

IN THE SUPREME COURT OF BELIZE, A. D. 2014

CLAIM NO. 470 OF 2014

	(ALLYSON MAJOR SR.	CLAIMANT
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BETWEEN	(AND	
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	(ATTORNEY GENERAL OF BELIZE	FIRST DEFENDANT
	(PC 889 MARIO FRANZUA	SECOND DEFENDANT
	(PC 245 ORLANDO BOWEN	THIRD DEFENDANT

*BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA*

**Appearances:**

**Mr. Anthony Sylvester of Musa and Balderamos for the Claimant**

**Mr. Nigel Hawke, Senior Crown Counsel, along with Ravell Gonzalez for the Defendants**

**Hearing Dates:**

**26<sup>th</sup> May, 2015**

**27<sup>th</sup> May, 2015**

**11<sup>th</sup> April, 2016**

**D E C I S I O N**

**The Facts**

1. On Tuesday, April 17<sup>th</sup>, 2012 P.C. Franzua and P.C. Bowen and other police officers of the Gang Suppression Unit (GSU) were on patrol on Peter Seco Street in Belize City when the smell of marijuana wafted to their nostrils. The G.S.U. went into a yard at No. 4439 Peter Seco Street in Belize City, where four men appeared to be engaged in yard work. P.C. Franzua recognized one of these four men to be one Errol Lynch who was wanted for the charge of "*Handling Stolen Goods*". The GSU then identified themselves

as police officers to the workmen and informed them that a search would be conducted on their person and on the premises for drugs and ammunition. Nothing incriminating was found on any of the four persons. Upon conducting a search of a wooden house and a cement house on the premises, the G.S.U. found a Black 16 gauge shotgun with a wooden butt (Serial Number 13047433), a Black 410 gauge double shotgun Winchester Brand (Serial Number 67361), two red 16 gauge live cartridges (Aguila Brand) and a red and black Briggs and Stratton lawnmower. These items were found under some lumber in the yard behind the cement house. P.C. Franzua asked the men the identity of the persons who lived at the houses and he learnt from one Kent Lynch that Keith Lynch and his common law wife Virginie Alvarez lived in the wooden structure, and Yvette Lynch and his stepfather Allyson Major lived in the concrete building. All four men were then arrested and charged jointly for the offences of Keeping a firearm without a gun license, keeping ammunition without a license and Handling stolen goods (in relation to the lawnmower). Although neither the Claimant Allyson Major nor his common law wife was present at the time of the search, arrest warrants were also prepared for them. On Tuesday April 17<sup>th</sup>, 2012 at 5:00 p.m. Allyson Major was arrested and charged for the offences of kept firearms without a gun license and handling stolen goods. He remained in custody from that date until Wednesday April 18<sup>th</sup>, 2012 at which time he was taken to court for his arraignment before a Magistrate. He was then remanded into custody at the Kolbe Correctional Facility, as under the Amendments to the Crime Control and Criminal Justice Act, the Magistrate was not able to grant him bail for firearm related offences. Mr. Major then had to obtain the services of an attorney to apply for bail from

the Supreme Court pending the determination of his case; after languishing in prison for 38 days he was able to secure bail and was released on May 17<sup>th</sup>, 2012. When the case was finally determined on November 15<sup>th</sup>, 2013, the charges against him were dismissed after the Magistrate found that the prosecution failed to establish a *prima facie* case against him. Mr. Major has now brought this claim against the Attorney General and the arresting officers seeking damages for breaches of his constitutional rights not to be deprived of his personal liberty unless upon reasonable suspicion of him having committed or being about to commit a criminal offence, and his constitutional right to be presumed innocent until he is proven guilty, or has pleaded guilty.

### **The Issues**

2. i) Are Sections 6(A) (1) and 6 A (4) (B) of the Firearms (Amendment) Act 2010 *ultra vires* Sections 5(1) (e) and Section 6(3) (a) of the Constitution of Belize?
- ii) Is the Claimant entitled to damages and if so, what type of damages and what amount?

### **Claimant's Legal Submissions**

3. Anthony Sylvester on behalf of the Claimant submits that Section 5(1)(e) of the Constitution of Belize is similar in its wording to Article 5(1) of the European Convention on Human Rights( ECHR), and that both these provisions provide the same protection to an individual: loss of liberty is only permissible in accordance with a prescribed law.

Section 5(1) (e) of the Constitution of Belize provides that:

*“(1) A person shall not be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say:-*

*.....*

*(e) upon a reasonable suspicion of his having committed, or being about to commit, a criminal offence under any law;”*

Article 5(1) of the European Convention of Human Rights states:

*“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...”*

Learned Counsel cites paragraph 20 of the European Court of Human Rights Guide (ECHR Guide) on Article 5 of the Convention which explains that the key purpose of Article 5 is *“to prevent arbitrary or unjustified deprivations of liberty”*. He submits that in order for a loss of liberty to be permissible, it must be lawful.

4. Mr. Sylvester starts by acknowledging that there is a presumption of constitutionality of statutes as was stated in ***de Freitas v The Permanent Secretary of Agriculture, Fisheries, Lands and Housing and others*** (Antigua and Barbuda [ 1998] UKPC 30) where the Privy Council stated as follows:

*“It is also accepted that in the construction of statutory provisions which contravene human rights and freedoms there is a presumption of constitutionality (Attorney General of the Gambia v Momodou Jobe [1984] A.C. 689) and that in construing constitutional provisions a liberal approach is required (Minister of Home Affairs v Fisher [1980] A.C. 319).*

Learned Counsel for the Claimant then argues that a claim for constitutional redress can be brought even where a Claimant alleges infringement of a right and that infringement

would have been done consequent to the exercise of a power under an existing law. He cites the ECHR Guide at para 25 as follows:

*“The requirement of lawfulness is not satisfied merely by compliance with the relevant domestic law; the domestic law must itself be in conformity with the Convention, including general principles expressed or implied in it. (Pleso v Hungary)”*

5. Mr. Sylvester argues that this guidance applies with equal force to the interpretation of section 5(1) of the Constitution of Belize and the application of a “law” by the law enforcement authorities which leads to the detention, arrest and remand (loss of liberty) of a person. In particular, an inquiry must be done to determine whether the provisions of the Firearms (Amendment) Act, which was applied by the Defendants in grounding their detention and arrest of the Claimant, is in conformity with the Constitution of Belize and the general principles expressed and implied therein.

Mr. Sylvester for the Claimant submits that the approach to be taken by the Court in determining whether the relevant section of the Firearm (Amendment) Act is *ultra vires* is that set out in para 25 of the ECHR Guide:

*“The general principles implied by the Convention to which Article 5(1) refers are the principles of the rule of law and, connected to the latter, that of legal certainty, the principle of proportionality and the principle of protection against arbitrariness, which is moreover, the very aim of Article 5 (Simons v Belgium).”*

6. He also cites Saunders J in **Attorney General of Belize v Phillip Zuniga et. al.** CCJ Appeal No CV8 of 2012-[2014] CCJ 2 (AJ) as follows:

*“Section 6 of the Constitution guarantees to everyone the right to equal protection of the law. The Constitutional protection afforded by this right goes well beyond the detailed provisions found in the section itself. In the A.G. of Barbados v Joseph and Boyce, de la Bastide P and Saunders J*

*observed that “the right to the protection of the law is so broad and pervasive that it would be well- nigh impossible to encapsulate in a section of a constitution all the ways it may be invoked or can be infringed.” In the same case, Wit J went further and drew attention to the inextricable link between the protection of the law and the rule of law, with the latter embracing concepts such as the principles of natural justice and “adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power...”*

7. Mr. Sylvester states that the proper approach to be taken by the Court is (i) a generous and purposive interpretation of the constitutional fundamental right being asserted as being infringed should be given, and (ii) where a law and the exercise of powers under that law offends the rule of law, then such a law and actions taken under that law are unlawful and unconstitutional.

He then cites Section 6 (A) (1) (b) of the Firearms (Amendment) Act (Act No. 10 of 2010):

*“6(A) (1) Where any unlicensed firearm or ammunition is found in or on any premises owned or occupied by more than one person, any of the following persons shall be presumed to be in possession of that unlicensed ammunition:*

- (a) The person in control of the premises;*
- (b) The person ordinarily resident in or on the premises’*
- (c) The person ordinarily employed in or on the premises; or*
- (d) The person in control of any cupboard, locker or other container or thing in which the firearm was found.”*

Learned Counsel on behalf of the Claimant submits that this Amendment to the Firearms Act casts a wider net over the category of persons than the previous Act in that a very wide class of persons is now deemed to be in possession of unlicensed firearm or ammunition e.g. it would not only be a person who has control or possession over a premises who would be caught by the amended provision, but also a person who was ordinarily resident there. He argues that this would now include every person above the

age of criminal culpability such as a fifteen year old female fourth form student who resides on the premises, land or house; a grandmother or grandfather or a bedridden person, or a person not present at the time of the search. The Claimant was therefore caught by this Amended provision of the Firearms Act which led to his being detained in Kolbe Foundation for 38 days.

8. Section 5(1) (e) of the Constitution of Belize mandates that deprivation of liberty by a law must be based upon a reasonable suspicion that a crime has been committed or is about to be committed.

Mr. Sylvester turns to the ECHR Guide to assist in explaining “*reasonable suspicion*”:

*“A ‘reasonable suspicion’ that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence (Ilgar Mammadov v Azerbaijan & et al). Therefore, a failure by the authorities to make a genuine inquiry into the basic facts of a case in order to verify a complaint was well-founded disclosed a violation of Article 5(10) (c) (Stepuleac v Moldova).”*

He then argues that Section 6 (A) (1) of the Firearms (Amendment) Act fails to provide a mechanism to enable the authorities to make a genuine enquiry into the facts of a case in order to verify whether reasonable suspicion exists that a crime has been committed. It is his argument that the legislation ties the hands of law enforcement personnel, and removes from them the responsibility to make the constitutionally genuine inquiry into the facts of a case in order to verify whether reasonable suspicion exists that crime was committed. All the officers have to be satisfied with, is whether the person fell into one of the classes of person set out in Section 6(A) (1) of the Firearm (Amendment) Act. He cites the European Court of Human Rights case of ***Fox v United Kingdom*** (1990) 13

EHRH 157 stating that a section 5(1) (e) provision (article 5(1) (c) European Convention) requires that a minimum standard must be met in order for a loss of liberty to be lawful or constitutionally permissible. This decision of the European Court was cited with approval by the House of Lords in ***O'Hara v Chief Constable of the Royal Ulster Constabulary*** [1996] UKHL 6 where Lord Hope of Craighead stated at p 14:

*"The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in article 5(1) (c) [section 5(1) (e)]. The court agrees with the Commission and the Government that having a 'reasonable suspicion' presupposes the existence of facts or information which would justify an objective observer that the person concerned may have committed the offence. What may be regarded as 'reasonable' will however depend upon all the circumstances."*

Mr. Sylvester goes on to argue that Section 6 A(1) of the Firearms Act obliterates the minimum requirement of reasonableness which is necessary to justify the deprivation of a person's liberty. The section provides a *"one size fits all"* scheme which seeks to justify the deprivation of a person's liberty for the commission of an offence under section 3(1) of the Firearms Act, when there may be no factual basis for the loss of liberty. This goes contrary to the scope, purpose and intent of the constitutional protection against deprivation of liberty but for reasonable suspicion of having committed an offence. The section is therefore null and void.

9. Learned Counsel for the Claimant then focuses his argument on the *de Freitas* test, where the Privy Council in paragraph 25 set out the factors to be considered by a court in determining whether a legislative provision is arbitrary:

25. *"In determining whether a limitation is arbitrary or excessive he said that the Court would ask itself:-*

*whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right;(ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*

26. *Their Lordships accept and adopt this threefold analysis of the relevant criteria."*

In his submissions, Mr. Sylvester immediately concedes that the regulation of the use and control of firearms and ammunition is fundamental in any society and therefore a law which makes provision for the restricted use of such articles is a desirable legislative objective. He also agrees that a law which limits a constitutional right such as section 5(1) (e) of the Firearms Amendment Act may be sufficiently important to justify limiting the constitutional right to protection of personal liberty. He therefore submits that the first criterion of the *de Freitas* test has been satisfied.

10. Mr. Sylvester argues that criteria two and three of the *de Freitas* test have not been satisfied. In relation to the second criterion (whether the measures designed to meet the legislative objective are rationally connected to it), it is his submission that that criterion has not been met. Legislating that any person who is 'ordinarily resident' at a house where a firearm or ammunition is found is deemed to be the owner of a firearm and ammunition, is not rationally connected to the legislative objective. How can a provision which allows for the detention and arrest of an entire family over the age of criminal culpability (including teenagers and senior citizens) on the sole basis of residence be said to be rationally connected to the need to regulate and strengthen the

laws against possession of unlicensed firearm or ammunition? Such a provision does not require any factual evidence of possession or knowledge as these are presumed based on a person's residence/association. The second criterion of the *de Freitas* test is therefore not met.

11. Learned Counsel also submits that the third criterion of the *de Freitas* test is also not met. The means used to impair the right or freedom are far more than is necessary to accomplish the legislative objective in that the right guaranteed by section 5(1)(e) of the Constitution of Belize is obliterated when section 6A(1)(b) of the Firearms (Amendment) Act is applied.

12. In considering whether section 6(A) (1) (b) of the Firearms (Amendment) Act passes the proportionality test laid down by Lord Steyn in *Ex parte Daly* [2001] UKHL 26, Mr. Sylvester submits that it does not. He says that the effect of this section is to have all persons above the age of criminal culpability living at a premises or house being detained, arrested and thereafter be placed on remand pursuant to the Crime Control and Criminal Justice Act, if a firearm or ammunition is found on the premises or house where they all live. Everyone ranging from school age teenagers to the old and infirm would be caught under this expansive web of guilt, even where there may be no rational basis to so include them. This provision in its blanket form results in an interference with section 5(1) (e) rights under the Constitution of Belize which is not proportionate to the legitimate aim sought to be pursued.

13. Mr. Sylvester therefore submits that Allyson Major's constitutional right guaranteed under section 5(1) (e) was infringed on the following basis: (1) there was no factual basis for reasonable suspicion on which the defendants could ground their detention, arrest and charge of Mr. Major. (2) Even if Mr. Major is said to have fallen within section 6A(1)(b) of the Firearms Act, that provision violates Mr. Major's section 5(1) (e) right in that (i) it takes out altogether the minimum standard/requirement of "*reasonableness*" which is necessary to justify the deprivation of a person's liberty; and (ii) it offends the principle of rule of law, specifically, it is a provision that is unreasonable, arbitrary and not proportionate.

14. Mr. Sylvester finally submits that the cumulative effect of sections 6A(1) and Section 6A(4) of the Firearms (Amendment Act) 2010 is that (1) a person is deemed to be in possession of the firearm or ammunition (the *actus reus*) if he is ordinarily resident at the premises; (2) the person is further deemed to have knowledge of the firearm or ammunition (the mental element or *mens rea*) and (3) the person is required to prove lack of knowledge of the existence of the firearm or ammunition. In the case of Allyson Major, the authorities allege that he was "*ordinarily resident*" at the premises, being 4439 Peter Seco Street, Belize City and therefore he was detained, arrested and charged. His right to presumption of innocence was therefore violated. In advancing his argument that section 6 of the Firearm Amendment Act displaces the presumption of innocence and violates the Claimant's section 5 rights under the Constitution of Belize, Mr. Sylvester looks at two Belize Court of Appeal cases, ***Criminal Appeal No. 27 of 2005 Cpl Edison Palacio, Joseph Grant and Others*** and ***Attorney General and Philip Zuniga et***

**al.** In the **Palacio** case, question for the consideration of the Court of Appeal was whether section 2(4) and section 6(2) of the Unlawful Possession of Property Act offended the Belize Constitution. President of the Court of Appeal Mottley (as he then was) summarized the effect of the section as follows:

*“Section 2(4) of the Act purports to create an offence, i.e. being unable to give an account to the magistrate within the time assigned, of the lawful manner by which he came into possession of the thing. The offence is only committed when he fails to give an account to the magistrate of the lawful manner by which he came into possession of the thing.”*

At para. 12:

*“Section 6 (2) of the Act sets out the procedure to be followed after the person who has been arrested appears before the magistrate. If the magistrate is satisfied that that person had possession of the property either as a result of evidence led or by admission of the person, the magistrate may call on that person to give an account of the lawful means by which he came into possession of the thing. However, if he fails to give an account within the time fixed by the magistrate he is guilty of an offence. Again the offence is only completed when the accused fails to give to the magistrate a satisfactory account for his possession.”*

15. Mr. Sylvester submits that in a similar fashion, section 6A(4)(b) of the Firearms (Amendment) Act 2010 places a burden on a defendant charged under that section to prove that he is not guilty of the offence; specifically, he must prove that he did not have knowledge and his failure to so prove deems him guilty. In the **Palacio** case the Court of Appeal found that to require the accused to prove his innocence is contrary to the presumption of innocence which is provided for by section 6(3)(a) of the Constitution. He urges this court to adopt that reasoning to the case at bar and strike down section 6A(4)(b) on a similar basis. By requiring a person to prove his lack of knowledge a defendant is effectively compelled to testify against himself. Unsworn

evidence is given whatever weight the tribunal of fact wishes to give it, while section 6(6) of the Constitution of Belize mandates that a person tried for a criminal offence shall not be compelled to give evidence at the trial. Mottley P in the *Palacio* case cited Lord Woolf in ***Attorney General of Hong Kong v. Lee Kwong-Kut*** [1993]2 LRC 259 where the respondent had been charged with an offence contrary to s. 30 of the Summary Offence Ordinance which required him to give an account to the magistrate of how he came to be in possession of anything which may reasonably be suspected of having been stolen or unlawfully obtained. At p. 264 of the Privy Council decision Lord Woolf said:

*“s.30 is therefore an offence which contains three elements (1) the possession or conveying of the property by the defendant(2) the reasonable suspicion that the property has been stolen or unlawfully obtained and (3) the inability of the defendant to give a satisfactory account of how the property came into his possession. The third element is not a special defence as is contended by Mr. Bratza in his extremely persuasive argument, on behalf of the Attorney General, but an ingredient of the offence which places the onus on the defendant, in order to avoid a finding of guilt, to establish that he is able to give an explanation as to his innocent possession of the property.*

*This third ingredient is the most important element of the offence since, were it not for the third ingredient, it is not difficult to envisage circumstances in which a defendant in possession of property could be guilty of an offence without any behaviour on his part to which it would be appropriate to attach the strictures of the criminal law.”*

Mr. Sylvester urges this court to adopt this reasoning and apply it to this case in striking down section 6 A (4) (b) of the Firearms Amendment Act as unconstitutional.

16. Mr. Sylvester also relies on the CCJ decision of ***Attorney General v. Philip Zuniga et. al.*** [2014] CCJ 2(AJ). In that matter, the Attorney General argued that the provisions under consideration were saved by the operation of section 6(10) of the Constitution.

Saunders J conceded that Section 6(10) of the Constitution does allow the State to impose on an accused “*the burden of proving particular facts*”. But His Lordship went on to clarify that the imposition must be reasonable and proportionate.

*“A balance must be struck between the importance of what is at stake and the rights of the defence. Since section 6(10) (a) is a derogation from a right that is to be generously construed, the derogation must be construed strictly.”*

At paragraph 72:

*“... The substance and effect, not necessarily the form, of the words used are paramount. If an accused is required to establish on a balance of probabilities the absence of an important element of the offence in order to avoid conviction the presumption of innocence is unjustifiably violated because a conviction is possible in spite of a reasonable doubt as to guilt. As Lord Bingham noted in *Sheldrake v DPP* it is ‘repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of a crime and for the defendant to then be required to disprove the accusation on pain of conviction and punishment if he fails to do so. The closer the legislative provision approaches that situation the more objectionable it is likely to be.’”*

Mr. Sylvester states that in the case at bar, section 6A(4)(b) of the Firearms (Amendment) Act requires the defendant to establish the absence of an important element in order to avoid conviction. That element is that of the absence of knowledge that is the *mens rea* of the offence. In so doing, he argues, the section unjustifiably violates the presumption of innocence. It relieves the prosecution of the onus of proving the mental element of the crime. This is seen to be even more grievous when it is remembered that by operation of section 6A(1)(b) the Claimant was automatically deemed to be in possession or have knowledge.

Mr. Sylvester also relies on Saunders J’s explanation as to why Section 6(10)(a) of the Constitution would not save such a provision:

*“Usually, section 6(10)(a) comes into play with reference to ‘offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities’. Here the accused does not have to show some positive exculpatory act on his part but rather is put in the unenviable position of having to establish a negative, namely, that he did not consent to or connive at the disobedience to the injunction. If the sub-section is to be construed in a manner that widens the blanket of guilt beyond those captured by sub-section 4, it comes perilously close to legislating guilt by association. We agree with the Court of Appeal that the sub-section contravenes section 6(3) (a) of the Constitution and is therefore invalid.”*

Mr. Sylvester submits that these pronouncements apply with equal force to section 6A(4)(b) of the Firearms (Amendment) Act.

#### **Legal Submissions on behalf of The Defendants**

17. Mr. Hawke on behalf of the Attorney General argues that the starting point is that an alleged impugned legislation is always to be presumed constitutional until such time as a competent court declares it inconsistent with the Belize Constitution. He cites ***de Freitas v the Permanent Secretary of the Ministry of Agriculture (Antigua and Barbuda)*** [1998] UKPC 30:

*“It is also accepted that in the construction of statutory provisions which contravene human rights and freedoms there is a presumption of constitutionality (Attorney General of the Gambia v Momodue Jobe [1984] AC 689) and that in construing constitutional provisions a liberal approach is required (Minister of Home Affairs v Fisher [1980] AC 319).”*

18. Mr. Hawke also relies on ***Dean Boyce and British Caribbean Bank v the Attorney General of Belize*** CCJ No. 1 of 2012 at paragraph 17:

*“However, the majority considered that it is also trite that until and unless set aside, the 2011 legislation is valid and must be given full force and effect. Its validity is to be presumed ...”*

While Mr. Hawke concedes that section 6(3) of the Constitution of Belize guarantees to everyone the presumption of innocence, he states that that guarantee is not absolute. Section 6(10)(a) of the Constitution itself provides that where any law requires the accused to prove particular facts, that law would not be held to be inconsistent or in contravention of section 6(3)(a) Mr. Hawke therefore submits that section 6A(4)(b) of the Firearms (Amendment) Act 2010 falls squarely within the ambit of section 6(10)(a) of the Constitution of Belize. He argues that the onus on the accused is to merely rebut the presumption of possession of the firearm and that is protected and saved by the Constitution of Belize in section 6(10)(a), which emasculates section 6(3) by striking that balance between the rule of law and the rights of the accused. Mr. Hawke agrees that it is not every reversal of burden to prove certain facts enacted by law that will be protected by section 6(10) of the Constitution. However, he contends that in the case at bar the presumption can be rebutted if on a balance of probabilities evidence can be adduced to show that an accused person does not fall within the category. He therefore submits that the imposition of the presumption is reasonable and proportionate.

19. Mr. Hawke also submits that the CCJ in *Attorney General v Philip Zuniga et al* has indicated that section 6(10)(a) comes into play with reference to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. He also refers to the New Zealand case of *Paul Rodney Hansen v The Queen*, NZ Supreme Court [2007] NZSC where the Supreme Court

did not find that the provisions of the Misuse of Drugs Act that reversed the onus of proof was repugnant to the New Zealand Bill of Rights.

20. Mr. Hawke also refers to the three pronged test laid down by the Privy Council in ***de Freitas v The Permanent Secretary of the Ministry of Agriculture*** [1998] UKPC 30 where the Privy Council adopted an approach borrowed from ***Nyambirai v National Social Security Authority and Another*** [1996] 1 LRC 64 where the court used that test to determine whether the restriction was reasonably justified in a democratic society. The court asked itself the following questions: (i) whether the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) whether the measures designed to meet the legislative objectives are rationally connected to it; and (iii) whether the means used to impair that right or freedom are no more than is necessary to accomplish the objective. He submits that in the case at bar, the imposition on the accused of proving that he is not in possession of the firearm or ammunition is reasonably required against the backdrop of why these measures were taken by the state. The Firearms (Amendment) Act 2010 was passed as a result of accelerated growth in the occurrence of gun related offences, including murder and robbery. In 2010 Belize saw 130 murders on record- an increase of twenty eight over the year 2008 (most of which were firearm related). The purpose of the amendment can be found in the long title of the Amendment which reads:

*“An Act to amend the Firearms Act, Chapter 143 of the Substantive Laws of Belize, Revised Edition 2000-2003, to further strengthen the law against possession of unlicensed firearms and ammunitions; to increase the penalties for firearm offences; and to provide for matters connected therewith or incidental thereto.”*

21. Mr. Hawke also cites the original section 6A(1) to the Firearm(Amendment) Act 2008 as follows:

*“Where any firearm or ammunition is found in or on any premises owned or occupied by more than one person such firearm or ammunition shall be deemed to be in joint possession of all such persons and it shall be for the said person or persons to adduce evidence to show that it was there without his or their knowledge or consent.”*

That section was replaced with the present section 6A(1) of the Firearm (Amendment) Act 2010 as follows:

*6A (1) “Where any unlicensed firearm or ammunition is found in or on any premises owned or occupied by more than one person, any of the following persons shall be presumed to be in possession of that unlicensed firearm or ammunition:*

- (a) The person in control of the premises;*
- (b) The person ordinarily resident in or on the premises;*
- (c) The person ordinarily employed in or on the premises; or*
- (d) The person in control of any cupboard, locker or other container or thing in which the firearm was found.*

*6A(4) (a) The presumptions made under subsections (1) to (3) shall be made where the Crown can show that it was unable to link, with certainty, the possession of the firearm or ammunition to any other person.*

*(b) It shall be for the person presumed to be in possession of the unlicensed firearm or ammunition to adduce evidence to rebut the presumption.”*

22. Mr. Hawke contends that the effect of the new amendment in the Firearms (Amendment) Act 2010 was to narrow the application of section 6A(1) to exclude persons who would have otherwise been caught by the wide net of section 6A(1) Firearms (Amendment) Act 2008. In effect the original provision was more draconian (he submits) since it was a deeming provision because it was as if a person was regarded as guilty. Mr. Hawke says that it had become necessary by section 6A(4)(a) of the

Firearms (Amendment) Act 2010 that where the Crown was unable to link with certainty the firearm or ammunition to any other person, then the presumption in section 6A4(b) would be triggered against the categories of person in section 6A(1). This mechanism is important in the state being able to hold individuals who may be in a position to determine who is in possession of the illegal firearms or ammunition accountable.

23. Mr. Hawke contends that the legislative objective is to deter the possession of illegal firearm or ammunition. It is sufficiently important to limit the fundamental right under section 6(3)(a) of the Constitution because the possibilities and consequences of evasion by individuals within proximity of the firearms or ammunition would be too great for effective control. The presumption cast on the accused is designed to highlight to law abiding community the severity of having or associating with individuals in possession of illegal firearms or ammunition. Mr. Hawke also argues that the means to impair the right under section 6A(1) of the Firearms (Amendment) Act is no more than is necessary to accomplish the objective of deterring possession of illegal firearms or ammunition.

24. Mr. Hawke cites *The Attorney General of Hong Kong v Lee Kwong-Kut* [1993] AC 951 where the Privy Council found that section 25(4) of the Drug Trafficking (Recovery of Proceeds) Ordinance which prescribes special defences (to be proven by a defendant on a balance of probabilities) did not offend against Article 11(1) of the Hong Kong Bill of Rights (the right to be presumed innocent). He commends the following declaration by the Privy Council in that case to this Court:

*“In the context on the war against Drug Trafficking, for a defendant to bear that onus under section 25(4) is manifestly reasonable and clearly does not offend Article 11(1).”*

25. The Learned Deputy Solicitor General also cites with approval the reasoning of the House of Lords in **R v Lambert** [2001] UKHL 37 where the issue was whether a reversal of the burden of proof provision in section 28 (2) and (3) of the Misuse of Drugs Act 1971 was incompatible with the presumption of innocence contained in Article 6.2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Lord Steyn said:

*“It is now necessary to consider the question of justification for legislative interference with the presumption of innocence. I am satisfied that there is an objective justification for some interference with the burden of proof in the prosecutions under section 5 of the 1971 Act. The basis for this justification is that sophisticated drug smugglers, dealers and couriers typically secret drugs in some container, thereby enabling the person in possession of the container to say that he was unaware of the contents. Such defences are commonplace and they pose real difficulties for the police and prosecuting authorities.”*

26. Mr. Hawke argues that it was necessary for the legislative interference with the presumption of innocence in section 6A(4)(b) for the person presumed to be in possession of the unlicensed firearm or ammunition to adduce evidence to rebut the presumption. He submits that the burden of proof is an evidential and not a legal one, and that since the *mens rea* of the accused as to possession of the firearm is not a vital element of the charge under section 6A, the production of some evidence that the accused was not in possession can rebut the presumption of guilt since the evidential burden is on a balance of probabilities. He further argues that the public policy consideration of securing prosecution of the persons culpable and the nature of the crime fight in Belize (especially gang violence involving firearms) required that a fetter be placed on the presumption of innocence. The presumption is reasonable, and proportionate and maintains the rule of law and is consistent with section 6(10)(a) of the Constitution of Belize. In the present case, applying the test in **Dallison v Caffery**

[1964] 2 All ER 610, the police officers had reasonable cause to arrest Mr. Major when they applied section 6(A)(b) of the Firearms (Amendment) Act 2010 when they discovered he was ordinarily resident in or on the premises. The claim should therefore be dismissed.

### **Decision**

27. I am grateful to both counsel for the extensive submissions which have been invaluable to this court in determining this issue. This is not a simple case by any means. I believe the essence of the conflict in this matter that needs to be resolved is articulated in ***R v Lambert*** [2001] UKHL 37 (cited by Mr. Hawke in his written submissions) where the beautiful language of Sachs J of the South African Constitutional Court in ***State v Coetzee*** [1997] 2 LRC 593 was cited with approval by Lord Bingham of Cornhill in ***HM Advocate v McIntosh Privy Council*** (5/2/2001):

*“There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The **starting point** of any balancing enquiry where constitutional rights are concerned **must be** that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences **massively outweighs** the public interest in ensuring that a particular criminal is brought to book... Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, carjacking, housebreaking, drug-smuggling, corruption...the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.” (emphasis mine)*

The Constitution of Belize is the supreme law of Belize. The presumption of innocence is guaranteed by that Constitution to each and every individual by section 6. There can be absolutely no violation of those sacred rights unless that violation is limited, proportional and reasonable. Now was the GSU justified in arresting Mr. Major under the Firearms (Amendment) Act 2010? He certainly came within the ambit of the section by the mere fact that he was “*ordinarily resident*” at the premises. I fully agree with the Learned Solicitor General that the appalling increase in crime in Belize is such that the amendment needed to be passed in an effort to control firearm and ammunition related offences. No one, not even learned Defence counsel, can quarrel with the indisputable fact that the legislative objective is a valid one and Mr. Sylvester readily concedes this point. However, the burning questions remain: Is the means employed by the legislature in passing the Firearms (Amendment) Act 2010 to curtail the fundamental right (the presumption of innocence) rationally connected to the legislative objective? And is the limitation of the right by the legislature no more than is necessary to meet that objective?

28. To determine whether the curtailment of the fundamental right was rationally connected to the legislative objective in the ***Paul Rodney Hansen v The Queen*** SC58/2005 cited by Mr. Hawke, the Supreme Court of New Zealand performed a comprehensive test to determine these two factors. The legislation under review was the Misuse of Drugs Act 1975 s6(6) where those persons who are in possession of controlled drugs above specified quantities are deemed (until the contrary is proved) to possess the drugs for the purpose of supply or sale. The appellant argued that requiring

an accused to persuade a jury that he did not have the quantity of drugs for the purpose of sale or supply was inconsistent with his right to be presumed innocent (until proved guilty) guaranteed to him under the New Zealand Bill of Rights Act section 25(c). In assessing whether there was a rational connection between the legislative objective and the means by which it was implemented i. e. section 6(6) of the Misuse of Drugs Act, Blanchard J examined the process used by the New Zealand legislature to determine what would be the minimum quantity for each controlled drug which would trigger the reverse onus of proof in section 6(6). He then looked at the provisions under the Act that required that the Minister establish an Expert Committee to advise the Minister on drug classification matters. The Expert Committee has the following functions:

*“(a) to carry out medical and scientific evaluations of controlled drugs, and any other narcotic and scientific evaluations of controlled drugs, and any other narcotic or psychotropic substances, preparations, mixtures, or articles; and*

*(b) to make recommendations to the Minister about -*

*(i) whether and how controlled drugs or other substances, preparations, mixtures, or articles should be classified; and*

*(ii) the amount, level, or quantity at and over which any substance, preparation, mixture, or article that is a controlled drug (or is proposed to be classified as a controlled drug) and that is to be specified or described in clause 1 of Schedule 5, is to be presumed for supply; and*

*(iii) the level at and over which controlled drugs to which clause 2 of Schedule 5 applies are presumed to be for supply; and*

*(c) to increase public awareness of the Committee's work, by( for instance) the timely release of papers, reports and recommendations.”*

His Lordship went on to detail the members of the Committee who would advise the Minister as follows:

*“Up to five people with expertise in pharmacology, toxicology, drug and alcohol treatment, psychology and community medicine; up to three people employed in the Public Service who have appropriate expertise in Public Health, the appropriateness and safety of pharmaceuticals and their availability to the public and border control, one member of the Police; one employee of the Ministry of Justice who has appropriate expertise in matters relating to the justice system and one person representing the views of consumers of drug treatment services.*

*Before recommending the making of a classification by Order in Council the Minister is obliged to consult with and consider the advice given by the Expert Committee and must have regard to the following matters:*

*(a) the likelihood or evidence of drug abuse, including such matters as the prevalence of the drug, levels of consumption, drug seizure trends, and the potential appeal to vulnerable populations; and*

*(b) the specific effects of the drug, including pharmacological, psychoactive, and toxicological effects; and*

*(c) the risks, if any, to public health; and*

*(d) the therapeutic value of the drug, if any; and*

*(e) the potential for use of the drug to cause death; and*

*(f) the ability of the drug to create physical or psychological dependence; and*

*(g) the international classification and experience of the drug in other jurisdictions; and*

*(h) any other matters that the Minister considers relevant. [76] The matters that the Minister must have regard to and on which the Expert Committee may give advice in connection with adding controlled drugs to the Schedule or setting trigger figures are:*

*(a) the amount of the drug that could reasonably be possessed for personal use, including, without limitation, levels of consumption, the ability of the drug to*

*create physical or psychological dependence, and the specific effects of the drug; and*

*(b) the amount, level, or quantity at and over which the drug is presumed to be for supply in other jurisdictions; and*

*(c) any other matters that the Minister considers relevant.”*

After conducting this extensive examination of the process employed by Parliament in classifying controlled drugs and the setting of the minimum amount which will trigger the presumption in the case of each individual drug, His Lordship determined that the process had been carefully constructed: *“The specification of the Expert Committee and the numerical balancing of the varying fields of expertise within that membership are designed to ensure that in advising the Minister, the Expert Committee takes account of the factors which Parliament believes to be relevant to its recommendations”*. He later stated that *“On examination of the methodological framework underpinning the practical operation of s6(6), there appears to be a rational connection between the objective of removing a significant impediment to obtaining the conviction of those who possess drugs for the purpose of supply to consumers and the means used to achieve that objective. Parliament was entitled in my view to consider that the legislative scheme would ensure that the operation of the reverse onus was not arbitrary, unfair or based on irrational considerations. In this case we have no evidence that it has not operated as intended”*.

29. Alas, when I examine provisions of the Firearms (Amendment) Act in the case at bar, I cannot say that there is any rational connection between the lofty and indeed, essential

legislative objective of reducing the prevalence of firearms and ammunition related offences, and the means used to achieve that objective. I have perused the Hansard to discern the reasoning of Parliament in passing the amendment but with the greatest of respect I do not see anything which would lead me to find that this amendment was anything other than a spontaneous reaction to an admittedly terrifying, frustrating and vexing problem plaguing Belizean society. I would have been in a position to answer this question in the affirmative, and I would have gladly done so, if there were some evidence presented in this court by the Learned Attorney General, for example, that in passing this Amendment to the Firearms Act 2010, Parliament had taken into consideration comprehensive reports on offences involving firearms and ammunition related offences prepared by key players such as the Police, the Director of Public Prosecutions, Civil Society, Church and community leaders involved in the day to day fight against crime. Without evidence of an extensive and methodological process, the amendment appears to be arbitrary and an anxious attempt to address the vexing and recurrent problem which occurs when, as Mr. Hawke vividly describes, in oral arguments, law enforcement officers seek to bring perpetrators to justice but are met by repeated plaintive cries of “Dah noh me”. It is often the case that family members may be involved in aiding the perpetrators or turning a blind eye to the criminal activities occurring in the household due to financial benefits coming into the house as proceeds of crime. I am constrained to agree with Mr. Sylvester's submission that the effect of the Amendment of having all persons above the age of criminal culpability living at a premises or house being detained, arrested and charged is unreasonable, arbitrary and

excessive and as a consequence unconstitutional. Mr. Major sat behind bars for 38 days because of the “*crime*” of being “*ordinarily resident*” on premises where illegal guns and ammunitions were discovered. This is an injustice rendered even more egregious by the fact that at the time of Mr. Major’s arrest and imprisonment, his stepson Kent Lynch had already pleaded guilty to the offences; thus rendering pellucidly invalid the Defence’s arguments that the presumption would only arise in situations where the Crown is unable to link with certainty the firearm or ammunition to any other person.

30. In answering the final question whether the third prong of the *de Freitas* test was satisfied, that is, whether the means used to impair the right is no more than is necessary to accomplish the legislative objective, I conclude that the answer is a resounding no. In *Hanson’s* case cited above, Blanchard J of the New Zealand Supreme Court was in a position to answer that question in the affirmative. In so doing, His Lordship held that “*It is important to emphasise that the Court does not have before it any evidence that any trigger levels have been inappropriately set*”. Having determined that there was a rational connection between the legislative objective and the means used to achieve it, His Lordship was able in that case to conclude that “*The effect on the presumption of innocence is, on balance, proportionate to the objective of facilitating the conviction of those who sell small quantities of drugs to consumers with potentially terrible consequences for New Zealand society ...*” Having found that there is no such rational connection between the legislative objective and the means used to achieve it, in the case at bar, I also find that the means used to impair the right to presumption of innocence is not proportional to the legislative objective. I find that the section in the

eminent words of Sanders J in CCJ decision of **Attorney General v Zuniga** places a legal burden on the accused, placing the accused in the unenviable position of having to prove a negative, (provide evidence to the prosecution that he does not know of the guns or ammunition), in order to avoid conviction. I find this is not a special defence, but an important ingredient of the offence, *mens rea*. This is an unjustifiable interference with the presumption of innocence and must be struck down. I therefore find that section 6A(1) of the Firearms (Amendment) Act is unconstitutional on this basis.

31. At the time of writing this judgment, I discovered that section 6A(1) of the Firearms Act No. 28 of 2010 has since been repealed and replaced by the following section of the Firearms (Amendment) Act 2014:

*“BILL  
for*

*AN ACT to amend the Firearms Act, Chapter 143 of the Laws of Belize, Revised Edition 2000-2003, to rationalise the evidential provisions relating to the possession of a firearm or ammunition; to relieve hardship in genuine cases; and to provide for matters connected therewith or incidental thereto.*

*(Gazetted.....2014).*

*BE IT ENACTED, by and with the advice and consent of the House of Representatives and the Senate of Belize and by the authority of the same, as follows: –*

*1. This Act may be cited as the*

**FIREARMS (AMENDMENT) ACT, 2014,**

*and shall be read and construed as one with the Firearms Act which, as amended, is hereinafter referred to as the principal Act.*

*2. Section 6A of the principal Act [inserted by Act No. 28 of 2010] is hereby amended by repealing subsection (1) thereof and replacing it by the following:-*

*“6A. (1) Where any unlicensed firearm or ammunition is found in or on any premises owned or occupied by more than one person, the following provisions shall have effect:*

- (a) where any such firearm or ammunition is found in or on any premises occupied by a family, the head of the family or the person in charge or control of the premises shall, for the purposes of this Act, be presumed to be keeper of such firearm or ammunition, unless there is evidence to the contrary;*
- (b) where any such firearm or ammunition is found in or on any premises occupied by a group of persons not constituting a family, the lessee of the premises (if there be one), or the person in charge or control of the premises shall, for the purposes of this Act, be presumed to be the keeper of such firearm or ammunition, unless there is evidence to the contrary;*
- (c) where any such firearm or ammunition is found in a room, cupboard, locker or other container, the person in occupation or control of such room, cupboard, locker or container shall, for the purposes of this Act, be presumed to be the keeper of such firearm or ammunition unless there is evidence to the contrary;*
- (d) where a case falls outside the scope of subparagraphs (a), (b), or (c) above and it is unclear who is the owner or keeper of such firearm or ammunition, the Police shall, before preferring any criminal charges, seek legal advice on the matter.”*

I find the words used in the preamble to be of import, as the bill states it is

*“An ACT to amend the Firearms Act, Chapter 143 of the Laws of Belize, Revised Edition 2000-2003, to rationalise the evidential provisions relating to the possession of a firearm or ammunition; to relieve hardship in genuine cases; and to provide for matters connected therewith or incidental thereto.” (emphasis mine)*

I note that Parliament has abolished the provision which indicts a person for being “ordinarily resident” on premises where illegal firearms or ammunition are found and I applaud them for doing so. This Bill was passed into law on October 15<sup>th</sup>, 2014.

32. Having found that in favour of Mr. Allyson Major in this Claim, I grant him the relief sought as follows:

1) A declaration that the application of section 6A(1)(a) & (b) of the Firearms (Amendment) Act 2010 (Act No. 28 of 2010) by the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant arresting the Claimant jointly with Leroy Gomez, Kent Lynch, Errol Lynch Sr., Woodrow Reyes Jr., Virginie Alvarez and Yvette Lynch for the offences of kept firearm without a gun license, was in breach of Allyson Major's section 5(1)(e) right of the Constitution not to be deprived of his personal liberty, unless upon reasonable suspicion of having committed, or being about to commit, a criminal offence.

2) A Declaration that the application of section 6A(1)(a) and(b) of the Firearms (Amendment) Act 2010 (Act No. 28 of 2010) by the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant which lead to the detention, arrest and trial of Allyson Major for the offences of kept firearm without a gun license infringed Mr. Major's constitutional right of presumption of innocence as contained in section 6(3)(a) of the Belize Constitution.

3) I award general damages of \$6000 BZ and special damages of \$6,050 BZ as special damages for the damage to the Claimant's character, credit, and reputation as a law abiding citizen, breaches of his constitutional rights which led to his incarceration for 38 days. I agree with the Deputy Solicitor General that this is not a case for vindictory damages, having regard to the case of *Juanita Lucas and Celia Carrillo v. The Attorney General of Belize* [2015] CCJ 6 (AJ) and *The Attorney General v. Ramanoop* (2005) 66 WIR 334 (UKPC).

4) Costs awarded to the Claimant to be agreed or assessed.

***Dated this Monday, 11<sup>th</sup> day of April, 2016***

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**Michelle Arana**  
**Supreme Court Judge**