



**IN THE SUPREME COURT OF  
THE TURKS AND CAICOS ISLANDS**

**CR 7/2024**

**REX**

**V.**

**BRYAN HAGERICH**

**BEFORE:-  
THE HON. JUSTICE LOBBAN JACKSON**

**APPEARANCES: -  
MR. CLEMENT JOSEPH AND  
MS ROSE -ANN RICHARDSON FOR THE PROSECUTION  
MR. O. SMITH K.C. AND  
MS. KIMONE TENNANT FOR THE DEFENDANT**

**HEARD: MAY 3, 2024  
DELIVERED: MAY 24, 2024**



**HEADNOTE**

*Sentence-Criminal Law- s 3(1) and s 30 of the Firearms Ordinance Cap 18.09-Possession of  
Ammunition-Mandatory Minimum Sentences-Exceptional Circumstances-Principles of Sentencing-  
Section 21 of the Constitution-Plea of Guilty-Law Reform*

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**SENTENCING JUDGMENT**

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## **Introduction**

1. Having made an Order for expedited hearing pursuant to R16(1) (b) of the ***Criminal Procedure Rules 2021*** on March 27, 2024; the defendant is before the Court for sentencing following his plea of guilty on March 28, 2024 to the sole count possession of ammunition contrary to section 3(1) of the ***Firearms Ordinance*** Chapter 18.09, hereinafter referred to as “the Ordinance.”
2. The particulars of the offence are that the he, on Saturday February 13, 2024, at the Howard Hamilton International Airport, Providenciales, Turks and Caicos Islands, had in his possession, one box containing twenty (20) rounds of Nosler 6.5 PRC 140gr ballistic tip ammunition without being the holder of a licence for a firearm which takes that ammunition.
3. By virtue of the Ordinance, the minimum sentence for an offence committed in contravention of section of 3(1) the Ordinance is a term of imprisonment for twelve (12) years.

## **The Facts**

4. On February 13, 2024, at about 1:52pm security personnel at the Howard Hamilton International Airport in Providenciales were in the process of screening passenger’s luggage by use of the X-Ray screening machine, when an image of a bag showed what appeared to be ammunition on the screen. The bag was removed and the passenger to whom the bag belonged was identified as Mr. Bryan Hagerich, the defendant in this case.

5. The defendant, a visitor to these Islands was preparing to depart with his family on a flight bound for the United States where he permanently resides.
6. The authorities were alerted and the defendant as well as the item, were handed over to the Police and taken to the Serious Crimes Unit. At that location the luggage was further examined in the presence of the defendant and twenty (20) rounds of Nosler 6.5 mm ammunition were recovered.
7. The defendant was arrested and cautioned by the Police on suspicion of possession of ammunition in relation to the said box.
8. On February 14, 2024, the defendant was interviewed by the Police in the presence of his attorney at the time and made no comment. The following day he was formally charged and cautioned for the offence of possession of ammunition.

### **The Law**

9. Section 3 of the Ordinance provides as follows:

*“(1) 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 the case of ammunition he is the holder of a licence for a firearm which takes that ammunition.*

*(2) No person licensed under subsection (1) shall keep a greater number of ammunition than is specified in his licence.*

*(3) 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' imprisonment and a fine without limit"*

10. Section 30 of the Ordinance provides as follows:

***"Mandatory minimum sentence: exceptional circumstances***

*30(1) This section applies-*

*(a) Where a person is convicted of –*

*(i) an offence under section 3(1) or (2);*

*(ii) an offence under section 21;*

*(iii) an offence under section 22(2) or (3) or*

*(iv) an offence under section 27 (1) and;*

*(b) to the sentencing of a person after 26 March 2018, regardless of whether the offence for which the person is being sentenced was committed before or after that date.*

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

*(a) The person was under the age of eighteen years at the time of the commission of the offence; or*

*(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.*

*(3) 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.*

- (4) *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”*

### **Preliminary Constitutional Issue**

11. Before dealing with the substantive matter of sentencing this court will deal firstly with the preliminary issue raised as to the constitutionality of the section under which the defendant stands to be sentenced.
12. Counsel for the defendant submitted that “in so far as sections 3(3) and 30 of the Ordinance purports to impose a mandatory custodial sentence and a fine in exceptional circumstances, the sections are unconstitutional, as they infringe the following fundamental rights and freedoms guaranteed by the Constitution of the Turks and Caicos Islands:

***Protection from inhuman treatment***

*3. No person shall be subjected to torture or to inhuman or degrading treatment or punishment.*

***Protection from arbitrary arrest or detention***

*5. (1) Every person has the right to liberty and security of the person.*

*(2) No person shall be deprived of his or her personal liberty save in accordance with the procedure prescribed by law in any of the following cases-*

*(a) in the execution of the sentence or order of a court, whether established for the islands or some other country, in respect of a criminal offence of which he*

*or she has been convicted or in consequence of his or her unfitness to plead to a criminal charge;*

***Provisions to secure the protection of law***

*6. (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”<sup>1</sup>*

13. Counsel for the defendant further submitted that the Court of Appeal having not dealt with the constitutionality of the sentencing provisions in the recent decision of the ***Attorney General’s Reference (No. 1 of 2023)***<sup>2</sup>; ( “AG’s Reference”) that it is open to this court to do so. Counsel relied on section 21 of the Constitution to support that proposition. The sections 21(1) -(3) provides:

***“Enforcement of fundamental rights***

*21. (1) If any person alleges that any of the foregoing provisions of this Part has been, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*

*(2) The Supreme Court shall have original jurisdiction-*

*(a) to hear and determine any application made by any person in pursuance of subsection (1); and*

*(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3), and may make such orders, issue writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Part to the protection of which the person concerned is entitled; but the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means*

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<sup>1</sup> Written Submissions for the Defence para. 28.

<sup>2</sup> [2024] TCACA 6.

*of redress are or have been available to the person concerned under any other law.*

*(3) If, in any proceedings in any court established in the Islands other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the foregoing provisions of this Part, the court in which the question has arisen shall refer the question to the Supreme Court, unless, in its opinion, the raising of the question is merely frivolous or vexatious.”*

14. In addition to the above provision, the case of ***Bowe and another v The Queen***<sup>3</sup> was relied on by the Defence. This is a case in which the Privy Council considered an appeal from the Court of Appeal of the Commonwealth of the Bahamas, concerning a challenge to the constitutionality of section 312 of the ***Penal Code of the Bahamas***, which imposed a mandatory death sentence for the offence of murder.
15. In deciding the case, the Board found that Article 28 of the Constitution of the Bahamas, which has a similar wording to section 21 of the Turks and Caicos Islands Constitution, gave the Supreme Court and the Court of Appeal jurisdiction to entertain constitutional questions which arose during the course of proceedings before them.
16. The Prosecution agreed that the Supreme Court has original jurisdiction to hear constitutional matters, however, it was also submitted that when a constitutional matter is raised, it is initiated by Originating Summons, as per the ***Civil Procedure***

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<sup>3</sup> [2006] 1 WLR 1623.

**Rules** and that such an Application would have the Attorney General appearing as the proper party to the proceedings per the **Crown Proceedings Ordinance**.<sup>4</sup>

17. The Prosecution submitted that the proper procedure, to allow this important question of the constitutionality of section 30 (1) of the Ordinance would be to stay these criminal proceedings until the constitutional question has been resolved.
18. Alternatively, the Prosecution submits that if the court does not accept the procedural point, that in any event the mandatory minimum provision even in cases where there is an exceptional circumstance, is constitutional and does not infringe on the citizen's right to protection from cruel and inhumane punishment, as section 30 (3) gives the sentencer the discretion, where he sees fit, not to impose the mandatory minimum sentence.<sup>5</sup>

### **Jurisdiction to deal with the Constitutional point raised**

19. Does this court have jurisdiction to deal with the issue raised? The answer is to be found in the wording of section 21(2) of the Constitution, the relevant portion of which states:

*".... but the Supreme Court **shall not** exercise its powers under this subsection if it is satisfied that adequate means of redress **are or have been available to the person concerned under any other law**" (emphasis mine)*

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<sup>4</sup> Para 5.3 of Written Submissions by the Prosecution

<sup>5</sup> Para. 5.4 of Written Submissions by the Prosecution



20. It is clear that the constitutional point could have been raised in the **AG's Reference**, as that case has an impact on all similar ones currently before the court. Indeed, at paragraph [5] of the decision, the Court of Appeal stated that:

*"In this judgment we have dealt only with the issues that have been raised before us. For example, no constitutional issues have been raised so we have not dealt with any"*

21. The issue not having been raised when the opportunity arose, this court declines jurisdiction.

### **Defence Submissions**

22. Counsel for the defendant submitted that there are exceptional circumstances in relation to the offence and the offender, such that would justify a departure from the mandatory minimum sentence of twelve years' imprisonment.

23. Counsel referred the court to **R v. Zakir Rehman and Gary Wood**,<sup>6</sup> the locus classicus on the interpretation of exceptional circumstances where the statute provides for a mandatory minimum sentence.

24. It was submitted that in determining whether the circumstances of a particular case are exceptional the court in **Rehman** explained that:

*"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*

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<sup>6</sup> [2006] 1 Cr. App. R. 77.

*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<sup>7</sup>*

25. Counsel for the defendant also referred to the **AG's Reference** where the Turks and Caicos Islands Court of Appeal expressed approval of the "**Redfern test**" namely that "*if to impose five years' imprisonment it would amount to an arbitrary and disproportionate sentence (Rehman at [16]). This test is consistent with human rights principles of the TCI constitution which states at s3. that " no person shall be subject to torture, inhuman or degrading treatment or punishment".<sup>8</sup>*
26. It was submitted on behalf of the defendant that there is no evidence that he sought to conceal or otherwise disguise the ammunition which was found in his possession. He did not seek to deny ownership of the bag in which the ammunition was found or the possibility that he may have put the item in his bag, albeit mistakenly.<sup>9</sup>

### **Personal Mitigation**

27. The defendant was 38 years old when he landed in Providenciales, he turned 39 years of age a few days after his arrest on February 13, 2024. He resides in

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<sup>7</sup> Written Submissions by the Defence at para. 10.

<sup>8</sup> Para 117 of **Attorney Generals Reference No. 1 of 2023**.

<sup>9</sup> Para 22 of Written Submissions for the Defence.

Pennsylvania in the United States of America. He is married with two children ages 5 and 3 years old. He manages a 176-bed Nursing Home facility.

28. It was submitted that the defendant has extensive training and experience in firearm handling and safety.
29. The defendant has no convictions recorded against his name.<sup>10</sup>

### **Medical Conditions**

30. It has been submitted that the defendant suffers from hypertension and anxiety disorder. He is currently under the medical care of Dr. Rita Camacho. Medical reports dated February 15, 2024 and April 5, 2024 have been submitted to substantiate the medical conditions mentioned.
31. It has also been submitted that the defendant's family has been "deeply impacted" by the events which transpired. His five-year-old daughter referred to as "C" for the purposes of these proceedings, has suffered serious psychological effects including sadness, anxiety and confusion. "C" is currently under the medical care of Dr. Andrew Garbarino and medical reports dated February 16, 2024 and March 22, 2024 have been submitted to substantiate the conditions mentioned. The reports state that "C" has a history of separation anxiety disorder and post-

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<sup>10</sup> Pennsylvania State Police Criminal Record Check/ Turks and Caicos Islands Criminal Records Check.

traumatic stress disorder (PTSD), due to the sudden death of her grandmother, as a result she has been a patient of Pediatric Care Specialists.

32. "C" is reportedly withdrawn since she has been separated from her father.<sup>11</sup>
33. The defendant's wife suffers from anxiety, depression, sleep disorders and postpartum depression, for which she is receiving treatment. A medical report dated March 22, 2024, prepared by Dr. Garbarino has been provided to substantiate the medical conditions mentioned.

### **Character References**

34. The Court has been provided with eleven character references, of which I will mention a few. Mr. Guy Reschenthaler, a Member of Congress, Chief Deputy Whip for the State of Pennsylvania, who sits on the Rules and the Appropriations Committees, describes the defendant as *"a community leader....an honorable citizen with no prior criminal history, who serves as the Executive Director for The Patriot, the largest non-profit senior living community in Summerset County. In his role Mr. Hagerich provides compassionate care for the elderly. Additionally, he volunteers in his local community with youth sports programs, including the Summerset Area Little League"*.<sup>12</sup>

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<sup>11</sup> Medical Report dated March 22, 2024.

<sup>12</sup> Attached to Written Submissions for the Defence at page 375.

35. Summerset County Commissioner, Ms. Pamela A. Tokar-Ickes describes the defendant as *“a loving husband and father of two young children who is actively engaged in the community and in his children’s lives. A standout athlete in high school and collage.... he can be found at the local little league fields coaching his daughter’s tee- ball league. Choosing a career in the senior living industry over other options, [He] has worked hard for several Pennsylvania- based organizations that prioritize resident care and quality of life.”*<sup>13</sup>
36. Summerset County Jail Warden, Mr. Brian Pelesky, who has known the defendant for the past eight years and has served the Summerset County in the Corrections/Law Enforcement sector for fifteen years; describes him as someone who *“has never encountered any troubles with the law and has been nothing short of a model citizen and role model for our community.”*<sup>14</sup>
37. Director of Nursing at The Patriot, describes the defendant as *“the essential piece of our team to ensure the wellbeing and health of the residents entrusted to our care. I have the utmost respect and admiration for Bryan as a leader, mentor and colleague. His dedication to our team, our residents and our mission is unparalleled and I am privileged for the opportunity to work under his guidance.”*<sup>15</sup>
38. Former resident of The Patriot, Mr. Larry Barnick who was rehabilitated at the facility in November 2023, following knee replacement surgery, said *“During my*

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<sup>13</sup> Attached to Written Submissions for the Defence at page 376

<sup>14</sup> Attached to Written Submission for the Defence at page 380

<sup>15</sup> Attached to Written Submissions for the Defence at page 382-383

*stay I was consistently impressed by Bryan's commitment to ensuring the highest standard of care for all residents. He demonstrated an unwavering dedication to promoting the well-being and dignity of each individual residing at The Patriot, fostering an environment of compassion, respect and empathy throughout the facility."*<sup>16</sup>

### **Type of Ammunition**

39. It was submitted on behalf of the defendant that no use was made of the ammunition and that the defendant hunts deer from time to time in Pennsylvania. He has a hunting licence for that purpose. The ammunition seized in this case is used for hunting big game, and requires a hunting rifle for its discharge.<sup>17</sup>
40. Counsel for the defendant also submitted documents/written opinions, to show that the box contained no more than 20 rounds of ammunition and that all were accounted for.<sup>18</sup> In addition, it was stated that the ammunition cannot be fired from a handgun, they cannot be shot without a rifle in the corresponding caliber, they simply have no value for self-defense or other harm.<sup>19</sup>
41. Finally, it was submitted for the defendant that he is a man of impeccably good character. He has a hunting licence<sup>20</sup> permitting him to legally acquire and possess the relevant ammunition in the United States where he resides. Through

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<sup>16</sup> Attached to Written Submissions for the Defence at page 384.

<sup>17</sup> Written submissions for the Defence at page 6.

<sup>18</sup> Opinion of Mr. Gregg F. James, Retired Police/Firearms Training Expert page 400.

<sup>19</sup> Opinion of Mr. Gregg F. James, Retired Police/ Firearms Training Expert page 401.

<sup>20</sup> Copies of Hunting Licence issued by the Pennsylvania Game Commission for the year 23/24.

inadvertence he travelled to this country with the said ammunition and is remorseful for doing so. There is no criminal intention attached to his possession of ammunition.<sup>21</sup>

42. It was submitted that the defendant's medical conditions militate against an immediate custodial sentence; the effect on his family has been adverse, in particular his daughter and there is no indication that he is likely to re-offend in this jurisdiction.

43. Counsel for the defendant also referred this court to a number of newspaper articles which documented cases where a fine was imposed on offenders in similar circumstances in the Cayman Islands, Bermuda and Jamaica, however, as was pointed out in the *AG's Reference* at paragraph [49] "*...the court was not presented with the provisions of applicable statutes, and the cases are unreported and not appealed...there was very little assistance that could be obtained from the articles.*"

### **Prosecution Submissions**

44. The Prosecution submitted that "the Defendant does not fall within the category of exceptional circumstances."<sup>22</sup>

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<sup>21</sup> Written Submissions for the Defence page 23.

<sup>22</sup> Written Submissions for the Prosecution para 3.1.

45. In determining whether exceptional circumstances exist, the Prosecution places heavy reliance on the recent local consolidated **AG's Reference** which dealt with the question of the application of the mandatory minimum sentence section of the Ordinance. In this case the Court affirmed that exceptional circumstances exist:

*"...if to impose five years' imprisonment (as the mandatory minimum was in that case) would amount to an arbitrary and disproportionate sentence (**Rehman** at [16]). We approve that test."<sup>23</sup>*

46. It was submitted by the Prosecution that the **AG's reference** referred to the dicta of Mottley P in **T-Jon Xaviers Wilson v. R**,<sup>24</sup> a previous decision of the court, where the President as he then was, said at para [26] of the judgment:

*"The Court of Appeal in England in several cases has cautioned that the word 'exceptional' was not to be diluted; it was indicated that sympathy for an offender was not enough to prevent a judge from doing their statutory duty.*

*4.7 Section 30(4) of the Firearms Ordinance specifically excludes guilty pleas and material assistance with the investigation of the offences as factors for consideration in determining exceptional circumstances<sup>25</sup>"*

47. The Prosecution submitted that it follows therefore that the sentencing judge must first treat the mandatory minimum sentence as the first step, unless he can identify peculiar and unusual circumstances, which would, if the mandatory

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<sup>23</sup> **AG's Reference** para. 119.

<sup>24</sup> (CR 11 of 2019) [2019] TCASC 14 (14 August 2019).

<sup>25</sup> **AG's Reference** at para 34.



minimum sentence was to be imposed, amount to an arbitrary and disproportionate sentence.<sup>26</sup>

48. The prosecution also relied on the case of ***R v Rehman; R v Wood*** and commended to the court the passage at paragraph [12] of the judgment:

*“In the case of the Firearm Act the focus is different. So far as we can determine the rationale of Parliament, the policy was to treat the offence as requiring a minimum term unless there were exceptional circumstances, not necessarily because the offender would be a danger in the future, but to send out the deterrent message to which we have already referred. The mere possession of firearms can create dangers to the public. The possession of a firearm may result in that firearm going into circulation. It can then come into possession of someone other than the particular offender for example by theft in whose hands the firearm would be a danger to the public. Parliament has therefore said that usually the consequences of merely being in possession of a firearm will in itself be a sufficiently serious offence to require the imposition of a term of imprisonment for five years, irrespective of the offence or the offender, unless they pass the exceptional threshold to which the section refers. This makes the provision one which could be capable of being arbitrary. This possibility is increased because of the nature of section 5 of the Firearms Act. This is difference from most sections creating criminal offences. In the majority of criminal offences there is a requirement that an offender has an intention to commit the offence. However, firearms offences under section 5 are absolute offences. The consequence is that an offender may commit the offence without realizing that he has done so. That is a matter of great significance when considering the possible effect of section 51A creating a minimum sentence.”*

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<sup>26</sup> Written Submissions for the Prosecution para 3.6.

49. The Prosecution submitted that mandatory minimum provisions arise as a result of legislative policy, to act as a deterrence to “would-be” offenders. In fact, much consideration must be given to the history of the local legislative amendments to the Firearms Ordinance over the years. That the Court is aware of the “gun culture”<sup>27</sup> that has plagued the islands in recent times which the court took judicial notice of at paragraphs [100] to [101] in the *AG’s Reference*.
50. It was submitted by the Prosecution that *“it cannot make good or logical sense to assume either, that visitors to the islands would automatically fall into the exceptional circumstances category, as this too would fly in the face of the intention of Parliament on the issue of possession of firearms and ammunition. For every visitor to fall within section 30 of the Ordinance would simply water down the meaning of what is to be considered an exceptional circumstance and would create two specific category for offenders under the Firearms Ordinance, one category for local resident offenders and another category for offenders who are visitors to the Islands, this could not have been the intention of Parliament”*.<sup>28</sup>
51. The Prosecution submitted that the personal circumstances of the defendant in this case, does not offer any scope to invoke section 30 (3) of the Ordinance and the mandatory minimum term of twelve years must be handed down, with the appropriate adjustments and orders.

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<sup>27</sup> Written Submission for the Prosecution para 3.7.

<sup>28</sup> Written Submissions of the Prosecution para 3.8.

52. Alternatively, if the court finds that there indeed exist exceptional circumstances, the court is required to then use its discretion in handing down both a term of imprisonment and a fine.

## **Analysis**

53. Based on the foregoing submissions, the first issue to be determined by this court is whether there are exceptional circumstances relating to the offence or the offender which would justify a departure from the mandatory minimum sentence pursuant to section 30 (2) (b) of the Ordinance.

54. The **AG's Reference** is instructive on the issue of what constitutes exceptional circumstances and cited with approval the test in **Rehman** [16], that exceptional circumstances exists<sup>29</sup> “... if to impose five years' imprisonment (as the mandatory minimum was in that case) would amount to an arbitrary and disproportionate sentence”.

55. The Court went on to state at paragraph [35] of the judgment:

*“Exceptional circumstances must be seen within the context of deterrent sentences provided for in s 3 of the Ordinances. Lord Bingham provided obiter a definition of deterrent sentences at [4] of **Rehman**:*

*‘4. The weapons with which we are concerned, are ones in relation to which Parliament by s. 51A has signalled it was important that there should be imposed deterrent sentences. By ‘deterrent sentences’ we mean*

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<sup>29</sup> **AG's Reference** at para 32.

*sentences that pay less attention to the personal circumstances of the offender and focus primarily upon the need for the courts to convey a message that an offender can expect to be dealt with more severely so as to deter others than he would be were it only his personal wrongdoing which the court had to consider”*

### **Exceptional Circumstances**

56. In determining whether there are exceptional circumstances it is useful to ask and answer the questions posed in ***R v. Avis***.<sup>30</sup>

a. *What sort of weapon was involved?*

20 rounds (bullets) of ammunition designed for hunting big game.

b. *What use, if any was made of it?*

No use was made of it, same was discovered when the defendant was leaving the islands.

c. *With what intention did the defendant possess it?*

The item appears to have been brought to the Island unintentionally or through ‘inadvertence’.

d. *What is the defendant’s record?*

The defendant has no criminal record.

57. In addition to the above questions and answers, using the holistic approach in ***Rehman***, I consider whether the circumstances taken together (in relation to the offence or the offender) makes it exceptional within the meaning of the law and

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<sup>30</sup> [1998] 2 Cr. App. R(S.) 178

decided cases, and whether considering the circumstances of the offence and the defendant's personal circumstances and character; if to impose twelve years' imprisonment would amount to an arbitrary and disproportionate sentence.

58. In determining whether this case has vaulted the high threshold of exceptional circumstances, I also consider the following factors:

- a. That the defendant has a licence in his home state to carry such ammunition and there was no intention to take same to the Turks and Caicos Islands. (The license is clearly not valid in the TCI and the defendant is properly before the court).
- b. That the several references reveal a person of exemplary character.
- c. The medical condition of the defendant's five-year-old daughter.
- d. That the defendant has no previous convictions under this Ordinance.
- e. Whether the public interest in preventing the unlawful possession use, manufacture, transfer, sale or acquisition of firearms would be served by the imposition of a lesser sentence.

59. To be clear no single of the factor listed in paragraphs [56] and [58] above amounts to an exceptional circumstance, however, taken together, the circumstances, as it relates both to the offence and the offender are such that to impose the minimum term of twelve years' imprisonment would in my view be arbitrary and disproportionate. Accordingly, I find that there are exceptional circumstances in this case.

## Factors affecting Sentence

60. The *AG's reference* made it clear that, where the Court finds exceptional circumstances pursuant to section 30 of the Ordinance, the sentence of the Court is not at large and the Court has no jurisdiction to impose a non-custodial sentence.
  
61. What then is the appropriate sentence in this case, where the usual principles of deterrence, retribution and rehabilitation applies? *R v. Yordan Zhekov*<sup>31</sup> is a useful reference point. In that case, the defendant pleaded guilty and the Court of Appeal reduced a sentence of two years' imprisonment for possession of a disguised firearm to 52 weeks' suspended for 12 months. The appellant was a Bulgarian lorry driver who entered the United Kingdom with a disguised stun gun in his vehicle cab, such weapon being legal in Bulgaria.
  
62. Allowing the appeal, the Court noted that the very exceptionality of this particular case required one to approach the question of deterrence with caution. The firearm was in no way lethal, was not capable of firing any projectile and had never been used. The appellant was a man of exemplary character and family commitments.<sup>32</sup> This is also a case where the appellant was facing the mandatory minimum of five years.

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<sup>31</sup> [2013] EWCA Crim. 1656.

<sup>32</sup> *R v Yordan Zhekov*. at para. 18.

63. Similarly, I will approach the question of deterrence with caution, especially in the context of the Prosecution's submission that the legislation was aimed at addressing the "*gun-culture*" in TCI and the reference to the "*upsurge in in offences involving the use of firearms in the Turks and Caicos Islands*" at paragraph [17] of the **AG's Reference** as the policy behind the law. What then is the mischief that the law was intended to address? Was it contemplated licensed firearm holders (albeit not valid in the TCI) would be subject to the mandatory minimum of 12 years' imprisonment or was it intended to address the use of firearms to commit robberies, shootings, murders and other offences in these Islands?
64. If there is any disparity in the legislative intent and the application of the law, then there needs to be some law reform to address the issue.
65. The Prosecution's submission that "*it cannot make good or logical sense to assume either, that visitors to the islands would automatically fall into the exceptional circumstances category, as this too would fly in the face of the intention of Parliament*"<sup>33</sup> suggest that there has been an uneven application of the said law.
66. However, it must be noted that each case in relation to whether exceptional circumstances are found or not found, turns on its own facts, and the court has a duty to examine the individual case, when a submission is made under section 30 (2) of the Ordinance.

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<sup>33</sup> Written Submissions by the Prosecution at para 3.8.

67. Further, it must be noted that for the very same reason that “Lady Justice” is depicted as blindfolded, the court does not see race, color, gender, or nationality. It matters not whether offender is a tourist, trader or candlestick maker, all are equal under the law.

### **The Sentence**

68. Having determined that there are exceptional circumstances in this case in relation to both the offence and the offender, the question is what is the appropriate sentence?

69. In view of the culpability and harm being at the lower end of the spectrum of seriousness for this very serious offence, I would determine the starting point to be 18 months’ custody.

70. There can be no discount for a plea of guilty<sup>34</sup>, however, this court takes account of the defendant’s previous good character, and time spent on remand. The sentence is thereby reduced to 52 weeks’ custody.

71. Given the defendant’s personal circumstances and the low level of the risk of re-offending, a sentence of immediate custody is not unavoidable. The sentence is therefore suspended for 12 months.

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<sup>34</sup> *AG Reference (No.1 of 2017)*; *AG Reference (No. 1 of 2023)* at para 87.



72. In addition, the defendant is fined the sum of \$10, 000 (\$500 per bullet), same is discounted for the reasons noted above to \$6, 700 or 12 months' imprisonment in default of payment.

73. In summary the sentence of the Court is 52 weeks' imprisonment suspended for 12 months and a fine of \$6,700 or 12 months' imprisonment in default of payment.

*/s/ T. Lobban- Jackson*

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**Hon. Justice Lobban Jackson**  
**Judge of the Supreme Court**

