

COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp & CAIS No. 163 of 2022

BETWEEN

JAMAAL HAMILTON

Appellant

AND

THE COMMISSIONER OF POLICE

Respondent

BEFORE: **The Hon Sir Michael Barnett, President, Kt**

The Hon Mr. Justice Evans, JA

The Hon Sir Brian Moree, JA, Kt

APPEARANCES: **Mr. Ian Cargill, with Mr. Alphonso Lewis, and Mr. Levan Johnson,**
Counsel for the Appellant.

Mrs. Jacqueline Forbes-Foster, Counsel for Respondent

DATES: **28 February 2023; 8 March 2023**

Criminal Appeal- Appeal against convictions and sentence- Possession of an unlicensed firearm- Contrary to section 5b of the Firearms Act Chapter 213- Possession of ammunition: Contrary to section 9 (2) (a) of the Firearms Act Chapter 213- Section 8A of the Firearms Act

On the morning of April 1, 2011, police officers were conducting a road check in the area of Paradise Island beach when they noticed a silver Suzuki Swift motor vehicle trying to avoid the checkpoint. The officers pursued the vehicle and forced it to stop, and upon approaching it they

saw two men inside and the passenger was holding a gun. The officers ordered the two men, Jamaal Hamilton and Ombre Moss, out of the vehicle. Upon inspection, they found a firearm and 15 rounds of ammunition inside the car. Both men denied any ownership or possession of the gun and ammunition. On November 15, 2022, Jamaal Hamilton and Ombre Moss were found guilty of possession of an unlicensed firearm and possession of ammunition, and were sentenced to 18 months in prison. On November 17, 2022, Jamaal Hamilton filed an appeal against his convictions and sentences.

Held: Appeal dismissed. The Appellant’s convictions and sentences are confirmed.

The evidence presented to the Magistrate was clear. A road check was ongoing, and the car driven by the Appellant drew the attention of the police. Upon searching the vehicle, a firearm was found wedged between the passenger seat and the center console of the interior. Section 8A of the Firearms Act became applicable in this situation. Generally, an accused person has a right to remain silent and is not required to answer any questions; however, due to the terms of Section 8A, it would have been in the Appellant's best interest to provide an explanation for the presence of the firearm in the vehicle. Since he failed to do so, no rebuttal was made to the prima facie evidence of his guilt. Therefore, the Magistrate had no choice but to convict him. It is evident why the Magistrate arrived at this conclusion, and there is no cause to believe that the convictions were unsafe. Thus, the appeal against conviction must be dismissed.

I hasten to add, however to be clear and as a caution, that Magistrates should be aware of the importance of providing reasons for their decisions in their rulings. It is important for confidence in the Judiciary, as it allows parties to better understand the decisions made in their cases. The provision of reasons also serves to help the appellate court to determine whether the decision of the judge was reasonable and according to law. As stated by Sir Michael Barnett, in **Adnan Oliver v R SCCrApp. No. 191 of 2014** ‘*as a general proposition adequate and intelligible reasons must be given for judicial decisions. A judge failing to give reasons must be the exception rather than the rule...*’

Adnan Oliver v R SCCrApp. No. 191 of 2014 considered
Ashano Knowles v The Commissioner of Police MCCrApp. No. 141 of 2022 mentioned
Derek Belle v The Commissioner of Police MCCrApp & CAIS No. 277 of 2015 considered
Kapry Kemp v Commissioner of Police MCCrApp No 37 of 2005 followed
Mario Taylor v Regina SCCrApp. No. 265 of 2017 considered

JUDGMENT

Judgment delivered by The Hon. Mr. Justice Evans, JA

1. The Appellant in this matter appeals against his convictions and sentence for the offences of (1) Possession of an unlicensed firearm: Contrary to section 5b of the Firearms Act Chapter 213; and (2). Possession of ammunition: Contrary to section 9 (2) (a) of the

Firearms Act Chapter 213. The Appellant was sentenced to ‘imprisonment of 18 months with immediate effect’.

2. The Notice of Motion which was filed on the 18 November, 2022 contained five(5) grounds of Appeal set out as follows:-
 1. **The decision of the Learned Magistrate to convict the Appellant was unreasonable and could not be supported having regard to the evidence.**
 2. **The decision by the Learned Magistrate was one that another Magistrate viewing the circumstances could not properly arrive at.**
 3. **The Conviction is unsafe and unsatisfactory.**
 4. **The sentence is harsh and unduly severe.**
 5. **Such other ground(s) that the Court deems just and reasonable.”**

THE PROSECUTION’S CASE AT TRIAL

3. The evidence led by the Prosecution indicated that on Friday 1st April, 2011 around 10:40 am while in the area of Paradise Island beach the police were conducting a road check. The officers’ attention was drawn to a silver 2009 Suzuki Swift motor vehicle license plate AX1220 as it turned around, appearing to attempt to avoid the road check that was being conducted in the area. As a result Chief Inspector Daniel Gabriel along with woman Police Constable Kacey Johnson pursued the vehicle and beckoned it to stop, which it did.
4. The evidence of Gabriel was that when he approached the vehicle he observed that there were two individuals in the vehicle. He testified that he was able to see the passenger with what appeared to be a gun in his hand which he attempted to hide away. The two men were ordered from the vehicle and a gun was located the passenger exited the vehicle he noticed the subject firearm wedged between the passenger seat and the centre console on the interior of the vehicle.
5. The evidence which was undisputed was that the Appellant was the driver of the vehicle and his co accused was the passenger. The men were arrested and were taken to Paradise Island Police Station where they were checked in. WDC 4081 Major testified that at the station she conducted an interview with the Appellant and when questioned about the firearm and ammunition he replied “no comment”. She further testified that he refused to sign the interview sheet.
6. The Appellant was subsequently, charged for the offences for which he was tried and convicted. At his trial the Appellant’s Counsel made an unsuccessful no case submission.

When called upon to answer the charges the Appellant elected to remain silent and gave no evidence. He was convicted after closing submissions were made on his behalf.

THE LEGAL POSITION

7. Section 5 of the Firearms Act as amended is in the following terms:-

“5. Penalties for revolvers.

Any person importing a revolver into The Bahamas or being found in possession of a revolver in contravention of this Part shall be liable -

(a) on conviction on information to imprisonment for a term in the range of ten years to fifteen years;

(b) on summary conviction, to imprisonment for a term in the range of twelve months to ten years and in addition to such term of imprisonment every such revolver shall be forfeited to the Crown:

Provided that where the court is satisfied that such person was the holder of a special licence issued under this Part and did not renew such licence during the period specified in the proviso to subsection (3) of section 4, or during the period of six months next following that period, the court may, in lieu of passing a sentence of imprisonment, impose on such person a fine not exceeding five thousand dollars.”

8. Section 9 of the Act provides that-

“9. (1) Subject to the provisions of section 12, 43 and 44 of this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition to which this Part of this Act applies unless he holds a firearm certificate in force at the time.

(2) If any person —

(a) purchases, acquires or has in his possession any firearm or ammunition to which this Part of this Act applies, without holding a firearm certificate in force at the time, or otherwise than as authorised by such certificate, or, in the case of ammunition in quantities in excess of those so authorised; or

(b) fails to comply with any condition subject to which a firearm certificate is held by him, he shall, subject to the provisions of sections 12, 43 and 44 of this Act, for each offence be liable —

- (i) on conviction on information, to imprisonment for a term being in the range of ten years to fifteen years;**
- (ii) on summary conviction to imprisonment for a term in the range of twelve months to ten years:**

Provided that where the court is satisfied that such person was the holder of a firearm certificate granted under this Part and did not renew such firearm certificate during the period specified in the proviso to subsection (4) of section 10, or during the period of six months next following that period, the court may, in lieu of passing a sentence of imprisonment, impose on such person a fine not exceeding five thousand dollars.

9A. Possession of firearm and ammunition with intent to supply.

(1) It is an offence for a person to have a firearm or ammunition in his possession with intent to supply it to another in contravention of the provisions of this Act.

(2) A person who contravenes this section commits an offence and is liable –

- (a) on conviction on information to a term of imprisonment in the range of ten years to fifteen years;**
- (b) on summary conviction to imprisonment to a term in the range of four years to seven years.**

(3) For the purposes of subsection (1), where a person is found in possession of two or more firearms or twenty- five more rounds of ammunition without a firearm certificate, it shall be presumed, unless the contrary is proved, that he is in possession of the said firearm or said ammunition with intent to supply it to another person irrespective of whether that person is within The Bahamas or elsewhere.

(4) For the purposes of this Act, “supply” includes sell, transfer or otherwise distribute.

SUBMISSIONS

- 9. A review of the grounds of appeal relative to the conviction raises the same issues and can be argued together. Mr. Cargill’s primary submission as I understand it to be is that there is no evidence that the Appellant had any, knowledge, custody or control of the firearm and the ammunition. He contends that at its highest the evidence is that the passenger was the one seen with the gun. Further that none of the witnesses testified that they saw the Appellant do anything in a suspicious manner, save and except turn around. He contends that turning the car around was equally consistent with simply seeking to avoid traffic.

10. The second point on which Mr. Cargill relies is that the learned Magistrate's decision is devoid of any reasons for his arriving at the conclusion that the Appellant was guilty of the offences charged. Finally, He contends that in the absence of any evidence of the Appellant's possession of the gun the Learned Magistrate must have relied on unreasonable inferences.
11. It is important to note that in the circumstances of the present case the starting point must be have regard to Section 8 A of the Firearms Act. As noted that provision provides that *'the occupier of any house, building, or premises or the person who has control of any privately operated vehicle, aircraft or vessel in which a firearm is found shall, for the purposes of this Part of this Act, be deemed to be in possession of such firearm unless the contrary is proved.'* The effect of this provision which was section 5(2) at that time was authoritatively stated in **Kapry Kemp v Commissioner of Police** MCCrApp No 37 of 2005. In that case Dame Joan Sawyer observed that-

"28. In my view, the offences under sections 5 and 9 of the Act are not absolute offences as that term is generally understood and a court would have to find that an accused person had actual or constructive possession of a firearm with actual knowledge or circumstances from which knowledge can be inferred, that he had a firearm before it could convict him of the offence of possession of a firearm or possession of a revolver without a special licence and so on.

29. While I accept that the offences under 5(1) (b) and 9 (2) (a) of the Act are not absolute offences, it seems clear to me, on the undisputed facts in this case as they were presented before the learned magistrate, that whoever possessed the firearm and ammunition in this case must have known that what they possessed were contrary to the law and therefore hid them.

30. In this case, there is a further legal hurdle for the appellant to overcome in order to succeed on this ground of his appeal: it is subsection 5(2) of the Act. That subsection reads:

'(2) The occupier of any house or premises in which a revolver is found shall, for the purposes of this Part of this Act, be deemed to be the possessor unless and until the contrary is proved.'
(Emphasis supplied)

31. At first glance that subsection seems to mean that whenever a revolver is found in a house or premises, then the court is entitled to find that the occupier of that house or premises is the possessor until the contrary is proved. In my judgment, a vehicle would fall within the term 'premises' for the purposes of that provision.

32. Where therefore, as in this case, a weapon and ammunition are found secreted in the van belonging to the appellant, the learned magistrate was entitled to decide that the burden then shifted to the appellant to show, on a preponderance of probability, that he was not the possessor because, for example, he had no knowledge that the weapon was there.

33. In this case, the appellant gave no evidence whatsoever to the Court and indeed when interviewed by the police in the presence of his then counsel and attorney, refused to comment.

...

35... The finding of the firearm and the ammunition in the vehicle belonging to appellant coupled with the lack of any explanation by the appellant, means that the evidence was weighted against him bearing in mind the provisions of subsection 5(2) of the Act. In so far as the outcome of the appellant's appeal depends on the first ground, it must fail.” (Emphasis added)

12. The principle derived from **Kapry Kemp** has been followed by this Court in the case of **Derek Belle v The Commissioner of Police** MCCrApp & CAIS No. 277 of 2015 and more recently in the case of **Ashano Knowles v The Commissioner of Police** MCCrApp. No. 141 of 2022. In **Derek Belle**, the provision at issue was section 8 (A) of the Firearms Act which was amended to replace what used to be section 5(2) of the Act. That section provides that-

"8A. Occupier of house, building, premises, vehicle or vessel.

(1) The occupier of any house, building, or premises or the person who has control of any privately operated vehicle, aircraft or vessel in which a firearm is found shall, for the purposes of this Act be deemed to be in possession of such firearm unless the contrary is proved.

(2) For the purposes of this section, "privately operated vehicle, aircraft or vessel" does not include a vehicle, aircraft or vessel that is operated as public transportation". (Emphasis added)

13. Isaacs JA, observed that use of the words '*unless the contrary is proved*' clearly indicates that the presumption could be rebutted. In that case the police stopped a vehicle with four occupants: three males and a female. The Officers searched the vehicle and discovered a 22 caliber rifle containing the magazine with 15 rounds in it. The rifle was on the floor of the vehicle at the rear of the left passenger seat. The person sitting in that area identified himself as Brandon Carey and, according to the evidence, he, when interviewed, told the Police that the rifle was his and that he had a licence for it. He was asked for the licence,

but stated that he did not have it on him. Belle was charged and convicted and thereafter lodged an appeal.

14. In allowing his appeal Isaacs JA stated that:-

“The upshot is that clearly none of the occupants had a licence for the weapon or for the ammunition. However, on the prosecution's own evidence, the rear seat passenger, Carey, admitted to the officers, according to them, that he owned the weapon; that he merely had brought it along to show to his friends. In the unsigned Record of Interview the answers were put before the magistrate (if not, the record itself since it was unsigned), that the person, Carey, said that the other persons had no knowledge that the weapon was present in the vehicle. Notwithstanding the presumption that the person in charge of a vehicle or a premises where a firearm is found is deemed to be the possessor, section 8A does go on to say, "until the contrary is proved". Clearly, the contrary had been shown in this case and, in the circumstances, we accede to the appeal on the basis that the decision of the learned magistrate to convict the Appellant was unreasonable and cannot be supported, having regard to the evidence. In the circumstances, the conviction is quashed; the sentence is set aside.”

15. Mr. Cargill contends that the same principle is applicable in the present case. He contends that the fact is that no witness saw the appellant with the firearm but rather Gabriel's evidence was that he saw the passenger with the gun. Counsel argues that this evidence rebuts the presumption and shows that the passenger was the person in possession of the firearm. It must be noted however, at no time did the passenger admit to being the owner of the firearm as in **Belle's** case. It is also clear that possession of an item can vest in more than one individual at the same time. By virtue of the conviction of both defendants the magistrate was obviously of the view that they acted together in possessing the firearm.
16. In my view the fact that the weapon was seen by the officer from outside the vehicle is a clear indication that the appellant must have known of its presence in the vehicle. His failure to provide an explanation for its presence and instead saying no comment when asked about it did nothing to rebut the presumption which was raised by the fact that he was the driver of the vehicle. It was therefore not unreasonable for the learned Magistrate to conclude that the guilty verdict was appropriate in the circumstances of this case.
17. With regard to Mr. Cargill's complaint relative to the lack of reasons contained in the Magistrate's ruling it is accepted that the ruling did not condescend to any real analysis. However, at paragraph 10 of **Kapry Kemp**, Dame Sawyer in dealing with a similar complaint stated as follows-

“10. It is clear from the ruling extracted above, that the learned magistrate did not deal in detail with every scintilla of evidence in the above ruling, but chose instead, to base her decision on the undisputed facts that the appellant was both the owner and the driver of the vehicle on which the concerned firearm and ammunition were found while there was no evidence from which a reasonable inference could be drawn that Bowe knew or must have known that the firearm was in the vehicle. There is nothing inherently wrong with that approach.”

18. In **Mario Taylor v Regina** SCCrApp. No. 265 of 2017 this Court (differently constituted) in dealing with a decision by a trial judge on a voir dire where no written reasons were provided stated as follows:-

“19. It clearly would have been helpful to have the views of the trial judge on the facts which were not in dispute as well as his findings as to how and where the injury occurred. The question, however, is whether the absence of the judge’s reasoning and findings on certain issues renders his ultimate decision unsafe. There are several cases which, although not dealing with criminal trials, in my view are of assistance. In *Missick v. Missick* SCCivApp No. 27 of 2011 John JA, considered the principles to be applied in resolving the appeal despite the absence of the judge's reasons. He adverted to dicta of Lord Thankerton in *Watt v. Thomas* [1947] 1 All ER 582. At paragraph 8 he stated: *"8. The principle has more recently been lucidly expressed by Lord Hope of Craighead in John Hanna v. Imperial Life Assurance Co. of Canada [2007] UKPC 29 where he said that the test to be applied in determining whether an appellate court should interfere was: Was her decision, in other words, one which no reasonable person acting judicially and properly instructed as to the relevant law could have reached? The answer to that question must be found by examining the whole of the material that was before the judge. No single factor is likely to be conclusive."*

20. In the case of *Sharma v. Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago)* [2006] UKPC 57 the Privy Council discussing the trial judge’s failure to give reasons observed as follows:

“Thirdly, by referring compendiously to "the totality of the evidence raised by the [Chief Justice]" the judge gave no indication of the particular evidence which she found persuasive. A judge must of course, when giving reasons for an interlocutory ruling of this kind, make plain that she is not finding any facts and that the evidence relied on may turn out to be incorrect, incomplete

or misleading. But it is ordinarily the duty of a professional judge to give reasons (Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377, 381), and her failure to do so fully justified the Court of Appeal in making its own analysis.”

21. In the case of *English v. Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 the Court recommended the approach to be taken by an appellate court as follows:

*“Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the Judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. This was the approach adopted by this Court, in the light of *Flannery in Ludlow v National Power PLC* 17 November 2000 (unreported). If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing, or to direct a new trial.” [Emphasis added]*

This makes it quite clear that in the absence of reasons an appellate court can consider the evidence presented to the court below and make its own analysis in order to resolve the appeal.”

19. The evidence presented to the Magistrate was clear. There was a road check ongoing, the car driven by the Appellant did a U-turn, which attracted the attention of the police. Inspector Gabriel beckoned the car to stop. It did stop and as Gabriel approached the vehicle he observed the passenger trying to hide something between the console and the seat. It was confirmed to be a firearm when the vehicle was searched and the firearm was located wedged between the passenger seat and the center console on the interior of the vehicle.
20. I am satisfied that in these circumstances section 8A of the Firearms Act became operative. I accept that in the normal course of things an accused person has a right to remain silent and is not obligated to answer any questions. However, having regard to the terms of Section 8A it was in the appellant’s best interest to provide an explanation for the presence of the firearm in the vehicle. He did not remain silent but instead simply said ‘*no comment*’. This did nothing to satisfy the evidential burden which had shifted to him and his election to not give evidence at his trial left the prima facie evidence of his guilt unrebutted. In these circumstances the Magistrate had no other option than to convict.
21. After a full review of the judgment, in the context of the material evidence and submissions at the trial, it is clear why the Magistrate reached the decision that he did. It follows that

notwithstanding the failure of the Magistrate to demonstrate the extent of his analysis of the case there is no basis for a finding that the convictions were unsafe. I would therefore dismiss the appeal against conviction.

22. I hasten to add however to be clear and as a caution, that magistrates should be aware of the importance of providing reasons for their decisions in their rulings. It is important to confidence in the Judiciary as it allows parties to better understand the decisions made in their cases. The provision of reasons also serves to help the appellate court to determine whether the decision of the judge was reasonable and according to law. As stated by Sir Michael Barnett, in **Adnan Oliver v R SCCrApp. No. 191 of 2014** *‘as a general proposition adequate and intelligible reasons must be given for judicial decisions. A judge failing to give reasons must be the exception rather than the rule...’*
23. Finally, although the Appellant’s notice of Motion contained a ground challenging his sentences no submissions were made relative thereto and Mr. Cargill confirmed at the end of his submissions that he was not pursuing the same. It follows that the appeal against sentence is taken as abandoned and therefore dismissed. The Appellant’s convictions and sentences are therefore confirmed.

The Honourable Mr. Justice Evans, JA

The Honourable Sir Michael Barnett, P

The Honourable Sir Brian Moree, JA