



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

CR50 of 2022

REGINA

v

MIKHAIL HINSON

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

**Appearances: Mr. Oliver Smith KC for the defendant.
 Mr. Clement Joseph, Principal Public Prosecutor for the Crown.**

Delivered: 15 November 2023.



JUDGMENT

1. **Baptiste J:** This is a judge alone trial. The defendant has been charged with the following offences:

(1) Carrying firearm contrary to section 3 (1) of the Firearms Ordinance, Chapter 18:09 of the Turks and Caicos Islands as amended. The particulars state that on the 27th October 2022, at Airport Road, Providenciales, he did carry a firearm, one silver .25 calibre FIE pistol, serial number A29872, without being the holder of a licence in respect of such firearm;

(2) Carrying ammunition contrary to section 3(1) of the said Firearms Ordinance, 3 (three) .25 calibre rounds of ammunition without being the holder of a firearms licence which takes those ammunition; and

(3) Possession of controlled drugs contrary to section 6 (2) of the Control of Drugs Ordinance Chapter 3:14 of the laws of the Turks and Caicos Islands. The particulars are that on 27th October 2022 at the Airport Road, Providenciales, Turks and Caicos Islands, unlawfully had in his possession a controlled drug, namely cannabis.

The defendant pled guilty to the possession of controlled drugs charge.

2. In every criminal trial the burden of proving the guilt of the defendant lies on the prosecution. The defendant is under no obligation to prove that he is not guilty or to explain the evidence offered by the prosecution. Our system of law requires that an accused person be presumed innocent.
3. The prosecution can only succeed in proving the guilt of the defendant by making me sure of it. Nothing less than that will do. The prosecution does not need to prove every fact that they allege to this standard. It is the essential elements or ingredients of the offence they must prove to that standard.
4. If after I have considered all the evidence I am sure that the defendant is guilty, my verdict must be guilty. If I am not sure my verdict must be not guilty. In short, I must be sure of the guilt of the accused and must not return a verdict of guilt against him unless I am are sure, and the burden lies on the prosecution to make me sure of his guilt. The accused has nothing to prove. I do not have to decide every disputed point that has arisen in the trial only those that are necessary for me to reach my verdict.
5. In this judge alone trial, I am judge of the law as well as judge of the facts. Facts are the things which I choose to believe from the evidence. The duty of determining the facts rest on me and I do so solely on the basis of the evidence led at the trial. In reviewing the evidence of a witness, I am not bound to accept everything the witness said. I may accept all or reject all or I may accept some and reject the rest. I must decide which

evidence to believe and how much weight or importance I give to the evidence of a witness.

6. The defendant has chosen to give evidence and subject himself to cross-examination. That evidence must be judged in the same fair manner as any other evidence in the case.
7. It is my duty to assess the evidence of the various witnesses and decide on their reliability and credibility. I have heard the final submissions of both counsel and will give them such weight as I think they deserve. I am not bound by them.
8. I must dispassionately weigh the evidence logically and with an open mind. I must act impartially, eschewing any sympathy for or prejudice against anyone involved in the proceedings. I am to determine all relevant factual issues according to the evidence presented during the trial. Included therein is the oral evidence of the witnesses, the exhibits and the statements of witnesses not called to give oral evidence but tendered during the trial.
9. In order to decide what the facts are, I will have to assess the witnesses who gave evidence. I will also have to decide what weight or importance I attach to any particular evidence. In assessing the witness's evidence, matters of concern include their credibility and reliability. It is for me to decide whether the witnesses are telling the truth. I have to consider all the evidence; use what I believe and reject what I disbelieve. Each part of the evidence should be given the importance I think it deserves.
10. From the facts that I find, I may draw inferences with respect to other facts and I may rely on these inferences in deciding whether or not the accused is guilty. Although entitled to draw inferences, that is to come to common sense conclusions, I cannot speculate as to what evidence there might have been or allow myself to be drawn into speculation. If there are two or more inferences I can draw, I must draw the inference which favours the accused.
11. I remind myself that I do not have to decide every issue which arises in this case, but only such issues which help me decide whether the accused is guilty or not and I have to

do so by having regard to the whole of the evidence and making my own judgment as to which evidence I believe and how much weight or importance I attach to the evidence.

12. I now consider the first count: Carrying firearm contrary to section 3 (1) of the Firearms Ordinance Section 3 (1) provides:

No person (other than a licensed gunsmith in the course of his trade) shall keep or carry any firearm or ammunition unless he is the holder of a firearm license with respect to such firearm or in the case of ammunition he is the holder of a license for a firearm which takes that ammunition.

13. A firearm means any lethal, barreled weapon of any description from which any shot, bullet or other missile can be discharged. In order to be defined as a firearm, a weapon must be lethal, barreled and capable of discharging a shot, bullet or other missile. That it is lethal, has to be determined by having regard to the possible effect of any shot, bullet or missile it discharges.
14. That it is capable of discharging a shot, bullet or missile must, where a cartridge is involved, be determined by having regard to its ability to accommodate the cartridge, to contain the explosive force involved in the firing of the cartridge and to ensure the discharge through the barrel of any shot, bullet or missile contained in the cartridge.
15. On Count 1 the prosecution must make me feel sure that the defendant carried a firearm: a silver .25 calibre FIE pistol and was not the holder of a licence to carry such a firearm. In order to qualify as a firearm, the crown would have to make me sure that it was lethal barreled and capable of discharging a shot, bullet or other missile. The prosecution, in order to establish the offence merely have to prove that the defendant carried the object in question, that the object in question is a firearm and the absence of a firearms licence in respect of such firearm.
16. Count 2 relates to the ammunition found in the said firearm. The prosecution must make me feel sure that the defendant carried the three rounds of .25 ammunition without being

the holder of a firearms licence which takes those ammunition.

17. In support of its case, the prosecution relied on the viva voce evidence of PC Ron Clarke and Superintendent Drexel Porter, while the witness statements of Sargeant Boxx and PC James were read in evidence. The evidence of PC Clarke is that on 27th October 2022, he was on mobile patrol along Airport Road, in Providenciales. He saw a white Yukon SUV. He observed the driver of the left-hand drive vehicle appear to look in the direction of the police vehicle and slouched down in his seat and immediately rolled the right front passenger window up. PC Clarke said he became suspicious of the driver's actions. The police vehicle turned around and gave chase. The emergency light and siren were activated. The Yukon SUV stopped.
18. The police emerged from their vehicle and approached the vehicle, the defendant was the driver of the vehicle. PC Clarke, posed some questions to him. PC Clarke asked the defendant if he had weapons in the vehicle, he said no. The defendant was instructed to lower all his windows which he did. PC Clarke saw a cutlass in a sheath inside the rear area of the vehicle. The defendant said it was for cutting coconut. He requested the defendant's consent to search the vehicle which he authorized (The defendant disputes that).
19. PC Clarke gave evidence that during the search he discovered a fanny pack in the centre console at the front of the vehicle. The defendant said it was his. Upon searching the Fanny pack, he recovered a quantity of cannabis and a .25 unlicensed pistol, in a black pouch. Other items found included several identification cards for the defendant among other items. The defendant acknowledged ownership of the fanny pack and the cannabis but denied knowledge and ownership of the small silver firearm. P C Clarke said the defendant said the firearm 'ain't mine' or 'I don't know about that'. The firearm contained ammunition. PC Clarke dialed 911 for forensic support. PC James photographed the vehicle, pouch and fanny pack. On completion PC James placed the firearm in a box and sealed it.

20. PC Clarke conducted a video and audio interview with the accused. He was shown three photographs of the firearm. He asked the accused questions but the accused did not answer any question pertaining to the firearm and ammunition. The accused I must say, is under no obligation to answer any question posed by the police. No adverse inference can be drawn against him in exercising his right to silence. The defendant was arrested and charged for the offences.
21. In cross-examination PC Clarke stated that no DNA or fingerprint of the defendant was found and he had no previous conviction. The defendant said someone must have put the firearm in his bag. In cross - examination of the police, it was also stated that no DNA or finger print was found on the firearm.
22. Superintendent Porter gave evidence that he is a certified Firearms Instructor for 15 years and also a Carbine Armorer. He received his carbine armorer training at the Broward County Sherriff's Department which was hosted by Colt. His only formal training was with Colt. He has limited experience with .25. He detailed his training and experience. As a result of which he was deemed an expert in the identification and functionality of firearms.
23. Normally, witnesses may only testify about what they have seen or heard, and may not testify about their opinions. Expert witnesses, because of their special training, education and experience, will be permitted to give an opinion to assist juries on matters of a specialist kind which are not of common knowledge. A ballistic expert in the light of his knowledge and experience of firearms, may well be able upon examination of a weapon, to express a valid opinion as to its potential liability to discharge deadly missiles and if that opinion is unchallenged, a tribunal of fact would be entitled, although not obliged to act upon it.
24. Superintendent Porter stated that he conducted a functions test of the firearm - FIE.25

firearm and concluded that it was in good working condition, it was functioning properly. He also removed the magazine containing 3 live rounds of .25 ammunition, loaded the firearm and discharged two rounds in a drum of water and recovered two shell casings and the two projectiles out of the drum of water. Superintendent Porter also stated that he checked the Firearms licence records to ascertain if the defendant was a licenced firearm holder. There was no data indicating that he is a valid licensed firearm holder in the Turks and Caicos Islands.

25. The statement of PC James was read. He is a trained Crime Scenes officer. His training included digital crime scene and evidence photography, processing of exhibits, and identification and recovering of forensic evidence. It is recorded in the statement that on the 27 October 2022 he was dispatched by 911 to the location and took photographs of the fanny pack and firearm and proceeded to the Chalk Sound police station. He met PC Clarke there and processed the firearm. He took the firearm from the fanny pack. He cleared the firearm and took three rounds of ammunition from the magazine. He used cotton swabbing applicator and swabbed the firearm, magazine and ammunition.
26. Sargeant Boxx's witness statement was also read. She is stationed at the Chalk Sound police station and attached to the Custody Department and Exhibit Room. On 27th October 2022 she received from PC Ron Clarke one exhibit bag and one white firearm box sealed, with the name of the defendant Hinson. On 7th November 2022 she received from PC Clarke one white DNA envelope with the defendant's name.
27. At the close of the prosecution's case, the defendant chose to give evidence and subject himself to cross-examination; he was not obliged to do so. It is for the prosecution to make me sure of his guilt. I must treat his evidence in the same fair manner I treat any other evidence in the case.
28. The defendant gave evidence that the vehicle did not belong to him and other persons had access to it. The vehicle was used as a private taxi service driven by other persons

and carried passengers from time to time. The defendant testified that he misplaced the fanny pack the day before he was arrested. Between the time he dropped off the vehicle on the evening before and the morning of the stop and search, the fanny pack and vehicle were outside his control. Other persons had access to the vehicle including the owner and other drivers who worked for the company. The vehicle was used by others and he ended his shift.

29. When he contacted the owner of the vehicle Ron Higgs, he was told that the vehicle was used by one Peterson to transport guests. When he went to collect the vehicle on the morning of the 27th October 2022, the vehicle was being reversed from the washing bay and cleaned by personnel from the car wash. The keys were left inside the vehicle under the mat, to allow other persons to use the vehicle.
30. From cross-examination it emerged that the defendant was a former member of the Royal Turks and Caicos Islands Police Force. The defendant stated that it was not the first time he had lost his fanny pack.
31. I have no difficulty in accepting the evidence of PC Ron Clarke that on the 27th October 2022 on the Old Airport Road Providenciales, the vehicle driven by the defendant was stopped and searched by the police and a fanny pack containing the .25 firearm and 3 rounds of .25 ammunition as well as cannabis was found in the front console. That evidence is incontrovertible. I also find as a fact that the fanny pack containing the .25 firearm, ammunition and cannabis were in the vehicle prior to it being searched by the police. I also accept the evidence of Superintendent Porter that he carried a functions test on the firearm and it worked properly and his evidence with respect to the ammunition. I find that the firearm satisfied the requirements of the description of a firearm as contained in the Firearms Ordinance.
32. In his closing address, Mr. Smith KC argued that the firearm and ammunition were not found in the defendant's physical possession. They were found in a fanny pack which he

had misplaced the day before and which he found in a vehicle which was also outside of his possession overnight. Mr. Smith submitted that if the court accepts the unchallenged and uncontroverted evidence of the defendant and given the evidence that any number of persons had access to the vehicle, and given the lack of DNA or such forensic evidence connecting the defendant to the gun, the prosecution has failed to prove its case to the required standard. The prosecution has failed to establish, so that the Court can feel sure, that the defendant assented to being in control of the firearm and ammunition, and he must therefore be acquitted.

33. Mr. Smith KC pointed out that samples were taken from the defendant for DNA analysis but there is no DNA linking the firearm and ammunition to the defendant, and given the state of the evidence produced by the prosecution and the evidence of the defendant, the case does not meet the required standard of proof, in that a tribunal of fact cannot be sure that Mr. Hinson had knowledge of the firearm and ammunition found in the vehicle, in that, the evidence does not prove that the defendant assented to control of these items. There is no finger print evidence linking the defendant to the firearm.
34. Mr. Smith KC further pointed out that the defendant was forthcoming about the fanny pack belonging to him and admitted to smoking marijuana found in it. The defendant remained co-operative during the course of the stop and search. The defendant is of good character and is to be believed and in any event it is not for him to prove his case. The firearm and ammunition were not dusted for fingerprint which could have produced evidence of who handled the firearm and ammunition.
35. Mr. Smith KC submitted that the absence of any forensic evidence connecting the defendant to the firearm and ammunition, especially when coupled with the defendant's testimony that others had access to the vehicle and the fanny pack, speaks loudly and clearly to his lack of knowledge that those items were in his fanny pack and equally supports the logical and inescapable conclusion that he did not assent to the carrying of firearm and ammunition. Given those uncontroverted, unchallenged and indisputable

circumstances, a fact finder cannot be sure as to remove the presumption of innocence and find the defendant guilty. There is no legal and factual basis on which the court can feel sure.

36. Mr. Smith KC stated that a revisit to the defendant's unchallenged evidence reveals the following: He misplaced the fanny pack the day before he was arrested. Between the time he dropped off the GMC Yukon vehicle on the evening prior, and the morning of the stop and search the fanny pack and vehicle were outside of his control. Other persons had access to the vehicle including the owner and other drivers who worked for the Company. The vehicle was used by others after he ended his shift. The defendant's evidence is that when he contacted the owner of the vehicle, Ron Higgs, he was told that the vehicle was being used by one Peterson to transport guests. Further the Defendant gave evidence that when he went to collect the vehicle on the morning of October 27, 2022, the vehicle was being reversed from the washing bay and cleaned by personnel from the car wash. The keys for the vehicle were left inside the vehicle, specifically under the mat, to allow other persons to use the vehicle.
37. In relation to the defendant's demeanor at the time of the search: (a) he was forthcoming about the fanny pack belonging to him and admitted to smoking marijuana and owning the marijuana found in the fanny pack; and (b) during the course of the stop and search remained co-operative.
38. Mr. Smith KC stated that the case for the prosecution against the defendant rests primarily on the following: The evidence of Ron Clarke that he observed the defendant slouched and rolled up his windows, which he considered suspicious leading him to pull the defendant over. Upon a search of the vehicle, the Investigating Officer found the firearm and ammunition in a fanny pack. The said fanny pack was found in a vehicle being driven by the Defendant. The defendant acknowledged ownership of the fanny pack. Critical to note as well that the discovery of the firearm is not captured on the body cam worn by Officer Clarke during the purported search of the fanny pack. There is no

evidence of direct physical possession or carrying. The firearm and ammunition were not found in the hands of the defendant.

39. Mr. Smith KC argued that the clear unchallenged evidence is that: The vehicle did not belong to the defendant. The defendant did not at all the material times, have exclusive possession of the vehicle and the fanny pack. The vehicle was used as a private taxi service driven by others and which would have carried passengers from time to time. Samples were taken from the defendant for DNA comparison. The testimony of Detective Theophilus James was that he swabbed the “firearm, magazine and ammunition” purportedly for the purpose of DNA analysis and comparison. There is no evidence of DNA linking the firearm and ammunition to the defendant, particularly in circumstances where the firearm and ammunition were found amongst Mr. Hinson’s belongings. This totally undermines any argument that the firearm and ammunition belonged to him. Additionally, there is no fingerprint evidence linking the defendant to the firearm.
40. Mr. Smith KC argued that it is the defendant’s case that he did not consent to a search of the vehicle. The defendant’s account is far more likely to be believed having regard to the fact that the police officers from the outset maintained an intimidatory stance. For a purported traffic violation, they approached the vehicle with firearms in hand and handcuffed the defendant very soon after stopping him. There were other items in the vehicle in particular in the centre console (Gatorade bottle, cup, documents) which were not examined or checked to see if they were in any way connected with the firearm and ammunition. PC Clarke failed to interview the owner of the vehicle. PC Clarke gave evidence that he attempted to take a witness statement from the owner of the vehicle but failed to do so, or to do any investigation into the owner’s use of the vehicle at the relevant time. The unchallenged evidence of the defendant is that the owner of the vehicle visited the scene and attempted to speak to PC Clarke, but was told to leave the area.

41. Mr. Smith further argued that the firearm and ammunition were not dusted for fingerprints which could have produced evidence of who handled them. The bodycam footage clearly showed the defendant denying that the gun belonged to him despite having acknowledged ownership of the fanny pack. However, the Investigating Officer was so focused on the defendant and concluded that the firearm must have been his, given the purported evidence that it was found in a fanny pack that the defendant acknowledged to be his. This tunnel vision approach limited the scope of PC Clarke's investigation and as such, he failed to investigate the possibility that the firearm and ammunition was put there by someone other than Mr. Hinson. The Investigating Officer failed to investigate credible leads to other persons who may have had access to the vehicle.
42. In any event the unchallenged evidence of the defendant is that he did not inspect the contents of the fanny pack upon recovering it. In the circumstances Mr. Smith KC submitted that that any presumption of carrying of the firearm and ammunition is totally rebutted. This submission is buttressed by the absence of any forensic evidence that would conclusively show that Mr. Hinson had contact with the weapon to the possible exclusion of others. Such was the reason for the swabbing for DNA, and the results failed to link Mr. Hinson to the weapon found.
43. Mr. Joseph argued that the defendant asserted that he lost control and custody of the fanny pack for approximately 16 hours thus insinuating that someone had an opportunity to have planted the firearm in it. Having lost custody of the fanny pack for that period, when recovered, the defendant would like this court to believe that he did not carry out an inventory to ensure that important items such as his driver's licence were still there; also, the cannabis which he had placed in the fanny pack shortly before separating from his fanny pack. Mr. Joseph pointed out that there is no dispute that the fanny pack belonged to the defendant, and that everything else recovered by the police that day were his property. Though he claimed to have lost control of the same fanny pack on a previous occasion, this was the only occasion on which he recovered it and found something in it that did not belong to him.

44. Mr. Joseph pointed out that the defendant pled guilty and admitted that the cannabis recovered in the fanny pack was his. Under cross-examination the defendant stated the circumstances under which the cannabis was discovered were the same as to when the firearm was discovered, i.e., he was held a distance away. The central theme of the defence is that the firearm did not belong to the defendant and he was not aware that it was in his custody.
45. Mr. Joseph stated that the elements of the offence of count one are: (i) to carry; (ii) that the item is a firearm and (iii) that the offender has it in his custody. There is no legal definition in the legislation of the term ‘carry’ and in accordance with statutory interpretation, it must be assigned its everyday meaning: to take or support from one place to another, convey, transport. Applying this meaning, Mr. Joseph submitted that the defendant had the firearm in his possession and was transporting it and thus was ‘carrying’ the firearm.
46. In addition, Mr. Joseph pointed out that the prosecution presented the evidence of ASP Porter who gave his experience and training and satisfied the court to have been deemed an expert in maintenance, instruction and functionality tests of firearms. He testified of having lifted the firearm from the exhibit room, test fired it and confirmed that it met the definition as described above. With respect to custody, the evidence is that the firearm was discovered in the Fanny Pack, owned and controlled by the defendant. He had actual control of the firearm.
47. Mr. Joseph submitted that the elements of the offence have been proved beyond reasonable doubt and the court should convict. The offence is one of strict liability and does not require mens rea of knowledge. In support thereof, Mr. Joseph relied on **R v Zahid [2010] EWCA Crim 2158**. In **Zahid** the court stated, *inter alia*, that; prima facie, it would appear that Parliament intended to impose a draconian prohibition on the possession of firearms for the obvious social purpose of controlling dangerous weapons.

This conclusion is supported by the fact that (a) the wording of s.5 makes it plain that Parliament intended to create an offence of strict ordinary liability; (b) the courts have held that comparable wording in s.1 of the 1968 Act creates a strict liability offence; (c) since the clear purpose of the firearms legislation is to impose tight control on the use of highly dangerous weapons, in order to achieve effective control and to prevent the potentially disastrous consequences of their misuse. Strict liability was considered necessary, just as it was in the equally dangerous field of drugs. Moreover, given the s.1 of the 1968 Act has been held to create an offence of strict liability, this consideration applies a fortiori to s.5, which is concerned with more serious weapons, such as automatic hand guns and machine guns, and imposes a higher maximum penalty.

48. Mr. Joseph stated that Crown adopted the decision in **Zahid** where the court stated inter alia Firearms Act are strict liability offences and that there is no scope for a defence based upon passages in the speeches of certain of their Lordship in **Warner v Commissioner of Police of the Metropolis [1969] 2 AC 256, [1968] 2 All ER 356, 132 JP 378**, that although the defendant was physically in possession of an object, he was ignorant of its nature.
49. On the issue of strict liability, Mr. Smith KC argued that a reading of the relevant statutory provisions could lead to an assumption that the statute creates an absolute offence of carrying with no reference to the accused's state of mind, but submitted that there is a knowledge requirement. That is, at the material time, the defendant knew that he was carrying a firearm or ammunition. The evidence is that the firearm and ammunition were found in a fanny pack near the centre console of a vehicle which was being driven by the defendant. It is clear from the evidence that the firearm was not found in the hands of the defendant, and accordingly, Mr. Hinson was not carrying the firearm and ammunition in the literal sense.
50. The defendant's defence is that the firearm and ammunition does not belong to him and were put in his fanny pack by someone else. And that at no time was he aware that the

weapon and ammunition were in the fanny pack and “carried” them with that present knowledge. It cannot be that the legislature intended to hold persons criminally liable for carrying a firearm or ammunition when they did not know they were doing so, and were wholly innocent in every respect.

51. Mr. Smith KC commended for the Court’s consideration what he said was the interpretation of section 3(1) in **Rashad Stubbs v Regina CR-AP 5/2016 [2018] TCACA 7** when the Court of Appeal in considering a charge of keeping firearm under section 3(1) drew guidance from the case of **Regina v William Whelan, Owen Whelan, Timothy Whelan** (September 17, 1971), in particular the following passage from the judgment of Lowry CJ at page 155:

“The Crown had to prove, considering that the possession was not direct physical possession, a number of things including the intent of each of the accused to be in possession of the gun, what the learned trial judge referred to as his assent to being in control of it, and it was conceded, as I say, that in order to do that the Crown could not rely on anyone’s physical possession and had to rely, therefore, on the surrounding circumstances. It is quite proper to regard those circumstances as consisting of what happens before, during or after the point of time to which the charge relates since what one is trying to ascertain is the mental attitude of the accused person”. (Paragraph 26 of **Rashad Stubbs v Regina**).

52. The concept of absolute offences which prima facie do not appear to require *mens rea* was discussed in the case of **R v James McNamara (1988) 87 Cr. App. R. 246**. In particular, the Court of Appeal sought to define basic possession in the context of a drug offence. At pages 250 to 251 the Court of Appeal provided the following guidance:

“Prior to the passing of the 1971 Act, the House of Lords, in **Warner v. Metropolitan Police Commissioner (1968) 52 Cr. App. R. 373, [1969] 2 A.C. 256**, tackled this question. Unhappily it is not altogether easy to extract from the

speeches of their Lordships the ratio decidendi. But doing the best we can, and appreciating that we may not have done full justice to the speeches, the following propositions seem to us to emerge.

First of all a man does not have possession of something which has been put into his pocket or into his house without his knowledge: in other words something which is “planted” on him, to use the current vulgarism. Secondly, a mere mistake as to the quality of a thing under the defendant’s control is not enough to prevent him being in possession. For instance, if a man is in possession of heroin, believing it to be cannabis or believing it perhaps to be aspirin. Thirdly, if the defendant believes that the thing is of a wholly different nature from that which in fact it is, then the result, to use the words of Lord Pearce, would be otherwise. Fourthly, in the case of a container or a box, the defendant’s possession of the box leads to the strong inference that he is in possession of the contents or whatsoever it is inside the box. But if the contents are quite different in kind from what he believed, he is not in possession of it.

“...the prima facie assumption is discharged if he proves (or raises a real doubt in the matter) either (a) that he was a servant or bailee who had no right to open it and no reason to suspect that its contents were illicit or were drugs or (b) that although he was the owner he had no knowledge of (including a genuine mistake as to) its actual contents or of their illicit nature and that he received them innocently and also that he had had no reasonable opportunity since receiving the package of acquainting himself with its actual contents.”

53. Mr. Smith KC submitted that in the circumstances of this case, where there is no direct physical possession [or “carrying”] (or evidence by way of DNA of physical possession), the Crown must prove, so that this Court is *sure*, that the defendant assented to being in control of the firearm that was found in the fanny pack. The Court in **Whelan and Others** and in **McNamara** makes clear that regard must be had to the surrounding circumstances.

54. Based on the authority of **McNamara**, Mr. Smith KC submitted that although the defendant is the owner of the fanny pack, he had no knowledge that it contained a firearm and ammunition when he when he found the fanny pack in the GMC Yukon on the morning of October 27. Further the defendant received the fanny pack innocently and did not have a reasonable opportunity to inspect its contents given that he was on his way to drop off the vehicle.
55. Mr. Smith KC argued that the prosecution has not brought any evidence to negative Mr. Hinson's sworn evidence as to the lack of knowledge and the absence of his assenting. This they have failed to do to the required standard of proof beyond a reasonable doubt. Mr. Smith KC stated that the importance of connecting the defendant to the firearm and/or ammunition was highlighted in **Stubbs** and posited that while **Stubbs** deals with firearm and drugs found in a house; the circumstances and findings in that case will assist this court.
56. In **Stubbs**, the Court of Appeal in quashing the appellant's conviction and sentence found at paragraph 28 of the judgment:

“In the opinion of the Court, while the evidence shows that as the cocaine and gun were found in the house, there may be an inference that one (or more) of the occupants was responsible for the cocaine and the gun being in the house, there was no indication as to which of the occupants of the house had possession of the cocaine or was keeping the firearm. In our view, there was insufficient evidence on which an inference may be drawn as to which of the occupants was in possession of the gun and the cocaine. Put another way, the evidence was insufficient to draw an inference that the appellant was in possession of the cocaine or was keeping the firearm.”

57. Mr. Smith KC also commended to the court **Cheddean Black v R [2020] JMCA Crim**

53 where the Jamaican Court of Appeal considered a conviction and sentence in respect of a charge of illegal possession of firearm and ammunition which were found on premises which could be accessed by multiple persons including the appellant.

58. It is necessary for me to consider the case of **Stubbs**. In **Stubbs**, the defendant appealed his conviction for keeping a firearm and possession of a controlled drug – cocaine. The judge pointed out to the jury that the Crown’s case depended on circumstantial evidence, rather than direct evidence in order to prove that the defendant was keeping the firearm and was in possession of the controlled drug. The defence stated that the appellant was not in possession of cocaine and was not keeping any firearm; further, he was not the only occupant of the house, but lived there with his mother and two brothers.
59. At paragraph 23 the Court of Appeal referred to the count of keeping a firearm pursuant to section 3 (1) of the Firearms Ordinance and noted that the trial judge reminded the jury that the defendant was charged with keeping and explained that keeping meant, the ordinary word, having it, keeping. It is not possession where you have to have knowledge, keeping there is just keeping. At paragraph 24, the Court referred to section 5 of the Firearms Ordinance which provides that the occupier of any house or premises in which any firearm is found, shall, be deemed to be the owner or keeper of such firearm until the contrary is proved. The court noted that the prosecution alleged that the appellant was the keeper of the firearm.
60. The Court of Appeal then referred to **Regina v Whellan and others**, (September 17 1971). The facts there were that the police entered the premises in search of firearms and found three brothers in beds in an upstairs room. A revolver and ammunition were found secreted under clothing on the top of a chest of drawers in this room. Each of the men denied possession of the gun and asserted that the gun had been planted by the police. They were all charged with unlawful possession of firearm and ammunition. At the trial they made statements asserting their complete innocence. The Court of Appeal held that although there was very strong evidence that somebody was guilty of the offence in

connection with the revolver and ammunition, there was nothing to indicate which individual was guilty, and insufficient evidence on which to found the inference that all three persons were in possession; accordingly, the convictions were quashed.

61. It was in that factual context that Lord Lowry LCJ made the statement at page 155 (quoted at paragraph 54 of this judgment) that the Crown had to prove, considering that the possession was not direct physical possession, a number of things, including the intent of each of the accused to be in possession of the gun, what the learned trial judge referred to as his assent to being in control of it.
62. I am not of the view that Stubbs assists the court given the very different factual and legal matrices. Section 5 of the Firearms Ordinance provides that the occupier of any house or premises in which any firearm is found, shall for the purpose of the Ordinance be deemed to be the owner or keeper of such a firearm until the contrary is proved. The prosecution alleged that Stubbs was the keeper of the firearm.
63. In **Stubbs**, the firearm and drugs which were recovered, and which formed the substance of the charges against the defendant, were found in a house occupied by the defendant, his mother and brothers, rather than in any particular person's physical possession. In the present case, the firearm was not found in any house or premises. It was found in a fanny pack belonging to the defendant, in a vehicle driven by the defendant. The fanny pack also contained other items inclusive of cannabis which the defendant claimed as his, but disclaimed knowledge of the firearm. The factual and legal matrices are markedly different and distinguishable from the present case. The concept of assent to being in control is of no moment in the circumstances of the present case. The prosecution does not have to prove that the defendant assented to being in control.
64. It would be instructive at this stage to determine the issue of strict liability. I have set out the competing arguments of the parties on that issue. In short the prosecution states that the offence charged is one of strict liability, while the defence is arguing to the contrary.

It is undoubtedly an important issue. The question is whether section 3 (1) of the Firearms Ordinance creates an offence of strict liability. There is no want of authority on the subject of strict liability.

65. In **B (A Minor) v Director of Public Prosecutions [2000] 2 AC 428**, Lord Nicholls explained that it is well established as shown by **Sweet v Parsley, [1970] AC 132** - that where a statute laying down a criminal offence is silent on the relevant mental element, the starting point in interpreting the statute is that there is a common law presumption of mens rea. That presumption is a strong one so that it will only be rebutted by express words or by necessary implication (see paragraph 29 of **PWR v Director of Public Prosecutions [2022] UKSC 2**). Lord Nicholls said at pp 463-464 “Necessary implication connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence.”
66. In **Nurse v Republic of Trinidad and Tobago [2019] UKPC 43**, the Privy Council accepted that the presumption of mens rea is a strong one but nevertheless held that the presumption was rebutted so that the offences in question (making a false customs declaration, imported prohibited goods, and importing goods that did not correspond with a customs declaration) were offences of strict liability. It was therefore unnecessary for the prosecution to prove that the defendants knew the nature of the goods inside the relevant containers.
67. **PWR v Director of Public Prosecutions [2022] UKSC 2** concerned whether section 13 of the Terrorism Act 2000 created an offence of strict liability. Section 13 provided that it is a criminal offence for a person in a public place to carry or display an article “in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation.” Counsel for the appellant submitted that applying the strong common law presumption of mens rea, section 13 (1) is not an offence of strict liability.

68. At paragraph 26, the Supreme Court stated that it was common ground between the parties that a limited mental element was indisputably required under section 13 (1) in the sense that the defendant must know that he or she was wearing or carrying or displaying a flag. Put another way, the carrying or displaying of the flag had to be deliberate and not inadvertent. If a person were to stick a flag into or onto a defendant's backpack without the defendant's knowledge, so that the defendant is carrying or displaying the flag without knowing that he or she is doing so, the defendant should not be guilty of the offence. The words "wears, carries or displays" necessarily imports knowledge of that limited kind.
69. The Court held that the crucial point was that the words used, arousing "reasonable suspicion" which imposed an objective standard, do not really lend themselves to the importation of a subjective requirement of mens rea. The Supreme Court agreed with what Holroyde LJ said in the Divisional Court at paragraph 50: "the language of section 13 is ... entirely clear and unambiguous ... nothing in the section requires any knowledge on the part of the wearer [or carrier] of the import of the item or article or of its capacity to arouse the requisite suspicion."
70. The Supreme Court, at paragraph 34, enunciated the correct approach in determining whether section 13 created an offence of strict liability:
- "[T]he correct approach to determining whether section 13 (1) is an offence of strict liability given that the section is silent as to mens rea, is to examine whether the strong presumption of mens rea is rebutted expressly or by necessary implication. Necessary implication is an implication that is compellingly clear. Whether that is so turns on the word used in the light of their context and the purpose or (mischief) of the provision in question."

71. The Supreme Court concluded at paragraph 58 that: "... section 13 is a strict liability offence. There is no extra mental element required over and above the knowledge required for the wearing or carrying or displaying of the article to be deliberate. The strong presumption as to mens rea is rebutted by necessary implication ... the implication is "compellingly clear" because of the words used, the context and purpose of the provision."
72. I would apply the guidance given in paragraph 34 of **PWR** to section 3 (1) of the Firearms Ordinance. Section 3 (1) is silent as to the mental element required for the offence. The question is whether the strong common law presumption of mens rea is rebutted expressly or by compellingly clear necessary implication. In making that determination, I have to consider the words used in the light of their context and the purpose or mischief of section 3 (1). Do the words, context and purpose of section 3 (1) of the Firearms Ordinance lead inescapably or inexorably to the conclusion that the presumption of mens rea is rebutted and the offence of carrying firearm is one of strict liability?
73. In the context of the Firearms Ordinance it would appear that Parliament intended to impose a draconian prohibition on the carrying of firearms for the obvious social purpose of controlling dangerous weapons. The words of the section make it plain that it is an offence of strict liability. The clear purpose of the firearms legislation is to impose a tight control on the use of firearms which are highly dangerous weapons.
74. There is an important public policy consideration behind the legislation that is, protecting the public from the misuse of firearms. Parliament intended to impose a tight control on the carrying of firearms for the obvious social purpose of controlling dangerous weapons: (see **R v Dyemi [2007] EWCA Crim 2060**, paragraph 23). A strict liability interpretation of section 3 (1) is supported by the words, purpose, mischief and policy of the section. Accordingly, I am of the view that this is an absolute offence. The strong presumption of mens re is rebutted by necessary implication. The implication is "compelling" because of the words used, the context and the purpose of the provision.

75. Mr. Joseph referred to the Firearms (Amendment) 2022 which repealed and replaced section 3 the Firearms Act in 2022. There is no longer an offence of carrying or keeping a firearm. The offence is now “having in his possession, discharge or use”. The amendment preceded the charges against the defendant. Possession imports mens rea: knowledge, custody and control.
76. I have set out the respective submissions of the parties pertaining to this case. The case for the prosecution is quite straight forward. In a nutshell it is that the police stopped the vehicle driven by the defendant and on searching it, found a fanny pack containing a .25 firearm and three .25 rounds of ammunition as well as a quantity of cannabis. The defendant admitted that the cannabis was his, the fanny bag was his, but denied knowledge of the firearm and ammunition. A functions test was carried out on the firearm by ASP Porter. I accept the evidence of the prosecution and find as a fact that the .25 firearm and ammunition as well as cannabis were found when the police searched the vehicle driven by the defendant. The defendant was not the holder of a firearms licence or a licence for a firearm which holds that ammunition.
77. I will summarise the defence. The defence is one of denial of the knowledge of the firearm and ammunition in the fanny pack. The central theme of the defence is that the firearm did not belong to the defendant and he was not aware that it was in the fanny pack. The uncontradicted evidence of the defendant is that he had misplaced the fanny pack the day before he was arrested. Between the time he dropped off the vehicle the day prior and the morning of the search, the fanny pack and vehicle were outside his control. Any number of persons had access to the vehicle. He did not assent to being in control of the firearm and ammunition and had no knowledge of the firearm and ammunition. The firearm was put in the fanny pack by someone else. He had no direct physical possession or carrying. The prosecution must prove that he assented to being in control of the firearm and ammunition in the fanny pack.

78. Further, there was no forensic evidence connecting him to the crime. No DNA linked him to the firearm or ammunition, although his DNA sample was taken for analysis. No fingerprints linking him to the firearms and ammunition. The lack of Forensic evidence linking the defendant to the firearm and ammunition was highlighted by the defence. This coupled with the evidence of the defendant that others had access to the vehicle.
79. Mr. Smith KC also contended that PC Clarke failed to investigate the possibility that the firearm and ammunition were put there by someone other than the defendant and failed to investigate credible leads to others who may have had access to the vehicle. In view of this contention, I direct myself that the prosecution is not required to call every person who might conceivably give evidence relevant to some issue at trial. The prosecution has a largely unfettered discretion as to who will be called and what evidence will be tendered. That is a judgment to be made by the prosecutor. If in so doing some element of the offence is failed to be established beyond reasonable doubt, the result will be an acquittal.
80. It is seen that Mr. Smith KC placed great emphasis on the lack of forensic evidence-DNA and fingerprint connecting the defendant to the firearm and ammunition. The absence of DNA or fingerprint of the defendant is being asserted to be evidence that the defendant did not carry or handle the firearm. In that regard, I direct myself that DNA is not necessarily left by a person who handles an object. Even if the absence of DNA went to give some support to the defendant's case, it was not determinative. I further direct myself that a person who carries a gun may not always leave either recoverable fingerprints or DNA upon it. It follows that the presence or absence of DNA or fingerprint was not determinative of the guilt or innocence of the defendant: see paragraph 24 of **The Queen v Crawford [2015] UKPC 44**.
81. Mr. Smith KC also emphasised that the defendant's evidence was uncontroverted. In the premises I direct myself in terms set out in **Griffith's v TUI (UK) Limited [2021] EWCA Civ 1442**. Lord Justice Nugee stated at paragraph 81:

“As a matter of basic principle it is the function of trial judges to evaluate all the evidence before them in reaching their conclusions on the factual issues. That includes deciding what weight should be given to the evidence. I see nothing in the authorities that suggest that that obligation to assess the evidence falls away if it is “uncontroverted”; uncontroverted evidence still has to be assessed to see what assistance can be derived from it, viewed in the context of the circumstances of the case as a whole. Uncontroverted evidence may be compelling, but it may not be: it may be inherently weak or unhelpful or of little weight for other reasons.”

82. Flowing from the above, although the defendant’s evidence is uncontroverted, it is not immune from assessment by the tribunal of fact. The judge in a judge alone trial or the jury in a jury trial is not relieved of the responsibility to assess the evidence to see what assistance can be derived therefrom, viewed in the context of the circumstances of the case as a whole. I also direct myself that I can accept some or all or reject part or all of the evidence of a witness.
83. I also take into account that the defendant is a person of good character. While good character is not a defence to a criminal charge, I am to direct myself on the relevance of good character to the credibility of the defendant as well as his propensity to commit the offences charged. The fact that a defendant is of good character supports his credibility and is to be taken into account when deciding whether I believe his evidence. A person of good character is more likely to be truthful than a person of bad character. Further a person of good character is less likely to have committed the offence with which he is charged.
84. The defendant’s evidence was clearly well thought of and some of it was hardly the kind of evidence that could be easily controverted. For instance, the evidence that he lost his fanny pack the day prior to the stop and search. I have to assess the defendant’s evidence in the circumstances of the case as a whole. In brief, the defendant denied knowledge of the firearm and ammunition that was found in the fanny pack. He stated that he had lost or misplaced the fanny pack the day prior to the search and the vehicle and fanny pack

were not in his possession and control for several hours and other persons had access to the vehicle. When he got the vehicle the morning of the search he did not have time to search the fanny pack, before the police stopped and searched the vehicle.

85. I do not believe the evidence of the defendant that he lost his fanny pack did not know the firearm and ammunition were in the fanny pack. I do not find that evidence to be credible. It is not without significance, and I emphasise, that the defendant accepted that the fanny pack was his, accepted that the cannabis found was his but completely denied knowledge of the firearm and ammunition, saying that they are not his, and were or must have been put there by someone else. Inside the fanny pack were documents inclusive of the defendant's driver's licence. On the morning of the trial, the defendant changed his plea to guilty in respect of the possession of the cannabis. I draw the inference of fact and come to the common sense conclusion that the defendant knew that the firearm and ammunition were in the fanny pack. This is the only inference to be drawn.
86. I am of the view that in denying knowledge of the firearm and ammunition, the defendant was simply constructing a narrative to extricate himself from criminal liability in respect thereof. This view is not undermined by the defendant's acceptance that the cannabis was his, but fortifies my belief that it was simply part of the construct to distance himself from criminal liability for the firearm and ammunition. I recognise that the burden of proof rests on the prosecution and the defendant is under no obligation to prove that he is not guilty. The defendant has nothing to prove. The prosecution must make me feel sure of his guilt.
87. An issue arose as to whether or not the defendant consented to the search of the vehicle, with the police stating that he consented, while the defendant disputed that. I direct myself that as a general proposition, it is axiomatic that a trial court is not required to make findings upon every question raised in the course of trial. It is required to make findings in relation to those matters which is necessary to resolve in order to reach a conclusion on the issues before it. There may well be loose ends or unresolved questions,

but that they do not have to be resolved unless necessary to decide whether the defendant is guilty or not shown to be so. I apply that general proposition and find it unnecessary to make a finding on the issue of whether the defendant gave permission to search the vehicle as it does not assist me to decide on the question whether he is guilty or not guilty.

88. In returning to the counts charged, the offences are carrying a firearm and carrying ammunition. Carrying is to be given its ordinary meaning, example, to take from one place to another, convey, transport. Arguments that the defendant did not own the firearm or it did not belong to him are no moment in that regard. It is not a question of ownership. When the police stopped and searched the vehicle the defendant was driving, they found the firearm in the fanny pack, and the rounds of ammunition in it. The defendant was undoubtedly carrying the firearm and ammunition. The offences charged are of strict liability and an argument as to the defendant's lack of knowledge of the firearm and ammunition and lack of assent to control do not assist the defendant for the reasons given earlier. In the circumstances of this case, even if the offence were not one of strict liability, I would have no difficulty in finding that the defendant knew that the firearm and ammunition were in the fanny pack.
89. I note Mr. Smith's invitation to the court to dismiss Count 2 on the basis that the prosecution has failed to adduce into evidence before the court, the ammunition which was recovered from the defendant. This Mr. Smith regarded as fatal. I do not consider this omission has the consequence attributed to it by Mr. Smith and consequently do not accede to his dismissal invitation. There is no doubt that the rounds of ammunition were extracted from the firearm and tested by ASP Porter, and the defendant was not the holder of a licence which takes that ammunition.
90. The prosecution has satisfied me to the extent that I feel sure that it has proved all the ingredients of the offences. I am sure of the guilt of the defendant on both counts. I accordingly find the defendant guilty of count 1: Carrying a firearm contrary to section 3 (1) of the Firearms Ordinance Chapter 18: 09 of the Laws of the Turks and Caicos

Islands; and guilty on Count 2, Carrying ammunition contrary to section 3 (1) of the said Ordinance. As indicated earlier, the defendant pled guilty to Count 3, possession of a controlled drug – cannabis, contrary to section 6 (2) of the Control of Drugs Ordinance, Chapter 3.14 of the Laws of the Turks and Caicos Islands.

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

