COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp No. 10 of 2020

BETWEEN

KENTON FERGUSON

Appellant

AND

COMMISSIONER OF POLICE

Respondent

BEFORE: **The Honourable Mr. Justice Jon Isaacs, JA**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Roy Jones, JA

APPEARANCES: **Mr. Barry Sawyer, Counsel for the Appellant**
Ms. Linda Evans, Counsel for the Respondent

DATES: **26 April 2021; 29 June 2021; 8 September 2021**

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Criminal Appeal – Appeal against conviction - Appeal against sentence - Possession of Ammunition - Possession of unlicensed firearms with intent to supply – Dock Identification- Whether conviction unsafe and unsatisfactory– Whether sentence unduly severe

On 23 May 2017, D/C 3543 McKenzie and Corporal Griffen, whilst in the Elizabeth Estates area saw a silver vehicle driving in a suspicious manner. D/C 3543 McKenzie identified the driver of the silver vehicle as the appellant and watched him as he went to #27 Barbados Avenue, hand over a white & blue Super Value bag to Dontray and then speed away. A search was made of Dontray's residence and a Super Value bag was found that D/C 3543 McKenzie identified as the bag he had seen the appellant give to Dontray minutes before. The bags were searched and found to contain two clear plastic baggies, foil wraps of suspected marijuana; clear plastic bags containing suspected cocaine; three firearms and an assortment of ammunition. Dontray was arrested and he said to the police officers, "Kenton give me this, and say hold it". The appellant was arrested and charged with possession of drugs, firearms and ammunition. At trial the defence called Dontray as a witness. The appellant was convicted of the possession of firearms and ammunition charges and sentenced to 5 years and 8 months imprisonment. He appealed the convictions and sentence on the grounds inter alia, that, "the Learned Magistrate could not have reached a conclusion of guilt on the basis that the prosecution failed to discharge it evidential burned (sic) to prove the case against

the Appellant beyond a reasonable doubt and as a result the conviction was unsafe and unsatisfactory", that the "Learned magistrate wrongly allowed dock identification of the Appellant when no previous form of identification was conducted by the prosecutor" and that the sentence imposed was unduly severe. The Court heard the parties and reserved its decision.

Held: appeal dismissed; convictions affirmed, the sentences imposed by the Chief Magistrate are varied to reflect the 7 months the appellant spent on remand. The appellant is to serve 5 years and 1 month from the date of conviction.

D/C 3543 McKenzie was not making "a dock identification in the true sense of the words" when he identified the appellant in court. D/C 3543 McKenzie had testified that he was familiar with the appellant as he had had the appellant under surveillance around one week before he observed the appellant hand over the blue and white Super Value bag later discovered to contain the three firearms.

The Chief Magistrate sits as the judge of the facts and the judge of the law. In that dual capacity she determines what the facts are in the case - a function performed by the jury in a case tried in the Supreme Court - and she is guided by the law as she interprets it to be - a function performed by the trial judge in the directions he gives to the jury, the triers of the facts, to apply to the facts as they find them to be.

There is nothing to suggest that the Chief Magistrate's acceptance of D/C 3543 McKenzie's evidence was so manifestly flawed that her assessment of it ought to be overturned. There has been nothing disclosed from the record or on the submissions of the appellant to suggest that the Chief Magistrate has "palpably misused [her] advantage" of seeing the witnesses so as to cause me to find that her decision to convict the appellant was unreasonable. Further, I find that there was ample evidence before the Chief Magistrate upon which her decision to convict the appellant can be supported.

As it relates to the sentence, this court is not persuaded that the sentence imposed on the appellant for three firearms is unduly severe. Moreover, there is nothing that is disclosed in the ruling of the Chief Magistrate which shows that she somehow erred in principle when sentencing the appellant.

Alexander Harris v The Commissioner of Police MCCrApp. No. 38 of 2020 followed
Betts v Commissioner of Police [1991] BHS J. No 60 considered
Davis and the Commissioner of Police MCCrApp No 68 of 2013 considered
Demetrius Williams v. The Commissioner of Police MCCrApp No. 223 of 2012 considered
Edouard Edmond v The Commissioner of Police MCCrApp. No. 214 of 2015 considered
Galen Forbes v The Commissioner of Police MCCrApp & CAIS No. 10 of 2013 considered
Holland v HM Advocate [2005] UKPC D1 mentioned

In re Wards of Court and In re MK, SK and WK, Minors: The Eastern Health Board v MK and Another [1999] 2 I.R. 99 considered
Kampry Kemp v Commissioner of Police MCCrApp No. 37 of 2005 applied
Keith Jones v. R SCCrApp No. 11 of 2007 applied
Maxo Tido v The Queen [2011] UKPC 16 applied
Musgrove v Commissioner of Police [1988] BHS J. No. 95 considered
Noel Lionel Cash and The Commissioner of Police MCCrApp No 47 of 2013 considered
Pipersburgh and Robateau v The Queen [2008] UKPC 11 mentioned
Pop (Aurelio) v R [2003] UKPC 41 applied
R v Gumbs (1927) 19 Cr. App. R applied
R v Wilkinson [2010] 1 Cr App R (s) 100 mentioned
Rodari Rolle v. The Commissioner of Police MCCrApp No. 254 of 2012 considered
Taylor v The Commissioner of Police [2015] 2 BHS J. No. 52 considered
Terrell Neilly v The Queen [2012] UKPC 12 considered

J U D G M E N T

Judgment by the Honourable Mr Justice Jon Isaacs JA,

1. The appellant appeals against his convictions and sentences. The appellant was charged before Chief Magistrate Joyann Ferguson-Pratt ("the Chief Magistrate") charged with counts 4, 5, 6, 7, 8, and 9. These counts relate to:

   (i) Possession of Ammunition (counts 4, 5 and 6);

   (ii) Possession of unlicensed firearms with intent to supply (count 7); and

   (iii) possession of Dangerous Drugs with intent to supply (counts 8 and 9).

   Counts 1, 2, and 3 were withdrawn by the Prosecution.

2. On 16 January, 2020 the appellant was found guilty on four counts and not guilty in respect of the two dangerous drugs counts. The Chief Magistrate sentenced the appellant as follows:

Count #4 - Possession of Ammunition - 1 year six months;

Count # 5 - Possession of Ammunition - 3 years six months;

Count # 6 - Possession of Ammunition - 3 years six months;

Count # 7 - Possession of unlicensed firearm with intent to supply - 5 years 8 months

Summary of Facts

3. On 23 May 2017, D/C 3543 McKenzie, along with Corporal Griffen, was in the Elizabeth Estates area on inquiries pertaining to an armed robbery in the Sea Grapes Plaza. While on Commonwealth Boulevard in Elizabeth Estates, D/C 3543 McKenzie espied a silver vehicle which was driving in a suspicious manner. He was able to identify the driver of the silver vehicle as the appellant. He watched as the appellant went to #27 Barbados Avenue to the residence of one Dontray Russell; and saw the appellant hand over a white/blue Super Value bag to Dontray; and then drive off at a high rate of speed. D/C 3543 McKenzie radioed for assistance; and was present along with Corporal Greenslade when a search was made of Dontray's residence. During that search, a Super Value bag was found that D/C 3543 McKenzie identified as the bag he had seen the appellant give to Dontray about five minutes before. A search of the bag revealed that it contained two clear plastic baggies, each containing six smaller plastic baggies that each contained ten silver foil wraps of suspected marijuana; clear plastic bags containing suspected cocaine; three firearms and an assortment of ammunition. Dontray was arrested and he said to the police officers, "Kenton give me this, and say hold it".

4. D/C 3543 McKenzie testified that when he observed the appellant hand over the plastic bag to Dontray, he was approximately thirty feet away in his vehicle. D/C 3543 McKenzie said it was broad daylight at the time and nothing obstructed his view. D/C 3543 McKenzie also testified that he was familiar with the appellant as he had had the appellant under surveillance around one week before.

5. The appellant was interviewed by Detective Corporal 2609 Arthur in the presence of his lawyer, Ms. Tamara Taylor. Acting on the advice of his attorney, the appellant declined to give any meaningful answers to questions posed by the officer. Moreover, the appellant refused to sign the record of interview.

6. At the trial before the Chief Magistrate the appellant gave sworn evidence and he called one witness, Dontray. The appellant denied all knowledge of the items in the Super Value bag and proffered as an alibi that he had been in the Fox Hill area with one Christopher; and that he had not seen Dontray on the day in question.

7. For his part, Dontray recanted his statement to the police and said he had only given one because he feared being beaten by the police. He did, however, under cross-examination accept the summary of the Prosecution's case read at the time he pleaded guilty to certain firearm related offences arising out of the same matter, as correct.

8. The Chief Magistrate accepted the Prosecution's witness, D/C 3543 McKenzie as being a witness of truth but rejected the evidence of the appellant as not credible. She questioned why the appellant had not brought Christopher as his alibi witness. Ultimately, the Chief Magistrate found the appellant guilty as mentioned earlier.

9. In sentencing the appellant, the Chief Magistrate took into consideration the plea in mitigation made on the appellant's behalf but considered the offences for which he had been convicted as serious; and that in sentencing the appellant, deterrence to other would be offenders would be the lynchpin of her sentences.

10. The appellant filed his appeal against conviction and sentence on 23 January 2020. His grounds of appeal at that time were as follows:

> **"1. That the verdict was unreasonable or could not be supported having regard to the evidence.**
>
> **2. That under all the circumstances of the case, the Verdict is unsafe or unsatisfactory.**
>
> **3. That the conviction was erroneous in point of law.**
>
> **4. That some specific illegality or irregularity, other than hereinbefore mentioned substantially affecting the merits of the case was committed in the course of the trial.**
>
> **5. That the sentenced (sic) passed was duly severe."**

11. On 20 November 2020, an amended notice of appeal was filed listing the following additional grounds:

> "6. **That the Magistrate took extraneous matters into consideration.**
>
> **7. That evidence was wrongly rejected or inadmissible evidence was wrongly admitted by the Magistrate and in the latter case there were not sufficient evidence to sustain the decision.**
>
> **8. That the decision was erroneous in point of Law, in that the identification evidence of D/Constable McKenzie was inadmissible and that the evidence tendered by the Prosecution should not have been entered into evidence.**

II. The learned Magistrate could not have reached a conclusion of guilt on the basis that the prosecution failed to discharge its evidential burden to prove the case against the Appellant beyond a reasonable doubt.

III. In the alternative, the Appellant submits that the concurrent sentences of up to 5 years and 8 months imprisonment cumulatively was duly served. (sic)"

12. On 11 June 2021, the appellant filed a re-amended appeal against conviction and sentence. The grounds stated therein are as follows:

"Ground 1- The learned Magistrate erred in law by not considering the case for the Appellant separately from that of his co-accused; thereby violating the fundamental principles of criminal law in allowing evidence which is admissible only against the co-accused to be taken into account when assessing the guilt of the Appellant. Consequently, the Learned Magistrate erred at law.

Ground 2- That the Learned Magistrate could not have reached a conclusion of guilt on the basis that the prosecution failed to discharge it evidential burned (sic) to prove the case against the Appellant beyond a reasonable doubt and as a result the conviction was unsafe and unsatisfactory.

Ground 3- The Learned Magistrate wrongly allowed the evidence of the firearms and ammunition to be admitted into evidence when the prosecution failed to establish a chain of custody.

Ground 4 – The Learned magistrate wrongly allowed dock identification of the Appellant when no previous form of identification was conducted by the prosecutor.

Ground 5 – That the prosecution failed to present sufficient evidence to sustain a conviction.

Ground 6 – The Learned Magistrate could not have arrived at a verdict of guilty on the basis that the prosecution discharged its evidential burden to prove the case against the Appellant beyond a reasonable doubt.

Ground 7- That the verdict was unreasonable or could not be supported having regard to the evidence and all the circumstances of the case the verdict is unsafe and unsatisfactory.

Ground 8 – The sentence imposed on the Appellant of 5 years and 8 months is unduly severe."

13. The reliefs sought are as follows:

"1. The appellant request that the court:

1) **Anxiously review and scrutinize the Learned Magistrate's Judgment and manuscript to determine whether her decision to convict the Appellant was flawed so much so that it endangered his liberty**
2) **Declare the conviction unsafe:**
3) **Quash the Appellant's conviction:**
4) **Order his immediate release: and**
5) **Alternatively, if the appeal against conviction fails, declare that the sentence is unduly severe and substitute it with a reasonable sentence."**

14. He asks that the Court quash his conviction and order his immediate release; and that as he has already spent one year and five months of his sentence, that it would not be in the interest of justice to remit the matter to a magistrate's court.

Ground 1

15. This ground alleges that the Chief Magistrate failed to consider the case for the appellant separately from that of Dontray, his co-accused. This ground is misconceived because Dontray was not jointly charged with the appellant at the time of the appellant's trial. Dontray had by the time of the trial been severed from the appellant's case due to the differences in the pleas of the two defendants, viz, Dontray pleaded guilty to the charges and was convicted and sentenced before the actual trial of the appellant - who had pleaded not guilty - commenced with the taking of evidence from the Prosecution witnesses.

16. In any event, Dontray having given evidence at the trial as a witness for the Defence, the Chief Magistrate was entitled to consider that evidence as a part of the case. There could be no complaint that Dontray's statement to the police in the absence of the appellant was hearsay because Dontray confirmed under oath he told the officers the appellant had given him the bag which had been found to contain the firearms. This evidence was not challenged on re-examination by the Defence.

17. Keane, J in **In re Wards of Court and In re MK, SK and WK, Minors: The Eastern Health Board v MK and Another [1999] 2 I.R. 99** offered an explanation of "hearsay" evidence, he said:

"As to the nature of hearsay, it has been comprehensively and helpfully defined as:-

"Testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of an out of court asserter." [McCormick on Evidence, 2nd ed [1972] p 584.]

Such evidence is excluded in our law because the person is not present in court to give evidence on oath or affirmation and to be cross-examined and the court is thus deprived of the normal methods of testing the credibility of the witness. As the Report of the Law Reform Commission on The Rule Against Hearsay in Civil Cases [LRC 25-1988] pointed out

"The law takes the view that the truth is best ascertained by the unrehearsed answers, on oath or affirmation, of witnesses who have actually perceived the relevant events and who are then subjected to cross examination in the presence of the court.""

18. There is no merit in this ground.

Grounds 2, 5, 6 and 7 - The Verdict is not Supported by the Evidence

19. Grounds 2, 5, 6 and 7 may be addressed together because they all attack the sufficiency of the Prosecution's case against the appellant.

20. D/C Mckenzie testified that he had observed the appellant hand over a blue and white Super Value bag to Dontray. The bag was later said to have been searched and three firearms and ammunition were found. Section 5 of the Firearms Act states, Inter alia:

"5. Penalties for revolvers.

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

(b) on summary conviction, to imprisonment for a term in the range of four years to seven years," [Emphasis added]

21. The term "being found in possession" has received judicial interpretation in our courts over the years and may be accepted as being found in actual physical possession or in constructive possession. Sawyer, P in **Kampry Kemp v Commissioner of Police**, MCCrApp No. 37 of 2005, provided a definition for "possession" as follows:

> **"… the word possession as used in sections 5 and 9 of the Firearms Act means actual or constructive possession 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."**

22. In **Betts v Commissioner of Police** [1991] BHS J. No 60, a case involving dangerous drugs that were seen to be jettisoned from an airplane, Gonsalves-Sabola, CJ made the following statement:

> **"17. The mere relinquishment of a physical possession of dangerous drugs in which a person is clearly proved to be, cannot retroactively negative the proved fact of possession. The law would offend against common sense if it fails to allow a purposive construction of the word "found" in the particular statutory context in which it occurs."**

23. I had cause to refer to the decision of Gonsalves-Sabola, CJ in my dissenting judgment in **Edouard Edmond v The Commissioner of Police** MCCrApp. No. 214 of 2015. At paragraph 74 I opined:

> **"74. Although Lightbourne and Betts are decisions of judges of concurrent jurisdiction in the court below, I am satisfied that the analysis of Gonsalves-Sabola, CJ in Betts is the correct expression of the law; and I adopt the views espoused therein. This means therefore, that once a person is seen possessing the firearm, the fact that he has relinquished physical possession of the firearm at the time it is discovered, will not avail him as a defence. I reiterate:**
>
> **"The mere relinquishment of a physical possession of [a firearm] in which a person is clearly proved to be, cannot retroactively negative the proved fact of possession.""**

24. At the time D/C 3543 McKenzie saw the appellant hand the Super Value bag later found to contain the firearms and ammunition to Dontray, I am satisfied that the appellant was "found is possession" of those items. Furthermore, although he was not in actual physical possession of the items at the time he was taken into custody, he was in constructive possession of the items.

25. The Chief Magistrate did not accept Dontray's evidence that what he told the police about the appellant giving him the blue and white Super Value bag was not true but it is probably the case that she did not accept that evidence since, as she notes in her record, Dontray accepted

the facts that were read to him after he pleaded guilty; and included in those facts was "that he had received the firearms minutes prior to his arrest".

26. The Chief Magistrate recorded the cross-examination of Dontray:

> **"Kenton Ferguson is my friend. When I was asked by the officers. I told them that Kenton gave it to me. Later, I gave an interview and said the same thing. On 29th May, 2017, I did accept the summary of the prosecution's case as correct. I did accept the summary of the prosecution case."**

27. Having accepted the summary of the Prosecution's case as correct, and not indicating to the Chief Magistrate at the time he appeared before her that he had been threatened by the police to give a false account against the appellant, the Chief Magistrate would have been justified in rejecting Dontray's evidence outright. The appellant would have been better served had he not called Dontray as his witness.

28. In the face of such damning evidence adduced through Dontray and earlier through D/C 3543 McKenzie, it could not be said that the Chief Magistrate's verdicts were unreasonable or could not be supported.

Ground 3 - The Firearms and Ammunition Wrongly Entered as Exhibits

29. Mr. Sawyer submitted that by failing to call the police officer to whom the firearms and ammunition was handed over, there was a break in the chain of custody and the firearms and ammunition were thereby rendered inadmissible as evidence in the trial. He argued that this break was fatal to the Prosecution's case against the appellant.

30. At page 4 of the Chief Magistrate's record the following appears:

> **"I arrested and cautioned Dontray Russell. He then said "Kenton give me this and say hold it". I then contacted Sargent Capron in care of CSI. I pointed out to her upon her arrival the aforementioned exhibits which she processed and collected same and I later <u>placed my markings on all exhibits for future identification purposes</u>. I then transported the suspects and he exhibits to the Elizabeth Estates Police Station and later on to the Drug Enforcement Unit." [Emphasis added]**

31. On 2 April 2019, D/C 3543 McKenzie identified the firearms and ammunition in court and they were entered as exhibits in the trial. Although the officer does not say in the record at the time he purported to identify the firearms and ammunition in court, "I see my markings on the firearms and on the ammunition", it may be reasonably inferred that his identification of those

items was as a result of the markings he made on them for the specific purpose of future identification.

32. On 10 April 2019, pursuant to section 120 of the Criminal Procedure Code, the firearms examiner and the report from the firearms licensing section were entered as exhibits without objection by the Defence.

33. In **Musgrove v Commissioner of Police** [1988] BHS J. No. 95, the appellant had been found by police officers, D/C Williams and P/C Brennen, in possession of two plastic bags containing suspected dangerous drugs. D/C Williams testified during the trial and his evidence was encapsulated in paragraph 5 of the judgment of Georges, CJ:

> **"They had arrested the Appellant and taken him to the Criminal Investigation Department where they had handed him over to Detective Constable Glen Stuart of the Drug Squad. They had also handed over the two plastic bags on which D.C. Williams had placed his initials. An item was then shown to D.C. Williams who identified it as the two plastic bags he had taken from the Appellant. He pointed to his signature on the bags. The plastic bags were then tendered in evidence and marked "B". D.C. Williams stated that until they had been shown to him in court he had not seen them since the day he had handed them to D.C. Stuart. He had placed his initials on a piece of white paper in the plastic bag."**

34. D.C Stuart testified as to receiving the two bags from Williams and Brennen and he had "taken the two plastic packages with the suspected marijuana to Inspector Ferguson on 10 March 1987. He had placed his initials on the bags and he identified them on Exhibit B." He had kept the bags in a drawer in a safe and had not seen them since 10 March 1987.

35. The prosecutor tendered the analyst's report prepared by Analyst Inspector Ferguson without objection by the Defence and it was made an exhibit in the trial.

36. After the Prosecution closed their case, Mr. Elliott Lockhart, the appellant's lawyer, "argued that there was no evidence that the Report tendered related to the Exhibit tendered. Further the chain of custody and control had not been established. There was no evidence of what had happened to the plastic bags between 10 March and the date of the hearing". Georges, CJ did not find any merit in Mr. Lockhart's submission and said at paragraph 10:

> **"10 The trial magistrate concluded that the exhibits had been properly identified and that there had been no break in the chain of custody. The question is one of fact and on appeal the only issue is whether there was evidence on which the trial magistrate could have reached the conclusion which she did. There was D.C. Williams' evidence that he had placed his**

> **initials on a piece of paper in the bags. There was the O.B.G.S. envelope which contained the two plastic bags and which also bore the witness' signatures. The report by Inspector Ferguson noted that he had received the plastic bags on 10 March, 1987 from D.C. Glen Stuart, the date on which D.C. Stuart had testified that he had handed the exhibit to Inspector Ferguson. The O.B.G.S. envelope as well as the report bore the letters and numbers MCR No. 199-87 and Lab No. 440F."**

37. Georges, CJ went on to say, "**The Report is in evidence and the similarities between it and the envelope containing the alleged dangerous drugs can be taken into account in arriving at a conclusion as to proper identity**". He found there was evidence to support the magistrate's conclusion.

38. It is important to note that in cases involving dangerous drugs it is essential for the Prosecution to establish that what was found in the possession of the defendant was in fact dangerous drugs of one kind or another. Usually a field test is conducted to determine the nature of the substance but it is frequently the case that an analysis is conducted later in a laboratory after the substance has passed through a number of hands. Thus, it is incumbent on the Prosecution to provide satisfactory proof that what was found was what was analysed and found to be dangerous drugs.

39. In the conjoint appeals of **Noel Lionel Cash and The Commissioner of Police** MCCrApp No 47 of 2013 and **Davis and the Commissioner of Police** MCCrApp No 68 of 2013, the appellants had been charged with possession of unlicensed firearms, possession of a prohibited weapon and possession of ammunition. After a trial before a magistrate the appellants were convicted. The brief facts appear at paragraphs 2 and 3 of the judgment; and are reproduced here:

> **"2. In summary, the facts were that on the evening of 28 November 2008 the appellants and D.C. were in a dark green Honda Legend vehicle travelling along Malcolm Road in the Southern District of The Bahamas. Police officers in a marked police vehicle called upon the driver of the vehicle to stop. The vehicle increased its speed, and with sirens blaring a high speed police chase ensued. In the course of the chase the appellants' vehicle crashed into a fence in the area of Park Road off Malcolm Road.**
>
> **3. The appellant Cash jumped out of the vehicle brandishing a firearm. The appellants were pursued by police officers and in an attempt to make good their escape they jumped over a fence of a resident's yard. The Police continued their pursuit of the appellants and arrested them and retrieved two firearms that fell from their hands. The firearms were found two to three feet**

> **away from them. The firearms were a chrome and black Blackhawk .357 revolver, loaded with four rounds of .357 ammunition, and two rounds of .38 special ammunition together with a chrome and black Tech 9 machine gun loaded with fifteen rounds of .9mm ammunition. D.C. the driver of the vehicle was unable to exit the vehicle as he was trapped in it following the impact. All three persons were arrested and charged with various firearm and firearm related offences."**

40. One of the complaints made by Ms. Mason-Smith, Counsel for Cash was that the magistrate had "erred when she relied on the testimony of Police Constable Hall who testified that he received the firearms and ammunition from Detective Corporal Francis" since Officer Francis did not testify in the trial.

41. The Court, differently constituted, found no favour with this complaint and said, inter alia, at paragraph 16:

> **"What must be proved is that the firearms that were seized were the same ones tendered in court. There is no legal requirement that every individual who came into contact with the exhibits must testify."**

42. I accept that there is a distinguishing feature in **Cash** that is absent in this case and that is, in **Cash**, the firearms were seen to fall from the hands of the appellants during a hot pursuit whereas in the present matter under appeal, the appellant was not present when the firearms were discovered in Dontray's home. However, D/C 3543 McKenzie testified that the three firearms were found in the same blue and white Super Value bag he had earlier seen the appellant hand over to Dontray.

43. In the present case, notwithstanding that the Prosecution did not call Sergeant Capron as a witness in the trial, once the Chief Magistrate was satisfied that the firearms and ammunition produced in court were the self-same items discovered and marked by D/C 3543 McKenzie, she could quite properly admit them into evidence. The identification of the firearms and ammunition by D/C 3543 McKenzie provided the necessary nexus between the items found and the items produced in court during the trial.

44. In the premises, there was sufficient evidence to support the Chief Magistrate's decision to admit the firearms and ammunition into evidence. There is no substance to this complaint.

Ground 4 - The Magistrate Wrongly Allowed Dock Identification

45. Mr. Sawyer submitted that the Prosecution led only the evidence of D/C 3543 McKenzie to identify the appellant in circumstances where D/C 3543 McKenzie was said to be along with another police officer, Corporal Griffen, who did not testify during the trial. Mr. Sawyer's argument went along the lines that in the absence of officer Griffen's evidence corroborating

D/C 3543 McKenzie's identification of the appellant, it was obligatory for the Prosecution to undertake some sort of identification procedure before the trial whereby the identification of the appellant by D/C 3543 McKenzie could be tested. In the absence of any such procedure or an explanation as to why none was done, D/C McKenzie's identification of the appellant in court was a dock identification; and ought not to have been permitted by the Chief Magistrate.

46. Mr. Sawyer referred to the cases of **Pop (Aurelio) v R** [2003] UKPC 41, **Maxo Tido v The Queen** [2011] UKPC 16 and **Terrell Neilly v The Queen.**

47. In **Pop**, as identified by the Board in their judgment, the only issue at the trial was whether it was Pop who shot the deceased. The only identification of Pop came from a witness, Adolphus, who had purported to witness the shooting which occurred around 6:00pm. The sun had gone down and night was setting in. There were two sources of light. Adolphus gave two versions of the shooting. Significantly, as appears in paragraph 2 of Lord Rodger's judgment, there were long lapses of time involved in the case:

> **"[2] Although the murder took place on 7 July 1995, the man who was to be the principal Crown witness, Martin Adolphus, was not interviewed by the police until 12 December 1995, some five months later. A warrant for the appellant's arrest was issued the day after Adolphus was interviewed but the police did not trace the appellant until he was taken into custody, apparently in relation to another matter, on 13 August 1998. For some reason the police did not then hold an identification parade."**

48. Of further significance, in his statement to the police, Adolphus had called the name Aurelio Pop; but in court had testified that he only knew the shooter as R. It was in those circumstances that their Lordships considered the issue of the failure of the police to hold an identification parade. At paragraph 9 Lord Rodgers said:

> **"[9] First, the police held no identification parade and in consequence the identification of the appellant was a dock identification. The failure to hold an identification parade was contrary to the practice in Belize as explained by the Court of Appeal in *Myvett and Santos v The Queen (unreported)* (9 May 1994, Criminal Appeals Nos 3 and 4 of 1994):**
>
> > **"The detailed code adopted in England for the holding of identification parades to have suspects identified is intended to ensure that the identification of a suspect by a witness takes place in circumstances where the recollection of the identifying witness is tested objectively under safeguards by placing the suspect in a line made up of like looking suspects, the English procedure is in practice followed here in Belize."**

> **The facts that no identification parade had been held and that Adolphus identified the appellant when he was in the dock did not make his evidence on the point inadmissible. It did mean, however, that in his directions to the jury the judge should have made it plain that the normal and proper practice was to hold an identification parade." [Emphasis added]**

49. In **Maxo Tido** (Supra), the Privy Council reiterated the point that dock identifications "are not, of themselves and automatically, inadmissible" and that "the admission of such evidence is not to be regarded as permissible in only the most exceptional circumstances". The fault of the trial judge found by the Board lay in the fact that none of her directions to the jury on dock identification had "focused directly on the problems associated with dock identification evidence".

See also **Pipersburgh and Robateau v The Queen** [2008] UKPC 11 and **Holland v HM Advocate** [2005] UKPC D1, 2005 SLT 563 - both mentioned in **Tido**.

50. The identification evidence placed before the Chief Magistrate may be seen in the following evidence of D/C 3543 McKenzie:

> **"When I observed the plastic bag being passed, I was about thirty-three feet away in my vehicle. There was nothing obstructing my view. It was daytime around twelve noon, my view was not obstructed. I had previous encounters of a similar nature with him. I had conducted surveillance the week before. Defendant duly identified."**

51. D/C 3543 McKenzie spoke to having seen the appellant around a week before the incident he spoke about; and he had previous encounters with the appellant. He also said at page 3: **"I saw Kenton and Dontray Russell both known to me"**. The cross-examination of the officer does not disclose any suggestion that the appellant was not previously known to the officer. The only issues raised were whether the officer could possibly see what he said he saw and that he could not be sure the person he saw was the appellant.

52. In the conjoint appeals of **Cash** (Supra), it was submitted that the "Deputy Chief Magistrate erred in law when she allowed dock identification of the appellants." The Court said, inter alia, at page 16:

> **"29. In the instant case the appellants were arrested by the Police Officers after they fled a car and jumped into the yard of a resident. To hold an identification parade after the officers had chased and arrested the appellants would have been nothing but a farce as they would have identified the two appellants. In court, the officers were merely identifying the persons they chased and arrested on the 24th November 2008. It was not**

identification for the first time and so it was not a dock identification in the true sense of the words."

53. Similarly, in my view, in the present appeal, D/C 3543 McKenzie was not making "a dock identification in the true sense of the words" when he identified the appellant in court. D/C 3543 McKenzie had testified that he was familiar with the appellant as he had had the appellant under surveillance around one week before he observed the appellant hand over the blue and white Super Value bag later discovered to contain the three firearms.

54. The Chief Magistrate sits as the judge of the facts and the judge of the law. In that dual capacity she determines what the facts are in the case - a function performed by the jury in a case tried in the Supreme Court - and she is guided by the law as she interprets it to be - a function performed by the trial judge in the directions he gives to the jury, the triers of the facts, to apply to the facts as they find them to be.

55. There is nothing to suggest that the Chief Magistrate's acceptance of D/C 3543 McKenzie's evidence was so manifestly flawed that her assessment of it ought to be overturned. She said;

> **"The court observed the demeanor and accepted the evidence of Sergeant McKenzie. His evidence did not waiver. He did not bow under cross examination. He was strong and resolute. He saw the defendant hand a Super value bag to another, (Kenton) and five minutes later that bag was found to contain three illegal firearms together with ammunition and drugs. His view was not obstructed and the Defendant was known to him."**

56. As an appellate court we ought to be slow to interfere with a finding of fact by the Magistrate. I had said at paragraph 26 of **Alexander Harris v The Commissioner of Police** MCCrApp. No. 38 of 2020, but it bears repeating:

> **"26. In The Attorney General v. Pratt [2013] 1 BHS J. No. 71, John, JA identified a number of cases pertaining to the approach an appellate court should take to appeals from lower courts; and at paragraphs 24 through 28 said as follows:**
>
> > **"24 The function of appellate courts in relation to appeals from lower courts has been very carefully considered in several cases. In the judgment of Davies L.J in Re O (infants) [1971] 2 All ER 744 at page 748 it was cogently expressed in the following passage:**
> >
> > **'In my considered opinion the law now is that if an appellate court is satisfied that the decision of the court below is wrong, it is its duty to say so and to act accordingly. This applies whether the appeal is an interlocutory or a final appeal whether it is an appeal**

from justices to a Chancery judge or from justices to a Divisional Court of the Divorce Division. Every court has a duty to do its best to arrive at a proper and just decision. And if an appellate court is satisfied that the decision of the court below is improper, unjust or wrong, then the decision must be set aside. I am quite unable to subscribe to the view that a decision must be treated as sacrosanct because it was made in the exercise of "discretion": so to do might well perpetuate injustice.'

25 In Sylvan v Ragoonath and Ors (1966) 11.W.I.R 33 a decision of the Court of Appeal of Trinidad and Tobago the magistrate discharged the defendants on a charge of larceny. The police appealed. The magistrate stated in his reasons for discharging the defendants that he had found himself in some doubt but did not disclose the precise subject of which he was in doubt: Wooding C.J in delivering the judgment of the court said inter alia...'we must stress that by not disclosing the precise subject of his doubt the magistrate has given us no real assistance on what was the essential issue which he had to determine ... for a magistrate not to state what his findings are on the or any of the material issues in a case is to ignore the requirement that he transmit to this court what his reasons were for the decision at which he arrived.' 26 In Charles Osenton and Co. v Johnston [1941] 2 All ER 245 at 250 Viscount Simon L.C said this about the function of an appellate tribunal: 'The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal maybe justified.'

27 More recently in Mitra Harracksingh v Attorney General of Trinidad and Tobago (2004) 64 W.I.R Sir Andrew Leggatt delivering the advice of the Board referred to the classic approach of an appellate court as formulated by Lord Sumner in Owners of SS Honestestroom v Owners of SS Sagaporack [1927] A.C

> **37 at page 47: '...not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his 14 advantage, the higher court ought not take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of witnesses and of their own view of the probabilities of the case.'**
>
> **28 In the case of Alphonso v Deodat Ramnath (1997) 56 W.I.R. 183 a decision of the Court of Appeal of the Eastern Caribbean States, Satrohan Singh JA had this to say on the duty of an appellate tribunal: 'It is axiomatic that where a trial judge had the advantage of seeing the witnesses, an advantage which this court did not have, an appeal court usually is, and should be, slow to reverse any finding of fact which appears to be based on the judge's assessment of the credibility of the witnesses. This general principle was referred to and elaborated on by Byron acting CJ in Raymond v Skelly (1997) (unreported). It was also explained in the wellknown and often-quoted case, Watt v Thomas [1947] 1 All ER 582 in the speech of Lord Thankerton.'"**

57. There has been nothing disclosed from the record or on the submissions of the appellant to suggest that the Chief Magistrate has "palpably misused [her] advantage" of seeing the witnesses so as to cause me to find that her decision to convict the appellant was unreasonable. Further, I find that there was ample evidence before the Chief Magistrate upon which her decision to convict the appellant can be supported.

Ground 8 – The Sentence of 5.8 years is Unduly Severe

58. Mr. Sawyer submitted that the sentence of 5.8 years' imprisonment is unduly severe. Although this was a ground of appeal, the written submissions found in the "CONSOLIDATED SUBMISSION ON BEHALF OF THE APPELLANT" do not deign to elaborate on why the sentence is unduly severe.

59. As the issue has been raised, I will address it by firstly pointing out that Lord Hewart LCJ, in **R v Gumbs** (1927) 19 Cr. App. R, a case involving an appeal against the severity of sentence, said, inter alia:

> **"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 a somewhat different sentence; for this Court to revise a sentence <u>there must be some error in principle</u>." [Emphasis added]**

60. The Chief Magistrate's sentencing remarks came after she had heard a plea in mitigation and they disclose her thinking as to what would be an appropriate sentence in the circumstances. She said:

> **"The Offences for which the Defendant is convicted are serious in nature. The Court must therefore through its sentencing canvas a sentence which will serve as a deterrent to other would be offenders."**

61. It is generally accepted that a sentencing magistrate or judge is guided by four principles or purposes when imposing a sentence on a convict, to wit, deterrence, rehabilitation, punishment and incapacitation. It is obvious that the Chief Magistrate considered deterrence to be of primary importance in the appellant's case. Can it be said that she was wrong to do so?

62. Courts have imposed sentences of imprisonment for firearms that range in degree of severity. A sampling of such cases illustrates this point.

63. In **Galen Forbes v The Commissioner of Police** MCCrApp & CAIS No. 10 of 2013, this Court, differently constituted, upheld a sentence of four years imposed on a young man with no previous convictions and who had entered a guilty plea at the earliest opportunity. Allen, P said:

> **"Notwithstanding that youth and previous good character may have in previous cases resulted in a reduction, nevertheless, having regard to the prevalence of guns, the increasing and alarming incidences of murder, manslaughter and assault with such weapons in the Bahamas today, we think deterrence should be the objective of this court in this case. We feel it is essential that we send a strong message to the appellant and to others who would offend that possession of firearms is a serious offence and will not be tolerated.**
>
> **In the premises, we are satisfied that four years is an appropriate sentence for the possession of a loaded gun in the circumstances and we shall not interfere with the sentence imposed by the magistrate. We therefore dismiss the appeal affirm the sentence imposed by the magistrate, namely four years, with effect from the date of conviction."**

64. In **Commissioner of Police v Brian Botham** MCCrApp & CAIS No. 134 of 2015, a differently constituted court found that the conditional discharge granted to the defendant by

the magistrate in circumstances where the defendant had been found in possession of a single firearm but 392 rounds of ammunition was unduly lenient even though the defendant had no previous convictions and had entered a guilty plea. The Court imposed a sentence of three years' imprisonment on the firearm charge but five years on the possession of ammunition with intent to supply charge.

65. In **Rodari Rolle v. The Commissioner of Police** MCCrApp No. 254 of 2012, Allen, P via an oral judgment of this Court, differently constituted; dismissed the appellant's appeal against his two years' imprisonment in respect of 52 rounds of ammunition.

66. **Demetrius Williams v. The Commissioner of Police** MCCrApp No. 223 of 2012, is a case where this Court (differently constituted) allowed the appeal against sentence imposed for possession of 24 rounds of ammunition and reduced the 4 year sentence to 30 months.

67. Lord Judge CJ in the English Court of Appeal case of **R v Wilkinson** [2010] 1 Cr App R (s) 100 - a case cited by Crane-Scott, JA at paragraph 27 of her judgment in **Taylor v The Commissioner of Police** [2015] 2 BHS J. No. 52 - said:

> **"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."**

68. In **Taylor** (Supra), Crane-Scott, JA went on to observe that:

> **"The unlawful possession and use of firearms and ammunition is a grave concern to this society."**

and that:

> **"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".**

69. Madam Justice of Appeal Crane-Scott then provided some guidance for a sentencer in the exercise of the sentencing discretion at paragraph 31 of her judgment:

> **"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? "**

70. And at paragraph 33 she stated:

> "**33. Needless to say, in an appropriate case, sentencers should endeavour to protect society from persons who (based on the available facts or the evidence before the courts) have no regard for the sanctity of life and the physical well being of others, bearing in mind that the judicial discretion may in appropriate cases be exercised with a view to general and specific deterrence."**

71. It is not sufficient for the appellant to demonstrate that the sentence was severe. He must show that it is "unduly severe". The cases cited above demonstrate that the sentence of 5.8 years falls within the ambit of sentences imposed on persons convicted of similar offences, many of them not involving multiple firearms.

72. Furthermore, the appellant must show that the Chief Magistrate somehow fell into error by arriving at her sentence unreasonably, to wit, in the "Wednesbury" sense. The Court (differently constituted) in **Keith Jones v. R** SCCrApp No. 11 of 2007, said at paragraph 43:

> **"43. It is not usual for this court to interfere with the exercise of discretion by a trial judge below unless it is shown that the judge, in exercise of that discretion failed to take into consideration those matters which he or she ought to have taken into consideration or took into consideration matters which he or she ought not to have taken into consideration."**

73. I am not persuaded that the sentence imposed on the appellant for three firearms is unduly severe. Moreover, there is nothing that is disclosed in the ruling of the Chief Magistrate which shows that she somehow erred in principle when sentencing the appellant.

74. There is no merit in this ground.

Conclusion

75. In the premises, the appeal is dismissed. The convictions are affirmed. When the judgment had been delivered, the appellant signalled that he wished to speak. The Court allowed him to address us and he indicated that the 7 months he had spent on remand (26 May 2017 to 14 December 2017) had not been taken into account. The Chief Magistrate's record does not indicate that the appellant's remand time was taken into account when she imposed her sentences. He was entitled to have that considered. In the circumstances, the sentences imposed by the Chief Magistrate are varied to reflect the seven months that the appellant spent on remand. Thus, the appellant is to serve five years and one month from the date of conviction.

_____

The Honourable Mr. Justice Isaacs, JA

76. I agree.

_____

The Honourable Madam Justice Crane-Scott, JA

77. I also agree.

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The Honourable Mr. Justice Jones, JA