



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

**CR 21 / 2022**

**BETWEEN:**

**Rex  
and  
Gino Bernadin**

**BEFORE:                   The Honourable Mr. Justice Davidson Kelvin Baptiste (Ag)**

**APPEARANCES:   Dr. Finbar Grant for Gino Bernadin  
                          Ms. Alexis and Mrs. Sophia Sandy - Smith for the Crown**

**Heard:                   12<sup>th</sup> May 2023**

**Delivered:           17<sup>th</sup> May 2023**



**SENTENCING REMARKS**

1. **Baptiste J (Ag.):** Gino Bernadin falls to be sentenced consequent upon a unanimous verdict of guilt by a jury of his peers for the offences of carrying a firearm and ammunition contrary to section 3 (1) and 3 (2) of the Firearms Ordinance of the Turks and Caicos

Islands. In terms of penalty, in so far as is material, sub-section 3 of section 3 imposes a term of imprisonment of not less than 7 years for these offences. Subsection 2 of section 30 provides that the court shall impose a term of imprisonment of at least the required mandatory minimum, unless it is of the opinion that there are exceptional circumstances relating to the offence or the person convicted of the offence which justify it in not doing so.

2. Dr. Grant, Bernadin's counsel, advocates in favour of the existence of exceptional circumstances relating to the offence and the offender and accordingly invites the court to dis-apply the mandatory minimum sentence on the bases that seven years imprisonment would be arbitrary and disproportionate as well as violative of the constitution. Dr. Grant commends the guidelines in **R v Nancarrow** [2019] EWCA Crim 470 and **R v Avis** [1998] 2 Cr App (S) 178 to the court and submits that in applying these guidelines to the circumstances of the offence and the offender, the court will find that there are exceptional circumstances.
3. The Crown contends in favour of the imposition of the mandatory minimum sentence. The contention is predicated upon, in its view, the absence of exceptional circumstances relating to the offence or the offender warranting a departure from the mandatory minimum sentence of seven years.
4. The legal principles pertaining to a mandatory minimum sentence are well-established. In **R v Rehman**; **R v Woods** [2006] 1 Cr.App.R (S) 77, [2005] EWCA Crim 2056, the Lord Chief Justice noted that the purpose of the statutory provision was to ensure that, absent exceptional circumstances the court would always impose a deterrent sentence. Likewise, in **Regina v Bartell** [2020] EWCA Crim 625 at paragraph [23], the court stated that the statutory purpose underlying the statutory mandatory minimum is deterrence: to prevent firearms coming into the hands of criminals who will deploy them in the course of committing the most serious crimes, example murder and robbery.

5. In **R v Nuncarrow** (supra), the court set out a number of points at paragraph [19] in deciding whether to impose a mandatory minimum sentence of five years where section 51 A (2) of the Firearms Act 1968 - the kindred English provision - applied:

- (1) The purpose of a mandatory minimum is to act as a deterrent.
- (2) Circumstances are exceptional if the imposition of a mandatory minimum would be arbitrary and disproportionate.
- (3) It is important that the courts do not undermine the intention of Parliament by accepting too readily that the circumstances of a particular offence or offender are exceptional.
- (4) In order to justify the dis-application of the 5-year minimum, the circumstances of the case must be truly exceptional. The court should take a holistic approach and consider whether the collective impact of all the relevant circumstances make the case exceptional.
- (5) The court should always have regard to the four questions set out in **R v Avis**, namely: what sort of weapon was involved? What use, if any, was made of it? With what intention did the offender possess it? What is the offender's record?
- (6) The circumstances of the offender are important. It would be relevant, for example, if the offender were unfit to serve a five-year sentence or if such a sentence might have a significantly adverse effect on his health.
- (7) Each case is fact - specific and limited assistance will be gained from referring the court to decisions in cases materially identical.

6. Delivering the judgment of the court in **Regina v Peers** [2021] EWCA Crim 1677, Lord Justice Coulson noted at paragraph [14]:

“There is a considerable body of reported cases dealing with what may or may not comprise exceptional circumstances for the purpose of this legislation. In summary those cases make it plain that exceptional circumstances mean precisely that, and that it will be a rare case in which that high hurdle is surmounted.”

The legislation in question was the Firearms Act 1968 for which Parliament prescribed a minimum term of five years for possession of an illegal firearm, contrary to section 5 (1) A of the said Act by operation of section 51 A thereof.

7. In **R v Edwards** [2007] 1 Cr. App R (S) 111, the court emphasised that strong personal mitigation on its own was unlikely to be sufficient to amount to exceptional circumstances. “That was because it were so, there would be a risk that those looking for a safe haven to harbor dangerous firearms would target those whose personal circumstances might excite the sympathies of the court. If that exercise were successful, it would undermine the very policy of the minimum term”; (**Peers** at paragraph [18]).

8. In **R v Bartell** (supra) the court stated at paragraph [27]:

“Ultimately the test would be whether the imposition of the minimum sentence would lead to a sentence that is arbitrary or disproportionate. However, the answer to that question must be considered in the light of the clear statutory intent that the offences to which section 51A apply must be met with strong deterrent sentences. This will mean that in some cases the sentence will be a harsh sentence and may appear particularly so where the offender has pleaded guilty.”

9. In making a determination as to whether exceptional circumstances exist, the court is enjoined to consider the circumstances of the offence and the offender. In the present case,

the circumstances of the offence are within narrow confines. The police, acting on intelligence, intercepted a car driven by Bernadin. Bernadin who was armed with a 9 mm firearm, tossed it away but the police retrieved it.

10. In explaining his possession of the firearm, Bernadin's evidence was that around 11:30 pm on 14<sup>th</sup> May 2022, while on a first date with a female friend, he drove to a bar in Five Cays where they had a few drinks. Before leaving, he responded to a "call of nature" (urinary) by repairing to the side of the bar. While relieving himself he noticed something shiny, partly covered with leaves, which aroused his curiosity. In satisfaction of that curiosity, he removed the leaves, saw a gun and picked it up. Acutely aware of the gun violence plaguing the community, he decided to do "an act of justice" by removing the gun and taking it out to avoid the weapon being found by the youth or potential criminals.
11. Having seen the press conference given by the Commissioner of Police on 8<sup>th</sup> April 2022 in which he pled for persons to turn in firearms, and in light of the extension of an amnesty, he decided to take the gun to the Grace Bay Police Station, which he said was the only one opened at the time. On leaving the bar, a young male asked him for a ride to Grace Bay to the Shisha lounge. He obliged. Grace Bay Police station was just across the street from the lounge and one had to pass the lounge before getting to the police station. He and the young man went inside the lounge to have drinks. On returning to the car soon after, the police intercepted him in the car and arrested and charged him for the offences.
12. Dr. Grant contends that the circumstances are exceptional. The weapon was found at a bar and Bernadin removed it with intent to take it to the police station, as he did not want it to fall into the wrong hands and end up being used for violence. When he was stopped by the police he was just across the street from the police station. He had made one stop and that was to drop a friend to Shisha Lounge. Bernadin had the gun for about half an hour. The Crown did not dispute or challenge Bernadin's case that he had the gun for that time period or that he found it at the bar. In the circumstances imposing the mandatory minimum sentence would be hash. In Dr. Grant's view, imposing a sentence that is less than the mandatory minimum would not undermine the intention of parliament. Bernadin's intent

in carrying the firearm was the same as that of parliament, to get it off the street away from being accessible to criminal elements.

13. With respect to the circumstances of the offender, Bernadin is 27 years old and was employed at the time of his arrest. He has been in a stable relationship since 2018 and provided financial support to his five-year-old son prior to arrest. Dr. Grant states that Bernadin was involved in a very serious motorbike accident and spent three months in hospital. He developed post-traumatic stress syndrome, has difficulty sleeping and is on medication, and would be severely affected by prolonged incarceration. It is noteworthy that no medical report or evidence has been furnished to the court in respect of Bernadin's health. Dr. Grant submits that the personal circumstances of Bernadin were exceptional and merited a sentence less than the mandatory minimum.
14. In respect of the questions posed in **R v Avis**, Dr. Grant points out that the weapon involved was an unloaded 9 mm firearm. There was no suggestion or evidence that the gun or ammunition was being transported to others who may have put it to criminal use. Further no suggestion that Bernadin intended to use them for a criminal purpose of his own; or that he was associated with persons with a criminal record or that he was part of or associated with a gang or any gang member. There was no victim or any negative community impact. In his youth, Bernadin had committed unrelated offences that were dealt with in the Magistrate's Court and given their nature he was subject to probation.
15. Dr. Grant asserts that the present case is akin to **R v Harrison (Raymond)** [2006] EWCA Crim 345. In Harrison, the Court of Appeal came to a different conclusion to the trial judge on the issue of exceptional circumstances. The trial judge had imposed the mandatory minimum sentence of five years. The Court of Appeal found that looking at the case as a whole, there were exceptional circumstances which allowed the court to disapply the mandatory minimum sentence. The Court of Appeal stated that the learned judge misdirected himself by focusing on one factor, the nature of the weapon rather than taking an overall view of all the relevant aspects, including the way in which the appellant initially

came into possession of the gun, how long he had it, what he had done with it and what he intended to do with it. The Court quashed the mandatory minimum sentence of five years and substituted 2 years, which properly represented the culpability of the appellant in the way he chose to deal with the firearm.

16. The Crown posits that **Lawrence Forbes v Regina** CR-AP 5 of 2019; [2020] TCACC 8 is on all fours with Bernadin's case. A jury found Forbes guilty of carrying a firearm and ammunition. He appealed the mandatory seven years imprisonment imposed by the Chief Justice on the ground that the Chief Justice wrongly rejected his assertion that there were exceptional circumstances which would have allowed the imposition of a sentence of less than seven years.
17. The Court of Appeal upheld the decision of the Chief Justice that there were no exceptional circumstances. The Court of Appeal noted that the Chief Justice pointed to the fact that the appellant was carrying a short gun at 11:00 pm, and was entitled to reject his explanation that he was taking the gun to the police. The evidence showed that at the time of his arrest, Forbes was walking in a direction away from the police station. When confronted by the police, he did not surrender the gun to the police but ran away before disposing of it. This also called into question his explanation.
18. The Crown also referred to **Reference by the Attorney General Under S.36 of the Criminal Justice Act 1988 and Another v Michael John Cook** [2017] EWCA Crim 1200. Cook was a collector who had accumulated guns over a number of years. He knew that the firearms were illegal and intended to hand them over at the next police amnesty. He was of good character and the sentencing judge found that there were exceptional circumstances. The appeal court disagreed and held that the circumstances of the case were not exceptional either in relation to the offence or the offender and the judge was clearly wrong to have found exceptional circumstances. Cook had a legitimate interest in firearms and had no intention to use them for any illegal purpose. However, the weapons had been acquired on numerous occasions over a number of years, were kept insecurely and there

was a real risk of it falling into the wrong hands. The available mitigation fell well short of exceptional circumstances.

19. In **Regina v Bartell** (supra) at paragraph 16 Lord Justice Simon stated:

“The judge found that there were exceptional circumstances although the case remained a serious one bearing in mind the factors set out in *Avis*. The weapons were genuine and there were relevant previous convictions and the weapons were not secured properly.”

The Court of Appeal found that there was nothing exceptional in either the offence or the offender.

20. Finally, the Crown submits that the intention of a defendant to make or not make use of a firearm has held little weight in the finding of exceptionality. This submission commends itself to this court.

21. The determination of facts relevant to the sentencing of an offender is a routine function of judges in the administration of criminal justice. As Callinan J stated in **Cheung v R** [2001] HCA 67 at paragraph [162]:

“It is the duty of the judge to determine the facts relevant to sentencing not found by the jury. Some of these facts will have emerged in evidence at the trial: others may only emerge in the course of the sentencing process. It is upon the basis of the offence proved, the factual elements of it necessarily found by the jury in reaching its verdict, and other relevant facts found by the trial judge, that the trial judge will exercise his or her sentencing discretion.”

At paragraph [163] Callinan J said:

“The principal constraint upon the power and duty of a sentencing judge to find “the sentencing facts” is that the view of the facts taken by the judge cannot be



inconsistent with the verdict of the jury. This may mean that the view of the facts which the judge is obliged to take on sentence might be different from the view that the judge would have taken if unconstrained by the verdict. The fact that a judge may not agree with a jury's verdict and may be required to sentence on a basis different from his or her strongly held view of the case simply follows from the division of function in a trial by jury."

22. In **King v Regina** [2017] EWCA Crim 128, Mr. Justice Sweeney stated at paragraph [31]:

"[T]he correct approach by the judge, after a trial, to the determination of the factual basis upon which to pass sentence, is clear. If there is only one possible interpretation of the jury's verdict, then the judge must sentence on that basis. When there is more than one possible interpretation, then the judge must make up his own mind to the criminal standard, as to the factual basis upon which to pass sentence. If there is more than one possible interpretation, and he is not sure of any of them, then (in accordance with basic fairness) he is obliged to pass sentence on the basis of the interpretation (whether in whole or in relevant part) most favourable to the defendant."

23. As the sentencing judge, it is my duty to determine the facts relevant to sentencing. The Crown's case was ventilated before the jury, so also was Bernadin's case. I note that Bernadin gave evidence on oath and was subject to cross-examination by Ms. Alexis. I also recognise that my view of the facts must be consistent with the verdict of the jury. In my view, there was only one possible interpretation of the jury's verdict. A complete rejection of Bernadin's case. The jury returned a unanimous verdict of guilty of both counts.

24. I have to consider whether the circumstances of the offence and the offender, viewed cumulatively, were truly exceptional, and be mindful of the statutory purpose – deterrence, underlying mandatory minimum sentences. Conscious also of the caveat against the court undermining the intention of parliament by accepting too readily in cases of this kind, the circumstances of a particular offence or offender are exceptional. The ultimate test would

be whether the imposition of the mandatory minimum would lead to a sentence that is arbitrary or disproportionate. The answer to that question must be considered in the light of the clear statutory intent that the offences to which the section applies must be met with strong deterrent sentences: paragraph [27] of **Regina v Bartell** (supra).

25. Bernadin was found with a 9 mm firearm with ammunition very late at night, when the police intercepted a car he was driving. While accepting that no use was made of the firearm, it was operational. The circumstances under which Bernadin said he found the firearm were very suspicious. I have no doubt that the jury rejected his evidence as being untrue. Further, in my judgment, he had no intention to deliver the gun to the police station. His actions certainly belied any such intention. If he were so concerned about getting the gun off the street to prevent it from falling into the hands of criminals, he surely would have shown more expedition in executing that objective, in order to get the gun to the police. Stopping at a bar to have drinks, irrespective to how far or close the bar was from the Grace Bay Police station, was an act hardly consistent with seriousness on his part and the intention he enunciated of delivering the firearm to the police station. This was further compounded by his act of tossing the gun away when he was intercepted by the police.
26. The circumstances of the present case, looked at as a whole, were not exceptional, either in relation to the offence, or the offender, so as to warrant a sentence less than the mandatory minimum of seven years imprisonment.
27. The order of the court is that Gino Bernadin is sentenced to seven years imprisonment on each count. The sentences are to run concurrently. The time he has spent on remand is to be deducted from the seven years.

**The Hon. Mr. Justice Davidson Kelvin Baptiste**  
**Judge (Ag) of The Supreme Court.**

