not contested by the Crown that Mr Rehman had every reason to believe that the gun was not one which it was illegal to possess."*

28. The Court found, at paragraph 30, that the judge was wrong to conclude that exceptional circumstances did not arise, and that regard should have been had to the Defendant's background, the fact that he had no knowledge of the unlawfulness of the weapon, as well as his antecedents. Whilst not identifying one

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<sup>7</sup> [2005] EWCA Crim 2056

particular circumstance, the Court, at paragraph 30 of its judgment, formed the view that taking into account all the matters relied upon by the Defendant, the case fell “on the right side of the line”:

*“On the facts of Mr Rehman's case, which we have already set out, we have decided that the judge was wrong not to conclude that the case was one involving exceptional circumstances. The background of Mr. Rehman was particularly important; but so was the fact that he had no knowledge of the unlawfulness of the one weapon that he had in his possession which contravened the provisions of s 5 of the Firearms Act and therefore resulted in the application of s 51A. It is perhaps not the clearest case because it is not possible to identify one particular circumstance, but looking at all the matters that were relied upon by counsel who appeared for him in the court below and by counsel who appears for him today it falls on the right side of the line. Those matters are set out in the skeleton argument at para 13 as follows:*

*“(1) he pleaded guilty at the first opportunity;*

*(2) he was a man aged 24 of hitherto good character;*

*(3) he and his family were entirely co-operative throughout the search and arrest procedure.*

*(4) he was an employee of HM Customs and Excise working as a VAT Assurance Officer, in which capacity he was a valued employee—as is evidenced by the reference supplied and evidence given by his line manager, David Spence, and by the fact that he was not suspended or dismissed from his post after details of his arrest became known (though he has since been dismissed from his employment after commencing his custodial sentence);*

*(5) It was common ground between the Crown and the Appellant that:*

*(a) the weapon was a blank firing replica purchased from France via the internet on or about 3 December 2003;*

*(b) it had not been converted, and no blank ammunition was found with it or had been purchased or otherwise acquired by the Appellant;*

*(c) the weapon had not apparently been fired prior to its being tested following its seizure;*

*(d) the weapon was found in its original wrapping under the Appellant's bed, where he had placed it and kept it since he received it;*

*(e) the police were led to the weapon via a search of the internet to identify persons who had purchased such weapons, and the Appellant had evidently done nothing to disguise his identity as a purchaser. Consequently, the police had obtained a search warrant under section 46 of the 1968 Act;*

*(f) it was apparent from the contents of his room that the Appellant was a collector of items of memorabilia, including other models. He had not known, until after his arrest, that possession of such a weapon was illegal, and he had been under the impression when he purchased it that it was only a collector's model. He had not put it on display with his other items of memorabilia but had kept it under his bed so that it was out of the way;*

*(g) furthermore, the Appellant was not aware that the replica weapon was capable of being converted until he was told so in the interview following his arrest. It was obvious from the fact that the replica weapon was accompanied by oil and a cleaning brush that it was more than merely a model; nevertheless, the Appellant was not aware of its capacity for conversion."*

*In our view the circumstances collectively make it possible to come to the conclusion that this is a case where the court was not required to impose the minimum term."*

### **Court's conclusion on exceptional circumstances**

29. As previously stated at paragraph 17 (supra), the Defence has advanced the following as amounting to exceptional circumstances:
- a. The defendant possessed the firearm legally in his home state of Kentucky and the firearm is registered to him.
  - b. He purchased the firearm and ammunition approximately 2-3 years ago, it is normally secured in its box in his home and it has never had to be used.
  - c. The defendant declared the firearm and ammunition on his departure from Kentucky and again on his arrival at Turks and Caicos Islands.
  - d. The defendant kept the firearm and ammunition secured in its box in a safe in his accommodation whilst in the Turks and Caicos Islands.
  - e. The firearm was not loaded.
  - f. The defendant declared the firearm and ammunition on his departure from the Turks and Caicos Islands.
  - g. There was no criminal intent to commit any offence by the Defendant and there was no possession for a criminal purpose.
  - h. There is no suggestion that the firearm or ammunition were used in any crime.
  - i. The Defendant is a 36-year-old father of two children in full time employment as Manager in the medical field and is a visitor to the islands.
  - j. The Defendant has no previous convictions in the USA, Turks and Caicos Islands or elsewhere.
  - k. The Defendant is of extremely good character.

30. The Court has taken these matters into consideration, as well as the fact that the Defendant was misled by the airline officials into believing that he could travel with the firearm and ammunition.

31. In addition, the Defendant's conduct can in no way be described as reckless or irresponsible. He was forthright with the relevant authorities and voluntarily declared that he was in possession of the firearm and ammunition. There was no attempt to conceal the items and he had them properly secured at all times, being of the genuine belief that it was not unlawful to travel with them and have them in his possession in the Turks and Caicos Islands.

32. I find that exceptional circumstances arise in this case, thereby enabling the court to depart from the statutory minimum sentence.

**Is the court mandated to impose a custodial sentence?**

33. Having found that the factual matrix falls within the ambit of "exceptional circumstances", the Court is now required to address its mind to what would be the appropriate sentence in the circumstances.

34. The starting point is the submission by Crown counsel that even if there are exceptional circumstances, the court can still only impose a custodial sentence, albeit one less severe than the statutory minimum.

35. Section 30(3) of the Ordinance provides:

*The court, in considering for the purposes of subsection (2) whether a sentence of less than the mandatory minimum term is just in all the circumstances, may have regard, in particular to –*

- (c) whether the person convicted of the offence has a previous conviction for an offence under this Ordinance.*
- (d) Whether the public interest in preventing the unlawful possession or use, manufacture, transfer, sale or acquisition of firearms would be served by the imposition of a lesser sentence.*

36. In ***R v Rehman; R v Wood*** (supra), the court seemed to concede, at paragraph 31 of its judgment, that in the appropriate circumstances, there could be a non-custodial sentence, but that a custodial sentence was merited in that particular case:

*“We therefore have to decide what term would be appropriate in these circumstances. The Appellant, Mr. Rehman, has now served the equivalent of over twelve months' imprisonment. Suffice it to say that while we would regard a custodial sentence as necessary in this case so as to achieve the deterrent message that Parliament intended, a period of twelve months would have been sufficient. We therefore quash the sentence of five years' imprisonment and substitute a period of twelve months' imprisonment. That means he can now be released.”* (Emphasis mine).

37. It is instructive to note that the word ‘sentence’ is not defined in the Ordinance. However, the regular meaning of the word ‘sentence’ can be discerned from various sources. In ***Osborn's Concise Law Dictionary (Eighth Edition)***, ‘sentence’ is defined as *‘The judgment of a court, particularly in an ecclesiastical or criminal court.’*

38. There appears to be no reason to suggest that the word 'sentence' in section 30(3) of the Ordinance ought to be given anything other than its regular meaning, that is to say, to include both custodial and non-custodial sentences.
39. Indeed, if a custodial sentence is still mandatory where the court finds that there are exceptional circumstances, this can result in extremely unjust outcomes. An example of this is where a person enters a home and commits a robbery with a firearm, but flees the scene, leaving the firearm in the home. The victim contacts the police but, not getting a response, decides to drive to the nearest police station to make a report and takes the firearm with him to hand over to the police. However, on the way to police station, he is stopped by the police and arrested and charged for the offence of possession of a firearm. Clearly, such a scenario would fall within the ambit of "exceptional circumstances". However, if Crown counsel's argument is accepted as being the correct interpretation of the law, a custodial sentence would have to be imposed on the victim.
40. I therefore hold the view that if Parliament intended for there to be a mandatory prison sentence even if there were exceptional circumstances, it would have expressly provided so in the legislation.
41. In arriving at this conclusion, I find myself in agreement with what was held by then Chief Justice Ramsey-Hale in *R v Aloysius Ebner CR 45/19* (at paragraph 28 of the Sentence Note) that where there are exceptional circumstances, the sentence will be at large, thereby enabling the court to impose a non-custodial sentence where the circumstances so merit. This was also the approach adopted by the court in the recent matters of *O'Connor* and *Guzman*.

## THE SENTENCE

42. Having found that there are exceptional circumstances and that I am not bound by the legislation to impose a custodial term, I turn now to consider what would be the appropriate sentence in these circumstances.

43. I am guided by the five principal objects of sentencing outlined by Wooding CJ in the case of *Benjamin v R*<sup>8</sup>, they being:

- i. The retributive or denunciatory, which is the same as the punitive;
- ii. the deterrent, *vis-à-vis* potential offenders;
- iii. the deterrent vis-vis the particular offender then being sentenced;
- iv. the preventative, which aims at preventing the particular offender from again offending by incarcerating him for a long period; and
- v. the rehabilitative, which contemplates the rehabilitation of the particular offender so that he might resume his place as a law-abiding member of society.

44. I have regard also to the following words of Wooding CJ in *Benjamin v R* in respect of these five principal objects:

*"...We accept these five principal objects as comprising the aims of punishment and we recognize that in some cases one object will be predominant whereas in others regard must be had more particularly to two or more of them..."*<sup>9</sup>

45. By way of mitigation, it has been submitted that the Defendant is a 36-year-old father of two who has never run afoul of the law. He volunteers extensively in his community.

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<sup>8</sup> (1964) 7 WIR 459 at pages 460-461

<sup>9</sup> Page 461



46. The firearm and ammunition were brought to the Turks and Caicos Islands for the protection of his girlfriend and him, he having lost a close relative to gun violence. He co-operated fully with the authorities, pleaded guilty at the earliest opportunity and is very remorseful for what has transpired.
47. The Defence has also forwarded some eleven references on behalf of the Defendant testifying to his good character. It should be noted that some of these were unsigned and sent to the court by way of forwarded email and the court could therefore give little if any regard to these. Nevertheless, the court had regard to the signed references, which collectively painted a glowing picture of the Defendant as an excellent father, model employee and community-oriented person.
48. The court has taken the matters presented in mitigation into account as well as the fact that the Defendant was unaware that it was unlawful to enter the Turks and Caicos Islands with firearm and ammunition, voluntarily declared them to an airline official in the United States of America and was asked to fill out a declaration form.
49. The court has also considered that the Defendant has already spent three (3) days in custody when he was unable to obtain a suitable surety to access bail.
50. I have also considered the following recent sentences imposed in three similar matters already referenced:

- a. In *R v Aloysius Ebner*, the Defendant was fined \$20,000 or 12 months' imprisonment.
- b. In *O'Connor*, the Defendant was, on 16<sup>th</sup> May 2023, ordered to pay a fine of \$5,670 or 90 days' imprisonment after pleading guilty to possession of a firearm and 44 rounds of ammunition.
- c. In *Guzman*, the Defendant was, on 5<sup>th</sup> June 2023, ordered to pay a fine of \$3,500 or 60 days' imprisonment after pleading guilty to possession of a firearm and 15 rounds of ammunition.

51. It should be noted that the sentence in each matter will depend upon the factual matrix and these sentences can only be used as a guide. The court is therefore not bound to impose a non-custodial sentence if the circumstances of the case do not merit this.

52. However, in this matter, I do not consider incarceration as necessary to prevent the Defendant from offending again or to deter him from offending in a similar manner. I am also satisfied that by spending three days in prison he has already learnt his lesson and that this is sufficient to deter him from offending in a similar manner in the future.

53. I am also not of the view that his overall conduct merits a custodial sentence in order to denounce his actions.

54. The Court therefore finds that a custodial sentence ought not to be imposed and that a fine should be the appropriate penalty in these circumstances.

55. In arriving at the fine, the starting point of \$10,000.00 is used. The Defendant is given credit for pleading guilty as well as his good character and the other mitigating circumstances already identified. The Defendant has also expressed remorse for his actions.

56. Taking all these factors into consideration, the Court considers that a fine of \$5,000.00 to be paid forthwith or 60 days imprisonment in default of payment is the appropriate penalty in the circumstances.

57. The Order of the Court is therefore as follows:

- a. The Defendant is to pay a fine of \$5,000.00 to be paid forthwith or 60 days imprisonment in default of payment.
- b. The Defendant's passport is to be returned to him.
- c. The firearm and ammunition are to be retained by the police and destroyed after they have completed their investigations in respect of same.

### **FINAL COMMENTS**

58. The Court has taken note of the fact that this is not the first time that an incident of this nature has occurred, and finds it unfortunate that officials from a reputable international airline can wrongly advise a traveler on the law as it relates to being in possession of a firearm and ammunition in the Turks and Caicos Islands.

59. What is even more remarkable is that upon his arrival in the Turks and Caicos Islands, the Defendant was allowed to leave the airport in Providenciales with the illegal items.

60. The court recommends that the Commissioner of Police should, as a matter of urgency, send official correspondence to the airlines operating internationally in the Turks and Caicos Islands, informing them that it is contrary to the law for a person to be in possession of a firearm and ammunition and that travelers should not be allowed to travel with firearms and ammunition. Indeed, it should be a mandatory requirement for airlines to inform travelers to the Turks and Caicos Islands of this.

61. Having regard to the proliferation of these matters, it would also be helpful if this information is prominently displayed on the homepage of the website of the Turks and Caicos Tourism Board.

62. It should be noted that the factual matrix and mitigating factors in each matter will be different, and this decision should in no way be taken as precedent that a foreign national who visits the Turks and Caicos Islands as a tourist with a firearm and/or ammunition will automatically fall within the realm of exceptional circumstances with a non-custodial sentence being imposed. Each matter will be decided on its own facts.



Dated 13<sup>th</sup> August, 2023

The Honourable Justice Chris Selochan

Judge of the Supreme Court