

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE
3

4 INDICTMENT NO: 0061/12
5

6 THE QUEEN
7

8 V
9

10 MARCUS STEVE MANDERSON
11



12
13 **Appearances:**

Ms. Nicole Petit for the Crown

14
15 Ms. Lucy Organ of Samson and
16 McGrath for the Defendant
17

18 **Before:**

The Hon. Mr. Justice Charles Quin

19 **Submissions heard:**

4th April 2013
20

21 **SENTENCE RULING**
22

- 23 1. On the 15th February 2013 the Defendant, Marcus Steve Manderson, was
24 convicted by a jury of unlawful possession of an unlicensed firearm contrary
25 to s.15(10 and s.15(5) of the Firearms Law (2008 Revision).
- 26 2. The jury found the Defendant guilty of having a modified Orion Flare Gun in
27 his possession on the 5th February 2012 at Windsor Park, George Town,
28 Grand Cayman.
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SUMMARY OF FACTS

3. On the 5th February 2012 police officers patrolling the Windsor Park area saw the Defendant with what appeared to be a firearm in his hand. The officers immediately issued a command for the Defendant to stop. Instead of complying with the instructions issued by the police officers the Defendant attempted to flee and, in the process of running away, threw the firearm into the yard of a nearby property. The Defendant was apprehended very shortly thereafter.

4. Whilst still at the scene where he was apprehended, the Defendant was taken to the adjoining property and, after a short search, the modified Orion Flare Gun was located.

5. In addition, the evidence presented by the Crown found DNA matching that of the Defendant in the interior of the firearm.

6. The jury did not accept the Defendant's evidence that he was being pursued by another man who had the gun and then threw it into the said property.

7. Although both the firearm experts for the Crown and Defence disagreed on the question of whether the item was actually a firearm, the jury accepted, by their conviction of the Defendant, that the modified Orion Flare Gun was a firearm, pursuant to the Firearms legislation of the Cayman Islands.



1 *THE LAW*

2 8. Section 15(5) of the Firearms Law (2008 Revision) reads:

3 *“Whoever contravenes this section is guilty of an offence and subject to*
4 *section 39 is liable on conviction to a fine of one hundred thousand*
5 *dollars and to imprisonment for twenty years.”*

6
7 9. Section 39(2) of the Firearms Law reads:

8 *“39. (2) Notwithstanding sections 6(2) and 8 of the Criminal*
9 *Procedure Code (2006 Revision) the court of summary jurisdiction or the*
10 *Grand Court before which the individual pleads guilty or is convicted*
11 *shall-*

12 *(a) In a case where the individual pleads guilty, impose a sentence*
13 *of imprisonment for a term of at least seven years (with or*
14 *without a fine); or*

15 *(b) In any other case, impose a sentence of imprisonment for a term*
16 *of at least ten years (with or without a fine),*

17 *unless the relevant court is of the opinion that there are exceptional*
18 *circumstances relating to the offence or to the offender which justify it*
19 *not doing so and such exceptional circumstances shall be stated by the*
20 *relevant court.”*

21
22 10. In cases other than a guilty plea the maximum sentence for possession of an
23 unlicensed firearm is 20 years' imprisonment with a mandatory minimum
24 sentence of 10 years, unless exceptional circumstances justify the imposition
25 of a lesser sentence.

26 11. A firearm is defined in Section 2(1) of the Firearms Law (2008 Revision)
27 which reads:



1 *"Firearm means artillery, machine gun, sub-machine gun, rifle, shotgun,*
2 *pistol, air gun, air pistol or any lethal barrelled weapon from which any*
3 *shot, bullet or other missile can be discharged"*

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5 12. The Chief Justice's sentencing guidelines in relation to firearms read as
6 follows:

7 *"The legislation is quite clear that the possession or use of any*
8 *unlicensed lethal barrel firearm is an extremely serious offence. Under*
9 *the Firearms Law the maximum penalty for possession of an unlicensed*
10 *firearm is 20 years and a fine of \$100,000.00. The tariff for that offence*
11 *unless there are very mitigating circumstances will be 10 years. If on the*
12 *other hand aggravating circumstances exist, for instance, the use of the*
13 *firearm for the commission of a serious offence the tariff will be in*
14 *keeping with decided cases and will be significantly higher."*

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16 13. Both counsel rely on the Guidelines adopted by the Grand Court and the
17 Cayman Islands Court of Appeal for firearms offences as laid down by the
18 former Lord Chief Justice of England and Wales, Lord Bingham in *R v. Avis*
19 *et al* [1998] 1 Cr. App. R. 420. Lord Bingham set out the following
20 guidelines:

21 *"The appropriate level of sentence for firearm offences will depend on*
22 *all the facts and circumstances relevant to the offence and the offender.*
23 *It will usually be appropriate for the sentencing court to ask itself a*
24 *series of questions:*

25

- (1) *What sort of weapon is involved? Genuine*
26 *firearms are more dangerous than imitation*
27 *firearms. Loaded firearms are more dangerous*
28 *than unloaded firearms. Unloaded firearms for*
29 *which ammunition is available are more*
30 *dangerous than firearms for which no*
31 *ammunition is available. Possession of a firearm*
32 *which has no lawful use (such as a sawn-off*
33 *shotgun) will be viewed even more seriously*
34 *than possession of a firearm which is capable of*
35 *lawful use.*



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- (2) What (if any) use has been made of the firearm?
It is necessary for the Court, as with any other offence, to take account of all circumstances surrounding any use made of the firearm – the more prolonged and premeditated and violent the use, the more serious the offence is likely to be.
- (3) With what intention (if any) did the Defendant possess or use the firearm? Generally speaking, the most serious offences under the Act are those which require proof of a specific criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence.
- (4) What is the Defendant's record? The seriousness of any firearms offence is inevitably increased if the offender has an established record of committing firearm offences or crimes of violence."



14. In *R v. Avis et al* Lord Bingham went on to state:

"Given the clear public need to discourage the unlawful possession and use of firearms both real and imitation, and the intention of Parliament expressed in a continuing increase in maximum penalties, the court should treat any offence against the provisions of the Firearms Act 1968 as amended, as serious."

15. The Cayman Islands Court of Appeal in the case of *Chavarría-Atilly v. R* [2009] CILR 118 applied Lord Bingham's dicta in *R v. Avis et al*. The Acting President Forte JA set out Lord Bingham's guidelines and added the following words at paragraph 10 of his Judgment:

"In the Cayman Islands, it has been the massive increase in offences under the Firearms Law that has led Parliament to enact the minimum sentences in respect of those offences, while at the same time making special provision for cases of exceptional circumstances. The mere possession of a firearm, even without any intention to use it for a criminal offence, can still be a danger to the public for the reason that it could get into the hands of someone who does have that intent."



DEFENCE SUBMISSIONS

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2 16. The Defendant was born on the 10th February 1988 and he is a 25 year old
3 Caymanian. At the time of the offence he was 23 years old. He has one
4 daughter who was born while the Defendant was on remand for this offence.

5 17. The Defendant had a difficult upbringing which was no doubt influenced by
6 his own father's incarceration when he was only 2 years old.

7 18. The Defendant is currently unemployed because of his incarceration, but he
8 has been employed since leaving school. He is the main provider for his
9 girlfriend and his child.

10 19. A previous employer, Mr. Eddison Manderson, said that the Defendant is
11 reliable and does the work asked of him, but he added that the Defendant
12 needed some guidance on "how to relate to other co-workers."

13 20. The Defendant was cooperative with the Probation Officer throughout the
14 interview process for the Social Inquiry Report (SIR), but still maintained
15 that he is not guilty, which therefore makes it very difficult for defence
16 counsel to make any further submissions on his behalf.

17 21. The Defendant has previous convictions:

18 i. Possession of ganja (2) and consumption of ganja in 2006 for which he
19 was fined and made the subject of a probation order for 12 months.

20 ii. Possession of ganja (3) and consumption of ganja (2) in 2009 for which
21 he was sentenced to 18 months' imprisonment.

1 *EXCEPTIONAL CIRCUMSTANCES*

2 22. The Defence submits that exceptional circumstances do exist in this case,
3 which would justify a departure from the mandatory minimum sentence of 10
4 years' imprisonment.

5 23. Counsel on behalf of the Defendant submits that the Court should look at the
6 circumstances of the offence and the offender in the round with the
7 understanding that no one identifiable factor needs to be present in order for
8 exceptional circumstances to be established.

9 24. For instance, the Defence points out that it is not necessary for the offender
10 to have necessarily cooperated with the police or pleaded guilty for there to
11 be exceptional circumstances.

12 25. Defence counsel submits that in this case, the following circumstances, when
13 taken together, amount to exceptional circumstances:

14 i. The item in question was a crudely modified Flare Gun. A copper barrel
15 had been attached to the Flare Gun. The barrel was not of a diameter
16 which would accept any conventional ammunition and, in order for
17 ammunition to be discharged, it had to be modified with tape. In
18 addition, the firing pin had to be held down with rubber tubing in order
19 for it to hit the firing pin with sufficient force to discharge a projectile.

20 ii. No ammunition, modified or otherwise, was recovered with this firearm.

21 iii. There is no evidence at all that the modified Flare Gun had ever
22 discharged ammunition prior to its recovery by the police.



- 1 iv. There is no evidence at all that the Defendant had used the item in
2 question in the commission of an offence (other than its mere possession)
3 or intended to do so.
- 4 v. There is no evidence of the force any projectile may attain when fired
5 from this item save for PC Stewart's evidence that it caused backslash
6 in a barrel of water, and for the jury's finding that it would cause more
7 than a trifling injury if fired at a vulnerable part of the body. Both the
8 firearms experts for the Crown and the Defence, Mr. Greenspan and Mr.
9 Boyce, agreed with each other that when the projectile is loose in the
10 barrel, the pressure exerted upon the projectile can be affected, and one
11 would expect the velocity of the projectile that is discharged to be lower.
- 12 vi. PC Stewart used safety equipment to fire the item in question and it was
13 broadly agreed by all parties that firing this item could be dangerous to
14 its firer;
- 15 vii. The jury was directed that in order to convict the Defendant they had to
16 be sure the item in question was a firearm, because it could discharge a
17 projectile or could be adapted to fire a projectile.
- 18 viii. The Defendant has a young family for which he is the primary provider.
- 19 ix. The Defendant has no previous convictions for violence or possession of
20 weapons or firearms.

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1 26. The Defence contends that when these nine points are taken together and
2 looked at in relation to this Defendant, they amount to exceptional
3 circumstances and therefore this Court ought not to impose the minimum
4 sentence of 10 years.



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1 *THE CROWN'S SUBMISSIONS ON EXCEPTIONAL CIRCUMSTANCES*

2 27. Crown counsel accepts that the exceptional circumstances proviso in the
3 Firearms Law permits the Court to avoid the prescribed sentence if there are
4 particular circumstances which would justify it not imposing the minimum
5 sentence.

6 28. Both the Crown and the Defence rely on the Judgment of the former Lord
7 Chief Justice Lord Woolf in *R v. Zakir Rehman and Gary Dominic Wood*
8 [2006] 1 Cr. App. R. (S) 77 in which Lord Woolf considered the previous
9 cases of *Offen* [2001] 1 Cr. App. R. 372 and the judgment of another former
10 Lord Chief Justice, Lord Bingham, in *Kelly* [2000] Q.B. 198 and *Buckland*
11 [2000] 1 W.L.R. 1262.

12 29. In *R v. Zakir Rehman and Gary Dominic Wood* at paragraph 11, Lord
13 Woolf describes Lord Bingham's dicta as follows:

14 *"First, they show that he [Lord Bingham] was focussing on cases*
15 *requiring consideration of whether there are exceptional circumstances*
16 *when there is a need to look at all the circumstance (sic) involved. Then*
17 *it is not appropriate to look at each [circumstance] separately and to*
18 *conclude that it does not amount to an exceptional circumstance. [An]*
19 *holistic approach is needed. There will be cases where there is one*
20 *single striking feature, which relates either to the offence or the offender,*
21 *which causes that case to fall within the requirement of exceptional*
22 *circumstances. There can be other cases where no single factor by itself*
23 *will amount to exceptional circumstances, but the collective impact of all*
24 *the relevant circumstances truly makes the case exceptional."*

25
26 The Court of Appeal granted Rehman's appeal and found exceptional
27 circumstances. In the 7th holding the report states:



1 “7H: The Court decided that the sentencing judge was wrong not to
2 conclude that the case involved exceptional circumstances. The
3 Appellant’s background was particularly important, as was his
4 ignorance of the unlawfulness of the one weapon that he had in his
5 possession. It was not possible to identify one particular circumstance,
6 but looking at all the matters which were relied on the case fell on the
7 right side of the line. Those matters include the Appellant’s plea of guilty
8 at the first opportunity, his previous good character, his cooperation
9 throughout the search and arrest procedure, and his employment with a
10 public authority of which he was a valued employee. The weapon was a
11 replica which had not been converted for use, no blank ammunition was
12 found or had been acquired by the Appellant, the weapon had not been
13 fired prior to its being tested following its seizure, it was found in its
14 original wrapping, the Appellant had done nothing to disguise his
15 identity as a purchaser, and the Appellant had purchased the weapon as
16 a collectors’ model. He was not aware that it was capable of being
17 converted until he was told so in interview following his arrest. Those
18 circumstances collectively made it possible to come to the conclusion
19 that the Court was not required to impose the minimum term.”

20
21 30. Ms. Petit on behalf of the Crown submits that the case of **Rehman** can be
22 distinguished from the case now before this Court on the following points:

- 23 i. Rehman pleaded guilty, unlike the Defendant in this case.
- 24 ii. There was cooperation by the Defendant in **Rehman**, unlike in this case
25 where the Defendant sought to evade capture.
- 26 iii. The weapon in **Rehman** was a replica, unlike in the present case where
27 the weapon was modified to discharge ammunition.
- 28 iv. The Appellant in **Rehman** never sought to dissociate himself from the
29 weapon. In the case before this Court the Defendant blamed another
30 individual for throwing the firearm that was recovered.



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v. It was accepted by the Court that in *Rehman* the Appellant had purchased the weapon as a collector's model and was not aware that it was capable of being converted.

31. Accordingly, the Crown submits that in the case before this Court, the circumstances advanced by the Defence do not amount to exceptional circumstances and therefore the Court should not be persuaded to depart from a starting point of the statutory minimum sentence of 10 years' imprisonment for this offence.





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ANALYSIS

32. The Defence's firearm's expert, Mr. Philip Boyce, was of the opinion that the modified Flare Gun was not a firearm because it couldn't discharge unmodified conventional ammunition.

33. Mr. Boyce stated that if the velocity of the projectile is not tested, one could not state with any certainty that the weapon was a lethally barrelled weapon.

34. However, Mr. Boyce accepted that the modified Flare Gun, with modified ammunition, was capable of causing more than a trifling injury, and agreed that the modified Flare Gun was capable of discharging a projectile which could cause death or serious injury.

35. The Crown's firearms expert, Mr. Greenspan, had no difficulty in describing the modified Flare Gun as a gun capable of expelling a projectile at a force capable of causing death or serious injury and was therefore a firearm.

36. Furthermore, the Royal Cayman Islands Police Service (RCIPS) firearms' instructor, PC Stewart, actually test fired the modified Flare Gun with a .38 bullet. He put a small amount of tape on the bullet and proceeded to successfully discharge the projectile from the weapon – firing the projectile into a barrel of water, resulting in the water splashing back up and hitting him in the face.

37. In any event, the jury heard the evidence of the two experts, as well as the evidence of PC Stewart, and came to the conclusion that the Flare Gun was a firearm as defined by the Cayman Islands Firearms Law.

1 38. The fact that the Defendant has a young family for which he is the primary
2 provider does not amount to exceptional circumstances. In *Ocran* [2011] 1
3 Cr. App. R. (S) 223 the 24 year old Defendant was a single mother of
4 previous good character who admitted that she had known of the presence of
5 two weapons hidden under a wardrobe in her flat – apparently placed there
6 by others who had access to the flat. The Court held that despite strong
7 personal mitigation, exceptional circumstances did not exist.

8 39. The firearm in this case is similar to the firearm in the case of *R v. Seymour*
9 *Ramsay* Indictment No. 88 of 2012 (18th January 2013). In *Ramsay* the
10 weapon was also a modified Flare Gun with a chamber bolted on in a very
11 rudimentary fashion. When a new Remington cartridge was loaded into the
12 firearm it did not fire at the first attempt, but then it did fire in similar
13 circumstances when tested by PC Stewart. Furthermore in *Ramsay*, the
14 United States firearm and tool mark examiner, Alan Greenspan, found that
15 that particular modified Flare Gun was also a firearm containing a lethally
16 viable barrel and was capable of causing death or serious injury if
17 discharged.



18 40. I reject the submissions made by the Defence and accept the Crown's
19 submissions on the issue of exceptional circumstances. It is clear from the
20 jury's verdict that they found that the modified Orion Flare gun was a firearm
21 which was capable of causing death or serious injury.

22 41. For all the aforesaid reasons I do not find that there any exceptional
23 circumstances in relation to the offence or to the Defendant.

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CONCLUSION

42. In the case before this Court I follow the Cayman Islands Court of Appeal in adopting Lord Bingham's Guidelines in *R v. Avis et al* and ask myself the same questions.

(a) What sort of weapon was involved?: The firearm in this case was an Orion Flare Gun containing a lethally viable barrel and capable of causing death or serious injury if discharged. As the firearm was deemed to be a lethal barrel firearm, I remind myself that the Acting President of the Cayman Islands Court of Appeal, Forte JA, stated in *Chavarría-Atily v. R*:



"The mere possession of a firearm, even without any intention to use it for a criminal offence, can still be a danger to the public."

(b) What (if any) use has been made of the firearm?: There is no evidence of any use of the firearm or any evidence of any prolonged, premeditated or violent use for this particular firearm.

(c) With what intention (if any) did the Defendant possess or use the firearm?: There is no evidence of any specific criminal intent to endanger life or to cause fear of violence. However, possession of an unlicensed firearm is, by its very nature, a very serious criminal offence. In order to discourage the unlawful possession of illegal firearms, the Legislative Assembly has laid down a minimum sentence of 7 years' imprisonment for a Defendant

