

**COMMONWEALTH OF THE BAHAMAS**

**IN THE COURT OF APPEAL**

**MCCrApp. No. 185 of 2023**

**BETWEEN**

**JAMES HART**

**Intended Appellant**

**AND**

**THE COMMISSIONER OF POLICE**

**Intended Respondent**

**BEFORE:**           **The Honourable Sir Michael Barnett, P**  
                          **The Honourable Mr. Justice Jon Isaacs, JA**  
                          **The Honourable Madam Justice Indra Charles, JA**

**APPEARANCES:**   **Mr. Alex C. Dorsett, Counsel for the Intended Appellant**  
                          **Ms. Sheanda Cooper- Rolle, Counsel for the Intended Respondent**

**DATES:**           **6 February 2024; 13 March 2024; 21 March 2024**

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*Criminal Appeal- Application for Extension of Time- Possession of an Unlicensed Firearm- Section 5(B) of the Firearm Act- Possession of Ammunition- Section 9(2) A of the Firearm Act- Constructive Possession*

On 1 December 2020, police searched James Hart, the intended appellant's, residence and found his grandmother, Freda Hart, in possession of a firearm and ammunition. The intended appellant later arrived and claimed ownership of the firearm. Both the intended appellant and Freda Hart were charged and convicted by the Magistrate. On 3 February 2023 the intended appellant was found guilty of possession. He was sentenced to thirty months' imprisonment on the firearm charge and twelve months' imprisonment on the ammunition charge with the sentences to run concurrently. He filed a Notice of Motion for leave to appeal out of time on 26 October 2023. The delay is calculated at over 8 months. The intended appellant asserts that the Magistrate erred in finding him guilty of firearm possession. He argues that Officer Leadon's testimony, implicating Freda Hart, was disregarded by the Magistrate, and there was no evidence of conspiracy between the intended appellant and Freda Hart. On 13 March 2024 after hearing the parties, the Court reserved its decision.

**Held:** The application for the extension of time to appeal is denied. The convictions and sentences are affirmed.

When considering applications for extension of time (EOT), the Court considers factors like length of delay, reasons for delay, prospects of success, and prejudice. The delay here is significant, with an unacceptable explanation. The intended appellant's grounds lack merit. In considering the circumstances of the case, the Magistrate cannot be said to have erred or acted unreasonably in arriving at the conclusion that the intended appellant was guilty of the offences charged. Due to the lack of success prospects and substantial delay without justification, the EOT application is denied.

*Alexander Williams v. Regina* SCCrApp. No. 155 of 2016 mentioned  
*Attorney General v Omar Chisholm* MCCrApp No. 303 of 2014 considered  
*Derek Bell v Commissioner of Police* MCCrApp No. 277 of 2015 considered  
*Errol Knowles v Regina* SCCrApp. No. 79 of 2017 mentioned  
*Garvin Adderley v Regina* SCCrApp. No. 250 of 2017 mentioned  
*Hamilton v The Queen* [2012] UKPC 31 considered  
*Jahmaro Edgecombe v Director of Public Prosecutions* SCCrApp. No. 110 of 2020 mentioned  
*Kapry Kemp v. Commissioner of Police* MCCr.App. No.37 of 2005 considered  
*Rodriguez Jean Pierre v The King* [2023] UKPC 15 considered  
*Shadda Armbrister v Commissioner of Police* MCCrApp. No. 81 of 2022 mentioned

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## JUDGMENT

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### **Judgment delivered by the Honourable Mr. Justice Jon Isaacs, JA:**

1. The intended appellant was convicted by Stipendiary and Circuit Magistrate LaQuay Laing (“the Magistrate”) on 3 February 2023, of possession of an unlicensed firearm, contrary to section 5(B) of the Firearms Act (“the Act”) and possession of ammunition, contrary to section 9(2)A of the Act. He was sentenced to thirty months’ imprisonment on the firearm charge and twelve months’ imprisonment on the ammunition charge with the sentences to run concurrently. He filed a Notice of Motion for Leave to Appeal Out of Time (“EOT application”) on 26 October 2023, that contained the following grounds:

**“1. That the learned magistrate erred in law and/or acted unreasonably in finding that the intended appellant was in possession of firearm and ammunition notwithstanding CPL Leadon’s evidence that she found Freda Hart in possession of the firearm and ammunition which evidence the magistrate accepted and in reliance upon which, Freda Hart was convicted.**

**2. That the learned magistrate erred in law and/or acted unreasonably in finding that the intended appellant was in possession of firearm and ammunition given the evidence of CPL Leadon and in the absence of any evidence of conspiracy from which the Magistrate could reasonably infer that James & Freda Hart were concerned together in possessing the subject firearm and ammunition.”**

2. The intended appellant was required to give notice of his appeal within seven days following the date of his sentencing as provided by section 235(2) of the Criminal Procedure Code (“the CPC”). Section 235(2) states:

**“(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 or his counsel 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.”**

3. He has failed to give notice within the time limited for an appeal; hence, he requires the leave of this Court to appeal.
4. In determining EOT applications, the Court takes into account a number of factors and criteria. See **Attorney General v Omar Chisholm** MCCrApp No. 303 of 2014 and **Rodriguez Jean Pierre v The King** [2023] UKPC 15.
5. In **Chisholm**, this Court, differently constituted, identified four factors to be considered: a) length of the delay; b) reason(s) for the delay; c) prospects of success; and d) prejudice to the respondent.
6. In **Rodriguez Jean Pierre**, the Privy Council found that there were other matters for the Court to consider than those mentioned in **Chisholm**. At paragraph 27 they said:

**“27. Furthermore, it should not be thought that the four criteria identified in Williams are the only relevant criteria when considering an extension of time. It will be necessary to consider the overall justice of the case. In the Board’s view, further relevant considerations will normally include the gravity of the offence and the severity of the sentence imposed. Considerations of legal certainty will also be highly relevant. There is an important public interest in the finality of legal proceedings, the efficient use of judicial resources, good administration and the interests of other litigants (*Liburd v The Queen* (Court of Appeal of the Eastern Caribbean) per Barrow JA at para 4; *R v Thorsby* [2015] 1 WLR 2901 per Pitchford LJ at para 13). It will also be necessary to take account of the interests of victims of crime and their families, and of witnesses.”**

7. The takeaway from **Chisholm** and **Rodriguez Jean Pierre** is that the Court should consider the factors and criteria to arrive at a decision which reflects the “overall justice of the case”. See: **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 **Jahmaro Edgecombe v Director of Public Prosecutions** SCCrApp. & CAIS No. 110 of 2020.
8. See also **Hamilton v The Queen** [2012] UKPC 31; [2012] 1 WLR 287 where their Lordships stated at paragraph 8 of the judgment:

**“...the overriding consideration will be whether it is in the interests of justice that the time limit should be extended. Weight will always be given to the merits of the appeal and to the severity of the sentence. The stronger the case appears to be that the appellant may have suffered a serious miscarriage of justice, the less likely it will be that the application will be rejected on the ground that it is out of time....”**
9. The delay in this case is calculated from 11 February 2023 to 26 October 2023, a total of eight months and fourteen days. The respondent arrived at sixteen days but I do not consider the two days as being consequential.
10. The explanation for his delay in appealing is found in paragraph 9 of his apparently unfiled affidavit in support of his EOT application:

**“9. That the reason for my delay in approaching the Court for an extension of time ... saved money to hire a lawyer to represent me.”**
11. There is no gainsaying that the delay in this case is inordinate and the reason proffered for the delay is unacceptable. This is an appeal from a summary court hence the requirement for alacrity when appealing. I said as much in **Shadda Armbrister v Commissioner of Police** MCCrApp. No. 81 of 2022, at paragraphs 6 and 8. The delay was nine months and twenty days and the reasons proffered were, inter alia, impecuniosity.
12. Nevertheless, I do proceed to consider the intended appellant’s prospects of success because courts have ruled that notwithstanding the length of the delay, if an appellant may suffer a serious injustice, the application to extend time should be granted; and in so doing, I will address both grounds together.
  1. **That the learned magistrate erred in law and/or acted unreasonably in finding that the intended appellant was in possession of firearm and ammunition notwithstanding CPL Leadon’s evidence that she found Freda Hart in possession of the firearm and ammunition which evidence the magistrate accepted a, and in reliance upon which, Freda Hart was convicted**

**2. That the learned magistrate erred in law and/or acted unreasonably in finding that the intended appellant was in possession of firearm and ammunition given the evidence of CPL Leadon and in the absence of any evidence of conspiracy from which the Magistrate could reasonably infer that James & Freda Hart were concerned together in possessing the subject firearm and ammunition**

13. Mr. Caleb Dorsett, Counsel for the intended appellant, has sought to impugn the Magistrate's decision to convict his client, in my view, solely on the basis that the Prosecution chose not to include the words, "being concerned together" in the charge sheet. Thus, once the Magistrate convicted Freda Hart, the intended appellant's grandmother, of possession of the firearm, the intended appellant could not be also convicted of possessing the same firearm because there was no evidence to show they were acting in concert or concerned together to possess the firearm.
14. The evidence adduced by the Prosecution during the trial disclosed that on 1 December 2020, a group of police officers, armed with a search warrant, went to #188 Golden Dew Loop, a residence in Wellington Heights, Grand Bahama. On their arrival, an elderly woman greeted them. She was asked if the intended appellant lived at the residence and she responded that he was her grandson. After being shown the search warrant, the woman identified herself as Freda Hart and said that the intended appellant did live there but he was not at home at the time. Two of the police officers, Superintendent Weir and Sergeant 1849 Kendal Smith went to the exterior of the residence while a female officer, Sergeant 3444 Lynetten Leadon, remained in the home with Ms. Hart.
15. While alone with Ms. Hart in the front room of the residence, Ms. Hart asked to use the bathroom. Officer Leadon accompanied her and Ms. Hart used the toilet. Both women returned to the front room. A woman arrived at the residence and came in. She identified herself as Deidre McIntosh, Ms. Hart's daughter. As Ms. McIntosh spoke to officer Leadon, Ms. Hart got up and went to a bedroom. Officer Leadon followed her. Ms. Hart came from a closet in the bedroom with a pink towel in her hand. Ms. Hart said she wanted to wash her hands and needed the towel to dry her hands. Officer Leadon told her that officers were still executing a search of the premises, she could not use the room until the search was completed. Ms. Hart then said she needed to stool so officer Leadon allowed her to use the bathroom again.
16. While in the bathroom Ms. Hart still had the pink towel in her hands on her lap as she sat on the toilet. Officer Leadon noticed that Ms. Hart did not pull down her underwear as she had done on the previous occasion so the officer became suspicious and asked Ms. Hart, having been told by Ms. Hart that the bedroom was her grandson's and the officer observing that male clothing was in the room, if she had removed anything from her grandson's bedroom. Ms. Hart replied, "No". Officer Leadon attempted to take the towel from Ms. Hart but Ms. Hart resisted clutching the towel and screaming. At this time Ms. McIntosh came to the bathroom and on seeing the tussle between the officer and her mother, asked the officer what she was doing to her mother. Officer Leadon

responded that she suspected that Ms. Hart had removed drugs from her grandson's bedroom and was trying to flush it. Ms. McIntosh told her mother to give the officer the towel but Ms. Hart refused to do so.

17. During the scuffle for the towel, officer Leadon felt something hard in the towel and realized that it was a firearm. The officer grabbed Ms. Hart by the arm and lifted her off the toilet and as she did so, the firearm fell into the toilet Ms. McIntosh asked her mother, "Mommy what you doing with gun?" Another person asked Ms. Hart the same thing. At some point Ms. Hart said words to the effect, "What wrong with him protecting himself?" Officer Leadon arrested and cautioned Ms. Hart for being in possession of the firearm. Officers Smith and Weir came inside the house with a male. Officer Leadon showed them the weapon. Sergeant Smith arrested and cautioned the male who gave his name as James Hart, the intended appellant. Whereupon the intended appellant said, "Man Smitty that my own, my Grammy don't have nothing to do with that gun".
18. Sergeant Smith had gone outside the home because he smelled a strong aroma of marijuana that appeared to come from the rear of the home. He and Superintendent Weir went to the rear of the home where he encountered a male, later identified as the intended appellant, sitting in the driver's seat of a vehicle in the back yard. He was asked to exit the vehicle but refused to do so and locked the doors. Superintendent Weir was able to breach a window and the officers were able to extract the male from the vehicle.
19. The officers conducted a search of the male and the vehicle but no weapons or drugs were found. They escorted the male inside the residence where Sergeant Leadon showed them a towel that contained a chrome and pearl handle STAR B SA .9mm Interarms pistol serial number 1776180 which contained one magazine and 8x .9mm ammunition.
20. When interviewed by the police in the presence their attorney at the time, K. Brian Hanna, both Ms. Hart and the intended appellant opted not to answer any question. At their trial, Ms. Hart and the intended appellant elected not to give evidence or call any witnesses. During the trial the Prosecution had adduced evidence showing the firearm was indeed a firearm as defined in the Act and neither defendant had a license to possess it. Further, the ammunition was tested and found to be capable of inflicting injury.
21. When the Magistrate came to determine the guilt or innocence of the defendants, he opined that:

**"The Question for determination by this Court is whether or not the Defendants Freda Hart and James Hart were in Possession of Unlicensed Firearm and Ammunitions on the date in question, within the meaning of the Firearms Act"**
22. The Magistrate quite correctly stated the two types of possession which could support a charge of possession of the firearm and ammunition, to wit, actual possession and

constructive possession. The former is the person(s) in actual physical possession and the latter is a notional possession. He wrote:

**“Thirdly and finally the prosecution must prove possession. There are two (2) types of possession as it relates to Unlicensed Firearm and Ammunition i.e Actual Possession (with knowledge) and constructive possession (with knowledge). Actual possession often times appears to be more straightforward as it include (sic) physical custody/possession of the item with knowledge whereas; constructive possession involves the item or items in question is/are not found in the physical custody of the person but rather with a person custody of control or subject to his control provided he knows the item(s) in question exists, and is in his possession/custody.”**

23. It is important to bear in mind the framing of the charges the intended appellant faced. They were:

**“POSSESSION OF UNLICENSED FIREARM: Contrary to Section 5(B) of the Firearm Act, Chapter 213.**

**Particulars are:**

**That you on Tuesday 1st December, 2020 Freeport, Grand Bahama was found in possession of a firearm, namely Chrome with Pearl handle Interarms .9mm Pistol S/N17761890, not being the holder of a special license in the prescribe form, from the Licensing Authority, authorizing you to possess the same.**

**POSSESSION OF AMMUNITION: Contrary to Section 9(2)A of the Firearm Act, Chapter 213. Particulars are:**

**That you on Tuesday 1st December, 2020 Freeport, Grand Bahama was found in possession of (8) .9mm unfired rounds of ammunition without being the holder of a firearm certificate in force at the time.”**

24. The Prosecution was alleging therefore, that the intended appellant possessed the firearm discovered by the officers at the residence. Section 5B of the Act states:

**“5. Any person importing a revolver into The Bahamas or being found in possession of a revolver in contravention of this Part shall be liable —**

**...”**

25. The Magistrate expressed his reasons for convicting the intended appellant as follows:

**“As it relates to the Prosecution case against the Defendant, James Hart on the issue of Possession the court find (sic) as follows. Again the Court relies on the uncontroverted evidence of both Officer Lynette Leadon and Officer, D/Set. 1849 Smith**

**who both testified that the Defendant James Hart admitted to ownership of the Firearm and Ammunition in question, though he was not found to have Physical Custody or Actual Possession at the time of discovery of the Firearm Officer Smith testified that when he arrested the Defendant, James Hart for Possession of Unlicensed Firearm and Ammunition and Cautioned him in the presence of Officer Leadon and the Co-Accused, he the Defendant, James Hart said “man Smitty that my own you know my Grammy don’t have nothing to do with this”. The Defendant, James did not refute this claim and opted not cross examine this witness. The Court is satisfied on the totality of the evidence that the Prosecution has proven this element of the offence and this Court is therefore satisfied that the Defendant, James Hart was in Constructive Possession with knowledge of the existence of the .9mm Pistol Serial Number 1776180 and Eight (8) unfired rounds of Ammunition.”**

26. The word “possession” has been considered and analysed in a number of cases many of which were mentioned by Sawyer, P in **Kapry Kemp v. Commissioner of Police** MCCr.App. No.37 of 2005. At paragraph 24 of Sawyer, P’s judgment the following appears:

**“For my part, I think the word “possession” as used in section 5 and 9 of the Act means actual or constructive with knowledge of what the thing possessed is. It is not concerned with any particular act but rather a state of affairs, for a person may be in legal possession of property in several different countries or places simultaneously, although actually and physically resident in another while the property or properties are in the actual control of another or others.”**

27. The brief facts in **Kemp** were that the police came upon a van with the engine running. They told the occupants to exit the vehicle and Kemp’s co-accused exited from the front passenger seat. Kemp was elsewhere in the yard but came to the van when the officers asked for its driver. He was the owner of the van. The van was searched and a loaded weapon was found hidden at the rear of the van. Both men were arrested and charged. Neither man made a statement when questioned by the police.
28. During the trial the men did not testify after their no case submissions had failed and stood on their submissions. The magistrate convicted Kemp and acquitted the co-accused. Kemp appealed on the grounds, inter alia, that the magistrate erred in law by failing to apply the principles governing the establishment of guilt in cases where two defendants are charged with the same illegal act and the prosecution fails to establish that they are acting in concert and that the magistrate was wrong in law by ruling that the appellant had a case to answer at the end of the case for the prosecution.
29. Mr. J. Henry Bostwick, Kemp’s lawyer, argued that Kemp was not in the van when the weapon was discovered and that the co-accused was the only occupant of the van. He



posited that it was incumbent on the prosecution to adduce evidence that the person charged had actual or constructive possession of the firearm from which the necessary knowledge that it was a firearm from which the necessary knowledge that it was a firearm could be inferred.

30. In addressing whether the magistrate erred, Sawyer, P said at paragraph 28:

**“28. In my view, the offences under section 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 special licence and so on”**

31. Ultimately, Sawyer, J found no favour with Mr. Bostwick’s argument.

32. Mr. Dorsett attempted to distinguish **Kampry Kemp** on the basis that Kemp had been charged jointly with another. He also referred to **Derek Bell v Commissioner of Police** MCCrApp. & CAIS No. 277 of 2015 for that same reason. Having read my oral judgment in **Bell**, I fail to see how that case assists the intended appellant.

33. I would indicate here that the omission of the words, “being concerned together” is entirely explicable because the Prosecution was not alleging that Ms. Hart and the intended appellant were acting together to possess the firearm as that would involve each playing a different part of a joint plan or agreement. There was no evidence of such advance planning by the erstwhile defendants.

34. I had mentioned the way the charges against the intended appellant were framed, to wit, that “you” were found in possession of an unlicensed firearm. As Sawyer, P stated in **Kampry Kemp** possession “**is not concerned with any particular act but rather a state of affairs**” hence when the intended appellant blurted out that the firearm was his, he not only admitted to ownership of it but that he had knowledge of it, regard being had to the evidence of officer Leadon that the weapon had been retrieved from a bedroom closet and that male clothing was in the room. A reasonable inference to be drawn from this evidence is that the intended appellant was acknowledging that the firearm was under his control.

35. Mr. Dorsett submitted that the intended appellant may have admitted to ownership of the firearm but that does not mean he was in possession of it at the time it was found as by then it was in the actual physical possession of Ms. Hart. This argument is pure sophistry as it fails to appreciate the nuances of constructive possession. Moreover, it is the height of pedantry to seek to cull from the intended appellant’s words, “Man Smitty that my own ..” the import he sought to convey, that is, the firearm belonged to him and he had it as his possession.

36. I am satisfied that in the circumstances of this case,. There is no merit to these two grounds and insofar as the success of the appeal rests on them it must fail.

**Conclusion**

37. I am constrained to conclude that the EOT application must be denied because the intended appellant's grounds have no prospects of success and due also to the inordinate delay it has taken him to launch his appeal with no reasonable explanation for same.

38. The convictions are affirmed; and there being no appeal against the sentences imposed by the Magistrate, those sentences are affirmed.

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**The Honourable Mr. Justice Jon Isaacs, JA**

39. I agree

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**The Honourable Sir Michael Barnett, P**

40. I also agree.

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**The Honourable Madam Justice Indra Charles, JA**