



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

CR 38/23

BETWEEN:

REX

Vs.

MICHAEL ALLAN GRIM

REASONS

Before: The Hon. Mr. Justice Chris Selochan

Appearances: Crown: Mr. Clement Joseph (in person)
(Ms. Nayasha Hatmin unable to attend)
Defence: Mr. Oliver Smith KC (Via MS Teams)
Ms. Kimone Tennant (in person)
Defendant present in person.

Hearing Date: 13th September, 2023

Venue: Court Room #1, Supreme Court, Providenciales

Handed Down: 18th September, 2023

BACKGROUND

1. On Wednesday 9th August, 2023, the Defendant, Michael Allan Grim, was charged with the offence of Possession of Ammunition, contrary to section 3(1) of the Firearms Ordinance, Chapter 18:09. The Defendant had been detained by the police on Tuesday 1st August 2023 and was released on police bail on 3rd August, 2023 pending further investigation. He was granted bail by the court on Friday 11th August, 2023.
2. The undisputed facts are that on Tuesday 1st August, 2023, the Defendant, a resident of Indiana in the United States of America, was at the airport in Providenciales, Turks and Caicos Islands, to board an aircraft to take him to Atlanta, Georgia, United States of America. He was visiting the Turks and Caicos Islands 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 was interviewed by the police and he admitted that the magazine and ammunition belonged to him and were in his possession.
3. The Defendant then applied for an expedited hearing in this matter in order to enter a guilty plea, and the application came up for hearing before this court on 6th September, 2023. There were no objections to the application by the Crown. By this date, Defence counsel had already filed submissions on Sentencing. At the hearing on 6th September 2023 I gave counsel for the Defence an opportunity to supplement

his submissions if he so desired and also gave directions for Submissions by the Crown on the issue of Sentencing.

4. As such, on 6th September 2023 this Court granted the application for an expedited hearing, making the following Orders:

- a. The matter is hereby deemed fit for an expedited hearing.*
- b. The Court finds that the Sufficiency Bundle relied on by the prosecution has disclosed sufficient evidence to establish a prima facie case that an indictable offence has been committed and to require the Defendant to stand trial.*
- c. Defence to file Supplemental Submissions by 4:00 p.m. on Thursday 7th September 2023.*
- d. Submissions to be filed by the Crown by Monday 11th September 2023.*
- e. The matter is adjourned to 13th September 2023 for Arraignment and plea.*
- f. Bail is to continue for the Defendant on the same terms and conditions.*

5. On 13th September, 2023 the Defendant pleaded guilty to the offence of Possession of Ammunition, being the sole count of an Information which read as follows:

STATEMENT OF OFFENCE

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

PARTICULARS OF OFFENCE

That you Michael Allan Grim, on Tuesday the 1st day of August 2023, at the Howard Hamilton International Airport, Turks and Caicos Islands, did have in your possession,

twenty (20) Rounds of ammunition not being the holder of a licence for a firearm which takes that ammunition.

PRELIMINARY POINT

6. At a preliminary stage of the proceedings, on 6th September, 2023, the court expressed a concern about whether the Defendant's proposed guilty plea would be unambiguous and therefore amount to him accepting all elements of the offence. The concern stemmed from the fact that in his interview (which was part of the Prosecution's case and not disputed by the Defence), the Defendant had stated, inter alia, that he had checked his bag before flying and could not say what could have caused him to travel with a magazine and twenty (20) rounds of ammunition. He had further stated that he had packed his luggage but had not come up with the rounds of ammunition before he left.
7. In addition, at paragraph 3 of his Submissions filed in support of his Plea in Mitigation, counsel for the Defendant, Mr. Oliver Smith KC, had stated that the Defendant maintained that he was not aware that ammunition was in his luggage and that he did not intend to travel with the ammunition, despite accepting that the ammunition belonged to him.
8. On the face of the interview given by the Defendant and the Submissions filed by counsel for the Defendant, it appeared to the Court that whilst the Defendant was acknowledging that he had custody and control of the luggage, there was an absence on his part of knowledge of the items being there, with a suggestion that they may have been placed there without the Defendant's knowledge.

9. In *Lewis v Commissioner of Police*¹, it was held that a plea of guilty must be unambiguous and that if a plea of guilty is entered accompanied by an explanation which amounts to a defence, the court is obligated to enter a plea of 'Not Guilty'. In finding that the magistrate had erred in accepting the plea of guilty, St. Bernard J said²:

"In our opinion the explanation given by the appellant amounted to a plea of not guilty and the magistrate should have entered such a plea and proceeded to try the case. Instead the magistrate said he believed the facts stated by the prosecuting officer, convicted the appellant and sentenced him to four months' imprisonment."

10. In his Submission to the court, lead counsel for the Crown, Mr. Clement Joseph, echoed the court's concern about whether a plea of guilty should be accepted in these circumstances.
11. The court brought this concern to the attention of counsel for the Defendant, who, upon receiving further instructions, stated unambiguously that the Defendant was not disputing that he had knowledge of the items, and withdrew the aspects of his submission that suggested an absence of knowledge. Mr. Smith KC also indicated that his further instructions were that the Defendant, upon reflection, had recalled that he had placed the items in the luggage.
12. In these circumstances, the Court was satisfied that the Defendant's plea of guilty was an unambiguous acceptance of all elements of the offence contained in the Information and could be accepted.

¹ (1969) 13 WIR 186

² at page 187 paragraph B

THE LAW

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

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

Section 3(4) of the Ordinance provides:

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

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

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

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

Section 30(4) of the Ordinance provides:

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

- (a) *whether the person pleaded guilty to the offence; or*
- (b) *whether the person materially assisted in the investigation of the offence.*

SUBMISSIONS ON BEHALF OF THE DEFENDANT

15. The essence of the Submissions on behalf of the Defendant was that the court should find that there were exceptional circumstances and therefore depart from the statutory minimum sentence. It was also contended that a custodial sentence should not be imposed.
16. Counsel for the Defendant, at paragraph 9 of his Submission, referred to certain principles which emerged in the case of *R v Zakir and Rehman and Gary Dominic Wood*³ where the Appellants had appealed maximum mandatory sentences of five (5) years which had been imposed on them after convictions under section 51A(2) of the Firearms Act 1968. These principles can be summarized as follows:
- i. Mandatory minimum sentences are deterrent 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.
 - ii. If an offender has no idea that he is doing anything wrong, a deterrent sentence will have no deterrent effect upon him.
 - iii. Circumstances are exceptional if it would mean that to impose the mandatory minimum sentence would result in an arbitrary and disproportionate sentence.

³ (2006) 1 Cr. App. R 77

- iv. In determining whether the circumstances of a particular case are exceptional, a holistic approach is needed as opposed to looking at each circumstance separately and concluding that it does not amount to an exceptional circumstance.

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

- a. The Defendant pleaded guilty at the first available opportunity and co-operated with the authorities. Whilst counsel has acknowledged that these matters have been specifically excluded by the legislation in consideration of what amounts to exceptional circumstances, they should, in his submission, form part of the holistic or overall view.
- b. At the airport, the Defendant accepted responsibility for the luggage and its contents.
- c. The Defendant purchased and possessed the ammunition legally in his home state.
- d. There was no criminal intent to commit any offence by the Defendant and there was no possession for a criminal purpose.
- e. There was no concealment of the ammunition or attempt to disguise it. Reference was made in this regard to the case of *R v Piot Jan Leboda*⁴ in which this factor was considered and a suspended sentence of eight (8) months was eventually ordered.
- f. The Defendant is of impeccably good character.
- g. The Defendant has expressed remorse for his actions.

⁴ [2016] EWCA Crim 1756

18. Counsel for the Defendant presented a plethora of authorities from jurisdictions in the Caribbean (the Turks and Caicos Islands, the United Kingdom, Bermuda, the Cayman Islands and Jamaica) where visitors to these islands who were found to be in possession of firearms and/or ammunition which they had lawfully acquired in their home countries were, upon pleading guilty, granted non-custodial sentences. Amongst the cases cited were four from this jurisdiction: *R v Aloysius Ebner*⁵, *R v David O'Connor*⁶, *R v Alex Guzman*⁷ and *R v Alec Keith Nash*⁸, the latter of which was a decision of this court.
19. It was also contended that the factual matrix in this case was very similar to *R v David O'Connor (supra)* in which the court had issued a non-custodial sentence.
20. Mr. Smith KC concluded by submitting that the imposition of a modest fine or a suspended sentence would do justice in this case.

SUBMISSIONS ON BEHALF OF THE CROWN

21. A large portion of the Crown's Submission was a repetition of what was submitted in *R v Alec Keith Nash (supra)*, a case which this court had sentenced in on 13th August 2023. Essentially, the Crown's submission is that the mandatory minimum sentence should be imposed because the factual matrix does not fall within the ambit of exceptional circumstances, but that, in the event that the court finds that there are exceptional circumstances, a custodial sentence less than the mandatory minimum should be imposed.

⁵ CR 45/2019

⁶ (CR12/2023)

⁷ CR 20/23

⁸ CR 31/2023

22. The Court means no disrespect to Crown counsel by saying that it will not delve into any analysis of the issue of whether there is an obligation on the part of the court to impose a custodial sentence where exceptional circumstances are found, since this was addressed at length in the recent judgment in *R v Alec Keith Nash (supra)* where this court found that where there are exceptional circumstances, the sentence will be at large and the court will therefore be at liberty to impose a non-custodial sentence. I had gone on to say as follows at paragraph 41 of my decision in that matter:

"In arriving at this conclusion, I find myself in agreement with what was held by then Chief Justice Ramsey-Hale in R v Aloysius Ebner CR 45/19 (at paragraph 28 of the Sentence Note) that where there are exceptional circumstances, the sentence will be at large, thereby enabling the court to impose a non-custodial sentence where the circumstances so merit. This was also the approach adopted by the court in the recent matters of O'Connor and Guzman."

23. Lead counsel for the Crown, Mr. Clement Joseph, also pointed out that there were material differences between *Guzman* and *Nash* and the instant case in that in those matters the Defendant had voluntarily declared the firearm and ammunition to the authorities and they had brought the firearms and ammunition into the Turks and Caicos Islands on the advice and acquiescence of the airlines. However, in this case, the Defendant did not declare the ammunition but rather it was discovered in his luggage when it was screened during a security check.

24. In support of his argument that there are no exceptional circumstances, counsel for the Crown referred to the decision in *R v Smith (Shaun Daniel)*⁹ where the court found no exceptional circumstances where the Appellant was a paraplegic and had married into a gangster family, was offered police protection, was informed by the police of a 'hit' on his life, had a firearm discharged at him, and was advised to wear a bulletproof vest by the police. He was later found to possess a firearm and ammunition without a licence and was convicted and sentenced to the mandatory minimum of five years imprisonment on each count to run concurrently, a sentence which was upheld by the Court of Appeal.
25. Counsel for the Crown also made reference to the case of *Laurensky Lefranc v R*¹⁰, where the Court of Appeal refused to interfere with the finding of the trial judge that there were no exceptional circumstances. He quoted what Mottley P. said in the Court of Appeal:

"The Court finds it necessary to repeat what was said in paras 89 and 90 of the judgment of Jim Kelly Joseph v R, CR-AP 18/18 where the Court said: [89] The Court must have regard to the observation of Thomas LJ (as he then was) when giving the judgment of the court in Attorney General's Reference (No. 23 of 2009) (R v Merrion) [2010] 1 Cr App. R (S) 70 at p 471 at [15]:

"Those who contravene the Firearms Act must, for the good of society, whatever the consequences are to their family, expect to receive the minimum sentence from Parliament. Judges must not feel sorrow or sympathy for any offender. The protection of the public demands nothing less than the imposition of minimum sentences. It is only in exceptional circumstances of the kind that have occurred in this case, rare as it is, that the court can exercise a degree of mercy."

⁹ (2007) WL 1685269

¹⁰ CR-AP 13/2019 [2020] TCACA 21

26. The Crown also made reference to the cases of *R v Evans*¹¹ and *R v Zakir and Rehman and Gary Dominic Wood* (supra), which have both been examined in the Court's Analysis below.

27. Counsel for the Crown also relied on the following extract from the judgment of the Court of Appeal of the Turks and Caicos Islands in *T-Jon Xavier v R*¹² where the mandatory minimum sentence was affirmed:

"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."

ANALYSIS OF THE COURT

Exceptional Circumstances

28. In examining whether the factual matrix of this matter falls within the realm of "exceptional circumstances", reference is made to the following authorities (the first two and the last from the Turks and Caicos Islands and the others from the United Kingdom):

a. In *R v Gino Bernadin*, Baptiste J (Ag) said:

*"In making a determination as to whether exceptional circumstances exist, the court is enjoined to consider the circumstances of the offence and the offender..."*¹³

¹¹ [2006] All ER (D) 387 (Mar)

¹² CR 11/2019 at paragraph 26

¹³ CR 21/22 at paragraph 9

- b. In *R v Aloysius Ebner (supra)*, then Chief Justice Ramsey-Hale found exceptional circumstances where the Defendant, a 73-year-old decorated US Marine, a Navy seal and gun collector, who was on 80 percent disability, was in his vessel which had run aground on an uninhabited cay with 7 pistols, a shotgun and 8000 rounds of ammunition. The court took into account the fact that he had lawfully acquired the firearms and ammunition in the United States and that there was no criminal intent.
- c. In *R v Merrion (Desmond Peter) (A-G Ref: 23 of 2009)*¹⁴, the Court of Appeal treated the fact that one of the children of the Defendant was suffering from a very aggressive illness which had put immense pressure on his family as an exceptional circumstance which merited the reduction of the sentence to three years from the mandatory minimum of five years. The Court of Appeal said at paragraphs 13 and 14:

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

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

¹⁴ [2009] EWACrim 1683

d. In *R v Nancarrow (Sean)* ¹⁵, the Court, at paragraphs 18 to 19, examined sections 51A(2) of the Firearms Act 1968 which provided for a mandatory minimum term of five years' imprisonment for an adult offender convicted under section 51(A)(a) of possession, acquisition, selling or transfer of a firearm which is disguised as another object unless exceptional circumstances exist. The Court looked at the principles which are applicable to determining whether exceptional circumstances arise:

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

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

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

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

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

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

¹⁵ [2019] EWCA Crim 470

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

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

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

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

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

- e. In *R v Evans*¹⁶, the Defendant purchased a firearm thinking that it was a replica. At paragraphs 12 to 15 of its judgment, the Court considered whether the case fell within the ambit of "exceptional circumstances":

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

¹⁶ [2006] EWCA Crim 87

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

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

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

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

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

f. In *R v Rehman; R v Wood*¹⁷ the Defendant was sentenced to five years imprisonment, being the minimum sentence required by the legislation, because the judge considered that there were no exceptional circumstances. The Court of Appeal summarized the facts at paragraph 19 of its judgment:

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

The Court found, at paragraph 30, that the judge was wrong to conclude that exceptional circumstances did not arise, and that regard should have been had to

¹⁷ [2005] EWCA Crim 2056

the Defendant's background, the fact that he had no knowledge of the unlawfulness of the weapon, as well as his antecedents. Whilst not identifying one particular circumstance, the Court, at paragraph 30 of its judgment, formed the view that taking into account all the matters relied upon by the Defendant, the case fell "on the right side of the line":

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

"(1) he pleaded guilty at the first opportunity;

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

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

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

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

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

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

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

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

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

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

(g) furthermore, the Appellant was not aware that the replica weapon was capable of being converted until he was told so in the interview following his arrest. It was obvious from the fact that the replica weapon was accompanied by oil and a cleaning

brush that it was more than merely a model; nevertheless, the Appellant was not aware of its capacity for conversion."

*In our view the circumstances collectively make it possible to come to the conclusion that this is a case where the court was not required to impose the minimum term."*¹⁸

g. In *R v O'Connor*¹⁹, Loban Jackson J, in finding that there were exceptional circumstances, adopted the holistic approach outlined in *R v Rehman and Wood (supra)*.

29. I have considered the matters advanced by Mr. Smith KC on behalf of the Defendant which he has contended amount to exceptional circumstances. I have also considered the arguments advanced by Mr. Joseph on behalf of the Crown that exceptional circumstances do not arise in this matter.

30. I note that I am required to look at the circumstances collectively in order to arrive at a holistic view of the matter.

31. I consider that the following matters point to exceptional circumstances in this matter:

- 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.

¹⁹ CR 12/2023 at paragraph 24

- 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.

32. I have also 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.*

33. I have noted that the Defendant has no previous convictions and am 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.

34. Taking these matters into account, I am of the view that in this matter, it would be arbitrary and disproportionate to impose the mandatory minimum sentence on the Defendant.

35. I therefore find that this case falls “on the right side of the line” as constituting exceptional circumstances, thereby enabling the court to depart from the statutory minimum sentence of twelve years imprisonment.

THE SENTENCE

36. Having found that there are exceptional circumstances, the sentence is now at large and therefore entirely within the discretion of the court. I now proceed to consider what would be the appropriate sentence in these circumstances.

37. The first matter which must be determined is whether a custodial sentence of less than the statutory mandatory minimum of twelve years is merited or a fine or other non-custodial sentence is more appropriate.

38. I have considered the following recent sentences imposed in somewhat similar matters already referenced, where the court found that there were exceptional circumstances:

- a. In *R v Aloysius Ebner*, the Defendant was fined \$20,000 or 12 months’ imprisonment.
- b. In *R v O’Connor*, the Defendant was, on 16th May 2023, ordered to pay a fine of \$5,670 or 90 days’ imprisonment after pleading guilty to possession of a firearm and 44 rounds of ammunition.

- c. In *R v Guzman*, the Defendant was, on 5th June 2023, ordered to pay a fine of \$3,500 or 60 days' imprisonment after pleading guilty to possession of a firearm and 15 rounds of ammunition.
 - d. In *R v Alec Keith Nash*, a decision of this court, the Defendant was, on 11th August 2023 ordered to pay a forthwith fine of \$5,000 or 60 days' imprisonment in default for being in possession of a firearm and twenty (20) rounds of ammunition.
39. Apart from these authorities, counsel for the Defendant has, as previously stated, also submitted various authorities from other jurisdictions, such as Bermuda, the Cayman Islands and Jamaica, in which non-custodial sentences have been imposed on persons in somewhat similar factual situations. I have also considered these authorities, but done so against the background of there being different statutory provisions in these jurisdictions as well as the fact that some of authorities were presented by way of newspaper reports rather than law reports, no doubt because they were not reported.
40. The court has in particular considered the case of *R v Piot Jan Leboda (supra)* where the lack of concealment was taken into account and a suspended sentence of eight (8) months was eventually ordered. Counsel for the Defendant has relied heavily on this case as justification for the imposition of a non-custodial sentence.
41. However, I remind myself of what this court had said at paragraphs 51 and 62 of *R v Alec Keith Nash* in respect to references to sentences in other matters of this nature as a guide:

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

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

42. In arriving at the appropriate sentence in this matter, I am guided by the five principal objects of sentencing outlined by Wooding CJ in the case of *Benjamin v R*²⁰, they being:

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

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

*"...We accept these five principal objects as comprising the aims of punishment and we recognize that in some cases one object will be predominant whereas in others regard must be had more particularly to two or more of them..."*²¹

²⁰ (1964) 7 WIR 459 at pages 460-461

²¹ At page 461

44. I find that the latter three categories in *Benjamin v R* would go towards the imposition of a non-custodial sentence in this matter since I do not form the view that a custodial sentence is needed to deter or prevent the Defendant from offending in a similar manner and I do not consider him to be in need of rehabilitation.
45. The first two principles of sentencing in *Benjamin v R* relate to the punitive aspect of sentencing and to deterrence vis-à-vis potential offenders. The court considers these principles to be particularly relevant to sentencing in this matter.
46. The court finds that it was irresponsible and negligent of the Defendant to have not removed the items from his luggage before his departure, kept the items during the entire stay and then attempt to return to his home country with them.
47. The court is also concerned that the items were not safely and properly stored and secured during the Defendant's stay in the Turks and Caicos Islands, but rather remained in his luggage during this time.
48. In addition, the Defendant had three opportunities to declare the items at airports and failed to do so: upon his departure from the United States of America, upon his arrival in the Turks and Caicos Islands and upon his attempt to depart the Turks and Caicos Islands.
49. I say all of this against the background of the concession on behalf of the Defendant that he had knowledge of the items being in his suitcase and that upon reflection he had placed them there.
50. The Court notes the seriousness of the offence as well as its prevalence in the Turks and Caicos Islands and the need to send a message to potential offenders and to

prevent travelers to these islands from readily providing explanations of the nature advanced by the Defendant in the expectation that a non-custodial sentence will automatically follow.

51. There is also the need to send a message to travelers to the Turks and Caicos Islands to exercise caution when packing suitcases and to ensure that items of this nature are brought to the attention of airport officials.

52. In the recent decision of this court in *R v Alec Keith Nash (supra)*, a non-custodial sentence in the form of a forthwith fine of \$5,000.00 was imposed on the Defendant. The court is aware that the matters in *R v Alec Keith Nash* were of a more serious nature in that they involved possession of a firearm as well as possession of ammunition. However, there were crucial mitigating factors that were present in *R v Alec Keith Nash* which were not disputed by the Prosecution and that are not present in this matter. These are worth repeating at this point. In *R v Alec Keith Nash*:

- i. The Defendant had made a voluntary declaration of the firearm and ammunition at the airport in the United States of America prior to his departure to the Turks and Caicos Islands, had been made to complete a Declaration Form and was allowed to travel with them. In essence, the Defendant was misled into believing that he could travel with the items to the Turks and Caicos Islands.
- ii. Upon arrival in the Turks and Caicos Islands, the Defendant again brought the firearm and ammunition to the attention of airline officials and was allowed to leave the airport in Providenciales with them.
- iii. The Defendant kept the items properly secured in a safe at his accommodation during his stay in the Turks and Caicos Islands.
- iv. Upon his arrival at the airport to depart from the Turks and Caicos the Defendant again indicated to officials that he had the items in his possession.

- v. The Defendant had provided an explanation about why he traveled with his firearm and ammunition, being for the protection of his family and him, he having lost a close relative to gun violence.

53. None of the mitigating factors outlined in paragraph 48 (*supra*) in *R v Alec Keith Nash* is present in this matter.

54. I pause to note at this point that with the proliferation of matters of this nature and the accompanying publicity that they invariably generate, it will become increasingly difficult for persons who find themselves in the position of the Defendant in *R v Alec Keith Nash* to justify the imposition of a non-custodial sentence. I reiterate that each matter of this nature will be decided on its own particular factual circumstances. In *R v Alec Keith Nash* for instance, the fact that the Defendant was a dedicated father of two young children was also a factor considered by the court in arriving at its decision to impose a fine instead of a sentence of imprisonment.

55. I have given consideration to all the authorities provided to the court by counsel for the Crown and the Defendant and am grateful for their extensive research. I have considered the submission by counsel for the Defendant in respect of the recent decision in *O'Connor (supra)*, which counsel posits is on 'all fours' with this matter. However, I am mindful that many of these decisions are from courts of equal jurisdiction and are therefore not binding on me but rather persuasive and that each matter depends on its own facts.

56. I am also mindful that in response to Question 5 of his interview with the police, the contents of which were not disputed by the Defence, the Defendant admitted

that he was aware that he was not allowed to have rounds of ammunition in the Turks and Caicos Islands.

57. I am therefore of the view that the actions of the Defendant in this matter merit a custodial sentence.

58. As previously stated, where the Court finds that there are exceptional circumstances, the sentence is at large and is therefore entirely within the discretion of the Court.

59. The issue which therefore now arises is what would be the appropriate custodial sentence.

60. In this regard, the court is guided by the following methodology adopted by the Court of Appeal of Trinidad and Tobago in the case of *Aguillera and others v The State*²²:

"The overall sentencing structure should, in general terms (apart obviously from containing the judge's explicit reasoning on all relevant issues), reflect the following matters:

(i) the calculation of the starting point which takes into account the aggravating and mitigating factors of the offence only; these are the objective circumstances which relate to the gravity of the offence itself and which assist in gauging its seriousness, that is, the degree of harmfulness of the offence;

(ii) an appropriate upward or downward adjustment of the starting point (or dependent on the circumstances, and if there is in effect, a cancelling out, no adjustment at all), which

²² (2016) 89 WIR 451 at paragraph 24 on page 466

takes into account the aggravating and mitigating factors relative to the offender; these are the subjective circumstances of the offender which in turn inform the degree of the culpability of the particular offender;

(iii) (where appropriate), a discount for a guilty plea; any deviation from the usual discount requires particularly careful justification and an explanation which is clearly expressed; and

(iv) credit for the period of time spent in pre-trial custody."

61. In arriving at the starting point, the court will firstly examine the aggravating and mitigating factors relating to the offence.
62. The only aggravating factor which the court has identified is the degree of irresponsibility displayed by the Defendant which has already been discussed at paragraphs 42 to 44 (*supra*).
63. However, the following are important mitigating factors relating to the offence, many of which were also relevant in the finding of exceptional circumstances:
 - a. There was no intent to utilise the ammunition in the Turks and Caicos Islands for criminal purposes.
 - b. There was no concealment of the ammunition.
 - c. There is no evidence that the ammunition was to be used at all by the Defendant in the Turks and Caicos Islands and, indeed, the Defendant was not in possession of any firearm.
 - d. The weapon for which the ammunition was obtained was licensed and was therefore not illegal in the Defendant's country.

64. In these circumstances, taking into account the powerful mitigating factors relating to the offence, and bearing in mind the statutory minimum sentence of twelve (12) years, I find an appropriate starting point to be five (5) years.

65. In respect of the offender, the court has found no aggravating factors, but has identified the following mitigating factors, many of which were also relevant in the finding of exceptional circumstances:

- a. The Defendant is a young man, aged 26.
- b. He is of impeccably good character.
- c. He has been actively involved in many character building and community programmers such as the Model United Nations.
- d. He has utilized his formative years to pursue further education and specialize in national security policy and counterterrorism.
- e. He is gainfully employed in a respectable position as the Deputy District Director of Congressional District 9.
- f. He is trained in responsible firearm handling and has been in multiple shooting sports associations.
- g. He volunteers regularly with various charitable organisations such as United Way, the Rotary Club and Gateway Christian Services.
- h. He has expressed his remorse for the incident.
- i. He co-operated with the authorities upon his arrest.

66. The court has also had careful regard to the thirteen (13) character references presented on the Defendant's behalf, speaking to his good character and conduct, both professionally and personally. The following is a summary of what was said by each referee:

- a. Hon J. Terrence Cody, a senior Judge of the State of Indiana, who wrote about the Defendant's good character and work ethic.
- b. Danita Burks, a Floyd County Clerk, who described the Defendant as a law abiding and respectable citizen, faithful employee and 'family guy' who loves the outdoors.
- c. Melissa Coffey, Chief Deputy of Floyd County Clerk, who described the Defendant as having a high degree of integrity and responsibility.
- d. Nancy Riley, First Deputy of Voter's Registration Office, who spoke highly of the Defendant's work ethic, punctuality and loyalty to his country. She described him as a law-abiding citizen of the United States.
- e. Chris Lane, Floyd County Prosecutor, who wrote of the Defendant's integrity, clean record, strong sense of responsibility and involvement in various civic activities.
- f. Steve Bush, Floyd County Sheriff, who described himself as a longtime family friend, and spoke of the Defendant as a level-headed person who was kind to others and who puts others' needs before his own.
- g. Aaron Lynn Durbin, a friend of the Defendant, who wrote that the Defendant was known for his exceptional understanding of the safety required in handling firearms and spoke about his character and integrity.
- h. Austin Joe Miller, who has known the Defendant since June 2022, wrote about him being a hard-working member of the public service who sees his job as one that is service to his community as well as the professional manner in which he performed his duties when he hired the Defendant as a temporary worker for a trade show.
- i. Cainon Lee Smiley, who described the Defendant as an exceptional person who possesses an exceptional sense of responsibility that covers his professional and personal life.

- j. Roger J. Howard, a friend of the Defendant of over eight years, who described him as a dedicated public servant and leader who inspires positivity and has the ability to bring out the best in others.
- k. Johnathan Pearce, a friend of the Defendant, described him as by far one of the kindest, most caring and most responsible people he has ever met who would never do anything to put innocent people in harm's way.
- l. Trey Rosenbaum, a friend of the Defendant, who described the Defendant as being of high moral character and as one who seeks to help those around him by, for example, giving car rides to friends who do not own vehicles.
- m. Zayne Graves, a friend of the Defendant of two years, who wrote about the tremendously positive and profound impact which the Defendant had on his life, and about how the Defendant provided him with sound advice doing a difficult time in his professional career.

67. Having regard to these powerful mitigating factors, the starting point of five (5) years is adjusted downwards to one (1) year.

68. The court takes into account the fact that the Defendant has pleaded guilty at the earliest opportunity. The sentence being at large, the court is empowered to give a full one third discount to the Defendant, leaving a sentence of imprisonment of eight (8) months. Any time spent in custody will be deducted from this period.

69. The court has also considered the imposition of a suspended sentence, but does not consider it to be appropriate in the circumstances for the reasons outlined hereinabove.

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

- a. The Defendant is to serve a term of eight (8) months imprisonment with any time spent in custody to be taken into account.
- b. The Defendant's passport is to be returned to him upon completion of his sentence.
- c. The twelve rounds of ammunition and the magazine are to be retained by the police and destroyed after they have completed their investigations in respect of same.



Dated 18th September, 2023

The Honourable Justice Chris Selochan

Judge of the Supreme Court