COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

MCCrApp No. 254 of 2018

BETWEEN

TENIRO MINNS

Applicant

AND

THE COMMISSONER OF POLICE

Respondent

BEFORE: **The Honorable Madam Justice Crane- Scott, JA**

The Honorable Mr. Justice Evans, JA

The Honorable Madam Justice Bethell, JA

APPEARANCES: **Appellant Pro se**

Mr. Vernal Collie, Counsel for the Respondent

DATES: **2 November 2020; 20 November 2020**

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Criminal Appeal – Application for Extension of Time-Application made after three and one half months delay-whether application should be granted -proper exercise of discretion in the face of the delay- Proper Application of Court of Appeal Rule 24(1) - section 5 (b) of the Firearms Act Chapter 213- section 235(2) of the Criminal Procedure Code- Whether sentence unduly harsh – whether magistrate properly exercised his discretion in arriving at sentence- Rules 15 of the Court of Appeal Rules- .

On 22nd August 2018, a complaint was made to the police with respect of a vehicle being taken at gunpoint. Acting on information, Officers 2420 Chong and 3592 Dames went to the area of Bimini

Avenue, where the defendant was seen. After speaking with the defendant, who was told that he was suspected of being in possession of a firearm, the defendant took the Officers to an abandoned building, where he pointed out to them a firearm loaded with three live rounds of ammunition. The firearm was hidden under a sheet metal. The defendant was cautioned and arrested as a suspect for possessing a firearm and ammunition without the requisite authority.

The Applicant was charged with one count of Possession of an Unlicensed Firearm, contrary to section 5 (b) of the Firearms Act Chapter 213 and one count of Possession of Ammunition, contrary to section 9(2)(b)(ii) of the Firearms Act Chapter 213.

The Applicant pleaded guilty to the offences and was sentenced following his plea in mitigation to three (3) years imprisonment on the count of Possession of Unlicensed Firearm and 1 year imprisonment on the count of Possession of ammunition, both counts to run concurrently.

The Applicant has filed an application for an extension of time within which to appeal alleging (1)**:** That the sentence in respect to Possession of an Unlicensed Firearm was too harsh in the circumstances of the case where the Appellant pleaded guilty at the first opportunity and was a first offender of any crime or criminal acts; and (2) That the personal circumstances of the Appellant such as his young age, and no past criminal history of any kind was not taken into account in mitigation before sentence was passed.

HELD: Appeal allowed. Sentence of 3 years quashed, and a sentence of two and a half years substituted for the conviction of possession of firearm.

(1) The learned Magistrate failed to take into consideration the Applicant's cooperation with the police investigation which was substantial.

(2) The unspecified allegation that the Applicant had used the firearm to commit a crime was not a proper matter for the magistrate to rely upon. He thus in my view took into consideration an extraneous matter which he ought not to have done. The magistrate's comment that the Applicant was being punished for "for possessing and using the firearm" in these circumstances manifests a serious error.

(3) After considering the full circumstances of this case I am satisfied that had the magistrate applied the proper principles of sentencing to this case his decision would have been different. It is in these circumstances that a decision was reluctantly made in the interest of fairness to interfere with his sentence. It was for these reasons that we acceded to the Application to extend time and proceeded to hear and determine the substantive appeal.

1. Attorney General v. Omar Chisholm MCCrApp No. 303 of 2014 mentioned

2. Alexander Williams v. Regina SCCrApp No. 155 of 2016 mentioned

3. **Errol Knowles v Regina** SCCrApp. No. 79 of 2017 mentioned

4. **Garvin Adderley v Regina** SCCrApp. No. 250 of 2017 mentioned

5. **Rodriguez Jean Pierre v Regina** SCCrApp. No. 110 of 2019 mentioned

6. Birkett v. James [1978] AC 297 applied

7. Caryn Moss vs. Director of Public Prosecutions and Director of Public Prosecution vs. Caryn Moss SCCrApp & CAIS No. 230 of 2018 considered

8. Prince Hepburn v Regina SCCrApp. No. 79 of 2013 considered

9. Taylor v The Commissioner of Police [2015] 2 BHS J. No. 52

10. Ziyang Li et. al. v The Commissioner of Police MCCrApp No. 175 of 2019 considered

11. Jermaine Ramdeen vs. Commissioner of Police MCCrApp. No. 64 of 2018 mentioned

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REASONS FOR DECISION

Reasons for Decision delivered by The Honourable Mr. Justice Evans, JA

1. The Applicant in this matter sought an extension of time within which to appeal his sentence of three years imprisonment which was imposed on him by Magistrate McKinney sitting in Court No. 1 on the count of Possession of an Unlicensed Firearm.

2. The Applicant was charged with one count of Possession of an Unlicensed Firearm, contrary to section 5 (b) of the Firearms Act Chapter 213 and one count of Possession of Ammunition, contrary to section 9(2)(b)(ii) of the Firearms Act chapter 213.

3. On 28th August 2018 the Applicant appeared before Magistrate McKinney when he was arraigned and pleaded guilty to the offences. The facts of the case were read to the Applicant and he accepted the facts as read. He was convicted and sentenced following a plea in mitigation to three (3) years on the count of Possession of Unlicensed Firearm and 1 year to Possession of ammunition to run concurrently.

4. The Applicant filed Criminal Forms Nos. 1 and 2 on 6th December 2018, however the form indicates that it was signed by him on 15th November 2018.

5. We heard the Applicant's application on the 2nd November 2020 and after hearing submissions we determined that the extension and leave to appeal should be granted. We also proceeded to consider the Appeal and determined that the appeal should be allowed. We made an order quashing the sentence of three years on the charge of possession of a firearm and substituted the sentence of 2 ½ years (two years and six months). We made no changes to the sentence of one year for possession of ammunition. At that time, we promised to provide written reasons for our decision and we do so now.

THE FACTS

6. The summary of the facts were set out by the Magistrate in the Record. On 22nd August 2018, a complaint was made to the police with respect of a vehicle being taken at gunpoint. Acting on information, Officers 2420 Chong and 3592 Dames went to the area of Bimini Avenue, where the defendant was seen. After speaking with the defendant, who was told that he was suspected of being in possession of a firearm, the defendant took the Officers to an abandoned building, where he pointed out to them a firearm loaded with three live rounds of ammunition. The firearm was hidden under a sheet metal. The defendant was cautioned and arrested as a suspect for possessing a firearm and ammunition without the requisite authority.

7. According to the arresting officer, when asked how he came to be in possession of the firearm and ammunition, the defendant told them that he had watched a male, who sells drugs on the streets, hid the firearm. Further that after the male, who hid the firearm left the area, he (the Applicant) went and stole the firearm from where it was hidden.

THE LEGAL FRAMEWORK

8. Pursuant to section 235(2) of the Criminal Procedure Code:

> **"(2) An Appellant, within seven days after the day upon which the decision was given from which the appeal is made, shall serve a notice in writing, signed by the appellant or his counsel, on the other party and on the magistrate's court of his intention to appeal and of the general grounds of his appeal.**
>
> **Provided that any person aggrieved by the decision of a magistrate's court may upon notice to the other party apply to the court to which an appeal from such decision lies, for leave to extend the time within which such notice of appeal prescribed by this subsection may be served and the court upon the hearing of such application may extend such time as it deems fit."**

9. The principles which govern the consideration of applications for extension of time are well settled. In the Case of **Attorney General v. Omar Chisholm** MCCrApp No. 303 of 2014 this Court differently constituted observed that when the court is called upon to consider whether to grant an extension of time in which to appeal, there are four factors which are relevant; namely: (a) Length of delay, (b) The reason for the delay, (c) The prospect of success on appeal, and (d) Prejudice, if any, to the Respondent. See also the cases of See also **Alexander Williams v. Regina** SCCrApp No. 155 of 2016, **Errol Knowles v Regina** SCCrApp. No. 79 of 2017, **Garvin Adderley v Regina** SCCrApp. No. 250 of 2017, and the more recent case of **Rodriguez Jean Pierre v Regina** SCCrApp. No. 110 of 2019.

10. The Applicant was convicted on 28th August 2018 and as noted earlier the Applicant's Criminal Forms 1 and 2 which seek leave to appeal against sentence, and for an extension of time within which to appeal respectively, are dated the 15th November 2018 and filed on 6th December 2018. The Applicant is therefore three (3) months and nine (9) days past the time within which he ought to have given notice to appeal.

11. The Applicant gave as his reason for the delay that he was not knowledgeable as to the process of lodging his appeal and that by the time he got some assistance the time for filing had passed. He however asserted that notwithstanding his delay his appeal had good prospects of success.

12. Mr. Collie in his submissions contended that the application should be dismissed. He argued that the reasons given for the delay were inadequate and that in any event the extension of time ought not to be granted as there is no prospect of success on appeal.

THE GROUNDS OF APPEAL

13. This Court's jurisdiction in appeals from the Magistrate's court is derived from sections 14 and 15 of the Court of Appeal Act. These sections are as follows:-

> **"14. (1) Any person who is dissatisfied with any judgment, sentence or order of a magisterial court, given or made after the coming into operation of this section in respect of any offence referred to in the Third Schedule to the Ch. 91. Criminal Procedure Code Act or of an offence for which he is liable to imprisonment for a period of one year or more, may appeal to the court on any of the following grounds-**
>
> **(a) subject to subsection (2), that the magisterial court had no jurisdiction in the matter; (b) that the magisterial court exceeded it, jurisdiction in the matter;**
>
> **(c) that the magistrate took extraneous matters into consideration;**
>
> **(d) that evidence was wrongly rejected or inadmissible evidence was wrongly admitted by the magistrate, and that in the latter case there was not sufficient evidence to sustain the decision;**
>
> **(e) that the decision was unreasonable or could not be supported having regard to evidence;**
>
> **(f) that under all the circumstances of the case, the decision is unsafe or unsatisfactory;**
>
> **(g) that the decision was erroneous in point of law, the particular point of law being specified in the grounds of appeal;**

(h) that the decision of the magistrate or sentence passed was based on a wrong principle or was such that a magistrate viewing the circumstances reasonably could not properly have so decided;

(i) that some material illegality or irregularity, other than hereinbefore mentioned, substantially affecting the merits of the case was committed in the course of the proceedings therein or in the decision;

(j) that the sentence was unduly severe or unduly lenient;

(k) that the Magistrate in passing any sentence in respect of any offence referred to in Part I of the Third Schedule or any offence referred to in the Fourth Schedule to the Criminal Procedure Code Act did not comply with any sentencing guidelines issued by the Chief Justice or did not provide sufficient justification for not following such guidelines.

(2) It shall not be competent for the court to entertain the ground of appeal set out in paragraph (a) of subsection (1) unless objection to the jurisdiction of the magisterial court was formally taken at some time during the proceedings and before the decision was pronounced.

(3) The decision of the court in any criminal proceeding brought before it on appeal under subsection (1) shall be final.

(4) In this section and in section 15, "magisterial court" means a court presided over by a magistrate.

Powers of court on hearing appeals.

15. (1) The court, upon an appeal under section 14, may adjourn the hearing of the said appeal, and may upon the hearing thereof-

(a) subject to subsection (2) of this section, allow the appeal on any of the grounds set out in subsection (1) of section 14;

(b) dismiss the appeal;

(c) vary or modify the decision of the magisterial court;

(d) remit the matter with the opinion of the court thereon to the magisterial court; or (e) make such other order in the matter as it may think just, and may, by such order, exercise any power which the magisterial court might have exercised, and such

order shall have the same effect and may be enforced in the same manner as if it had been made by the magisterial court.

(2) The court may notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the court considers that no miscarriage of justice has actually occurred."

14. The Applicant relied on two grounds which were set out in his notice as follows:

Ground one: That the sentence was too harsh in the circumstances of the case where the Appellant pleaded guilty at the first opportunity and was a first offender of any crime or criminal acts.

Ground two: That the personal circumstances of the Appellant such as his young age, and no past criminal history of any kind was not taken into account in mitigation before sentence was passed.

15. The essence of these grounds was an assertion that (1) the sentence imposed was too harsh; and (2) the magistrate did not apply the principles of sentencing properly. These grounds are consistent with the general understanding that in dealing with an appeal against sentence this court will only interfere if (1) the sentence is found to be excessive or (2) the principles with regard to sentencing were not correctly applied.

16. It is immediately evident that in this matter we are being asked to consider the magistrate's exercise of his discretion relative to his sentencing powers. In this regard I begin by stating and reminding myself of the principle which governs the exercise we have been asked to undertake. Lord Diplock in **Birkett v. James** [1978] AC 297 provided guidance to appellate courts as to how to approach a review of a trial judge's exercise of discretion and in my view, this would apply equally to a magistrate. Lord Diplock opined as follows:-

"An appellate court ought not to substitute its own discretion for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he has decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either (1) where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account..."

17. This Court (differently constituted) observed in **Caryn Moss vs. Director of Public Prosecutions and Director of Public Prosecution vs. Caryn Moss** SCCrApp & CAIS No. 230 of 2018:

> **"86… In approaching matters of this nature we are always mindful of the principle that an appellate court should be slow to interfere with the exercise of trial judge's discretion and should not interfere unless some error in principle has been disclosed. This principle is as old as the guidance given by Lord Hewart, LC in the case of *Gumbs* (1927) 19 Cr. App. R. 94 where he stated as follows:**
>
> **"Two principles from time to time have been mentioned in this Court, and in some cases they may have to be considered together. One is that this Court never interferes with the discretion of the Court below merely on the ground that this Court might have passed somewhat different sentence: for this Court to revise sentence there must be some error in principle."**

18. The case of **Prince Hepburn v Regina** SCCrApp. No. 79 of 2013 is also instructive. At paragraph 36 this Court (differently constituted) opined that:

> **"In exercising his sentencing function judicially the sentencing judge must individualize the crime to the particular perpetrator and the particular victim so that he can, in accordance with his legal mandate, identify and take into consideration the aggravating as well as the mitigating factors applicable to the particular perpetrator in the particular case. This includes but is not limited to considering the nature of the crime and the manner and circumstances in which it was carried out, the age of the convict, whether or not he pleaded guilty at the first opportunity, whether he had past convictions of a similar nature, <u>and his conduct before and after the crime was committed.</u> He must ensure that having regard to the objects of sentencing: retribution, deterrence, prevention and rehabilitation that the tariff is reasonable and the sentence is fair and appropriate to the crime." [Emphasis Mine]**

DISCUSSION

19. In considering the issues raised in this appeal it was important for us to see how the magistrate approached the sentencing process. In reviewing the record of the proceedings before the magistrate as set out by him, we noted that the learned magistrate identified the mitigating factors as follows:

> **"The defendant asked the court for leniency**
>
> **ii. No Prior conviction**

iii. Employed as part time construction worker

iv. Young age

v. Pled guilty at first opportunity

vi. Expression of remorse"

20. The way in which the Magistrate applied the mitigating factors vis a vis the aggravating factors can be seen from his sentencing comments as follows:

> **"The sentencing jurisdiction of the court under Section 5(b) of the Firearms Act Chapter 213 is twelve months to ten years. The court has taken into consideration mitigating factors as they relates to the defendant. Having taken those factors into consideration, the court must also weigh those factors against the aggravating factors as stated by the prosecutor in this case.**
>
> **The firearm in this case is considered to be a fairly powerful and dangerous weapon. Not only did the defendant possess the firearm, but he used it in the commission of an offence. The sentence of the court is not to punish the defendant for the alleged offence committed, but for possessing and using the firearm as he accepted he did, whilst committing an offence.**
>
> **The court recognizes the defendant is a young person and there is the possibility of him rehabilitating and making positive contribution to society in the future. However, the court cannot overlook the serious nature of the defendant having an illegal firearm in his possession, using the firearm to commit an offence and the havoc created among members of the society by persons like the defendant, who possess and use such illegal weapon to commit an offence against innocent persons in our society.**
>
> **The sentencing jurisdiction of the court for such offence where a defendant has either pled guilty or is found guilty is twelve months to ten years. The court will not impose the maximum sentence given the mitigating factors as aforementioned.**
>
> **The court does impose the following sentences:**
>
> **1. Possession of an unlawful firearm: Three (3) years imprisonment at the Department of Corrections.**
>
> **2. Possession of Ammunition: One (1) year imprisonment at the Department of Corrections.**
>
> **Sentences are to run concurrently." [Emphasis Mine]**

21. Firstly**,** it is noted that the learned magistrate did not appear to have had regard to the conduct of the Applicant in leading the Police to the Gun. It is apparent that there is nothing in the record which would reflect that the police had any prior knowledge as to where the gun was located. It follows that without the Applicant's co-operation in taking them to where the gun was located there would have been no basis for charging him with the offences to which he pleaded guilty. We must assume that the police did not use force to coerce him to do so and so it must be taken that he voluntarily did so. In my view this level of co-operation should have been accepted by the magistrate as a significant mitigating factor in the Applicant's favour.

22. However, not only did the magistrate not take into consideration that mitigating factor he apparently took into consideration allegations that the Applicant had used the gun to commit another crime This is borne out by the magistrate's comments that- .

> "**Not only did the defendant possess the firearm, but he used it in the commission of an offence. The sentence of the court is not to punish the defendant for the alleged offence committed, but for possessing <u>and using the firearm</u> as he accepted he did, whilst committing an offence."**

23. It is to be noted that Applicant was charged with possession of a firearm simpliciter and thus it was improper for the magistrate to take the position that he was punishing the Applicant for using the gun. I am aware that if there was cogent evidence as to the use of the gun this could be an aggravating factor relative to the possession thereof. See the case of **Taylor v The Commissioner of Police** [2015] 2 BHS J. No. 52 where Crane-Scott, JA in delivering the judgment of the court made these helpful comments:

> **"26. It is evident from a reading of the Firearms Act (as amended over the years) that as a general rule, Parliament intends firearms offences to carry custodial sentences thereby reflecting the abhorrence with which Bahamian's, through their Parliament, view the illicit use and abuse of firearms.**
>
> **27. In our view the time has come for the country's courts to reflect, through their sentences, the following sentiments expressed by Lord Judge CJ in the English Court of Appeal case of R v Wilkinson [2010] 1 Cr App R (s) 100:**
>
> **'2. The gravity of gun crime cannot be exaggerated. Guns kill and maim, terrorise and intimidate. That is why criminals use them. Sentencing Courts must address the fact that too many lethal weapons are too readily available: too many are carried: too many are used always with devastating effect on individual victims and with the insidious corrosive impact on the well-being of the local community.'**

28. The unlawful possession and use of firearms and ammunition is a grave concern to this society. They are used to kill and injure and to further the commission of other violent crimes. Illegal guns and ammunition are integral to the illicit drug trade and are used the world over by rival gangs bent on protecting turf, exacting gang discipline and imposing street justice.

29. Based on the recent (2014) amendment to the Firearms Act it is now clear that by virtue of Section 9 of the Act, Parliament intends a custodial sentence to be imposed by a stipendiary and circuit magistrate following a summary conviction for the purchase, acquisition or possession of a firearm or ammunition and that sentence should fall within the range of 12 months to 10 years.

30. In balancing the relevant factors with a view to the proper exercise of the sentencing discretion, we expect that sentencers will pay due regard to such aggravating and mitigating factors of the offence as well as those of the offender as may be available.

31. When determining the seriousness of a particular offence under the Firearms Act, sentencers should have regard to factors which may include, but which are not necessarily limited to the following considerations, initially suggested by Lord Bingham CJ in the case of Tony Avis and others (1998) 2 Cr App R (S) 178:

(i) What sort of weapon or ammunition is involved? Or we may add, what quantities are involved?

(ii) What use (if any) has been made of the firearm or ammunition?

(iii) With what intention (if known) did the defendant possess or use the firearm or ammunition as the case may be?

(iv) What was the defendant's record (if any in) relation to such offences?

32. When considering the particular circumstances of the offender, sentencers may have regard to such of the following as may be relevant in the particular case:

(1) An early plea of guilty will always be a strong mitigating factor in favour of the offender and should always be taken into account by way of a discount on sentence;

(2) Expressions of remorse (if any) (bearing in mind that the absence of remorse should not be held against the offender and cannot be regarded as having aggravated the seriousness of the offence);

(3) Clean criminal record and good character (if any);

(4) Young age (if applicable);

(5) Employment status (if known);

(6) Possibility of rehabilitation (if known);

(7) Cooperation with the police investigations;"

[Emphasis Mine]

24. The magistrate in his remarks accepted that the Applicant had no previous convictions as such as far as the law is concerned the Applicant had committed no other crime. The magistrate does not in his remark identify the crime which he alleges that the Applicant committed and which he asserted that the Applicant admitted to. It is noteworthy that the summary of facts which the magistrate provided does not contain an allegation that the Applicant was the person who took the vehicle at gunpoint. It follows that the Applicant's acceptance of those facts cannot be construed as an admission to a crime other than possession of the firearm and ammunition. Nor is there any direct evidence on the record to explain the Magistrate's comment that the accused accepted that he used the firearm to commit a crime. This court has had the need on previous occasions to remind magistrates that proper records should be kept of what transpires at hearings especially where guilty pleas are taken.

25. In **Ziyang Li et. al. v The Commissioner of Police** MCCrApp No. 175 of 2019 I observed that:

"38. This is an opportune time to remind Magistrates of the importance of complying with the requirements set out in the provisions of the Criminal Procedure Code Act. Section 199(1) provides as follows:

"199. (1) If both parties appear, the court shall proceed to hear the case, and the substance of the charge or complaint shall be read to the accused person by the court and he shall be asked whether he admits or denies the truth of the charge"

39. Although the Act does not specifically say so, it is implicit that the Magistrate on reading the charge to ensure that the

accused person understands the charge which he is being asked to plead to. This is a fundamental tenet of a fair hearing and so if necessary the Magistrate should explain the charges to the accused in a manner which he is able to understand.

40. Section 200 is in these terms:

"200. If the accused person admits the truth of the charge, his admission shall <u>be recorded as nearly as possible in the words used by him</u> and the court shall convict him and pass sentence upon or make an order against him <u>unless</u>, after hearing anything which may be said by or on behalf of the accused, whether in mitigation or <u>otherwise</u>, there shall appear to the court to be sufficient cause to the contrary" [Emphasis Added]

41. The compliance with this provision will ensure that there is an ability to conduct an assessment as to whether the guilty plea is unequivocal or not. In order for this provision to be meaningful however the Magistrate must require the prosecution to provide a summary of the facts on which the charge is based and the accused should then be given the opportunity to say whether he accepts the same. It is only then that Magistrate should proceed to make a determination whether to accept or refuse the guilty plea after hearing anything which may be said by or on behalf of the accused, whether in mitigation or otherwise."

26. In my view the unspecified allegation that the Applicant had used the firearm to commit a crime was not a proper matter for the magistrate to rely upon. He thus in my view took into consideration an extraneous matter which he ought not to have done. The magistrate's comment that the Applicant was being punished for "**for possessing <u>and using the firearm"</u>** in these circumstances manifests a serious error.

27. As noted, the Applicant relied on two grounds the first being that the sentence was too harsh. In my view if that ground stood alone the Applicant would have little chance of success as the sentence of three years is not outside the acceptable range for cases of this nature and in the absence of some error in principle could not properly be challenged. However, ground two in my view is important having regard to the two errors identified on the record. These two significant errors brings into play ground two and directly affects the Magistrate's assessment of the proper sentence in this particular case.

28. It must be kept in mind that although the practice of having regard to sentences passed or affirmed for similar offences may provide some persuasive authority and may even assist us in considering the proportionality (or lack thereof) of a sentence in a particular case, they do not bind us in any way. See **Jermaine Ramdeen Vs. Commissioner of Police** MCCrApp. No. 64 of 2018. Each case must be considered on its particular facts to determine where the justice lies. In other words, the sentence must fit the particular crime and the particular defendant when all of the relevant considerations are properly considered. See **Prince Hepburn v Regina (**supra).

29. We had also given consideration as to whether this was a proper case for the recourse to Section 15 of the Court of Appeal Act which deals with the powers of this Court when considering appeals from the Magistrate's Court. That section as far as is relevant provides as follows:

> **"(2) The court may notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the court considers that no miscarriage of justice has actually occurred".**

30. Mr. Collie submitted that in as much as the sentence imposed is within the acceptable range there has been no injustice and the appeal should be dismissed. This argument attractive as it is would have more force if ground one stood alone and if the only issue was whether the sentence was too harsh. However, ground two calls into question the propriety of the exercise of the magistrate's discretion. I am of the view that the errors committed by the Magistrate has in this particular case resulted in an injustice. I am also satisfied that had the magistrate taken into consideration the conduct of the Applicant in cooperating with the police in their investigations; And had he not carried out his stated intent to punish the Applicant not only for possessing the firearm but also for **"using the firearm"** his decision would have been different. The result is that I am satisfied that the magistrate has erred in principle by giving weight to something which he ought not to have taken into account and by failing to give weight to something which he ought to have taken into account .

31. After considering the full circumstances of this case we were satisfied that had the magistrate applied the proper principles of sentencing to this case he would not have imposed the three year sentence on the Applicant. It was in these circumstances that a decision was reluctantly made in the interest of fairness to interfere with his sentence. We therefore acceded to the Application to extend time and proceeded to hear and determine the substantive appeal.

32. As noted above we allowed the appeal and made an order quashing the sentence of three years on the charge of possession of a firearm and substituted the sentence of 2 ½ years (two years and six months). We made no changes to the sentence of one year for possession of ammunition.

The Honourable Mr. Justice Evans, JA

The Honourable Madam Justice Crane-Scott, JA

The Honourable Madam Justice Carolita Bethell, JA