**COMMONWEALTH OF THE BAHAMAS**
**IN THE COURT OF APPEAL**
**MCCrApp No. 116 of 2023**

**BETWEEN**

**DEON BURROWS**

**Intended Appellant**

**V**

**THE COMMISSIONER OF POLICE**

**Intended Respondent**

**BEFORE:** **The Honourable Mr. Justice Jon Isaacs, MB, JA**
**The Honourable Madam Justice Maureen Crane-Scott, JA**
**The Honourable Mr. Justice Milton Evans, MB, JA**

**APPEARANCES:** **Intended Appellant, Pro se**
**Ms. Darnell Dorsette, Counsel for Intended Respondent**

**DATES:** **15 February 2024, 29 February 2024**
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*Criminal Appeal - Criminal Procedure Code, section 235(2) - Extension of Time Application - Length of the Delay - Reason(s) for the Delay - Prospects of Success - Prejudice to the Respondent - Overall Justice of the Case - Interference with Findings of Fact of a Tribunal of Fact*

The intended appellant was convicted by the Magistrate of possession of an unlicensed firearm, possession of ammunition, and 2 counts of assault with a deadly weapon. He was sentenced by the Magistrate to two and a half years' imprisonment on the firearm charge, one year on the ammunition charge and eighteen months' imprisonment on each count of assault with a deadly weapon.

The intended appellant appealed his conviction, but it was later than allowed by statute. The matter was heard as an extension of time application; the intended respondent objected to the application on the prospects of success of the appeal.

**Held: Extension of time application refused, conviction is affirmed.**

The factors to be considered on an extension of time application are: a) length of the delay; b) reason(s) for the delay; c) prospects of success; d) prejudice to the respondent. Additionally, a court must give consideration to the overall justice of the case.

An appellate court should be slow to overturn findings of fact by a lower tribunal. It should hesitate long before interfering with a finding by the tribunal pertaining to the credibility of a witness, unless the party challenging such a finding can show the tribunal has committed an error of reasoning that is sufficiently serious and fundamental to undermine the conclusion.

We find no fault in the Magistrate's decision not to accept the evidence of the intended appellant and his witness. As a tribunal of fact, the Magistrate was entitled to come to the conclusion that he did. There is no basis for interfering with his approach to the credibility of witnesses.

There was also no error of principle disclosed in the reasoning of the Magistrate, and nothing to suggest that he took into account matters that he ought not to have or he failed to consider matters that he should have.

*Attorney General of Canada v Bedford, et al* 2013 SCC 72; mentioned
*Attorney General v Omar Chisholm* MCCrApp No. 303 of 2014; followed
*Mnyandu v Padayachi* [2017] 3 LRC 170; mentioned
*Rodriguez Jean Pierre v The King* [2023] UKPC 15; followed
*R v Cairns* [2013] EWCA Crim 467; mentioned
*Woolmington v DPP* [1935] AC 462; mentioned

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**REASONS FOR DECISION**

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**Delivered by The Honourable Mr. Justice Jon Isaacs, MB, JA:**

1. We heard this application on 15 February 2024, and dismissed it. We promised to put our reasons in writing, and this we now do.

2. On 11 May 2023, the intended appellant was convicted by Stipendiary and Circuit Magistrate Samuel McKinney ("the Magistrate") of possession of an unlicensed firearm, contrary to section 5(b) of the Firearms Act ("the Act"); possession of ammunition, contrary to section 9(2)A of the Act; and (2 counts) of assault with a deadly weapon, contrary to section 265(5) of the Penal Code. That same day, he was sentenced by the Magistrate to two and a half years' imprisonment on the firearm charge, one year on the ammunition charge and eighteen months' imprisonment on each count of assault with a deadly weapon. The sentences were to run from 11 May 2023.

3. On 9 June 2023, the intended appellant filed a Criminal Form No. 1 appealing his conviction. The intended appellant was required to give notice of his appeal within seven days following the date of his sentencing, as required by section 235(2) of the Criminal Procedure Code ("the CPC"). He failed to give notice within the time limited to appeal; hence, he requires the leave of the Court to appeal. Leave is sought by filing an application to extend the time within which to appeal ("EOT application"). Although the intended appellant did not file an EOT application, he was appearing pro se. Accordingly, rather than insisting that he make the EOT application by submitting a Criminal Form No. 2, we heard his application; the intended respondent objected to the application solely on the prospects of success of the appeal.

4. In determining EOT applications, the Court takes into account a number of factors: 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 additional matters than those mentioned in **Chisholm** for the Court to consider. 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 thrust of **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*".

8. The intended respondent's opposition to the EOT application solely on the prospects of success meant that the intended appellant had to satisfy us that his grounds of appeal were meritorious. There would be little justification in hearing the substantive appeal if his grounds were without merit.

9. The lone ground set out by the intended appellant was, *"The reason why I will* (sic) *like to appeal this case is because the lack of evidence from prosecution.* (sic)*"*

10. In his oral submissions, the intended appellant attempted to augment his ground by arguing that the Magistrate was biased because the Magistrate was a former police officer and preferred the police officers' evidence over that of the intended appellant. We refused to entertain this argument as it was not one of his grounds and we required the intended appellant to focus on his ground that his conviction was based on a lack of evidence.

11. The intended appellant submitted that the Magistrate should not have rejected his evidence and the evidence of his witness, Adrius Austin (a Defence Force officer), in preference to the evidence of the police officers, particularly Patrick Rolle. The latter had testified that he was in Prime Time Night Club ("PTN"), at the material time, when he observed the intended appellant with a firearm in his hand held in a downward position by his side.

12. The intended appellant's account in court was that he was in PTN when a group of men tried to rob him of his neck chain. One of the men, who wore an orange shirt, produced a firearm but the intended appellant was able to take the weapon away from the man and ran out of PTN followed by the men. He fired the weapon in the air to scare them off and, subsequently, he saw the flashing lights of a police vehicle. He ran towards the vehicle to tell the police what had happened. He heard an officer telling him to stop but, before he could comply, he was shot.

13. The account of the intended appellant about what transpired in PTN was supported in large part by Adrius Austin who testified that he was at PTN as a promoter and also assisted with providing security for the event. He testified that he noticed a commotion in PTN. He went on to say as follows:

> **"I noticed a male wearing an orange shirt who appeared to be under the influence of alcohol approached the defendant and there was [a] scuffle.**
> **The male wearing the orange shirt reach [t]o the front of his trousers.**
> **The scuffle got intense and everyone scattered out of the club.**
> **The defendant was able to break free from the three or four men he was in the scuffle with.**
> **After I heard the females screaming, I noticed what appeared to be a gun in the hand of the male wearing an orange shirt.**
> **I didn't get involved to break up the scuffle.**
> **I was standing about six feet away from the defendant and the men involved in the scuffle.**
> **No other security got involved in the scuffle.**
> **The defendant and the men moved to the door.**
> **I noticed three of the men who were in the scuffle with the defendant ran after him."**

14. The evidence of two police officers, Anderson and Stuart, who responded to the sounds of gunshots that appeared to come from the direction of PTN, was that on arriving in the area of PTN, they observed the intended appellant running towards them carrying a firearm in his right hand. Officer Stuart ordered him to stop and drop the weapon but

he raised his hand with the weapon and pointed it at the officers. This prompted Officer Stuart to shoot the intended appellant. A Smith and Wesson .40mm pistol, serial number DSL637 was recovered off the ground near where the intended appellant had fallen.

15. Evidence was led by the Prosecution of the Firearms Examiner's Forensic Firearms Report which revealed that the weapon involved in the incident was tested and found to be capable of discharging a .40 S&W caliber cartridge. Further, the ammunition was capable of inflicting injury.

16. D/Sgt. 2802 Burnside, the Firearms Licensing Officer, made a report indicating that the intended appellant was not issued a license to possess the firearm or ammunition. That report was exhibited in the trial.

17. The Magistrate rehearsed the evidence adduced during the trial, the law covering the matters and the issues he had to decide. Ultimately, he concluded as follows:

> **"38. The court has had the opportunity to see, hear and assess the witnesses for prosecution as they gave their evidence in this case from the witness box. The court found the witnesses called by the prosecution to be truthful and credible. None of the witnesses for prosecution was shaken or had their evidence discredited during the process of cross examination.**
> **39. The court found the defendant and his witness to be untruthful, and prefers the evidence adduced by prosecution over that of the defence.**
> **40. The court further found that prosecution proved its case to the requisite standard, beyond reasonable doubt, that on October 12, 2019, Deon Burrows, the defendant, unlawfully possessed the .40mm pistol serial number DSL6374 which was introduced into evidence and eight live rounds of ammunition loaded in the firearm at the time he possessed it.**
> **41. The court further found that Deon Burrows, the defendant, on the night in question unlawfully assaulted Officers Anderson and Stuart, the complainants, by pointing the firearm in their direction after having been ordered by Officer Stuart to drop the firearm to the ground."**

18. In my analysis, I start with the following observation made by Viscount Sankey LC in **Woolmington v DPP** [1935] AC 462 at page 481:

> **"Throughout the web of the English criminal law one golden thread is always to be seen, that <u>it is the duty of the prosecution to prove the prisoner's guilt</u>... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."** (Emphasis added)

19. The intended appellant sought to impugn the findings of fact made by the Magistrate. In order for him to convince us that we ought to overturn the Magistrate's findings, the intended appellant faced a Herculean task. The authorities caution that an appellate court should be slow to overturn findings of fact by a lower tribunal. We should hesitate long before interfering with a finding by the tribunal pertaining to the credibility of a

witness, unless the party challenging such a finding can show the tribunal has committed an error of reasoning that is sufficiently serious and fundamental to undermine the conclusion.

20. This principle is elucidated in **R v Cairns** [2013] EWCA Crim 467 where Leveson, LJ, speaking on behalf of the English court of appeal, stated at paragraph 10:

> **"[10] Following well established principles, this court will not interfere with a finding of fact made either following a trial (R v Wood (1992) 13 Cr App Rep (S) 317) or a Newton hearing (R v Ahmed (1984) 80 Cr App Rep 295, 6 Cr App Rep (S) 391, [1985] Crim LR 250) provided that the judge has properly directed himself or, exceptionally, where the court is satisfied that no reasonable finder of fact could have reached that conclusion. It follows, therefore, that it is important for all involved in the exercise to ensure that it is conducted correctly and in accordance with principle. Against that background, we turn to the specific appeals."**

21. Further, in **Attorney General of Canada v Bedford, et al** 2013 SCC 72, McLachlin, CJ, in delivering the judgment of the Supreme Court said, inter alia, at paragraph 48:

> **"As this court stated in Housen v Nikolaisen 2002 SCC 33, [2002] 2 SCR 235, appellate courts should not interfere with a trial judge's findings of fact, absent a palpable and overriding error."**

22. Next, in **Mnyandu v Padayachi** [2017] 3 LRC 170 at paragraph 28, the following appears:

> **"[28] It is trite that a court of appeal will not interfere with the findings of fact and credibility of the trial court unless it is apparent from the record that the court a quo either materially misdirected itself or erred to the extent that its findings are vitiated and fall to be set aside. The court of appeal must also remain cognisant that the trial court has the advantage of having observed and heard the witnesses."**

23. Additionally, Lord Thankerton in **Thomas v. Thomas** 1947 AC 484, at pages 487-8 said:

> **"i. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. ii. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. iii. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."**

24. The intended appellant argued that the Magistrate should have accepted his, and Adrius Austin's, accounts as to what transpired inside PTN. Between paragraphs 24 through 29 of his ruling, the Magistrate said:

> **"24. In response to Officer Rolle identifying himself to the defendant as a police officer and ordering him to stop, the defendant raised his hand in which he held the firearm in the air, discharged the firearm about six times and took off running. The court does not accept the defendant's story that he rushed an armed male in the club, disarmed him of the firearm, and then had to run out of the club fearing for his life with the men he had the altercation with in tow trying to catch him for whatever reason.**
> **25. The court also found the defendant to be untruthful with regards to the reason he gave for discharging the firearm in the air once he got on the outside of the club. In his record of interview under caution, the defendant told the investigator that he fired the gun in the air about twice once when he got on the outside of the club. The reason he gave for discharging the firearm was that as he ran out of the club, he heard footsteps behind him causing him to fire the gun to scare off whomever he claimed was running behind him. He said that he never looked back to see whose footsteps they were that he heard behind him.**
> **26. However, in his evidence under oath from the witness stand, the defendant gave a different reason for the gun going off. According to the defendant, he must have been holding the gun too hard which caused it to go off.**
> **27. The defendant called Adrius Austin, a defence force officer, as his witness. This witness testified that he was part of the promotion team that put on the event that night at the club. He also said that he along with others worked as private security to police the event.**
> **However, when asked by the prosecutor to name some of the other security officers on duty that night who worked along with him, he said that he could not recall any of their names.**
> **28. This witness called by the defendant was also asked by the prosecutor why as military personnel he did not intervene if he saw a person in the club with a firearm. His response to the prosecutor's question was that he had no reason to approach the defendant, plus he was at the bar as security watching the money.**
> **29. When it was put to this witness by the prosecutor that he did not see anyone with a firearm, Austin, the defendant's witness, responded by saying that the female would not have screamed gun, gun, if there wasn't a gun. From this witness' demeanour in the box, the nervous shifting of his body when asked simple questions under cross examination by the prosecutor, the court made written notes that this witness appeared not to be a truthful witness."** (Emphasis added)

25. We were unable to find any fault in the Magistrate's decision not to accept the evidence of the intended appellant and his witness. As a tribunal of fact, the Magistrate was perfectly entitled to come to the conclusion that he did and we could see no basis for

interfering with his approach to what was essentially a matter of credibility of the witnesses.

26. In the absence of any error of principle disclosed in the reasoning of the Magistrate, and there being nothing to suggest that he took into account matters that he ought not to have or he failed to consider matters he should have, we did not find that the intended appellant's appeal had any prospect of success. Accordingly, the EOT application was refused.

27. The decision of the Magistrate to convict the intended appellant on the four counts is affirmed. As there was no appeal against the sentences imposed by the Magistrate, those sentences remain extant.

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

28. I agree with the disposition of this appeal.

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**The Honourable Madam Justice Crane-Scott, JA**

29. I also agree with the disposition of this appeal.

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**The Honourable Mr. Justice Evans, MB, JA**