

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CRIMINAL SIDE**

3
4 **INDICTMENT NO: 0059/2016**

5
6
7 **REGINA**

8 **V.**

9 **ANDY ERROL BARNES**



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13 **Appearances:**

Mr. Scott Wainwright for the Crown

14
15 **Ms. Sue-Helen McConnell of Priestleys for the**
16 **Defendant**

17
18 **Before:**

Justice Marva McDonald-Bishop (Actg.)

19 **Hearing:**

2nd July 2021

20 **Delivery of Decision:**

15th July 2021

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25 **HEADNOTE**

26 ***Criminal Law – Possession of Unlicensed Firearm – Sections 15 and 39***
27 ***of the Firearms Act (2008 Revision) – Whether the statutory minimum***
28 ***sentence should apply – Exceptional circumstances argued – Mental***
29 ***health considerations – delay in sentencing awaiting mental status reports.***
30

31
32 **SENTENCE JUDGMENT**
33



1 **THE BACKGROUND**

- 2 1. On 28th August 2019, following a re-trial¹ of the defendant by a judge sitting with a
3 jury, the defendant was convicted on a single-count indictment that charged him with
4 the offence of possession of an unlicensed firearm, contrary to s.15(1) and s.15(5) of
5 the *Firearms Act* (2008) Revision. The particulars of the offence were that on 18th
6 March 2016, in the jurisdiction of the Cayman Islands, he had in his possession a
7 firearm, namely a .38 calibre revolver, which was not under and in accordance with the
8 terms of a Firearms Users' (Restricted) License.
- 9 2. The facts that the jury accepted and which grounded the defendant's conviction were
10 that on 18th March 2016, a police party visited residential premises at 139 Old Crewe
11 Road in Georgetown, Grand Cayman, to execute a firearms search warrant. The
12 defendant was present in an apartment that he shared with other persons. During the
13 search of the apartment by the police, the subject firearm was found under a
14 microwave attached to the kitchen wall. The firearm was wrapped in a stainless steel
15 mesh and loaded with six live rounds of ammunition. Forensic evidence (DNA and
16 fingerprint) linked the defendant to the firearm and the microwave in which it was
17 located.
- 18 3. The defendant had strenuously denied in his interview with the police and at trial that
19 the firearm belonged to him and that he had placed it in the microwave.
- 20 4. When the case came before the court for sentencing, the court considered that a Social
21 Inquiry Report (SIR) would have been helpful, therefore, an order was made for these
22 reports to be obtained. Upon receiving the SIR, the court observed that the probation

¹ As ordered by the Cayman Islands Court of Appeal (CICA) on the 17th April 2019.



1 officer had recommended that the defendant be subject to psychological assessment. It
2 was suspected that he might have post-traumatic stress disorder.

3 5. Counsel for the defendant also reported to the court at the sentencing hearing at which
4 the SIR was submitted that the defendant was suffering from psychological problems
5 in custody while awaiting sentence. Therefore, in keeping with the probation officer's
6 recommendation, it was considered prudent that he be assessed. Accordingly, the court
7 referred the defendant for psychiatric and psychological assessments because it formed
8 the view that it could be assisted by information regarding the defendant's mental
9 status. The Court directed that the psychiatric and psychological reports be submitted
10 to it upon completion of the evaluation process.

11 6. Except for the SIR, the court waited for almost two years for all the requisite pre-
12 sentencing reports to be submitted as directed. After receiving the SIR and antecedent
13 report in 2020, the court did not receive the psychiatric report until April 2021. To
14 date, the psychological report has not been obtained, although the psychologist had
15 interviewed the defendant. Despite repeated requests for the report to be forwarded
16 and, alternatively, a suggestion made to the Mental Health Unit (MHU) that the
17 psychologist could attend court virtually to assist the court, the result of the interview
18 by the psychologist is still not with the court. With this case hanging over the
19 defendant's head for almost two years, I formed the view that the defendant would be
20 prejudiced by further delay.

21 7. After discussions with counsel for the prosecution and the defence, I directed the
22 sentencing hearing without the psychological report. Although the psychiatric report is,
23 in the end, helpful, the information required by the court is still incomplete in the
24 absence of the psychological report. In my view, the inordinate delay in the disposal of

1 the matter because of the delay in the provision (or non-production) of the relevant pre-
2 sentence reports should enure to the defendant's benefit in determining the appropriate
3 sentence to be imposed on him. As I have indicated to counsel, I would not treat the
4 unavailability of the psychological report in any way detrimental to the defendant.

5 8. I will revert, in due course, to how I have treated with this issue of delay and the
6 absence of the psychological report in determining the length of the sentence to be
7 imposed.



8 **THE APPLICABLE LAW**

9 9. Section 15(5) of the *Firearms Act* (2008) provides that a person convicted of the
10 offence of possession of an unlicensed firearm is liable to a fine of \$100,000.00 and
11 imprisonment for 20 years.

12 10. Section 39(2) of the *Firearms Act* (2008), however, provides, in so far as is relevant
13 for immediate purposes, that where a person is convicted after a trial, for this offence,
14 the court shall impose a sentence for a term of imprisonment of at least ten years (with
15 or without a fine), unless the court is of the opinion that there are exceptional
16 circumstances relating to the offence or to the offender which justify its not doing so.

17 11. By way of background, it should be briefly noted that the defendant was tried and
18 convicted in the Grand Court in 2016. However, following a successful appeal, the
19 conviction was quashed, the sentence set aside, and a re-trial was ordered. Although
20 there was a ground of appeal challenging the sentence of 13 years as being manifestly
21 excessive, the CICA, understandably, did not address that issue in light of the outcome
22 of the appeal as it relates to the conviction.

1 12. It is common ground between the prosecution and the defence that the defendant ought
2 not to receive a higher sentence than the sentence of 13 years' imprisonment imposed
3 on him at the first trial.

4 13. Counsel on both sides have also submitted that one of the factors that the trial judge
5 had considered in the first trial as an aggravating factor is absent from this case as there
6 is no evidential basis that would support it.

7 14. I have accepted those submissions. Therefore, I have started on the premise that
8 nothing would justify a sentence of more than 12 years, 6 months' imprisonment in the
9 absence of that particular aggravating feature present in the evidence in the first trial.
10 Therefore, this sentence of 12 years, 6 months is viewed as the maximum custodial
11 sentence that could be imposed on the defendant for the purposes of these proceedings.

12 15. It remains the contention of counsel for the defendant that there are exceptional
13 circumstances in this case, particularly relating to the defendant's circumstances, that
14 would justify a disapplication of the mandatory minimum sentence of 10 years'
15 imprisonment prescribed by s.39(2) of the *Firearms Act*.

16 **ISSUES**



17 16. In the light of Ms. McConnell's submissions, the issues for this court's consideration
18 are:

19 *i.* Whether there are exceptional circumstances that would justify a sentence below
20 the statutory minimum; and

21 *ii.* Whether or not there are exceptional circumstances, what is the appropriate
22 sentence to be imposed.

1 **ISSUE (i): WHETHER THERE ARE EXCEPTIONAL CIRCUMSTANCES TO JUSTIFY A SENTENCE**
2 **BELOW THE STATUTORY MINIMUM?**

3 17. Both counsel have commended the guidelines set out in *R v Avis*², which the courts in
4 this jurisdiction have utilised in determining the appropriate sentence in serious firearm
5 offence cases.

6 18. *Avis* has authoritatively established the material considerations for the court to be as
7 follows:

8 *i.* What is the sort of weapon that was involved?

9 *ii.* What (if any) use had been made of the firearm?

10 *iii.* With what intention, if any, did the defendant possess or use the firearm?

11 *iv.* What is the defendant's record?

12 19. I have been guided accordingly, and so, in keeping with the *Avis* guidelines, I have
13 sought to resolve these questions on the facts before me as an appropriate starting point
14 in my analysis as follows:

15 *i.* *What sort of weapon was involved?*

16 (a) Counsel for the defendant submitted that there was nothing exceptional
17 regarding the weapon. According to her, although the firearm was loaded,
18 there are numerous examples of a loaded gun not leading to an increase



² [1998] 1 Cr App R 420



1 beyond the mandatory minimum sentence. Reference was made to *R v*
2 *Kennedy Smith*³ as an example of such a case.

3 (b) Mr. Wainwright, for the prosecution, highlighted the fact that the firearm
4 was loaded with six live rounds as an aggravating factor that should result
5 in an upward movement from the statutory minimum.

6 (c) Having had regard to the reasoning of Quin J in *Kennedy Smith*, the case
7 relied on by the defence, I cannot accept that I should not consider the fact
8 that the firearm was loaded. Thus, in my view, the fact that the gun was
9 loaded with six viable rounds cannot be ignored as an aggravating feature.

10 (d) The type of weapon, a .38 revolver, in and of itself, would not have led to
11 an upward adjustment in the starting point as there is, indeed, nothing
12 intrinsically remarkable about the gun itself, over and above it being a
13 lethal weapon, which is inherent in the commission of the offence.

14 (e) I have taken into account, however, that the loaded gun with six viable
15 rounds of ammunition would not only have been ready for immediate use
16 but would also have been more lethal than it would have been if it were
17 without ammunition. Therefore, the loaded firearm was more dangerous
18 than the firearm standing on its own would have been.

19 (f) It is also observed that in deciding to impose no more than the minimum
20 sentence in *Kennedy Smith*, Quin J took into account several factors, not
21 only relating to the offence but also to that particular offender. One of the
22 distinguishing features to note about the case of *Kennedy Smith*, which

³ Ind. No 0086/2012

1 makes it unsuitable as a precedent to be followed in this case, is that the
2 defendant in that case, unlike this defendant, had no criminal history for
3 firearm offences. Furthermore, Kennedy Smith was 18 years old at the
4 commission of the offence - much younger than this defendant. Finally,
5 there was, above all else, evidence of Kennedy Smith's good character.
6 There is nothing to suggest that the same could be said of the defendant
7 before me, who is not only much older than Kennedy Smith, but who does
8 not have the benefit of a good character consideration. Quin J also did not
9 expressly indicate what he viewed as aggravating or mitigating factors in
10 the case and did not explicitly demonstrate the balancing of those factors
11 in arriving at the sentence he imposed. Therefore, it cannot be said with
12 certainty that he had not considered that the firearm was loaded as an
13 aggravating feature. It could well be that Quin J had done so but found that
14 other matters in mitigation outweighed the effect on the sentence.

15 (g) In my view, there is nothing in the case of *Kennedy Smith* that would be
16 binding on this court to lead it to hold that the fact that the firearm was
17 loaded in this case ought not to be taken into account as an aggravating
18 factor. Accordingly, I am content to hold that the fact that six rounds of
19 ammunition were in the firearm is an aggravating factor in this case that
20 would warrant a movement upward from the statutory minimum sentence
21 of ten years' imprisonment

22 ii. What (if any) use had been made of the firearm?



23 (a) Ms. McConnell submitted that there is no evidence that the defendant used
24 the firearm. She noted that it was found hidden in private residential

1 premises and was not being carried in a public place. The prosecution has
2 also conceded that there is no evidence that any use had been made of the
3 firearm.

4 (b) Accordingly, I accept the submissions of counsel and hold that there is
5 nothing to suggest that the gun had been used by the defendant or anyone
6 in his company with his knowledge and encouragement.

7 *iii. With what intention (if any) did the defendant possess or use the firearm?*

8 (a) The submission on behalf of the defendant, which is shared by the
9 prosecution, is that there is no evidence of any intent on the defendant's
10 part to unlawfully endanger life or cause injury. According to counsel,
11 there is no intention to be attributed to the defendant, which would in any
12 way aggravate the offence.

13 (b) I accept these submissions, although the fact that it was not empty would
14 import the reasonable inference that it was intended for use, that is, to
15 discharge the deadly missiles it contained from it. However, in the absence
16 of any direct evidence as to why the defendant possessed the firearm or
17 that he intended to use it, I would hold that there is nothing that could be
18 taken as an aggravating or mitigating factor in adjusting the statutory
19 minimum sentence based on his intention.

20 *iv. What is the defendant's record?*



21 (a) The criminal record paints a disturbing picture. The history shows 44
22 previous convictions (but one was quashed on appeal in relation to this
23 charge arising from the first trial for this case). The last two convictions



1 were in 2017 and 2019, while he was in custody on this charge. He was
2 sentenced to a suspended sentence of four months' imprisonment in 2017
3 and a custodial sentence of one month in 2019.

4 (b) The antecedent report also shows, among other things, that in 1998, the
5 defendant was sentenced on two counts of possession of an imitation
6 firearm. He received an immediate custodial sentence on one count and a
7 suspended sentence on the other. Those convictions were not yet spent at
8 the time of the commission of this offence in 2016.

9 (c) Despite having been given custodial sentences for a firearm offence
10 involving an imitation firearm, the defendant was again convicted of
11 illegal possession of ammunition in 2011, for which he received a
12 custodial sentence. This conviction was also not yet spent at the time of
13 the commission of this offence in 2016.

14 (d) Ms. McConnell has urged the court to find that the defendant's criminal
15 record is not relevant as an aggravating feature in determining whether the
16 minimum sentence should be imposed. According to counsel, the
17 defendant's relevant previous convictions are dated, being from 1998 and
18 2011, and so ought not to be considered an aggravating factor. However,
19 counsel for the prosecution submitted that "the court might feel" that those
20 previous convictions for firearm offences – possession of imitation firearm
21 and ammunition - are relevant as aggravating circumstances.

22 (e) I have considered the defendant's criminal history as an aggravating
23 feature while making some allowance for the fact that the relevant
24 offences are relatively dated. However, I believe that the fact that the



1 firearm was loaded and in good working condition (with his DNA profile
2 found at strategic places on it) must be viewed against the background of
3 his previous engagements in the criminal justice system in cases involving
4 firearm offences.

5 (f) I accept that the lapse of time is a material consideration that could enure
6 to his credit; however, the weight to be accorded to that factor is reduced
7 because the record has shown that there has been an escalation in his
8 commission of firearms offences. He has moved from an imitation firearm
9 to a genuine firearm in good working condition and from possession of
10 ammunition, simpliciter, to possession of a firearm loaded with
11 ammunition. Therefore, the defendant has ‘graduated’ from the
12 commission of less serious firearms offences to more serious ones.

13 (g) This upward movement in the scale of offending in breach of the *Firearms*
14 *Act* must be taken into account as a clear manifestation of the defendant's
15 resistance to rehabilitation and the failure of short periods of incarceration
16 to act as a deterrence. In such circumstances, the court cannot ignore his
17 previous convictions for firearm offences.

18 (h) The defendant’s criminal record, coupled with the fact that he was in
19 possession of a loaded firearm, would serve to move the sentence upward
20 from the statutory minimum to a term of 11 years six months’
21 imprisonment. I have made some allowance for the lapse of time between
22 the commission of the previous relevant offences and this offence in
23 determining the weight to be attached to the previous convictions as an
24 aggravating factor.



1 **ADDITIONAL CONSIDERATIONS**

- 2 20. The enquiry regarding the appropriate sentence is not complete. It is accepted that the
3 court must weigh in the balance the aggravating features with matters going to
4 mitigation of sentence and whatever exceptional circumstances there might be which
5 could impact the statutory minimum sentence in the defendant's favour. Also, the
6 guidelines considered in *Avis* are just part of the considerations in determining whether
7 exceptional circumstances exist to justify a departure from the minimum sentence.
- 8 21. According to Ms McConnell on behalf of the defendant, the departure from the
9 application of the mandatory minimum sentence is justified on the basis that a term of
10 imprisonment may significantly and adversely affect the defendant's health and that
11 would, in any event, be significantly more onerous and punishing than for a 'typical'
12 offender.
- 13 22. Regarding the question of whether exceptional circumstances exist based on the
14 matters being relied on by the defendant, counsel Ms. McConnell helpfully drew the
15 court's attention to instructive dicta from *R v Rueben Hesmer Hydes*⁴ and *Archbold*
16 *Criminal Pleading Evidence and Practice* 2020 Ed., Chap. 5A-661 d 2020, with some
17 relevant cases cited therein, which include *R v Nancarrow*⁵; *R v Zakir Rehman and*
18 *Wood*⁶; and *R v Robert Dawson*⁷.
- 19 23. An apt starting point is a review of the relevant principles extracted from the various
20 authorities that apply to the enquiry of whether exceptional circumstances exist in this

⁴ Indictment No. 32 of 2017, judgment delivered 29th August 2018

⁵ [2019] EWCA Crim 470

⁶ [2005] EWCA Crim 2056

⁷ [2017] EWCA Crim 2244



1 case. The material principles as helpfully summarised by the English Court of Appeal
2 in *R v Nancarrow* are as follows:

- 3 i. The purpose of the mandatory minimum term is to act as a deterrent⁸;
- 4 ii. Circumstances are *exceptional* for the purpose of the section if to impose the
5 mandatory minimum would amount to an arbitrary and disproportionate sentence⁹;
- 6 iii. It is important that the courts do not undermine the intention of Parliament by
7 accepting too readily that the circumstances of a particular offence or offender are
8 exceptional. To justify the disapplication of the statutory minimum sentence, the
9 circumstances of the case must truly be exceptional¹⁰;
- 10 iv. It is necessary to look at all the circumstances of the case together, taking a holistic
11 approach. It is not appropriate to look at each circumstance separately and
12 conclude that, taken alone, it does not constitute an exceptional circumstance.
13 There can be cases where no single factor by itself will amount to exceptional
14 circumstances, but the collective impact of all the relevant circumstances makes
15 the case exceptional¹¹;
- 16 v. The court should always have regard, amongst other things, to the four questions
17 set out in *R v Avis*¹²;
- 18 vi. The reference in the section to the circumstances of the offender is important. It is
19 relevant that an offender is unfit to serve the statutory minimum sentence or that
20 such a sentence may have a significantly adverse effect on his health¹³;

⁸ (*Rehman and Wood* at paragraph 12)

⁹ *Rehman and Wood* at paragraph 16

¹⁰ *R v Dawson* at paragraphs 12 and 19

¹¹ *Rehman and Wood* at paragraph 11

¹² *R v McCleary* [2014] EWCA Crim 302 at paragraph 11)



1 vii. Each case is fact-specific, and the application of the principles dependent upon the
2 particular circumstances of each individual case. Limited assistance is to be gained
3 from referencing the court to decisions in cases involving facts that are not
4 materially identical¹⁴.

5 24. By way of extension to what I would refer to as the '*Nancarrow* guidelines', I have
6 noted what was held In *R v Chavarria-Atily*¹⁵ that whether there are exceptional
7 circumstances is a question of fact squarely within the discretion of the sentencing
8 judge in each particular case.

9 25. It is also important to note the observation of learned Chief Justice Smellie at
10 paragraph [16] of *Parsons v The Attorney-General*¹⁶, which was reiterated by Carter J
11 (Actg.) in *Reuben Hesmer Hydes* at paragraph [34], that:

12 *"While the primary thrust of the statute is deterrence, the legislature is understood*
13 *to be in earnest to avoid arbitrary, and thus unduly harsh or disproportionate*
14 *punishment, including as that might turn out to be the case having regard to the*
15 *subjective circumstances, not only of the offence but of the offender as well."*

16 ANALYSIS AND FINDINGS FOR ISSUE (i)

17 26. The exceptional circumstances being advanced concern the defendant's mental health,
18 which, according to Ms. McConnell, could affect the impact of incarceration on him.

19 27. In so far as it relates to mitigating circumstances arising from the defendant's personal
20 circumstances, counsel has identified several factors, which she has advanced as
21 constituting exceptional circumstances that would justify a sentence below the
22 statutory minimum.

¹³ *Rehman and Wood* at paragraph 15; *R v Shaw* [2011] EWCA Crim 167 at paragraphs 6 and 7

¹⁴ *R v Stoker* [2013] EWCA Crim 1431 at paragraph 22

¹⁵ [2009] CILR 118

¹⁶ [2012] (1) CILR 388

1 28. In addition, she pointed to various aspects of the SIR and the psychiatric report
2 obtained by the court in her bid to persuade the court that there are unique
3 circumstances relating to the defendant that give rise to exceptional reasons to depart
4 from the statutory minimum sentence.

5 29. From the SIR, counsel highlighted several matters, more particularly, the following:

6 i. The defendant has had a very difficult upbringing which allegedly involved severe
7 parental abuse and neglect. Due to the harshness of his upbringing, the defendant
8 first attempted suicide in his early teens and made several attempts during his
9 teenage years. This familial instability resulted in him becoming involved in the
10 criminal justice system as an offender¹⁷.

11 ii. The defendant was married for 15 years and is now divorced. He and his ex-wife
12 were parents to four children. The couple's second youngest child, Jeremiah
13 Barnes, was shot and killed at four years old in February 2010. Jeremiah died in
14 the defendant's arms. This tragic and traumatic episode has had an overwhelming
15 impact on the defendant. To date, no one has been convicted for the murder, and
16 this has impacted the defendant considerably¹⁸.

17 iii. In the immediate aftermath of the killing of Jeremiah, the family frequently
18 relocated for security reasons and the loss of stable employment proved very
19 challenging for them¹⁹.

20 iv. The defendant's ex-wife has moved to the UK with his two youngest children since
21 2019. This has caused the defendant to feel lost and constantly worried about them.

¹⁷ (Ref: pages 3 to 5 and 11).

¹⁸ (Ref: page 4)

¹⁹ (Ref: page 4)



1 The defendant is now deprived of any real relationship with those children. This
2 exceeds the usual separation when in custody, where visits and regular telephone
3 calls permit the continuation of some familial relationship. The effect of this
4 further separation from his remaining children on the defendant is exacerbated by
5 the previous loss of a child. The defendant has expressed that his biggest fear is
6 something happening to his children while he is in prison unable to help²⁰.

7 v. The defendant has disclosed that he often feels "sad, lost and anxious", feelings
8 which have been constant since the fatal shooting of his four-year-old son. He
9 shared that his son is constantly on his mind; he described feeling haunted by
10 flashbacks and nightmares of his son's murder²¹.

11 vi. Following his son's death, he was prescribed anti-depressants, which he continues
12 to take presently. He stated he would wake up some days and feel "okay", and on
13 other days, he "struggles to find the will to continue living". More recently, he has
14 struggled with anxiety attacks and had to be hospitalised on one occasion²².

15 vii. The probation office received a report from a volunteer counsellor at HMP
16 Northward, which confirms that the defendant has attended 30 individual
17 counselling sessions from August 2017 to present. The counsellor has reiterated
18 the defendant's trauma - particularly his difficulty in coping with the death of his
19 son and having to "interact with the accused killer while in prison". His separation
20 from his children was highlighted, and it was confirmed that he used prescribed
21 anti-depressants and sleep aid medications²³.

²⁰ (Ref: page 6)

²¹ (Ref: page 7)

²² (Ref: page 7)

²³ (Ref: pages 8 and 9)



1 *viii.* The defendant’s psychological trauma coupled with the tragic loss of his son and
2 present separation from his children appear “to greatly contribute to the deficits
3 and challenges”. Given his history of trauma and behaviour patterns, “there could
4 be possible underlying mental health concerns, specifically Post-Traumatic Stress
5 Disorder”²⁴.

6 30. Ms. McConnell also relied on the psychiatric report of Dr. Arline McGill dated 7th
7 April 2021, in which it was reported, in so far as is immediately relevant, that:

8 (a) The defendant has “expressed bitterly the trauma of being incarcerated in
9 prison with the killer of his child who teased him about the killing.”²⁵

10 (b) He reported that he had tried to hang himself after his son died and
11 attempted to harm himself up to two or three years ago²⁶.

12 (c) “The medical records indicate symptoms of Depression and post-traumatic
13 stress disorder requiring psychotherapy and treatment”²⁷.

14 (d) The defendant’s “screening forms indicated significant trauma along with
15 a learning disorder. In addition, he also subscribed to significant symptoms
16 of OCD related to checking behaviour and has frequent suicidal thoughts
17 but no intention of harming himself. He is sometimes hypervigilant (feels
18 as if something lurks in the shadows).”²⁸

24 (Ref: page 2)

25 (Ref: page 2)

26 (Ref: page 2)

27 (Ref: page 2)

28 (Ref: page 2)



1 (e) The defendant is a mid-aged man who suffers from a sequelae of severe
2 psychological and physical trauma beginning in childhood, exacerbated by
3 a traumatic incident resulting in his son's death and other traumatic
4 incidents during his incarceration at Northward Prison. At his own
5 admission, and in keeping with his history of severe trauma, he has
6 attempted to harm himself several times"²⁹.

7 31. Counsel further submitted that the defendant's family is everything to him and that
8 against the background of his childhood trauma and mental health issues, incarcerating
9 him for a further time would have a devastating effect on him. Accordingly, counsel
10 submitted that, "considering the unique circumstances of this matter", it would be just
11 to find that these unique circumstances will allow the court to conclude that they are
12 exceptional and justify a sentence below the statutory minimum. Ms. McConnell
13 contended that the circumstances are "truly exceptional" and provide "good grounds
14 for the court to find that the imposition of the statutory minimum sentence would result
15 in an arbitrary and disproportionate sentence".

16 32. I see nothing in the psychological circumstances of the defendant that is established by
17 evidence to be directly related to the offence he has committed.

18 33. Furthermore, the defendant has not given any explanation for having the firearm in his
19 possession in the circumstances alleged by the prosecution because he has consistently
20 declared his innocence.



²⁹ (Ref: page 3)

1 34. However, although there is no nexus shown between the offence and the mental state
2 of the defendant, I have no reason to reject the findings and opinion of the psychiatrist.
3 In doing so, I have endorsed the view of Henderson J, expressed in *R v Bodden*
4 *Cordero*³⁰, that the court in carrying out the sentencing exercise, may take into account
5 the particular psychological circumstances of the offender, even where they do not
6 relate to the offence itself. Therefore, I have been guided by the psychiatric report as a
7 material consideration in determining whether matters concerning the defendant
8 himself, as distinct from the offence, would render the case one with exceptional
9 circumstances.

10 35. In the absence of the psychological report, due to no fault of the defendant, I am
11 prepared to hold that it would have been no less favourable to the defendant regarding
12 his diagnosis and attitude towards his incarceration. I, therefore, accept that he has a
13 mental disorder, which affects his mental health and behaviour. Additionally, this
14 mental disorder has affected his response to incarceration, particularly regarding the
15 tragic circumstances in which his young son died and the undisputed fact that he is
16 seeing the person who has been accused of killing his son in prison and who is,
17 reportedly, teasing him about the killing.

18 36. I must hasten to state for the record, however, that there is no evidence that anyone has
19 been convicted for the murder of the defendant's child, and so the court cannot act on
20 the premise that the killer is, in fact, in prison with the defendant. The presumption of
21 innocence still avails that person alleged by the defendant to be the killer until the
22 contrary is proved. Therefore, the highest the court can go is to say that the person who
23 has been accused of killing the defendant's child is also in the same prison. Counsel for
24 the Crown has confirmed this.

³⁰ SCA 11 of 2011



1 37. I appreciate that the defendant could be psychologically affected while he is
2 incarcerated by seeing and interacting with the person he believes is responsible for the
3 death of his child.

4 38. I am prepared to accept, as an unusual circumstance, that the defendant is gravely
5 affected by the death of his child, for which he has not yet received justice, and having
6 to be in prison with the person he believes is responsible. That situation must be
7 particularly distressing. Moreover, the loss of that child, his detachment from his other
8 children, coupled with his unstable mental condition, would have led to more difficulty
9 on his part in coping with incarceration when compared with the 'typical' prisoner at
10 HMP Northward.

11 39. Regarding what is to be viewed as 'exceptional', Bingham LJ in *R v Kelly*³¹ helpfully
12 explained it this way:

13 *"We must construe exceptional as an ordinary, familiar English adjective and not*
14 *as a term of art. It describes a circumstance which is such as to form an exception,*
15 *which is out of the ordinary course or unusual, or special or uncommon. To be*
16 *exceptional, a circumstance need not be unique, or unprecedented or very rare;*
17 *but it cannot be one that is regularly or routinely or normally encountered."*

18
19 40. With all good conscience, it cannot be said that the defendant's circumstances are not
20 out of the ordinary. It is not routinely or normally encountered that the child of an
21 offender is murdered in his presence and died in his arms. Then, he has to be troubled
22 by the alleged taunting of the person he believes has killed the child in a context where
23 that person has not been held criminally responsible. It would seem that his
24 incarceration with the alleged killer who is allegedly taunting him has reopened his
25 wounds, which have not been sufficiently healed over the years.

³¹ [2000] QB 198





1 41. Although one could honestly say that the defendant is the author of his own misfortune
2 in getting himself imprisoned again, I believe that his mental state at this time is likely
3 to make incarceration more unbearable for him than another inmate and exacerbate his
4 mental challenges. Indeed, this is a striking mitigating factor, which could reduce the
5 contemplated sentence of 11 years and six months which I arrived at following the
6 increase allowed for aggravating features.

7 42. However, in determining the extent of the downward adjustment in the sentence on
8 account of the mitigating factors related to the defendant's circumstances, the ultimate
9 question to be considered is whether these special circumstances of the defendant
10 would render the imposition of the statutory minimum of 10 years an arbitrary and
11 disproportionate sentence. According to the authorities, this question must be
12 considered in the light of the clear statutory intent that the offences to which s.39(2) of
13 the *Firearms Act* apply have to be met with strong deterrent sentences.

14 43. Therefore, all the matters highlighted by counsel for the defendant as being exceptional
15 must be juxtaposed against the intention of Parliament in prescribing a minimum
16 sentence for this type of offence. It is meant purely as a deterrent sentence, and the
17 court must be vigilant in giving effect to the clear intention of Parliament. As Lord
18 Woolf instructively stated in *Rehman and Wood*:

19 *"So far as we can determine the rationale of Parliament, the policy was to treat the*
20 *offence as requiring a minimum term unless there were exceptional circumstances,*
21 *not necessarily because the offender would be a danger in the future, but to send*
22 *out the deterrent message to which we have already referred. The mere possession*
23 *of firearms can create dangers to the public. The possession of a firearm may*
24 *result in that firearm going into circulation. It can then come into possession of*
25 *someone other than the particular offender for example by theft in whose hands the*
26 *firearm would be a danger to the public. Parliament has therefore said that*
27 *usually the consequence of merely being in possession of a firearm will in itself be*
28 *a sufficiently serious offence to require the imposition of a term of imprisonment of*
29 *five years, irrespective of the circumstances of the offence or the offender, unless*
30 *they pass the exceptional threshold to which the section refers."*



1 44. The devastating effect of the use of illegal firearms in the commission of serious
2 offences is an all too familiar and undesirable feature of Caribbean societies.
3 Parliament intends to confront and eliminate this monster by using strong deterrent
4 measures in the form of lengthy terms of imprisonment. The court must give effect to
5 Parliament's intention unless exceptional circumstances exist. Therefore, I am mindful
6 that the court must not be too hasty to find exceptional circumstances and be too ready
7 to reduce the sentence below the statutory minimum.

8 45. The facts and decision of the Court of Appeal of England and Wales in *R v. Merrion*
9 (*Desmond Peter*) *Attorney General's Reference (No. 23 of 2009)*³² prove rather
10 instructive in its demonstration of the judicial approach to the issue of whether
11 exceptional circumstances exist in cases like these. The defendant had been charged
12 with two offences - having attempted to import two firearms into the UK. Each offence
13 carried a five-year minimum sentence. He pleaded guilty, and there were strong
14 mitigating factors in his favour. He did not want the guns for a criminal purpose and
15 was not associated with criminals except the person who sent the guns to him. The trial
16 judge found as exceptional his positive good character and service to his country
17 through charitable and army activities and his industrious life. There was also no
18 question of the defendant seeking to use the weapon criminally. He was sentenced to
19 three years imprisonment for offences under the UK *Firearms Act*.

20 46. The Attorney-General appealed on the grounds that there were no exceptional
21 circumstances justifying the sentence below the statutory minimum and the sentences
22 were too lenient. The Court of Appeal found that the trial judge erred in finding
23 exceptional circumstances. The court opined that there were no exceptional
24 circumstances, so the trial judge should have imposed the five-year minimum sentence.

³² [2009] EWCA Crim 1683



1 47. During the Court of Appeal hearing, however, there was a change in the defendant's
2 position. The court received a letter from a doctor at a hospital indicating that one of
3 the defendant's children was suffering from a very aggressive illness, and it had put
4 immense pressure upon the family. The aggressive illness could have been fatal or at
5 least debilitating. The court found that those matters could properly have been regarded
6 as exceptional circumstances had they been put before the trial judge. The court
7 concluded that the events went "to particular and unusual circumstances that affected
8 the offender, given the severe nature of the illness and the strain it imposed upon the
9 family". The court reduced the sentence to three years. Their lordships then proceeded
10 to say:

11 *"[B]ut beyond that we cannot go. Those who in anyway contravene the Firearms*
12 *Act must for the good of society whatever the consequences are to their family,*
13 *expect to receive the minimum sentence from Parliament. Judges must not feel*
14 *sorrow or sympathy for any offender. The protection of the public demands*
15 *nothing less than the imposition of the minimum sentences. It is only in exceptional*
16 *circumstances, of the kind that have occurred in this case, rare as it is ... that the*
17 *court can exercise a degree of mercy."*

18
19 48. In the light of the preceding authorities, it is clear that the minimum sentence is
20 intended as a strong deterrence. The antecedent history and antisocial behavioural
21 pattern of the defendant before this court cannot be overlooked, at the same time that
22 the court is giving consideration to what counsel has presented as the adverse effect of
23 incarceration on him.

24 49. When all the matters placed for consideration before the court are considered, it is
25 evident that the defendant's risk of re-offending is very high, in keeping with the
26 probation officer's assessment of him. So, there is a need for greater emphasis on
27 deterrence, rehabilitation and protecting society from his offending more than it would
28 have been for a person with a more pristine character. This consideration has weighed

1 heavily against him in determining the extent to which there should be a downward
2 adjustment from the statutory minimum sentence.

3 50. Having conducted what I would like to believe is a careful balancing exercise of the
4 competing variables, I find that the factors that favour an application of the mandatory
5 minimum sentence have been slightly outweighed by the factors that counsel would
6 regard as amounting to exceptional circumstances that would warrant a departure from
7 the statutory minimum.

8 51. Therefore, applying the defendant's special circumstances, I would reduce the sentence
9 arrived at after the mitigating circumstances are considered by two years. There would,
10 therefore, be a downward adjustment on account of his unique circumstances relating
11 to the effect on him of incarceration, which would put him below the minimum
12 sentence of ten years to nine years six months' imprisonment.

13 **THE INORDINATE DELAY AND ABSENCE OF THE PSYCHOLOGY REPORT**

14 52. I have additionally found that the inordinate delay in obtaining the pre-sentence reports
15 from the date of his conviction is a special feature in his case that ought not to be
16 overlooked in the interests of justice. The difficulties brought about by the Covid-19
17 pandemic reportedly affected the pace at which psychiatric/psychological assessments
18 were being conducted on the island. The defendant would have been almost two years
19 in his sentence had he been sentenced shortly after the trial ended in September 2019,
20 as was the court's intention. However, nearly two years later, the court had to proceed
21 to sentencing him without the benefit of a psychological report, which was requested.





1 53. There is no satisfactory explanation from the State as to why the report was not
2 available for the court, even though the psychologist interviewed the defendant. Thus,
3 the court had to proceed with the sentencing without further delay, as it is
4 acknowledged that the defendant would have been increasingly affected by the
5 proverbial 'sword of Damocles' hanging over his head, the longer the delay. The court
6 has also noted what is reported as his more favourable familial circumstances and
7 attitude to life through a letter submitted to the court by his common-law spouse.

8 54. I consider it only fair and in keeping with the interests of justice to give the defendant
9 the benefit of the delay in the production of the psychiatric report and the absence of
10 the psychological report. Therefore, I would act on the premise that the psychology
11 report would have been favourable to him to mitigate the sentence.

12 **ISSUE (II): WHAT IS THE APPROPRIATE SENTENCE TO BE IMPOSED?**

13 55. On the totality of the circumstances detailed above, I am prepared to hold that there are
14 exceptional circumstances in this particular case relating to the defendant that would
15 justify a sentence below the statutory minimum. Accordingly, I would impose a
16 sentence of 8 years, 3 months' imprisonment in light of all the circumstances.

17 56. The defendant had been on remand in custody from 18th March 2016 until 27th March
18 2020, when he was granted bail pending sentencing due to difficulties caused by the
19 pandemic.

20 57. Accordingly, the time spent on pre-trial and pre-sentence remand as agreed by counsel
21 on both sides would be 3 years, 11 months and 13 days (after deducting the one month
22 served on the sentence for the offence committed in prison). I order that the time spent
23 in custody on pre-trial/pre-sentence remand in relation to this offence, since 18th March

1 2016 (that is, excluding any period spent serving a sentence on any other offence),
2 being 3 years, 11 months and 13 days is to be credited to the defendant as part of the
3 time served towards this sentence.

4 58. The defendant was also placed on a 24-hour electronically monitored curfew upon
5 being granted bail. It is agreed between counsel and accepted by the court that the
6 defendant spent 469 days under the curfew order.

7 59. *The Cayman Islands Sentencing Guidelines* provide that the percentage of the total
8 time spent on an electronically monitored curfew to be deducted from the sentence is
9 discretionary. Accordingly, having borne in mind all the circumstances of the case and
10 of the defendant, including the reason for the inordinate delay in sentencing him, I
11 would order that the total period of 469 days spent on the 24-hour electronically
12 monitored curfew also be credited towards his sentence as time served.

13 60. **Order**

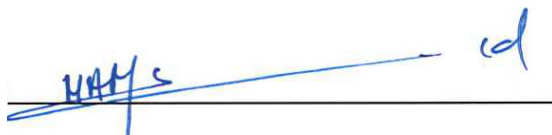
14 *i.* Accordingly, the defendant is sentenced as follows:

15 (a) 8 years 3 months' imprisonment.

16 (b) 3 years, 11 months and 13 days spent in pre-trial/ pre-sentence custody to
17 be deducted from the sentence as time served.

18 (c) All 469 days spent on 24-hour electronically monitored curfew to be
19 deducted from the sentence as time served.

20 **Dated this the 15th July 2021**

21  A handwritten signature in blue ink, appearing to read 'HAYES' followed by a flourish, is written over a horizontal line. To the right of the signature is a small blue mark resembling the letters 'ed'.

22 **McDonald-Bishop J**
23 **Acting Judge of the Grand Court**