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

INDICTMENT NO: 0107/12

THE QUEEN

V

MICHAEL HUGH POWELL



Appearances: **Ms. Candia James for the Crown**
Mr. Trevor Burke Q.C. instructed by
Mr. Ben Tonner of Samson &
McGrath for the Defendant

Before: **The Hon. Mr. Justice Charles Quin**

Submissions heard: **21st May 2013**

SENTENCE RULING

1. On the 4th January 2013 the Defendant pleaded guilty to the second count on this Indictment namely, Possession of an Unlicenced Firearm contrary to s.15(1) and s.15(5) of the Firearms Law (2008 Revision).
2. The particulars of the offence were that the Defendant, on the 19th day of November 2012 at #2065 Breakers, Bodden Town, Grand Cayman, had in his possession a firearm namely one .22 Longhorn Revolver, except under and in accordance with the terms of a Firearm User's (Restricted) Licence.



SUMMARY OF FACTS

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3. The Crown told the Court that on the 19th November 2012 the Defendant was arrested in relation to a particular incident and, following the Defendant's arrest, the police secured a search warrant for the Defendant's home address.

4. During a search of #2065 Breakers, the Defendant directed DC Neblett to his bed and, with his right foot, the Defendant dragged a towel from under the nightstand in the bedroom and invited DC Neblett to look at it.

5. In the towel was the black Longhorn Revolver. After being seized, secured and examined by a USG officer, the revolver was found to contain 9 live rounds of .22 ammunition.

6. In his interview on the 19th November 2012 the Defendant admitted to possession of the firearm in question and stated that he found the firearm in the bushes whilst working on the road in the Prospect area. The Defendant accepted that it was "a very stupid mistake" of his not to have handed the firearm over to the police when he found it.

7. The Defendant told the police in that interview that, whilst on the job as a Caribbean Utilities Company (CUC) linesman in the Prospect area, nature called and he went over to a bush area to relieve himself. The Defendant said whilst at that spot he noticed a bucket and a crate and he assumed it was a location where people had been "hanging out." The Defendant said something had been burned there and there were many footprints in the area. The Defendant said he saw the gun under the crate, but he put the crate back over the gun and left the area and returned to his job site.

1 8. The Defendant said that sometime during that same night he returned to the
2 location in the bushes and took possession of the gun. The Defendant said he
3 kept the gun from sometime in early September to mid November until the
4 gun was discovered at his home address on the 19th November 2012.

5 9. The Defendant admitted that he knew the firearm had ammunition because
6 he had opened it and he had realised that it had ammunition. In his interview
7 the Defendant said,

8 *“When I found it I tried to open it and it opened. I could see it had*
9 *shots in it, I closed it back.”*

10 10. The Defendant said he was stupid to have kept the firearm and said in his
11 interview,

12 *“Being stupid, not thinking, I took it home. I wrapped it up in a towel*
13 *and it was there [under the nightstand] from then.”*

14 Asked again why he kept the weapon the Defendant said:

15 *“... I guess with a lot of stuff happening in Cayman and ... it’s just*
16 *being stupid...”*

17 11. Asked when next did he come “in contact” with the firearm after that first
18 occasion, the Defendant said it was about a week prior to his arrest when he
19 was cleaning his abode. The Defendant said that, about a week prior to his
20 arrest,

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“I moved it, picked it up, a week ago, like I said, when I was cleaning the house and when I tried to open it again it wouldn’t open and I said, this ain’t no good, it seized up. I just wrapped it back up and throw it under there [the nightstand] again.”

12. The firearm was tested by the firearms instructor, PC Stewart, and he fired two of the nine rounds of ammunition which were in the firearm, and they discharged successfully, and left the firearm with seven viable rounds of ammunition.

13. The firearm was next tested by the Tools and Firearms Examiner, Mr. Allen Greenspan, who found the firearm to be operable. Mr. Greenspan also confirmed that, in his view, it was a lethally barrelled firearm, capable of causing death or serious injury.



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CROWN'S SUBMISSIONS

- 14. Crown counsel conceded that mitigating factors include the fact that the Defendant pleaded guilty at an early stage. The Defendant was cooperative with the police and he is of previous good character.
- 15. However, Crown counsel also submits that the Defendant was knowingly in possession of a loaded firearm, and a loaded firearm that was operable. Crown counsel highlights the fact that there is no evidence that the Defendant made any effort to hand over the firearm to the police.
- 16. Accordingly, Crown Counsel submits that there are no exceptional circumstances.
- 17. Crown counsel states that the Defendant's guilty plea and his previous good character are relevant, in that, they will assist the Defendant in ensuring that the minimum sentence is not increased.



DEFENCE SUBMISSIONS

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18. Leading counsel, Mr. Trevor Burke Q.C., submitted that are exceptional circumstances in relation to both the offender and the offence.

19. Mr. Burke highlights that the Defendant:

- i. Is a man of hitherto good character;
- ii. Made an immediate and full and frank admission to the police and was cooperative throughout.
- iii. Examined the firearm twice, but apart from examining it on those two occasions, the firearm remained hidden and secure at his home.
- iv. In keeping the firearm, the Defendant effectively removed the gun from criminal circulation on the island:

(a) Mr. Burke points out that it would have been easier for the Defendant to leave the firearm where he found it in the bushes, but he decided to take it home, even though he had no intention of using it. The Defendant said he took the firearm home and hid it, and that the firearm never left his house.

20. The Defence submits that the Defendant removed the firearm from criminal circulation and that the Defendant had wished to surrender it.



1 21. Leading counsel points to the fact that there was an amnesty on all firearms
2 from July 2010 to July 2011 when 23 firearms were surrendered and that
3 those 23 persons were in the same position as the Defendant – save for the
4 fact that the Defendant is outside of the amnesty period. Mr. Burke submitted
5 that if the amnesty had been in place he would have surrendered the firearm.

6 22. In addition, leading counsel submits that the Defendant made an enquiry to
7 find out where a police officer namely, DC Garry Edwards, was. The
8 Defendant had the mobile number of this RCIPS officer, but discovered that
9 DC Edwards had left Cayman and had relocated to Canada.

10 23. Mr. Burke submits that the Defendant is a man of exceptionally good
11 character and highlighted two examples to illustrate this:

12 In September 2011 the Defendant called the police when a pallet of ganja
13 was washed up, so that the ganja was surrendered and destroyed.

14 In July 2011 the Defendant witnessed a shooting near the Texaco petrol
15 station in Bodden Town and the Defendant immediately went to the victim's
16 aid and ensured that an ambulance was called. Mr. Burke states that the
17 Defendant's call may well have saved the victim's life.

18 24. Leading counsel on behalf of the Defendant said there were a number of
19 reasons why the Defendant did not report the illegal firearm to the police:

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- 1 i. The Defendant did not want the criminal who owned the gun to find out
2 that he (the Defendant) had found it and handed it over to the authorities.
- 3 ii. The Defendant knew he would make no use of the gun.
- 4 iii. The Defendant and his father have both had firearm licences in the past.
5 The Defendant's father, Washburn Powell has a licence for a shotgun,
6 and the Defendant was named on the licence as a user of the shotgun.
- 7 iv. The Defendant, himself, had a licence for a Mossberg 410 shotgun rifle
8 from March 1998 to July 2007.

9 25. The Defendant's position is that this was a completely accidental discovery
10 of the firearm. He decided to take the gun into his possession in order to
11 remove the gun from criminal circulation. He made a discrete enquiry for an
12 RCIPS officer he knew. There was an absence of any amnesty during the
13 material time, and these circumstances amount to exceptional circumstances
14 in relation to the offence.



15 26. In addition, leading counsel submits that the Defendant's active cooperation
16 with the RCIPS, and his assistance in discovering the firearm – when taken
17 together with his very good previous character – amount to exceptional
18 circumstances in relation to the offender.

19 27. Mr. Burke relies upon what he justifiably describes as glowing personal and
20 character references from many highly respected persons in the Cayman
21 Islands – written on the Defendant's behalf and provided to the Court in the
22 Defence bundle of references.

1 28. The Court notes that the Defendant joined CUC upon leaving school and
2 became a linesman foreman. The Defendant has worked for CUC for almost
3 25 years. The Court notes that the president and CEO of CUC described the
4 Defendant as a “*dedicated, reliable and valued employee*” and further, upon
5 the Defendant’s release from custody, CUC would be pleased re-employ
6 him, should a suitable vacancy arise. The Court accepts that the Defendant
7 has an excellent work record with CUC.

8 29. There is also no doubt that the Defendant is a good father to his children and
9 he takes great care of his elderly parents. The Defendant’s sister, Ms.
10 Cassandra Powell, gave live evidence and confirmed that the Defendant is
11 the primary caregiver for his elderly parents.

12 30. Mr. Burke urges the Court to take what has been described as an holistic
13 approach to sentencing, and submits that there are exceptional circumstances
14 relating to the offence and the offender, which justify the Court imposing a
15 sentence less than the minimum term of seven years.

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1 *THE LAW*

2 31. 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.”*

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7 32. 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.”*

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22 33. 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 34. 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 35. 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 36. 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.

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(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.*



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(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."*

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22 37. In *R v. Avis et al* Lord Bingham went on to state at pages 420 and 421:

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

28 38. The Cayman Islands Court of Appeal in the case of *Chavarría-Aitily v. R*
29 [2009] CILR 118 applied Lord Bingham's dicta in *R v. Avis et al*. The
30 Acting President Forte JA set out Lord Bingham's guidelines and added the
31 following words at paragraph 10 of his Judgment:

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

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EXCEPTIONAL CIRCUMSTANCES

39. The former Lord Chief Justice of England and Wales, Lord Woolf, in interpreting what is meant by exceptional circumstance in *R v. Offen and Ors.* [2001] 1 W.L.R. 253 stated at paragraph 44:

“The leading authority as to the interpretation of section 2, prior to the coming into force of the 1998 Act, is the decision of this court in R v. Kelly [2000] QB 198. In that case the then Chief Justice Lord Bingham gave a construction of “exceptional” which has been followed in later cases. Lord Bingham said, “We must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as form an exception, which is out of the ordinary course or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.”

40. In *R v. Zakir Rehman and Gary Dominic Wood* [2006] 1 crim App. R. (S) 77 at paragraph 11, Lord Woolf describes Lord Bingham’s dicta as follows:

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

The Court of Appeal granted the *Rehman* appeal and found exceptional circumstances. In the 7th holding the report states:



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



1 *ANALYSIS*

2 41. The Defendant in this case, as with Rehman pleaded guilty and cooperated
3 with the police. However, the weapon in *R v. Rehman* was a replica which
4 had not been converted for use. No blank ammunition was found or had been
5 acquired by the Appellant, and further, the Appellant had purchased the
6 weapon as a collector's model. Furthermore, in *Rehman*, the Appellant was
7 not aware that the replica was capable of being converted until he was told so
8 in an interview following his arrest.

9 42. The English Court of Appeal in *Rehman* was also persuaded that the
10 Appellant's background demonstrated that he was ignorant of the
11 unlawfulness of this replica and thus, this, with the other factors, led to
12 exceptional circumstances.

13 43. Regrettably, in this case, the Defendant is very familiar with firearms and
14 particularly with the distinction between a lawful firearm and an unlawful
15 firearm. The Defendant was the user on his father's firearm licence for a
16 shotgun, and the Defendant, himself, had a firearm licence for a Mossberg
17 410 shotgun for almost a decade – from 1998 to 2007.

18 44. Accordingly, there can be no doubt that the Defendant knew that this was an
19 illegal firearm. The Defendant must have also realised that it was a loaded
20 illegal firearm, in that, it contained nine rounds of ammunition.



1 45. The Court is at a complete loss as to why the Defendant should return to the
2 bushes where he saw the firearm and collect the firearm and further, why the
3 Defendant would keep the firearm in his custody and under his control for so
4 many weeks.

5 46. With the greatest of respect to the Defendant's leading counsel, the
6 submission that the Defendant went back to the bushes in the middle of the
7 night to recover the firearm in order to remove it from criminal circulation is
8 implausible. For the Defendant to have gone out of his way to take
9 possession of an illegal firearm and then to keep it for 9 or 10 weeks, only
10 served to compound his "very stupid mistake."

11 47. If the Defendant wanted to remove the firearm from criminal circulation, he
12 should have immediately reported it to the police. The Defendant is an
13 intelligent man who knew of, and understood the serious consequences of
14 being in possession of an illegal firearm.

15 48. The Defendant had several different options through which he could have
16 reported this illegal firearm and its ammunition, thereby removing it from
 any potential criminal circulation.



19 When the Defendant first discovered the firearm he should have shown it to
20 his fellow CUC workers, and they could have reported it to the police
 without any adverse repercussions whatsoever.

21 Additionally the Defendant could have left the firearm at the scene and called
22 the police or the confidential hotline.

1 Alternatively, as soon as the firearm came into his possession, the Defendant
2 could have taken it to the police.

3 49. It is extremely regrettable that it was not until the Defendant was arrested and
4 the police (acting on information they had received) were executing a search
5 warrant at his home, that he then revealed to the RCIPS that he had the
6 firearm in his possession.

7 50. The Court is guided by the English Court of Appeal in the *Attorney*
8 *General's Reference Number 23 of 2009* [2009] EWCA Crim 1683 in which
9 *R v. Zakir Rehman and Gary Dominic Wood* was applied. Lord Justice
10 Thomas gave the judgment of the Court and stated at paragraph 12:



11 *“It is well known what a scourge guns are to any society and the courts*
12 *must, in accordance with the will of Parliament, make sure that the*
13 *policy of Parliament is carried out in the sentencing of offenders, even*
14 *though in a particular case, apart from the minimum term, an offender*
15 *might not merit a sentence of such severity. It is in circumstances such as*
16 *those before the court that courts must be very, very careful to have*
17 *regard to this policy.”*

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19 Lord Justice Thomas went on to state in paragraph 15:

20 *“Those who in any way contravene the Firearms Act.....must for the*
21 *good of society, whatever the consequences are to their family, expect to*
22 *receive the minimum sentence from Parliament. Judges must not feel*
23 *sorrow or sympathy for any offender. The protection of the public*
24 *demands nothing less than the imposition of minimum sentences.”*

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26 51. Having considered all submissions made by leading counsel, and, having
27 read the selection of very impressive references submitted on behalf of the
28 Defendant, I cannot find that there are any exceptional circumstances in
29 relation to the offence or the offender, which would justify this Court

1 departing from the minimum sentence prescribed by the Legislative
2 Assembly.

3 52. I would only add that possession of a firearm is a serious offence, which
4 necessitates intervention by the Court to prevent the unlawful circulation of
5 illegal firearms. The primary intention of the Firearms Law is that the
6 sentencing court must prioritise the deterrence of others and not the
7 individual circumstances of the offender. Factors such as the Defendant's
8 previous good character are relevant only when considering how far above
9 the minimum the Court should go.

10 53. The Defendant's reasons for picking up the gun and keeping it in his
11 possession do not give rise to an exceptional circumstance, nor does the
12 Defendant's previous good character give rise to exceptional circumstances.

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1 *CONCLUSION*

2 54. I follow the recent decision in *R v. Marcus Manderson* Indictment Number
3 61 of 2012 dated the 4th April 2013 and the Court of Appeal of England and
4 Wales, by asking myself the same questions as set out by Lord Bingham in *R*
5 *v. Avis et al.*



6 (a) What sort of weapon was involved: The firearm is a .22
7 Longhorn revolver which contained lethally viable ammunition
8 and was lethally barrelled, that is, the firearm was capable of
9 causing death or serious injury if discharged. Furthermore, there
10 were nine rounds of ammunition loaded into the gun. As the
11 firearm was deemed to be a lethally barrelled firearm, I remind
12 myself that the Acting President of the Cayman Islands Court of
13 Appeal stated in *Chavarría-Atily v. R*: “*The mere possession of*
14 *firearm, even without any intention to use it for a criminal*
15 *offence can still be a danger to the public.*”

16 (b) What (if any) use has been made of the firearm: There is no
17 evidence of any use of the firearm or any evidence of any
18 prolonged, pre-meditated or violent use of this particular firearm.

19 (c) With what intention (if any) did the Defendant possess or use the
20 firearm: There is no evidence of any specific criminal intent to
21 endanger life or to cause fear of violence. However, possession
22 of an unlicensed firearm is, by its very nature, a very serious
23 criminal offence. In order to discourage the unlawful possession
24 of illegal firearms, the Legislative Assembly has laid down a

1 minimum sentence of seven years' imprisonment for a
2 Defendant who pleads guilty and ten years' imprisonment for a
3 Defendant in any other case.

4 (d) What is the Defendant's record; The Defendant comes before the
5 Court without any previous convictions and is a clearly a man of
6 exemplary character. I take into account that the Defendant has
7 no previous convictions and that he is a person of exemplary
8 character.

9 55. Accordingly, for all the aforesaid reasons, I impose the minimum sentence of
10 seven (7) years' imprisonment, with time spent in custody to be deducted.

11 56. I also order the immediate destruction of the firearm.

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15 Dated this the 30th day of May 2013

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18 Honourable Mr. Justice Charles Quin
19 Judge of the Grand Court

