Criminal Appeal No 8 of 2023

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
BEFORE THE HON JUSTICE WOLFFE
CASE No. 15 of 2011

Dame Lois Browne-Evans Building
Court Street
Hamilton HM12
Bermuda

Date: 19/12/2025

Before:

THE RT HON SIR CHRISTOPHER CLARKE, PRESIDENT
THE RT HON DAME ELIZABETH GLOSTER DBE, JUSTICE OF APPEAL
and
THE RT HON SIR GARY HICKINBOTTOM, JUSTICE OF APPEAL

Between:

JARON ROBERTS

Appellant

and

THE KING

Respondent

Appearances: Ms Susan Mulligan and Ms Ashley Fubler of the Legal Aid Department, for the Appellant
Ms Cindy Clarke, Director of Public Prosecutions, for the Respondent
Ms Shakira Dill-Francois, Solicitor General, for the Attorney General

Hearing date(s): 19-20 November 2025
Date of Judgment: 19 December 2025

JUDGMENT

HICKINBOTTOM JA:

Introduction

1. On 17 May 2023, after a trial before Wolffe J and jury, Jaron Roberts ("the Appellant") was found guilty of (i) possession of a firearm contrary to section 20(1) of the Firearms Act 1973 ("the 1973 Act": in this judgment, references to statutory provisions are to this Act unless otherwise appears); (ii) possession of ammunition also contrary to section 20(1); and (iii) violently resisting arrest contrary to section 2(n) of the Summary Offences Act 1926. On 31 May 2023, he was sentenced to a total of 16 years' imprisonment for these offences, consecutive to a sentence of 12 months in respect of drug offences to which he had earlier pleaded guilty.

2. The Appellant now appeals against the firearm and ammunition convictions. There is no appeal in respect of resisting arrest or the drug offences.

3. At trial, the Appellant was represented by Ms Victoria Greening assisted by Mr Archibald Warner. The Director of Public Prosecutions, Ms Cindy Clarke, appeared for the Crown. Before us, Ms Susan Mulligan and Ms Ashley Fubler appeared for the Appellant; the Director of Public Prosecutions for the Respondent; and the Solicitor General for the Attorney General who appeared because one ground of appeal raised a constitutional issue.

The Background

4. Just before 6pm on 31 July 2021, police officers were monitoring traffic for the Somerset Cricket Club motorcade at the junction of Mullet Bay Road and the Wellington slip road, when they saw a Honda motorcycle without a rear licence plate cutting the corner as it turned into the slip road, causing a van exiting the slip road to stop sharply to avoid a collision. The motorcycle sped away and was pursued by a police vehicle with lights flashing. The police radioed ahead, with the result that, before entering Slip Point Lane, the motorcycle was brought to a halt by other officers.

5. The motorcyclist was found to be the Appellant. Whilst officers were in the process of issuing him with Moving Violation Tickets, they found that there were outstanding warrants for his arrest. The officers informed the Appellant that he was going to be arrested and asked him what was in the small brown leather backpack he was wearing. The officers later reported that the Appellant's demeanour then changed and that this raised their suspicions.

6. An officer handcuffed the Appellant to restrain him and, whilst he was doing so, the Appellant resisted. Several officers came to the assistance of the arresting officer and the Appellant was taken to the ground. There, he continued to kick out at the officers, and the officers deployed a taser to subdue him. Once the Appellant was in the control of the officers, his backpack was searched. Inside was found a clear Tupperware sandwich container in which there was a KEL-TEC .380 automatic firearm (with a magazine loaded with three live 9mm rounds of ammunition) and a balaclava. Found under the seat of the motorcycle were just over 20g of cannabis with a street value of about $1500 and a set of scales. A knife and a second balaclava were also found there but played no part in the criminal proceedings.

7. In the circumstances described below, the Appellant eventually accepted that the cannabis and scales were his; and he pleaded guilty to possession of a controlled drug and of scales fit, and intended for, the preparation of a controlled drug for misuse. However, in his Defence Statement dated 25 November 2021 and at trial, he denied knowledge of the loaded firearm being inside the backpack; and he denied resisting arrest.

8. Initially, the Appellant was charged under section 2(i)(a)(iv) of the 1973 Act in respect of the firearm, and section 3(1)(a) in respect of the ammunition. The former provides (so far as relevant): *"… it is an offence for any person to… have in his possession… any firearm the barrel of which is less than 24 inches in length*". The barrel of the firearm found in the sandwich box was less than 24 inches in length. The firearm licensing provisions do not apply to such a weapon: possession of such a weapon is absolutely prohibited. Section 3(1)(a) provides (again, so far as relevant): *"… it is an offence for any person to… have in his possession…any firearm or ammunition without holding a licence for that purpose in force at that time; or otherwise as authorised by such licence*". At the relevant time, the Appellant did not have a licence for any licensable firearm or ammunition.

9. However, on 8 January 2012, the Appellant had been convicted of five counts of using a firearm while committing an actual or attempted robbery contrary to section 26A of the 1973 Act, for which he was sentenced to 10 years' imprisonment consecutive to 6 years for the actual/attempted robberies themselves, i.e. a total of 16 years. On appeal before this Court (Criminal Appeal No 1 of 2012), the sentence for the firearm offences was reduced to 5 years, and thus the aggregate sentence to 11 years.

10. As a result of those previous firearm offences, on 21 April 2023, the Crown applied to amend the indictment to replace the charges under sections 2 and 3 with charges under section 20(1) of the 1973 Act, which provides (under the heading, "Possession or handling of firearms by persons previously convicted of crime"):

> *"It is an offence for a person who has been sentenced in Bermuda or elsewhere for any offence involving firearms or of which violence or the threat of violence was an element to imprisonment or to corrective training at any time to possess or handle a firearm or ammunition."*

That application also sought to join into one indictment the counts for possessing a firearm and ammunition and resisting arrest, and the counts for possessing cannabis and the scales found on the same occasion.

11. Those applications were successful, and the indictment was formally amended on 19 May 2023 to one containing five counts, as follows:

Count 1: "*being a person to whom the section applies*", possession of a firearms contrary to section 20(1) of the 1973 Act.

Count 2: "*being a person to whom the section applies*", possession of ammunition contrary to section 20(1) of the 1973 Act.

Count 3: violently resisting arrest.

Count 4: possession of a controlled drug, namely cannabis.

Count 5: possession of equipment fit and intended for use in connection with the preparation of a controlled drug for misuse.

12. It is necessary to provide some background as to the formulation and evolution of the section 20(1) counts. The relevant transcripts from the trial, referred to below, formed part of the Record of Appeal.

13. Before the indictment was put to the Appellant, there had been discussion between the Crown and Ms Greening as to the form of the particulars of the section 20(1) counts, prompted by Ms

Greening's formal objection to there being any reference to the Appellant's previous firearms offences. That objection is referred to in the transcript (17 May 2023, the first day of the trial, at page 19 line 3). It was agreed that no such reference should be made, but rather the Appellant would formally admit those previous offences in an admission that would not be before the jury, and the charges would simply reflect that admission in the formula "*Jaron Roberts… being a person to whom this section applies, possessed"* the firearm and ammunition respectively. That formulation was incorporated into an amended indictment which was the version before the jury. There was further discussion about that formulation on the second day of the trial (in the absence of the jury and presence of the Appellant), in which Ms Greening summarised the position by saying (18 May 2023 transcript, page 19 lines 13-15): "*Short of the jury going home, contrary to your* [i.e. the judge's] *directions, and googling what [section 20] means, the jury have been protected from [knowing that the Appellant had previous firearms offences] by the court and by the parties, by agreement*".

14. Whilst it was the Crown's case at trial that the Appellant's demeanour changed and he resisted arrest because he did not want the police to look in his backpack where he knew there to be a loaded firearm, it was the Appellant's case that he resisted because he did not want to go to jail that afternoon. The Appellant had, of course, been arrested and been in jail before, for the robberies and associated firearms offences in 2012. Discussion of this first occurred on the first day of the trial, in the absence of the jury but in the presence of the Appellant, because there was an issue as to whether the Appellant had said to police officers at the time, as recorded on a police bodycam: *"I do not want to go to jail*" or "*I do not want to go to jail* ***again***". He had also said that he had been to prison for five years or had not been to prison for five years. The result of that discussion was that it was agreed that he had said "*I do not want to go to jail*", and not "*I do not want to go to jail* ***again***"; and the judge ruled that the reference to having been in prison before should be redacted from the bodycam footage before that was shown to the jury.

15. Matters became slightly more challenging on the second day of the trial, when a police officer in giving evidence recalled – wrongly – that the Appellant had said at the time of his arrest: "*I do not want to go to jail* ***again***". In the absence of the jury but presence of the Appellant, there was an application by Ms Greening to discharge the jury which led to a discussion as to how, if the jury were not discharged, the matter could be fairly dealt with. The judge refused to discharge the jury, on the basis that the evidence as to what the Appellant had in fact said when arrested could be corrected. However, following a discussion on the matter, it was made clear by the judge (at page 22 of the 18 May 2023 transcript) that, if it were suggested by or on behalf of the Appellant that he had never been to jail, then that would be an assertion of his own good character which, pursuant to section 16(1)(e)(ii) of the Evidence Act 1905 (quoted immediately below at paragraph 16), would remove the shield which protected him from evidence of his previous convictions being adduced to the jury.

16. The third day of the trial brought further challenges, because, during the course of his evidence, the Appellant asserted his own good character by saying that people looked up to him as part of the "*Bikes up, guns down*" movement and that "*us riding bikes had actually stopped the gun violence*", i.e. he was maintaining that that he was positively and actively against firearms; and a lot of people had told him how he had changed their lives (for the better). That prompted an application by the Crown in which Ms Clarke relied on section 16(1)(e)(ii) of the Evidence Act 1905 to bring into evidence certain aspects of the Appellant's bad character. Section 16(1)(e)(i) and (ii) (which are relevant to specific grounds of appeal raised), provide as follows:

> "*Every person charged with an offence, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person, subject to the following conditions—*

> *…*
>
> *(e) a person charged and called as a witness shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that with which he is then charged, or is of bad character, unless—*
>
> *(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; or*
>
> *(ii) he has personally or by his counsel questioned any witness for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the informant in the proceedings or any witness for the prosecution; …".*

17. In making the application, Ms Clarke did not seek to refer to the Appellant's previous convictions, however; she only sought to refer to the fact that this was not the first time that he had been arrested. That was the subject of discussion both in court (absent the jury but in the presence of the Appellant) and between Counsel (absent both the jury and the Appellant who, because he was in the middle of giving evidence, was not consulted by Ms Greening and whose instructions were not sought). The result was that there was an agreement between Counsel, approved by the Court, that the bad character evidence (and, so, cross-examination) would be restricted to establishing that this was not the first time the Appellant had been arrested, with the caveat that that restriction would be reviewed if the Appellant went further with his assertions of his own good character; and the judge would give the Appellant a warning about the consequences of him giving evidence about his own character on the section 16 "*shield*" from disclosure of previous convictions or other bad character evidence. That warning was duly given (19 May 2023 transcript, pages 11-12). Ms Greening expressly said that she was content with the warning given at that stage (page 12 lines 25-32); although, following delivery of the warning, the Appellant specifically asked the judge: "*so what about me not knowing this when I first went up to the stand?*" (page 12 line 18 to page 13 line 4), to which the judge responded that the Appellant had a lawyer, and advice was matter for them not him (page 12 lines 20-25). The judge said that he would give the jury a direction as to how the evidence in relation to the previous arrest was to be considered by them (page 10 lines 19-21), and no complaint is made by the Appellant as to the direction given.

18. For those reasons, for the section 20(1) counts, it was not in issue at trial that the Appellant had relevant previous firearms offences. However, he maintained that he had no knowledge of being in possession of the weapon when the motorcycle was stopped, the second element of an offence under section 20(1). That was the issue at trial.

19. After trial, the Appellant was found guilty of possession of both a firearm and ammunition contrary to section 20(1), and of resisting arrest.

The Appeal

20. On 12 June 2022, the Appellant served a Notice of Appeal against the convictions for possessing the firearm and ammunition, settled by Ms Greening. In an Amended Notice of Appeal dated 24 September 2025, settled by Ms Mulligan, he raised three grounds:

    Ground 1: Section 20(1) of the Firearms Act 1973 is unlawful as being incompatible with the Bermuda Constitution as well as with the European Convention on Human Rights and the

common law right to a fair trial (Ground 1(a)-(d) and (e)(ii)); and, in any event, the procedure by which the indictment was amended and pursued to charge the Appellant under section 20(1) rather than sections 2 and 3 of the Act was unfair (Ground 1(e)(i) and (iii), (f) and (g)).

Ground 2: The Judge erred in his directions to the jury on the burden of proof.

Ground 3: The Appellant's trial Counsel was ineffective to the extent that his convictions amounted to a miscarriage of justice.

21. I will deal with each ground in turn.

Ground 1(a)-(d), and (e)(ii): The Constitutional Challenge

22. As initially formulated, under this ground it was submitted that the firearm/ammunition counts (Counts 1 and 2) were unconstitutional, unlawful and in contravention of the fundamental right to a "*fair hearing*" or "*fair trial*" as guaranteed by Section 6 of the Bermuda Constitution Order 1968, Article 6 of the European Convention on Human Rights and the common law.

23. The basis for this ground was set out in paragraph 1(c) of the Amended Grounds of Appeal. It was submitted that section 20(1), in and of itself, violates this fundamental right because it makes a second offence one of absolute or strict liability with a sanction in the form of a substantial term of imprisonment. The repugnance to that right is compounded by the fact that legislation and general sentencing principles mandate a more severe penalty for a second or subsequent offence in any event. Furthermore, it was said that section 20(1) lacks the necessary regulatory/statutory framework (which exists in the United Kingdom in respect of the offence of "*Possession of firearms by persons previously convicted of crime*" under section 21 of the UK Firearms Act 1968) to ensure that the Appellant was aware that he was specifically prohibited from possessing a firearm and ammunition and could be charged with, not simply an offence under sections 2 and/or 3, but an offence under section 20(1); so that an offence under section 20(1) could be committed without the offender being aware of the relevant prohibition or that his conduct might offend that section.

24. There are four points to be made in response.

25. First, it is for Parliament to determine the elements of any statutory offence. In section 20(1), it has prescribed two elements: (a) that the relevant person has possessed or handled a firearm or ammunition, when (b) that person has previously been sentenced in Bermuda or elsewhere to imprisonment or corrective training for an offence involving firearms or of which violence or threatened violence was an element.

26. Ms Mulligan appeared to suggest that section 20(1) was repugnant to the Constitution because it requires the prosecution to prove – and, so, generally for disclosure to the jury of – a defendant's previous conviction(s) in respect of a firearm, in circumstances in which the defendant himself has not put his character into issue. That, it was suggested, meant that any criminal proceedings under section 20(1) were necessarily tainted by procedural unfairness.

27. However, whilst it may not be common, Parliament is clearly able, lawfully and within the terms of the Constitution, to formulate an offence as a matter of substantive law in which one element is that the defendant has a previous conviction for the same, or another identified, offence or offences as it has done with section 20(1). Such an offence requires proof of that element by the Crown. As it has made a previous conviction an element of the offence, Parliament must be assumed to have well-understood that evidence of that conviction to the jury may be necessary (and, so, admissible) in cases in which there is a charge brought under that provision. The admissibility of such evidence in these circumstances is covered by section 16(1)(e)(i) of the

Evidence Act 1905, quoted above (paragraph 16).

28. A requirement for *procedural* fairness (whether deriving from the Constitution, an international Convention or the common law) cannot undermine the will of Parliament as expressed in the *substantive* law. Where evidence of that previous conviction is disclosed, then it is for the judge to ensure that procedural fairness is maintained, e.g. by giving the jury any appropriate direction as to the purposes for which the jury can use the evidence (e.g. for establishing that there had been a relevant previous conviction), and those for which it cannot (e.g. as evidence of propensity to possess, handle and/or be otherwise associated with firearms). But such usual requirements of procedural fairness in an individual case do not mean that section 20(1) is inherently and fatally defective as a statutory provision. I deal below (paragraphs 35-45) with the application of the principles of procedural fairness in this case, of which Ms Mulligan also made complaint.

29. Second, the challenge to the constitutionality of section 20(1) is based upon the false premise that the section does not require any mental element or *mens rea*. Of course, whilst it is a tenet of statutory interpretation that Parliament is unlikely to make an offence with a potential substantial sentence of imprisonment an offence which does not require some mental element, it is equally true that, by clear and unambiguous wording, Parliament is able to create offences of strict liability.

30. However, section 20(1) is self-evidently not a strict liability offence. As described above, as one element of the *actus reus*, it requires that the defendant to have been in possession of the relevant firearm or ammunition. That element is the same as for a section 2 or section 3 offence. As Ms Mulligan accepted, it is well-established that, for a person to have "*possession*" of a thing for these purposes (so, for both sections 2 and 3, and for section 20(1)), they must have knowledge that they have that thing (although they do not have to know that the thing they have is a firearm as defined in the 1973 Act). Indeed, the very issue in the trial of the Appellant on Counts 1 and 2 was whether he knew that he had the firearm and ammunition in the sandwich box in his backpack. He said, firmly, that he did not. By their verdicts, subject to the further grounds of appeal discussed below, the jury found that he did.

31. Third, Ms Mulligan's submission was based on a second false premise, namely that the sentence for a section 20(1) offence will be greater than that for a section 2 or section 3 offence; and that is why (she suggested) the indictment was amended to pursue section 20(1) counts. As a distinct strand of argument, in paragraphs 37-38 of her written submissions under the heading "Duplicity/Proportionality", Ms Mulligan said that, on the interpretation put forward by the Crown, section 20 "potentially permits a Court to impose double and perhaps triple punishment for one act of possession of a firearm"; because (as I understand her argument), for the same act of possession, an individual could be charged with an offence under section 2 or 3 **and** with an offence under section 20. However:

    (i) The statutory sentencing range for offences under sections 2, 3 and 20, as set out in Table 2 of Schedule 1 to the 1973 Act, is the same: imprisonment for 12-17 years for a first offence, and for 17-20 years for "a second or subsequent offence". The "second or subsequent offence" appears to refer to an offence under one of the sections listed in the header to Table 2, which includes sections 2, 3 and 20 themselves, but not section 26A (under which the Appellant had previously been convicted), the sentencing ranges being set out for that offence in a separate table (Schedule 1 Table 3). The logic behind these sentencing provisions is not always obvious; but what is clear is that an offence under section 20(1) has the same sentencing range as offences under section 2 and 3; and the amendment to the indictment to replace the section 2 and 3 counts with offences under section 20(1) could not have been moved by any wish of the Crown to give the Court greater sentencing powers on conviction. Indeed, in its application to amend the indictment to change the charges from sections 2 and 3 to section 20, the Crown did not

rely on the availability of greater sentencing powers, but rather submitted that "*the proposed amendments are the most appropriate charges in the circumstances, in deference to parliamentary intention*" (paragraph 11 of the Crown's Application for Joinder and Amendment to the Indictment). In other words, by creating a new firearms offence triggered by a previous conviction for offences involving firearms, Parliament must have intended section 20 be used to charge when a defendant satisfied the triggering provisions. One cannot disagree with that proposition.

(ii) The argument under the heading "Duplicity/Proportionality" has no force. The rule against duplicity (i.e. the charging of more than one offence within a single count) does not come into play at all: and it is common for an offence to comprise all the elements of another offence together with a further element or elements. There is no prospect of that leading to a doubling (or any increase) of sentence because (i) both offences should not be left on the indictment, except as alternatives; and (ii) even if they were left on the indictment and the defendant were found guilty of both, the sentencing judge would be bound to sentence on the basis of the relevant conduct and impose a sentence for one offence and no additional effective sentence for the other.

32. Fourth and finally, the firearms legislation that applies to the United Kingdom (i.e. the UK Firearms Act 1968) does not assist the Appellant. Under the Bermuda Firearms Act 1973, by virtue of section 2 read with section 7 (which identifies the weapons that can be possessed in Bermuda with the benefit of a gun licence), possession of the firearm in this case is absolutely prohibited in Bermuda. No particular notice to the Appellant of that prohibition was necessary to make possession a criminal offence. In any event, the Appellant well knew, from his previous experience if not otherwise, that possession of such a weapon was a criminal offence. In the United Kingdom, there is a procedure for specifically notifying a person who has been convicted of a firearms offence that, if they possess a firearm in the future, they will commit a further offence, which ensures that they do not consider they might be protected by (e.g.) having a firearms certificate. That has no relevance here, where the relevant weapon is not licensable.

33. In any event, whatever the position might be in the United Kingdom, it is clear that, in Bermuda, it is an offence to possess such a weapon as the Appellant was alleged to possess; for the commission of an offence, it is unnecessary for an individual to be put on notice that possession is an offence; and, on the facts of this case, given his previous convictions, it is inconceivable that the Appellant laboured under the misapprehension that he would not be committing a criminal offence if he were to possess a firearm in the future. It is not to the point that he may not have appreciated that, if he were to be in possession of a firearm in the future, then he would be committing an offence under section 20(1) instead of or as well as under section 2. I do not consider that, had there been a disparity in the sentencing range for the two offences, that would have affected the position; but, in fact, as I have described, the sentencing ranges are the same; and the sentences "*for a second or subsequent offence*" would not apply whether the Appellant had been charged under section 20 or sections 2 or 3, because his previous offences were under section 26A.

34. For those reasons, I do not consider it to be arguable that section 20(1) is inherently defective or unconstitutional in the sense that the section itself is, or a prosecution for any offence under it will necessarily be, incompatible with the Bermuda Constitution or other normative fundamental rights to a fair trial/hearing.

Ground 1(e)(i) and (iii), (f) and (g): Procedural Fairness

35. Ms Mulligan submitted that, even if section 20(1) did not operate in such a way that it inevitably breached fundamental constitutional rights, the way in which the prosecution was allowed to amend and pursue Counts 1 and 2 under section 20(1) was procedurally unfair so that the

convictions resulted from a miscarriage of justice which this Court should correct. There were two strands to this submission.

36. First, it was submitted that, because of the timing of the application to amend "*on the eve of his trial*", the Appellant and his Counsel had little time to consider their position on the new charges. However, there is no force in that submission. Reflecting the information sworn by the Magistrate and served on 3 Augst 2021, the original indictment was signed by the Supreme Court Registrar on 26 August 2021; so, the Appellant was aware of the allegation of possession of a firearm and ammunition from no later than that date. The application to amend was raised in court on 21 April 2023, and the Crown was ordered to file and serve the application by 26 April 2023, which it did. That was three weeks before arraignment and plea on 17 May 2023, at the start of the trial. The new indictment included, as the only new element/allegation, that the Appellant had been previously convicted of firearm offences which he understandably and inevitably accepted in the form of a written admission. That gave more than adequate time for the Appellant and his Counsel to consider their position; and, in these circumstances, it is not arguable that they suffered any prejudice or disruption to their preparation for trial, or unfairness, by virtue of the fact or timing of the amendment.

37. Second, even if section 20(1) does not necessarily give rise to procedural unfairness because it may result in the disclosure to the jury of a defendant's previous convictions (see paragraphs 22-34 above), Ms Mulligan submitted that the Judge failed to protect the Appellant from the risk of the jury finding out that he had previous convictions for firearm offences under section 26A and using that knowledge improperly as evidence that the Appellant had a propensity to commit offences of this sort. The Judge did not give the jury any direction with regard to how they might use, and how they might not use, evidence of the Appellant's previous firearms convictions if they were to find out about them. She suggested that the Appellant's right could be best protected – indeed, as I understood her submission, could only be properly protected – by a bifurcation of the trial, putting section 2 and 3 charges in one indictment to be tried first and then, if the Appellant were found guilty, putting a second indictment forward charging the section 20(1) offences.

38. However, I do not consider it is arguable that the Appellant suffered from any procedural unfairness on the basis of this ground (the contextual background for which is set out above at paragraphs 12-18).

39. Whilst it may be possible to say in advance that a particular procedural course will inevitably result in unfairness to a defendant, procedural fairness can otherwise be maintained in different ways. In a particular case, it is necessary to consider whether the procedure in fact adopted in that case is fair – a matter which has to be assessed by looking at the whole course of the case from beginning to end.

40. In respect of a charge under section 20(1), the judge took the view that evidence of previous convictions must be admissible because they are an element of a statutory offence itself (19 May 2023 transcript, page 15 lines 13-15). I agree. If that evidence were admitted, to maintain procedural fairness, everything else being equal, it would be incumbent on the trial judge to give the jury a direction as to how they may, and how they cannot, use that evidence: i.e. they may use it when considering whether the defendant has committed a previous firearms offence for the purpose of being satisfied that he has committed the section 20(1) offence before them, but they cannot use it as evidence of propensity to have possession of a firearm. Judges are well used to giving such directions as to the use of evidence by a jury; and, in the absence of evidence to the contrary, juries are trusted to comply with such directions when given to them.

41. In this case, procedural fairness was maintained in a different, but no less effective, way. As I have described (paragraphs 13 and following above), it was agreed between the Crown and Ms

Greening on behalf of the Appellant that evidence of his previous firearm offences would be kept from the jury by an admission (that would not go before the jury) and a formulation of the charge that simply made clear that, subject to him being found to be in possession of the firearm/ammunition, the Appellant was "*a person to whom the section [i.e. section 20(1))] applies*". That way of proceeding was instigated by Ms Greening as preferable, and Ms Clarke (who was of the same view as the judge that evidence of the previous convictions was admissible because they formed an element of the section 20(1) offence) conceded the point for the purposes of this case. The Appellant now says that Ms Greening proceeded without his instructions – an issue I consider under Ground 3 – but, on any view, to proceed in this way was reasonable and did not arguably result in any procedural unfairness to the Appellant.

42. Ms Mulligan submitted that there was a risk that a member of the jury might disobey the judge's direction to consider only what they heard in court and not to conduct their own researches; and then, without the benefit of any direction as to how that improperly obtained evidence could be used, proceed to take what they found out as evidence that the Appellant has a propensity to possess firearms. However, that was a risk which was fully understood and taken into account during the trial (18 May transcript, page 19 lines 10-15); and it was a risk that was no greater than the risk of a juror, told of the previous convictions and given a direction as to how that evidence might be used, might disobey that direction and take those convictions into account for an improper purpose. There is no evidence in this case to undermine the presumption that jurors will comply with the directions given to them by the Court.

43. In my judgment, for the protection of the Appellant's right to a fair hearing/trial, it was not necessary or even appropriate to bifurcate the trial as Ms Mulligan suggested. Parliament has created the section 20(1) offence with the requirement to prove a prior conviction; it would be opaque rather than transparent and open justice to use the fiction that section 2 and 3 charges were the full extent of the matters faced by the particular defendant. Certainly, procedural fairness does not require such a process.

44. I have considered carefully all Ms Mulligan's submissions relating to procedural fairness, of which there were numerous strands. I do not consider that any has any more merit than the particular, primary matters upon which she relied, as set out above.

45. For those reasons, I am unpersuaded that the Appellant suffered any procedural unfairness as he suggests.

Ground 2: Misdirection on Burden of Proof

46. Ms Mulligan submitted that the judge erred when directing the jury in relation to the presumption of knowledge pursuant to section 31(1)(b) of the 1973 Act, as follows (23 May 2023 transcript at page 25, the words complained of being those which I have highlighted in bold):

> *"If the accused is to be acquitted of the offences of possession of the firearm and the ammunition offences,* ***it is for the accused to show sufficient evidence that he did not know that the firearm and ammunition was in the sandwich container which was in the backpack".***

Ms Mulligan submitted that that, in effect, improperly reversed the burden of proof, in circumstances in which the Appellant did not have any burden of proof in respect of any element of the offence.

47. Section 31(1)(b) provides:

> *"(1) in a prosecution under this Act and without prejudice to any other provision of this Act—*
>
> *(a) ...*
>
> *(b) Where it is proved that a person had in his possession or custody or under his control anything containing a firearm or ammunition, it shall be presumed until the contrary is proved, that such a person was in possession of or handled such firearm or ammunition."*

48. It is well-established in the jurisprudence of both England and Wales and Bermuda that such a presumption does not impose a burden of proof on a defendant, but only an evidential or evidentiary burden, i.e. "*a burden of raising, on the evidence in the case, an issue as to the matter in question for consideration by the tribunal of fact*". If an issue is so raised, then "*it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail the defendant*" – so the burden of proof in respect of the elements of the offence never moves (the quotations being from Sheldrake v DPP [2004] UKHL 43; [2004] 3 WLR 976 at [1] per Lord Bingham of Cornhill, adopted by this Court in Rumley v R [2021] CA (Bda) 18 Crim at [21] per Bell JA giving the judgment of the Court). In R v Perinchief-Leader [2020] CA (Bda) Crim 11 at [63], Clarke P put it this way:

> "*The effect of the presumption is to create an evidentiary burden. It is such that the accused must give sufficient evidence to raise the issue as to whether she knew that the items which turned out to be firearms and ammunition were in her suitcases. If she does not do that, it is to be presumed that she knew that the items which turned out to be firearms and ammunition were in her suitcases, and it will be for the Crown to prove beyond reasonable doubt that she knew what the items were. If she does give sufficient evidence to rebut the presumption, that is not the end of the matter, the jury must then determine whether the Crown has proved that she knew both that the items which turned out to be firearms and ammunition were in her suitcases and also knew that that was what they were."*

This appears to have been from where the judge in this case obtained the phrase "*sufficient evidence*".

49. I accept that the passage from the judge's summing up in this case of which Ms Mulligan complains, quoted above, looked at in isolation, may appear infelicitous. He did not clearly explain "*sufficiency*" of evidence in this context; and I accept Ms Mulligan's submission that, as to whether there was sufficient evidence for issue of possession to be left to the jury was essentially a matter of law, so, as the judge did leave the issue to the jury, it was unnecessary for him to refer to the section 31 presumption at all. He could have simplified his directions by merely directing the jury that the prosecution had the burden of proof on all matters, and that that burden required evidence to satisfy them to the criminal standard.

50. However, when the passage of which complaint is made is looked at in context, I am quite sure that it would not have led any juror to have been misled into proceeding on the basis that the burden of proof had, in any way and in respect of any element of the offence, moved from the prosecution.

51. The short passage relied on was part of a longer paragraph, which in full reads as follows:

> *"If the accused is to be acquitted of the offences of possession of the firearm and the ammunition offences, it is for the accused to show sufficient evidence that he did not know that the firearm and ammunition was in the sandwich container*

> *which was in the backpack. If after considering the accused's defence you are left with a reasonable doubt that he knew that the firearm was in his backpack, then you should find the accused not guilty. Therefore, you can only convict the accused if you are satisfied that the prosecution had beyond a reasonable doubt disproven the accused's defence. If you are satisfied that the prosecution had disproved the accused's defence beyond a reasonable doubt and proved beyond a reasonable doubt that the accused committed the offences of possession of a firearm and ammunition, then you can find the accused guilty of the offence."*

52. When looked at in that context, it is clear from that passage that the jury were told in tolerably clear terms that the burden of proof lay with, and only with, the prosecution. That that was where the burden of proof lay was further emphasised by the judge in other places in his summing up, including at 23 May 2023 transcript at page 2 lines 20-34, page 22 lines 21-33 and page 24 lines 6-10 and 26-33 (immediately before the quoted passage), and 24 May transcript at page 19 line 29 and following. That last reference is towards the end of the summing up, where the judge says, in clear and unambiguous terms (emphasis added): "*The accused, I remind you, is under no duty to prove his innocence.* ***He is under no duty to prove anything****."*

53. When looked at in that context as a whole, it is clear that a juror could not have considered that any burden of proof lay on the Appellant, and could not have been in any doubt that the burden of proof in respect of all elements of the section 20(1) counts lay upon the prosecution.

Ground 3: Ineffective Assistance of Counsel

54. Finally, in a new ground supported by an affidavit by the Appellant sworn on 12 October 2025, Ms Mulligan submitted that there had been a miscarriage of justice as the result of trial Counsel being ineffective.

55. The Appellant's affidavit states that:

(i) although he was present at the application heard in court concerning the amendments to the indictment, he did not consent to them or even understand them, nor were they explained to him (paragraphs 5-7 and 10-12);

(ii) the ramifications of pleading guilty to the drugs offences which were then removed from the indictment (which undermined the defence that, when stopped, he may have been anxious about the drugs rather than the loaded firearm being found) were not explained to him (paragraph 8);

(iii) he had only one meeting with Ms Greening and Mr Warner, and a few rushed telephone conversations; and Ms Greening did not go through the evidence and the defence with him prior to trial (paragraphs 14-15);

(iv) Ms Greening did not take any proof of evidence from him, or note of his version of events, before trial (paragraph 16);

(v) Ms Greening did not advise him as to the legal shield which protected him from being asked questions about his previous convictions/bad character, and how that shield might be lost; nor did she seek the Court's permission to take his instructions during the course of his evidence on the agreement eventually reached upon how character evidence should be dealt with (paragraphs 19-25); and

(vi) Ms Greening was late in trying to advance an argument that section 20(1) of the 1973 Act was unconstitutional: she raised it only after conviction and prior to sentencing, rather than

at the time the prosecution sought to amend the indictment to include the section 20(1) counts (paragraphs 26-28).

56. Trial Counsel, Ms Greening, was given an opportunity to respond to this ground, and she swore an affidavit on 4 November 2025, in which she stated that *"[she] and [her] colleague Mr Warner consulted with the Appellant (often with his parents present) on no less than ten occasions in the lead up to trial to take detailed instructions, provide detailed advise and prepare for trial*" (paragraph 1). The affidavit was not as helpful as it might have been: it did not respond to the individual criticisms made in the grounds and the Appellant's affidavit; it did not descend to appropriate detail; nor did it attach or refer to any documents such as attendance notes. Ms Mulligan said that she had seen the file and it did not contain any such attendance notes etc.

57. Ms Mulligan relied on the following ways in which, she contended, Counsel was deficient.

58. First, it was said that Counsel failed to take a written or signed proof of evidence from the Appellant before he gave evidence in the witness box. However, although Ms Greening did not respond to this assertion in her affidavit, it is clear from what we have seen that, at trial, Ms Greening was well-enough acquainted with the Appellant's version of events to be able to take him through his evidence-in-chief fully and properly; and that he was well-enough prepared to put forward his version of events firmly and coherently. With the exception of the other, specific complaints referred to below, the Appellant does not suggest that he did not put forward his evidence as fully as he would have wished to do. Therefore, even if no written proof of evidence was taken, there is no evidence that this adversely affected either the Appellant's ability to give his version of events or the safety of the conviction such that there was any possible miscarriage of justice.

59. Second, it is said that Ms Greening failed to take written instructions or fully explain to the Appellant his right to testify or remain silent at trial. However, particularly given the other evidence and the presumption in section 31(1)(b) (see paragraph 47 above), had the Appellant failed to give evidence at trial, he would inevitably have been convicted. So, again, any failing on the part of Ms Greening could have had no impact on the verdict that was in fact returned.

60. Third, it is said that Ms Greening did not explain about the shield protecting the Appellant from evidence of his previous convictions or other bad character evidence being admitted, and how that shield might have been lost (notably, by the Appellant himself asserting that he was of positive good character). It was submitted that the absence of such advice may well have led to him making positive assertions about his good character, which he might well not have made had he been properly advised about the possible consequences of such evidence. It is said that such failure is evidenced by him raising this point with the judge following the warning given by the judge during the course of his evidence (see paragraph 17 above). The further criticism is made that, after the prejudicial cross-examination of the Appellant had occurred, Ms Greening did not seek the permission of the Court to speak to the Appellant to obtain instructions.

61. However:

    (i) Prior to the Appellant giving evidence, there was a discussion in Court in the presence of the Appellant about the section 16 shield and how it might be lost in the context of the application to discharge the jury, when the police officer indicated that the Appellant had said that: "*I can't go to jail again*" (see paragraph 15 above). It was made clear by the judge on that occasion that, if the Appellant went so far as to say that he had not been to jail before, that would remove the shield. Whilst I accept that that was a different context in relation to the loss of the shield – because the Appellant asserted positive good character in the form of anti-firearm views – the Appellant cannot say that he did not know anything

about the shield and, even if not the precise ways in which it might be lost, the consequences of losing it.

(ii) The Appellant did not lose all the benefits of the shield because, as I have explained, Ms Clarke restricted the evidence she sought to elicit the fact that the Appellant had been arrested before (see paragraph 17 above). She did not seek to elicit evidence of his previous convictions, nor were they ever disclosed in evidence.

(iii) The judge gave a direction as to how the jury might properly use, and how they must not use, the evidence of previous arrest that had been given. No compliant is made about the content of that direction.

(iv) Ms Greening did not seek the judge's permission to speak to the Appellant and take his instructions prior to agreeing, with the Court's approval, that the cross-examination of the Appellant on his bad character would be restricted to evidence that he had been arrested before. Whilst that evidence was important to the Crown's case – that the Appellant's demeanour changed because he was anxious about the police finding the loaded firearm in his backpack, rather than the fact that he did not want to be arrested and go to jail – I do not consider that, even if that application to speak to the Appellant during the course of his evidence had been made and the judge had acceded to it, the course of the trial would have been different.

(v) In all of the circumstances, even on the assumption that Ms Greening did not give the Appellant proper advice in relation to the shield, as to how it might be lost and the consequences of losing it, I am satisfied that that did not result in any undermining of the safety of the conviction or any arguable miscarriage of justice.

62. Fourth, it is said that Ms Greening neither discussed with the Appellant, nor took his instructions, in relation to the amendments to the indictment to change Counts 1 and 2 to allege a breach of section 20(1) and add the drugs offences, to none of which the Appellant consented. Further, it is said that that Ms Greening did not advise the Appellant upon the ramifications of pleading guilty to the drugs counts and removing them from the indictment, when the jury might have considered that his reaction to the police was due to the fact that he had possession of the drugs and scales rather than any knowledge that he had possession of the loaded firearm.

63. However:

(i) as I have explained (paragraph 22 and following), section 20(1) was the appropriate statutory provision under which to pursue the firearm/ammunition offences, given his previous firearms convictions;

(ii) the Appellant would have gained no advantage from the charges being pursued under sections 2 and 3 rather than section 20(1): the issue at trial would in any event have been possession, and the sentencing regime was identical;

(iii) had the Appellant objected to the amendment to change the charges to section 20(1), the judge would in an event have been bound to have allowed that amendment; and

(iv) with regard to the drugs counts, in this appeal, the Appellant complains of both the fact that they were included in the amended indictment (and Ms Greening's failure to advise him properly with regard to that amendment), and their exclusion from the indictment before the jury when he had pleaded guilty to them. But the Appellant cannot have it both ways; nor can he properly suggest that he should have been allowed to have relied on his possession of drugs and scales (as opposed to

possession of the loaded firearm) at the time of his arrest to explain his change of behaviour, whilst avoiding the drugs counts being put on the same indictment. In fact, as Ms Clarke submitted, the Appellants defence was not that he was anxious about discovery of the drugs but rather that he did not want to be arrested because he did not want to go to jail that afternoon. These grounds relating to the drugs counts simply have no foundation.

64. Fifth, it is submitted that any application based on the unconstitutional nature of section 20(1) ought to have been made by Counsel when the application to amend the indictment to include section 20(1) counts was made. However, for the reasons I have already given (paragraph 22 and following above), any such application was bound to fail: section 20(1) is incompatible with neither the Bermuda Constitution nor any other fundamental rights to a fair trial/hearing.

65. Sixth, there is a general complaint that Ms Greening did not allow the Appellant to engage fully and appropriately in his own trial, including a failure generally to advise him and take his instructions. However, Ms Mulligan only sought to pursue the specific complaints addressed above. I have dealt with those.

66. Having considered all these complaints, on the basis of all the evidence, I do not consider that the conduct of Ms Greening could be characterised as flagrantly incompetent, or indeed at all incompetent; nor do I consider that any conduct on her part was such as to render the convictions unsafe or the trial process unfair or, even arguably, amounting to a miscarriage of justice.

Conclusion

67. For those reasons, I do not consider any of the grounds of appeal have been made good. In my view, the convictions are sound; and I would dismiss this appeal.

GLOSTER JA:

68. I agree.

CLARKE P:

69. I, also, agree.