

**IN THE COURT OF APPEAL  
THE TURKS AND CAICOS ISLANDS  
PROVIDENCIALES (CRIMINAL DIVISION)**

**AG REF 1/23**

**IN THE MATTER OF THE ATTORNEY GENERAL'S REFERENCE (NO. 1 OF 2023)**

**AND IN THE MATTER OF SECTION 3 AND SECTION 30 OF THE FIREARMS  
ORDINANCE (AS AMENDED)**

**BETWEEN:**

**REGINA**

**v**

**DAVID O'CONNOR**

**REGINA**

**v**

**ALEX GUZMAN**

**REGINA**

**v**

**MICKEY WILLIAMS**

**REGINA**

**v**

**ALEC KEITH NASH**

**REGINA**

**v**

**MICHAEL GRIMM**



**Interested Parties**

**Before:**                **The Honourable Mr Justice Adderley, President (Ag.)**  
                               **The Honourable Madam Justice Cornelius-Thorne, JA**  
                               **The Honourable Mr Justice Hylton, JA**

**Appearances:**    **The Attorney General, the Honourable Rhondalee Braithwaite-Knowles KC, and with her Ms Clemar Hippolyte for the Crown**  
                               **Mr Oliver A Smith KC and with him Kimone A Tennant for the interested Party**

**Hearing dates:**    **16 January, 2024**

**Delivery date:**    **29 February 2024**

*Attorney General’s Reference- Firearms Ordinance – Sentencing – Mandatory Minimum Sentence – Exceptional Circumstances - Whether in the event of a conviction on a unlawful firearm charge a custodial sentence is mandated - Whether upon a finding of exceptional circumstances the judge is free to sentence at large.*

*In five separate cases within a two year period each of the interested parties pleaded guilty to charges of possession of an unlicensed firearm and ammunition under the Firearms Ordinance CAP 18.09. The judges found that there were “exceptional circumstances” and concluded that sentencing was therefore at large. Four of the offenders were fined and one was given a custodial sentence below the mandatory minimum. The Honourable Attorney General is of the view that the facts did not constitute exceptional circumstances and that in any event the Ordinance did not allow the imposition of non-custodial sentences. In the absence of the right of the Crown to appeal in this jurisdiction the Attorney General has referred the matter to this court under the Attorney General’s Reference of Question Ordinance CAP215.*

*Held: Under the Firearms Ordinance CAP 18.09:*

*(1) Upon a finding of exceptional circumstances sentencing is not thereby at large*

(2) *A judge has no jurisdiction under the Ordinance to impose a non-custodial sentence and the imposition of such a sentence is therefore wrong in principle*

(3) *As to the determination of exceptional circumstances it is undesirable for this court to prescribe a set of facts that would constitute exceptional circumstances or are capable of constituting exceptional circumstances as it might unduly fetter the discretion of the judge, but a test for a set of circumstances which according to **Rehman** may be considered exceptional would be those which “if to impose five years’ imprisonment<sup>1</sup> would amount to an arbitrary and disproportionate sentence” (**Rehman** at [16]). We approve that test. Within the legal framework of the TCI, and considering the obiter statements made in **R v Merrion** and **R v Kelly**, we would take the test for exceptional circumstances to mean “a set of particular and unusual circumstances that affect the offender or the offence and which in the opinion of the court justify it in not performing its statutory duty of imposing the mandatory minimum sentence. In forming that opinion the court must have regard to the dominant purpose of Parliament in enacting the section”.*

(4) **R v Aloysius Ebner** (CR 45 of 2019) [2019] TCASC 3 was wrongly decided.

#### **Cases considered:**

*A-G's Reference (No 23 of 2009); R v Aloysius Ebner (CR 45 of 2019) [2019] TCASC 3; Aubeeluck v The State of Mauritius [2010] UKPC 13; R. v Avis [1998] 2 Cr. App. R. (S.) 17; Benjamin v R (1964) 7 WIR 459; R v Bowler [2007] EWCA Crim 2068; R v Anthony Clarke Junior; Lavardo Outten and R v Earnest Dolce (AG R 1 of 2017) [2018] TCACA 2; Jude Denejour v R (CR-AP 8 of 2021) [2022] TCACA 9; Stan Forbes v Regina (CR-AP 6 of 2019) [2020] TCACA 9; R v Jordan; R v Alleyne; R v Redfern [2004] EWCA Crim 3291; Regina v. Kelly (Edward); Regina v. Sandford [2000] Q.B. 198, [1999] 2 Cr App R (S) 176; Jim Kelly Joseph v R, (CR-AP 18/18)[2019] TCACA 11; Laurensky Lefranc v Regina (CR-AP 13 of 2019) [2020] TCACA 21;; R v Merrion (2009) EWCA Crim 1683; R v Nancarrow [2019] EWCA Crim 470, [2019]2 Cr. App R.(s.) 30; R. v Rehman; R v Wood) [2005] EWCA Crim 2056;; Reyes v R - Privy Council Appeal No. 64 of 2001; T-Jon Xaviers Wilson v R (CR 11 of 2019)[2019]TCASC 14 (14 August 2019).*

## **DECISION**

### **Adderley, P(Ag.)**

1. This consolidated Attorney General’s Reference (“AG’s Reference”) is the first of its kind since the Mandatory Minimum Sentence and exceptional circumstances provisions were introduced by the Legislature and brought into force in the Firearms Ordinance CAP 18:09

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<sup>1</sup> or the minimum mandatory sentence.

in 2010 in the Turks and Caicos Islands (“TCI”). This is also the first time the court is being asked to determine whether in the event of a conviction on an unlawful firearm charge a custodial sentence is mandated, or whether upon a finding of exceptional circumstances the judge is free to sentence at large.

2. Since there is no statutory provision in this jurisdiction giving a right of appeal to the Crown in criminal cases, this Reference by the Attorney General is made pursuant to the Attorney General’s Reference of Question Ordinance CAP 2:15. In it she seeks answers to several questions arising out of the sentences meted out by Judges in the subject cases.
  
3. Section 3 of the said Ordinance provides as follows:-  
*“Reference to Court of Appeal*  
*3. The Attorney General may, with the approval of the Governor in Cabinet, refer to the Court for hearing and consideration, any question of law or fact concerning-*  
*(a) the interpretation of the Constitution;*  
*(b) the constitutionality or interpretation of any Ordinance; or*  
*(c) any other matter that the Attorney General thinks fit, whether or not that other matter is in the opinion of the Court similar to the matters set out in paragraphs (a) and (b), is of public interest or public importance.”*  
*4. Where a reference is made to the Court of Appeal, the Court is required to:*  
*a) hear and consider the reference;*  
*b) answer each question referred to it; and*  
*c) certify to the Attorney General its opinion on each question giving the reasons for each answer”*
  
4. In the absence of Sentencing Guidelines especially for firearm and related serious offences the Honourable Attorney General is of the opinion that it is of the utmost importance that the Court of Appeal through an AG’s Reference be invited to formulate, even if in a general sense, some sentencing guidelines for firearm and related serious offences. She submitted that it is in the interest of public order, safety and security, that certainty be brought to what

constitutes exceptional circumstances, and when properly found to be present in the cases before the Court, what is the proper sentence that should be imposed. Otherwise, public trust and confidence in the justice system may be eroded.

5. In this judgment we have dealt only with the issues that have been raised before us. For example, no constitutional issues have been raised and so we have not dealt with any.
6. The questions at the heart of the AG's Reference are of sufficient public interest and importance to warrant due consideration by the Court of Appeal. The Hon Attorney General holds the opinion that both **R v Aloysius Ebner**<sup>2</sup> and the cases at Bar, are precedents that should not be allowed to stand unchallenged so as not to beget similar lenient sentences and render the legislative intent of the provisions of the Firearms Ordinance nugatory.

### **The Background**

7. The Reference relates to the five matters outlined below.
8. On December 15, 2022, after pleading guilty to the firearms charges LobbanJackson, J sentenced Mikey Williams to 3 years' imprisonment, suspended for two years for each of the two counts of possession of firearm and possession of ammunition contrary to the Firearms Ordinance
9. On May 16, 2023, Lobban-Jackson, J sentenced David O'Conner to a fine of \$5670.00 with no custodial sentence. Mr. O'Connor had pleaded guilty of being in possession of 44 rounds of 9 mm. hollow-point type of ammunition.
10. On June 5, 2023, Lobban-Jackson, J. sentenced Alex Guzman to a non-custodial sentence of a fine of \$3,500. Mr. Guzman had pleaded guilty to being in possession of a firearm and ammunition contrary to the Firearms Ordinance.

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<sup>2</sup> CR 45/19, Delivered 5 Nov 2019, [2019] TCASC 3.

11. On 11 August, 2023, Selochan, J sentenced Alec Keith Nash to a non-custodial sentence of a fine of \$5,000.00 to be paid forthwith or 60 days imprisonment in default of payment. Mr. Nash had pleaded guilty to the charge of possession of a Firearm and possession of Ammunition, contrary to section 3(1) of the Firearms Ordinance.
12. On September 18, 2023, Selochan, J sentenced Michael Grimm to a term of eight (8) months imprisonment with any time spent in custody to be taken into account. Mr. Grimm had pleaded guilty to being in possession of ammunition contrary to the Firearms Ordinance.
13. It is submitted by the Honourable Attorney General that:
  - i. In the case of **R v David O'Connor (O'Connor)** the Court was wrong in finding that exceptional circumstances existed and the sentence imposed was unlawful, and even if lawful, was unduly lenient and manifestly inadequate;
  - ii. In the case of **R v Alex Guzman (Guzman)**, the sentence imposed was unlawful and even if lawful, was unduly lenient and manifestly inadequate;
  - iii. In the case of **R v Mikey Williams (Williams)** the Court was wrong in finding that exceptional circumstances existed. The sentence imposed was unlawful and even if lawful, was unduly lenient and manifestly inadequate;
  - iv. In the case of **R v Alec Keith Nash (Nash)** the Court was wrong in finding that exceptional circumstances existed and the sentence imposed was unlawful, and even if lawful, was unduly lenient and manifestly inadequate.
  - v. In the case of **R v Michael Grimm (Grimm)** the Court was wrong in finding that exceptional circumstances existed and the sentence imposed was unlawful, and even if lawful, was unduly lenient and manifestly inadequate.

## PRINCIPLES GOVERNING APPELLATE COURTS IN SENTENCING APPEALS

14. As drawn to our attention by Mr Smith K.C. the authors in **Archbold Criminal Pleading Evidence and Practice 2024 Ed.** set out certain principles which guide the Court of Appeal in its review of sentences imposed by lower courts. At paragraph 7-135, the following are the circumstances where the court will interfere. The categories are not exhaustive:

“(a)where the sentence is not justified by law, in which case it will interfere not as a matter of discretion but of law;

(b)where sentence has been passed on the wrong factual basis;

(c)where some matter has been improperly taken into account or there is some fresh matter to be taken into account;

(d)where there has been a failure to honour a legitimate expectation; or

(e)where the sentence was wrong in principle or manifestly excessive.”

15. They further, stated at paragraph 7-141:

“...the court will not interfere with the discretion of the sentencing court merely on the ground that it might have passed a somewhat different sentence: Gumbs (1927) 19 Cr. App. R. 74, CCA; Ball (1951) 35 Cr. App. R. 164, CCA. ...”

## POLICY

16. In **Jim Kelly Joseph**<sup>3</sup>, this court cited with approval the following observation of Lord Chief Justice Woolf, per Mottley P, at para. 56:

“The policy which led the Parliament in England to amend the Firearm Act to provide for mandatory minimum sentence applies with equal force to the reason why the Legislature in the Turks and Caicos Island amended the provision of the Firearm Ordinance to provide for a mandatory minimum of seven years’ imprisonment”

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<sup>3</sup> (CR-AP 18/18) [2019] TCACA 11

17. In **Stan Forbes v Regina (CR-AP 6 of 2019) [2020] TCACA 9** (delivered on 30 January 2020), this Court explained further the legislative policy rationale for the mandatory minimum sentence of 7 years (before it was further raised to 12 years in 2022). At para. 15, Mottley, P said:

“The upsurge in offences involving the use of firearms in the Turks and Caicos may very well be at the root of the policy which lead to the Legislature amending the Firearm Ordinance to require the courts to impose a mandatory minimum sentence. The statement by Lord Woolfe [*in Rehman & Wood*] that the mere possession of a firearm can create dangers to the public applies with equal or greater force in the Turks and Caicos Islands. It must be remembered that the economy of these Islands depend on tourism and international business. The use of firearms will create a danger to the economy. This may be the reason why the Legislature had said that offences against section 3(1) and/or (2) are punishable by mandatory terms of imprisonment.” [emphasis added]

## LEGISLATIVE HISTORY IN THE TCI

18. The legislative history of mandatory minimum sentences and the changes in penalty provisions can be traced in the following Firearms ordinances. Sections 3(1) and 3(2) of the ordinances set out the offences. The sections are similarly worded as follows:

“3. (1) No person (other than a licensed gunsmith in the course of his trade) shall keep, carry [‘have in his possession’]<sup>4</sup>, 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.

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

19. The penalty is set out in Section 3(3). The Firearms Ordinance, Cap 18.09, Laws of the TCI (with revision date of 31 August 2009) (“**the 2008 Ordinance**”), provided as follows:

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<sup>4</sup> “*have in his possession*” is the wording in **the 2022 Ordinance** instead of the words “*keep, carry*” used in **the 2010 Ordinance**.



Section 3(3): A person who contravenes the provisions of Subsection (1) or (2) commits an offence and is liable on summary conviction to a fine of \$40,000 **or** to imprisonment for a term of 2 years and on indictment to a fine of \$50,000 **or** to imprisonment for 5 years, or to both.(emphasis added)

20. The mandatory minimum sentence of 5 years was first introduced by the Firearms (Amendment) Ordinance, 28 of 2010 (in force 1 December 2010) (“**the 2010 Ordinance**”),

21. In that ordinance subsection 3 provides for the penalty as follows:

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

22. Eight years later that mandatory minimum was raised to 7 years in the Firearms (Amendment) Ordinance 8 of 2018<sup>5</sup> (“**the 2018 Ordinance**”). Subsection 3 provides:

“(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 seven years but not exceeding fifteen years **and** a fine without limit.” (emphasis added)

23. In 2022 the mandatory minimum was further raised to 12 years by the Firearms (Amendment) Ordinance 20 of 2022<sup>6</sup> (“**the 2022 Ordinance**”). The penalty provision in subsection (3) provides:

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<sup>5</sup> (in force 26 March 2018 L.N. 20/2018).

<sup>6</sup> into force November 7, 2022.

“(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 but not exceeding fifteen years **and** a fine without limit.” (emphasis added).

24. Subsections (1) and (2) referred to in s.3(3) provide:

“3. (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 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.

25. So, the **2008 Ordinance** gave jurisdiction to the court to impose a term of imprisonment **or** a fine or both.

26. The **2010 Ordinance** changed that. Not only did it introduce the mandatory minimum sentence of 5 years in section 3(3), it removed the courts summary jurisdiction making the offence an indictable one only, and in effect bifurcated the punishment making the convict liable not for a term of imprisonment **or** a fine but instead for a mandatory term of imprisonment **and** a fine. That formula was retained both in **the 2018 Ordinance** and in **the 2022 Ordinance** currently in force.

27. These changes are considered to be deliberate and a reaction to the continued escalation of firearms-related crimes in the jurisdiction by making the convict liable to a custodial sentence and a fine.

28. In furtherance of its resolve to deal with the firearms issue, in the same year that it passed **the 2010 Ordinance**, Parliament had enacted in relation to 10 related gun crimes the Firearm Related Offences (Detention and Bail) Ordinance CAP 29 of 2010 which came into force on 1 December 2010. This Ordinance, among other things, took away from the Magistrate Courts the power to admit to bail for firearm related offences. Under the heading “*No bail for offences involving the use of firearm, etc.*” It transferred that power exclusively to the Supreme Court pursuant to section 7 of the said Ordinance 29 of 2010.

### **EXCEPTIONAL CIRCUMSTANCES**

29. The introduction of “exceptional circumstances” to sentencing was introduced in **the 2018 Ordinance**.

30. Section 30 of the Firearms Ordinance provides for exceptional circumstances as follows:

“(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(1) 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.

31. Nevertheless, a distinction must always be drawn between the finding of exceptional circumstances and the sentence imposed after such finding. If exceptional circumstances are found the factors set out in s 30(3) (a) and (b) of the Ordinance may be taken into account in relation to the offence or the offender in the discretion of the judge to fit the justice of the particular case. namely:

(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. [emphasis added]

#### WHAT CONSTITUTES EXCEPTIONAL CIRCUMSTANCES?

32. In **Rehman**<sup>7</sup> speaking within the context of The European Convention on Human Rights the court opined 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]).

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<sup>7</sup> (R. v Rehman; R v Wood) [2005] EWCA Crim 2056; [2006] 1 Cr. App (S) 404.

33. In **R v Merrion**<sup>8</sup> Thomas L J intimated at [14] that exceptional circumstances “...*go to particular and unusual circumstances...*” that affected the offender. At [12] he also quoted what Lord Bingham CJ, as he then was, said in **R v Kelly [2000] QB 198, [1999] 2 Cr App R (S) 176** in relation to a similar worded provision relating to the life sentence:

“To relieve the court of its duty to impose a life sentence under section 2(2), however, circumstances must not only be exceptional but such as, in the opinion of the court, justify it in not imposing a life sentence, and in forming that opinion the court must have regard to the purpose of Parliament in enacting the section ...”

34. In **T-Jon Xaviers Wilson v R**,<sup>9</sup> (CR 11 Of 2019) [2019]TCASC 14 (14 August 2019) at paragraph 26 this court in affirming the mandatory minimum 7 years’ sentence imposed on the defendant, Mottley P said at para 26:

“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 investigation of the offence as factors for consideration in determining exceptional circumstances.”

35. Exceptional circumstances must be seen within the context of the 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>8</sup> A-G's Reference (No 23 of 2009); **R v Merrion** (2009) EWCA Crim 1683.

<sup>9</sup> (CR 11 Of 2019)[2019]TCASC 14 (14 August 2019)

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.”

**If the judge finds exceptional circumstances does the sentencing become at large?**

36. In paragraph 28 of her Sentencing Note in the decision of *R v Aloysius Ebner*<sup>10</sup> Ramsey-Hale CJ, Chief Justice of the Turks and Caicos Islands, as she then was opined:

“Having decided that there are exceptional circumstances that justify the Court in departing from the mandatory minimum sentence prescribed by the Ordinance, the sentence is now at large”

37. Mr Smith KC relying on that authority submitted that the minimum mandatory sentence only applies to cases that are not exonerated by exceptional circumstances. He submitted that on the plain reading of the provision once exceptional circumstances are found the mandatory minimum provision goes out of the window, and the general law of sentencing should apply.
38. Section 30(2) mandates the Court to impose a term of imprisonment of at least the required mandatory minimum term. That term is stipulated in section 3(3) of **the 2022 Ordinance** as 12 years.
39. The court must impose as a sentence at least this minimum term (12 years’ imprisonment) unless the offender is under the age of 18 years at the time of the offence (s.3(3)(a)), or the completely distinct and independent ground s.3(3)(b) that the court is of the opinion that there are exceptional circumstances relating to the offence or the offender which justify it departing from the mandatory minimum.

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<sup>10</sup> (CR 45 of 2019) [2019] TCASC 3.

40. Section 30(3) refers to the matters that may be taken into consideration in imposing a lesser “*sentence*” upon the finding of exceptional circumstances. In my judgment the meaning of the word “*sentence*” used in s.30(3) is clear from a proper construction of the development of the legislation.
41. As underscored by Cornelius Thorne JA **the 2010 Ordinance** introduced a bifurcated sentence with two components: imprisonment for a minimum term of 5 years as the first component and a fine without limit as the second component.
42. **The 2018 Ordinance** amended that. While it retained the component of a fine without limit, it amended the component of imprisonment to a minimum term of 7 years. It also added s.30 for the first time (inserted by Order 8 of 2018) which introduced exceptional circumstances for the first time and allowed the possibility of a shorter term of imprisonment if exceptional circumstances were found.
43. **The 2022 Ordinance** retained the “*fine*” component as before, but again amended the mandatory minimum imprisonment component to 12 years and retained the provisions of s 30 which would allow the court to reduce the term in exceptional circumstances.
44. Under **the 2022 Ordinance** the sentence is fixed as a term of imprisonment and a fine. So as not to offend the doctrine of the separation of powers the judge continues to have the discretion as to the length of the term of imprisonment within the range provided and the size of the fine as, in his or her opinion, the nature and circumstances of the offence demands. The same discretion remains when imposing a reduced term in exceptional circumstances.
45. Mr. Smith K.C. also relied on **Redfern**<sup>11</sup> to support the submission that if exceptional circumstances are found then the sentencing becomes ‘at large’. He stated that it is the clear reading of the section.

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<sup>11</sup> R v Jordan; R v Alleyne; R v Redfern [2004] EWCA Crim 3291.

46. The English court in **Redfern** relied on the Firearms Act 1968 of England. Section 51A(2) of that Act provides:

“...the court shall impose an appropriate custodial sentence (or order for detention) for a term of at least the required minimum term (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify doing so”

47. Section 51A(2) is materially the same as s.30(3). However, there is clearly no equivalent in the 1968 English Act to s.3(3) of **the 2022 Ordinance**. Under the English Act the minimum mandatory term can be imposed “*with or without a fine*” while **the 2022 Ordinance** mandates two components of the sentence: a sentence of imprisonment **and** a fine. As Parliament is deemed not to legislate in vain, this must be considered a deliberate act of the Turks and Caicos Parliament especially since it is evident that the Ordinance is otherwise modelled on the English Act which came into force on 22 January 2004. By section 51A(2) the English court is required to impose a custodial sentence (with or without a fine) for at least the mandatory minimum term unless the court finds exceptional circumstances that justify imposing a lesser term.

48. It is not surprising, therefore, as we observed at the appeal hearing without objection, that in none of the English cases cited by Mr Smith KC or by the Honourable Attorney General in which exceptional circumstances were found, was a sentence other than a custodial sentence imposed. Mr Smith K.C. was astute to take the point that if the TCI Parliament intended the word “*sentence*” to mean “*term*” in s. 30(3) it could have so stated it. However, we are of the opinion that by the bifurcation of the sentence by the use of the word “*and*” instead of “*or*” in the sentencing provision in s.3(3) it achieved the same objective.



49. In a further attempt to assist the court Mr Smith K.C. indicated that he was aware from newspaper articles that non-custodial sentences for firearms possession were imposed in several other jurisdictions including Jamaica, The Cayman Islands and Bermuda. A quick perusal of the newspaper articles showed that they may have been based on statutes with different provisions than those in this jurisdiction, as none mentioned a mandatory minimum term or that the court considered whether there were exceptional circumstances. In any event, the court was not presented with the provisions of the applicable statutes, and the cases are unreported and not appealed. Regrettably, therefore, there was very little assistance that could be obtained from the articles.
50. Even if the sentencing was at large the court could only impose sentences authorized by statute or by common law. Nothing in **the 2022 Ordinance** gives jurisdiction to the court to impose a fine in lieu of imprisonment as existed under **the 2008 Ordinance** before the mandatory minimum was introduced by **the 2010 Ordinance**. A power in a statute to imprison does not automatically give jurisdiction to impose a fine in lieu thereof. As set out in s.8(3) of the Criminal law Ordinance Cap 3.01 that can only apply to a conviction where the sentence is not fixed by law . That is not the situation in the instant case. Section 8(3) reads:
- “8(3) Where a person is convicted of an offence, other than an offence for which the sentence is fixed by law, the court, if not precluded from sentencing the offender by its exercise of some other power, may impose a fine in lieu of or in addition to dealing with him in any other way in which the court has power to deal with him, subject to any enactment limiting the amount of the fine that may be imposed or requiring the offender to be dealt with in a particular way.
51. When, therefore, the bifurcated sentence created by s.3(3) is read in conjunction with sections 30 (1) and 30(2) and the existing law, there seems to be little doubt that the word “*sentence*” referred to in section 30(3) refers to the “*term*” of imprisonment component of the sentence. Selochan J therefore fell into error in **Grimm**, as did M Smith K.C.

following him, in concluding that in this context the dictionary definition of “*sentence*” could be applied.

52. For all of the above reasons in my judgment the court had no jurisdiction to impose only a fine without a custodial sentence, and any such sentences were wrong in principle.

### Excluded Circumstances

53. S.30(4) of **the 2022 Ordinance** excludes certain considerations from being “exceptional” in the following terms:

“(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. (Inserted by Ord. 8 of 2018)” (emphasis added)

54. It should be noted that by s.30 (2) (b) exceptional circumstances can relate to the offence or by personal mitigation to the person convicted of the offence.
55. In **R v Nancarrow**<sup>12</sup> delivering the judgment of the Court (Holroyde LJ, Popplewell J, and HH Judge Wendy Joseph QC) Popplewell J helpfully summarized under 8 heads the principles developed thus far that should guide a judge in deciding firearms cases. One of those principles extracted from **Redfern** is that it was the opinion of the court that was critical as to what the exceptional circumstances were and 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, the Court of Appeal will not readily interfere (**Rehman** at [14]).

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<sup>12</sup> [2019] EWCA Crim 470, [2019]2 Cr. App R.(s.) 30.

56. The same principle applies to the imposition of the sentence by the judge in the exercise of his or her discretion. The test for an appellate court interfering with such a decision is well known and the principles are summarized by the authors of Archbold 2024 edition extracted at [14] above. The case law is replete with other authorities to the same effect.

## **THE CASES AT BAR**

### **DAVID CARROL O'CONNOR**

57. The facts as narrated in the Judgment by the learned Judge are recited below.

“4. The Defendant is an American tourist who has been a visitor to the Turks and Caicos Islands for the past 12 years. He is a business owner, firearms instructor and licensed firearm holder in three (3) of the United States, namely New York, Utah and Florida.

5. On March 25, 2023, the Defendant was at the Providenciales International Airport preparing to board a flight to return to the United States where he resides, when a security screen of his backpack using an x-ray screener, revealed a bag within containing forty-four (44) rounds of ammunition. The police were alerted and Mr. O'Conner was arrested and interviewed on suspicion of unlawful possession of ammunition.

6. During his interview the Defendant said that he did not check that bag because he doesn't use it to go to the shooting range and that it was “clearly an accident that there was ammo in that bag”. He went on further to say that he did not see the ammo until it was pulled out by security at the airport. And that “only a fool would try to knowingly bring ammunition onto an airplane.”

7. When asked in the said interview if he had anything he wished to say to the police in regard to the allegation, the Defendant said this “I have been travelling for 25 years and I have never

intentionally disrespected a country's culture, rules or laws. And I had no intent to break any in Turks and Caicos. And additionally in those 25 years of travelling have never had any trouble in any place I have visited."

58. Mr. O'Connor had pleaded guilty to being in possession of the 44 rounds of 9 mm, hollow-point ammunition without being licensed to possess such ammunition.

#### **THE REASONS FOR THE JUDGE FINDING EXCEPTIONAL CIRCUMSTANCES**

59. The learned judge gave these reasons:

"24. Having taken a holistic approach as outlined in the case R v. Rehman and Wood, I consider that:

(i) the Defendant had lawfully acquired the ammunition in the United States where he resides and is a licensed firearm holder in 3 states. (copies of the licenses were produced to the court)

(ii) the Defendant did not possess the ammunition with any criminal intent,

(iii) the Defendant had not been previously convicted of any offence under the Ordinance.

(iv) the Public interest in preventing the unlawful possession or use of the subject matter of the charge would be served by the imposition of a lesser sentence.

60. Having regard to the quantity of ammunition she decided that the appropriate sentence was a fine with a starting point of \$10,000. The Defendant was given full discount for a plea of guilty at the earliest opportunity, which reduced the fine to \$6,670, and to taking into account of his previous good character the fine was further reduced to \$ 5, 670 to be paid forthwith or serve a term of 90 days' imprisonment in default of payment.

## OPINION

61. The imposition of a fine without a custodial sentence was wrong in principle and therefore unlawful.
62. As to the exceptional circumstances, s.30(3) sets out the matters that may be considered in deciding whether to reduce the mandatory minimum sentence in the case of a finding of exceptional circumstances namely (a) whether the offender has a previous conviction for an offence under the Ordinance, and (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.
63. In **R v Bowler** [2007] EWCA Crim 2068 Mr. Justice Oppenshaw on behalf of the panel gave guidance at [13] on how to approach finding exceptional circumstances:
 

“The authorities make clear that in applying these provisions there is no list of circumstances, some of which can, and some of which cannot amount to exceptional circumstances. Whilst it is clear that rather more than just a substantial personal mitigation is required, the court must look at all the relevant circumstances of the offence and of the offender and ask whether the imposition of the minimum term in the particular circumstances of the particular case is a disproportionate and arbitrary response to the danger presented by the unlawful possession of prohibited weapons...” [underline added]
64. In **Bowler** there was personal mitigation plus other facts including serious health concerns which led the court to conclude that there were exceptional circumstances which led them to reduce the custodial sentence below the mandatory minimum.
65. Madam Attorney General submitted that in **Jude Denejour v R** (CR-AP 8 of 2021) [2022] TCACA 9 the matters taken into account were similar to this case and Lobban-Jackson, J found in that case that they did not constitute exceptional circumstances with which this court

had agreed. The learned judge did not state what she took into account to distinguish the two cases and so it is not possible to say that she was clearly wrong.

66. One difference appears to be that Mr O’Conner was a visiting tourist and Mr Denejour had lived in Turks & Caicos for over 21 years during which time he had never ran afoul of the law. If that was a factor taken into consideration it does seem to us, that one set of circumstances cannot be exceptional by virtue only of the fact that the offender is a visiting tourist and the same or similar facts not exceptional for a resident. Exceptional circumstances cannot be a static term; what are exceptional circumstances today may not be exceptional circumstances tomorrow as they become more commonplace, for example if the frequency of the occurrence in similar circumstances reaches a certain level. The courts must continue to be alive to this possibility.
67. In making her determination in this case the learned judge appears to have correctly asked 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 [11]). Also she did not mention any record of the offender.
68. The offender had 5 character reference letters, and substantial personal mitigation. I cannot say that she was clearly wrong in finding exceptional circumstances.
69. However, in deciding on the sentence the learned judge took into account item (iv) where she stated:
 

“I consider that (iv) The Public interest in preventing the unlawful possession or use of the subject matter of the charge would be served by the imposition of a lesser sentence”
70. That consideration is provided for in s.30(3)(b) when the court is considering whether a term less than the mandatory minimum is just in all the circumstances. On the facts of this

case it is counter-intuitive that the public interest in preventing the unlawful use of the firearm would be served by the imposition of a lesser sentence. In the absence of reasons under this head it is not possible for an appellate court to determine whether or not a judge exercised his or her discretion properly or at all.

71. The imposition of a fine only was clearly wrong in principle, with the inevitable result that the sentence was too lenient. However, using the correct test, it is not possible to say that the judge was clearly wrong in finding exceptional circumstances

#### **ALEX GUZMAN**

72. The facts briefly are that on Tuesday 25<sup>th</sup> April, 2023, Mr. Guzman proceeded to the JetBlue Counter at the Providenciales International Airport to check in for his flight to the United States. He declared to the Customer Representative that he was in possession of a firearm and ammunition and wanted an authorization from the airline to travel on his return journey to the United States with the firearm. This was in keeping with the circumstances under which he entered the TCI with the firearms as was afforded to him by Delta Airlines. The Defendant was charged with possession of a firearm and ammunition to which he pleaded guilty.
73. The following facts about Guzman's circumstances were not disputed: (i) At the port of embarkation in the United States, the Defendant was granted authorization (though erroneously) by Delta Airline and assured that it was legal for him to travel to Turks and Caicos Islands with the Firearm and Ammunition. (ii) He at no time tried concealing the presence of the firearm and ammunition and upon departure, in good faith, approached JetBlue Airlines to declare the firearm and 17 rounds of ammunition, seeking permission to take them back in the manner he brought them into the TCI. (iii) There was no criminal intent on his part. He admitted being in possession of the firearm for his protection.

#### **THE REASONS FOR THE JUDGE FINDING EXCEPTIONAL CIRCUMSTANCES**

74. The court found exceptional circumstances on the above facts and fined the offender \$3500. The **Avis** questions were not asked nor was consideration given to s.30(3) namely, *“(a) whether the offender has a previous conviction for an offence under the Ordinance, and (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 the lesser sentence”*.

## **OPINION**

75. We are unable to say that the judge was clearly wrong in forming an opinion that there were exceptional circumstances.
76. The judge did not consider all that he ought to have in deciding on the appropriate sentence. In any event even in this case a non-custodial sentence was wrong in principle. However, it is clear that the judge would have had to consider what was the appropriate term in the circumstances.

## **MIKEY WILLIAMS**

77. The brief facts are that on Sunday 16th January 2022, about 1:08 A.M. police officers were off duty at the Chalkies Sports Bar located on South Dock Road, Providenciales, TCI. While in the parking lot, they heard several loud explosions sounding like gun shots. They ran towards the sounds. On their way they saw a male running from the direction where the explosions originated. The male was holding on the right side of his waist what appeared to be a bulky black object. An officer then searched the male and while searching the waist area on the right side, the male pulled out a black handgun and shouted "*Glock 19 hot*". He was arrested for the offence of carrying a suspected unlicensed firearm and cautioned. He made no reply. Eight(8) rounds of 9mm ammunition were found in the magazine to be inserted in the firearm and one (1) round of 9mm ammunition was found in the chamber of the firearm. The police officer informed him of the offences of Carrying Ammunition, cautioned him and arrested him on suspicion of the said offence. He replied



*"The firearm is not mine I saw somebody dropped when they were jumping the fence and I picked it up".*

## OPINION

78. After a plea of guilty the court sentenced him to 3 years imprisonment suspended for 2 years. It was unclear how the learned judge decided that there were exceptional circumstances but this seems to be a case where the learned judge was clearly wrong in finding exceptional circumstances.
79. The judge was therefore wrong not to impose the minimum mandatory sentence. In addition, the Attorney General correctly submitted as determined by this court in the **AG's Reference No.1 of 2017** [2018] TCACA 2 that there is no power under the Suspended Sentence Ordinance CAP 3.04 to suspend the 3 years' sentence. A Suspended Sentence can only be applied to terms of not more than 2 years. Therefore, the sentence was unlawful on that ground also.

## ALEC KEITH NASH

80. The Defendant was a 36-year-old resident of Kentucky in the United States of America. He left his home to fly to TCI to vacation 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.
81. Rather than advising the Defendant that he could not travel to TCI with these items, the representative completed a declaration ticket, which the Defendant signed. The Defendant was then advised that upon arrival in the TCI, he would be required to speak with a representative since he would have to collect his bag from a different area. It was not disputed that the Defendant was in lawful possession of the firearm and ammunition in his home state.
82. The Defendant subsequently entered TCI lawfully via the international airport in Providenciales on an American Airlines flight. 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.

83. The Defendant collected the bag and left the airport. He remained in Providenciales on vacation until 17th July, 2023 (4 days). During this time, the firearm and ammunition were stored in a box in the safe of his hotel room.
84. On 17<sup>th</sup> July 2023, the Defendant went to the international airport in Providenciales 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. He was charged under s.3(1) in relation to possession of an Elite SG 9mm Pistol and under s.3(2) in relation to twenty (20) SIG SAUER 9mm rounds of ammunition and pleaded guilty.

#### **THE REASONS FOR THE JUDGE FINDING EXCEPTIONAL CIRCUMSTANCES**

85. In addition to the self-evident mitigating facts relating to the offence and the offender the learned judge took into account that he purchased the firearm two to three years ago, he was 36 years old with 2 children and declared the firearm throughout his travel. Although some irrelevant matters were taken into consideration, it cannot be said that a finding of exceptional circumstances is clearly wrong.
86. The court imposed a fine using a starting point of \$10,000, and applying the reduction for a guilty plea as a part of the mitigating circumstances.
87. On the question of sentence, the Honourable Attorney General submitted that the starting point at \$10,000 was arbitrary and no credit ought to have been given for the guilty plea in accordance with this Court's decision in **Attorney General's Reference No. 1 of 2017**<sup>13</sup>.

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<sup>13</sup> R v Anthony Clarke Junior; Lavardo Outten and R v Earnest Dolce (AG R 1 of 2017) [2018] TCACA 2.

## **OPINION**

88. In our judgment the Attorney General is right. Furthermore, as pointed out generally the sentence of a fine alone is wrong in principle and therefore unlawful. However, here again, exercising his discretion as to the term of imprisonment in the circumstances could have presented a challenge

## **MICHAEL GRIMM**

89. The undisputed facts were that on 1<sup>st</sup> August, 2023, the Defendant, a resident of Indiana in the United States of America, was at the airport in Providenciales, TCI to board an aircraft to take him to Atlanta, Georgia, United States of America. He was visiting the TCI on vacation. Prior to boarding a Delta Airlines aircraft, his luggage was scanned and items appearing to be rounds of ammunition were detected. A search of his luggage was then conducted and one black magazine containing twenty(20) 9mm hollow point rounds of ammunition was found. Later that day, the Defendant admitted that the magazine and ammunition belonged to him and were in his possession. He pleaded guilty.

## **THE REASONS FOR THE JUDGE FINDING EXCEPTIONAL CIRCUMSTANCES**

90. The Judge considered that the following matters pointed to exceptional circumstances:
- a. The Defendant purchased and possessed the ammunition legally in his home state and has been trained in responsible firearm handling. He has even advised and assisted with the development of responsible and safe training standards for firearms handling for shooting sports clubs at the middle school and high school level.
  - b. At the airport, the Defendant accepted responsibility for the luggage and its content and thereafter co-operated fully with the authorities.
  - c. There was no criminal intent to utilize the ammunition to commit any offence in the Turks and Caicos Islands and, indeed, there was no firearm found with the ammunition. Rather, the Defendant came to the Turks and Caicos Islands as a tourist.
  - d. There was no concealment of the ammunition or attempt to disguise it.

- e. The Defendant is of impeccably good character and volunteers regularly with charitable organizations.
- f. The Defendant has expressed remorse for his actions.

91. The judge also stated that he considered Section 30(3) of the Ordinance which 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 –

- (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.

92. The judge noted that the Defendant had no previous convictions and he was also of the view that 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 than the mandatory minimum.

93. Taking these matters into account, he was of the view that it would be arbitrary and disproportionate to impose the mandatory minimum sentence on the Defendant.

94. He therefore found exceptional circumstances thereby in his view enabling the court to depart from the statutory minimum sentence of twelve years imprisonment.

95. Having found that there were exceptional circumstances and erroneously believing that he was not bound by law to impose a custodial term, he considered what would be the appropriate sentence in these circumstances and referred to the five principal objects of sentencing outlined by Wooding CJ in the case of **Benjamin v R** (1964) 7 WIR 459 namely:

- 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.
96. He then imposed a fine giving credit for an early plea and cooperation with the police among other things and using as a guide sentences that had been passed in recent similar cases at bar.
97. It is noted that in deciding whether there were exceptional circumstances he wrongly took into consideration that Grimm cooperated with the police and other irrelevant matters. He gave no reason for opining that it was just to go below the minimum after giving consideration to s30(3) namely *(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.*

## OPINION

98. It cannot be said that the judge was clearly wrong in forming an opinion that the circumstances were exceptional. Apart from falling into the error of concluding that a custodial sentence ought not to have been imposed on the offender, Selochan J's approach to sentencing at large was in accordance with accepted authorities.
99. However, for the reason given earlier the imposition of the non-custodial sentence was wrong in principle. It remains to be seen how the lower courts will deal the custodial sentences in this type of case.

## DISPOSITION

100. The court takes judicial notice that the use of unlicensed firearms is wreaking havoc by facilitating the explosion of murders and other firearms related crimes in the Turks and Caicos Islands.
101. Apart from the outrage sparked by the public it is having untold adverse effects on important sectors of the nation's economy, like tourism, for example, where because of the gun related crime advisories are being issued by some countries warning their citizens of the dangers of vacationing in the TCI . It is also having an adverse effect on the public order, safety, security and peace of mind of its people. In response and as a means of deterrence the Turks and Caicos Islands Parliament has increased the minimum mandatory sentence for possession of an unlicensed firearm 3 times in the last 13 years, first to 5 years in **the 2010 Ordinance**, then to 7 years in the **2018 Ordinance** and now to 12 years imprisonment in **the 2022 Ordinance**.
102. Parliament could not have made its intention at deterrence clearer. If in the Turks and Caicos Islands a person is convicted of being found in possession of an unlicensed firearm, the offender will receive a term of imprisonment and may have to pay a fine as well.. This provision has broken the mold of a sentence of imprisonment **or** a fine in lieu thereof. The judge may have a discretion over the term of imprisonment imposed and the amount of the fine if he or she finds that there were exceptional circumstances relating to the offender or in relation to the offence, but that the offender must receive a custodial sentence is certain.
103. Parliament has made its intention at sending a message of deterrence clear by removing the power to grant bail from the magistrates and reposing it in the Supreme Court. So notice to the world is given that since 2010 the offender in an unlawful firearms case cannot get bail from a magistrate's court, will serve a term of imprisonment and pay a fine. Unless and until changed that is the law as it presently stands in the Turks and Caicos Islands.
104. We endorse the recommendations made to the TCI authorities by Selochan J. at paragraph 60 and 61 of his judgment in **Nash** in relation to publicising the TCI law in this regard, as well as his warning concerning foreign nationals who visit the TCI as tourists, not to

assume that if they are found in possession of unlawful firearms they will automatically fall into the category of “exceptional circumstances”.

105. The court takes judicial notice that the United States Embassy in The Bahamas in a travel alert for American citizens issued on September 23, 2023 on the internet stated: *“Firearms, ammunition, and other weapons are not permitted in the Turks and Caicos Islands (TCI). TCI authorities strictly enforce all firearms related laws. The penalty for traveling to TCI with a firearm, ammunition, or other weapon is a minimum custodial sentence of twelve (12) years”*.
106. In **Laurensky Lefranc v Regina** (CR-AP 13 of 2019) [2020] TCACA 21 no exceptional circumstances were found by the trial judge. In refusing to interfere with that finding, Mottley P. observed at [32]:

“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 7 count in Attorney General’s Reference (No. 23 of 2009) (R v Merrion) [2010] 1 Cr App. R (S) 70 at p471 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”**. [emphasis added]
107. For the reasons stated the Judges in the subject cases had no jurisdiction to impose non-custodial sentences. Sending a message of deterrence required that any leniency shown when having regard to mitigating circumstances must be reflected in the length of incarceration imposed, however short, and in the quantum, of the fine, however small. All of the sentences which imposed a fine only were wrong in principle and therefore unlawful.

108. The learned judges fell into error by using **R v Aloysius Ebner** CR 45/19 as a precedent when none of the issues occurring in these cases were thoroughly ventilated in that case and the effect of s.30 was not thoroughly considered.
109. For the reasons set out in this Decision **Aloysius Ebner** was wrongly decided.

### **THE ATTORNEY GENERAL’S QUESTIONS**

110. The Attorney General’s Reference of Question Ordinance CAP 2.15 provides at s.3:
- “3. Where a reference is made to the Court of Appeal, the Court is required to:
- a) hear and consider the reference;
  - b) answer each question referred to it; and
  - c) certify to the Attorney General its opinion on each question giving the reasons for each answer”
111. It now remains only to answer the Honourable Attorney General’s questions and to certify this court’s opinion in the context of the facts found and the sentences imposed in **O’Connor; Guzman; Williams; Nash; and Grimm.**

### **THE ATTORNEY GENERAL’S ANSWERS**

**Question 1:** What set of circumstances may be considered exceptional under section 30 of the Firearms Ordinance?

112. Madam Attorney opined that in *Jude Denejour v R* (CR-AP 8 of 2021) [2022] TCACA 9 the matters taken into account were similar to this case and Lobban-Jackson, J found in that case that they did not constitute “exceptional circumstances” with which this court had agreed. Without distinguishing the facts in Denejour she found in O’Connor that the facts constituted exceptional circumstances.



113. It is always arguable whether the facts of any two cases are materially the same because a decision must take into account all of the circumstances. Facts can be so materially similar that without valid reasons given to distinguish the two cases it could appear to create an inconsistency and arbitrariness in the law as to what constitutes “exceptional circumstances”. This would erode public trust and confidence in the judiciary and the judicial system.
114. The conundrum which an appellate court faces lies in the test which governs appellate courts. As Asquith L.J., as he then was, in *Bellenden (formerly Satterthwaite) v. Satterthwaite* [1948] 1 All E.R. 343, said, at p. 345: “... *We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere;*”
115. So on the same material facts it is possible that neither the finding of exceptional circumstances or the opposite finding of no exceptional circumstances could be said to be “clearly wrong”.
116. It is therefore understandable that the Honourable Attorney General would ask this court to lay down, if it can, some general guidelines as to what is capable of constituting exceptional circumstances.
117. In answer to the observation made by Hylton JA all parties agreed that it would be undesirable to set out specific factual circumstances that could be classed as capable of being exceptional circumstances. Without unduly restricting the discretion of the judge the court is at this time unable to identify essential ingredients, as it were, or prerequisites for a certain set of facts to be capable of constituting exceptional circumstances. The Redfern test is a good starting point: “...*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 contained in the TCI constitution which states at

s.3 that “no person shall be subjected to torture, inhuman or degrading treatment or punishment” and similar constitutions whose wording adopts Article 5 of the United Nations Human Rights Convention<sup>14</sup>.

118. The court must continue to rely on the opinion of the first instance judges. In order to maintain consistency and to avoid the appearance of arbitrariness, where facts and circumstances appear to be materially the same as a previous case the judge must give reasons for his or her departure from the earlier opinion in order to distinguish it. While decided appeals on the question of exceptional circumstances are not binding precedents, because of the varied facts that may arise, they can be a strong guide in a particular case to whether or not the facts and circumstances constitute exceptional circumstances. This is evident from the relatively long string of cases from this court cited by the Attorney General in which this court upheld the findings of no exceptional circumstances.
119. It is our opinion that this court ought not to fetter the discretion of the judge at first instance but due regard should be given to the decisions of this court on similar circumstances. The set of circumstances which according to **Rehman** may be considered exceptional would be those which “*if to impose five years’ imprisonment<sup>15</sup> would amount to an arbitrary and disproportionate sentence*” (**Rehman** at [16]). We approve that test. Within the legal framework of the TCI, and considering the obiter statements made in **R v Merrion** and **R v Kelly** earlier, we would take the test for exceptional circumstances to mean “*a set of particular and unusual circumstances that affect the offender or the offence and which in the opinion of the court justify it in not performing its statutory duty of imposing the mandatory minimum sentence. In forming that opinion the court must have regard to the dominant purpose of Parliament in enacting the section*”.
120. The Court hereby certifies to the Attorney General that for the reasons stated its opinion on Question 1 is that this court should not fetter the discretion of the judge by setting out

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<sup>14</sup> See the full discussion in *Aubeeluck v The State of Mauritius* [2010] UKPC 13 which also discussed among other authorities *Reyes v R* - Privy Council Appeal No. 64 of 2001 cited by Mr. Smith K.C

<sup>15</sup> or the minimum mandatory sentence.

a set of circumstances which may be considered exceptional or capable of being exceptional under s. 30. Instead, the judge should exercise his or her discretion applying the test set out above in this answer .

**Question 2:** Are the circumstances in **O'Connor; Guzman; Williams; Nash** and **Grimm** indeed exceptional?

121. The court in each case gave its judgment above on the correctness of the opinion of the trial judges in their finding of exceptional circumstances. Except for Williams where in our opinion the judge was clearly wrong in assessing exceptional circumstances, on the facts given and having regard to the constraints of an appellate court, in none of the cases could it be said that the judge was clearly wrong.
122. For the above reasons with the exception of **Williams** we certify that it is our opinion on the facts presented and the authorities we cannot say that the judges were clearly wrong in forming the opinion that there were exceptional circumstances. Once the judge has exercised his discretion and has done so properly, it is not within this court's remit to make its own determination of whether the circumstances were exceptional except within the parameters laid down by the authorities.

**Question 3:** Where exceptional circumstances are properly found to exist, what sentence under section 3(3) of the Firearms Ordinance, is the Court empowered to impose as proportionate to the exceptional circumstances found, and consistent with the dominant purpose or intent of the Legislature?

123. As provided by **the 2022 Ordinance** section 3(3) requires the court to impose both a sentence of imprisonment **and** a fine even if it finds that there are exceptional circumstances. Proportionality consistent with the exceptional circumstances and the dominant purpose of Parliament in enacting the section can be reflected in the length of the term and the quantum of the fine.

124. However, in our judgment judges must give their reasons for the reduced sentence imposed. If reasons are not given an appellate court may not have sufficient material on which to determine whether or not the judge was clearly wrong in imposing the lighter sentence. An example is s.30(3)(b). When weighed against the dominant purpose of the section, because of the apparent inherent improbability of circumstances satisfying that subsection, a mere statement by the judge that he or she considered that subsection is not enough for the court to make a judgment of whether the judge was clearly wrong in imposing the lighter sentence.
125. For the reasons stated we certify that in our opinion where exceptional circumstances exist the court has no jurisdiction to impose a non-custodial sentence. It can impose a custodial sentence for a term **and** a fine in a quantum that is fair and just in the circumstances, consistent with the exceptional circumstances and having regard to the dominant purpose of Parliament in enacting the section. However, it must give its reasons for so doing so including a reduction under s.30(3) b.

**Question 4:** Were the sentences imposed in **O Connor; Guzman; Williams; Nash and Grimm** lawful and even if lawful, were they unduly lenient?

126. Where non-custodial sentences were imposed it was wrong in principle because the Judge had no jurisdiction to impose such a sentence. They were therefore unlawful and unduly lenient. In the case of **Williams** the sentence was also unlawful because it purported to suspend a part of a 3 year sentence when on the authority of this court<sup>16</sup> suspension can only apply if the sentence is “*not more than 2 years*”<sup>17</sup>.
127. For the above reasons we certify that in our opinion all of the non-custodial sentences imposed were unlawful and therefore unduly lenient, and the custodial sentence imposed in

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<sup>16</sup> Attorney General’s Reference No. 1 of 2017.

<sup>17</sup> Section 3(1) of the Suspended Sentencing Ordinance CAP 3.04.

**Williams** was unduly lenient because in our opinion the finding of exceptional circumstances was clearly wrong.

29<sup>th</sup> February, 2024

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Adderley, JA, President (Ag)

I agree

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Cornelius-Thorne, JA



I also agree

Hylton KC, JA