

ONTARIO COURT OF JUSTICE

DATE: 2023 01 25
COURT FILE No.: Toronto

B E T W E E N :

HIS MAJESTY THE KING

— AND —

RIMZAN LYE, BENJAMIN OWUSU AND RIKISHA REDDON BARROW

Before Justice Riun Shandler
Heard on November 14, 15, 16, 18, 29 and December 5, 2022
Reasons for Judgment released on January 25, 2023

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SHANDLER J.:

I. Overview

[1] Mr. Rimzan Lye, Mr. Benjamin Owusu and Ms Rikisha Reddon Barrow are charged with various firearms and weapons offences arising from the search of a residence and a vehicle conducted by the police pursuant to two search warrants granted on April 8, 2021.

[2] When the police breached the residence door in the early morning hours of April 9, 2021, Mr. Lye went onto his balcony where he threw a gun and then scaled down the building to the unit below. The police arrested him and recovered a loaded Glock 19 firearm, a magazine, and ammunition.

[3] The police found two other individuals inside the unit – Mr. Benjamin Owusu and Ms Rikisha Reddon Barrow – as well as three firearms, five magazines and ammunition. They included a Glock 45, a Glock 17 and a loaded Iver Johnson revolver.

[4] As a result of the police search, Mr. Lye, Mr. Owusu and Ms. Reddon Barrow were jointly charged with four different offences in relation to each of the four firearms, as follows:

- Four counts of possession without being the holder of a license, contrary to s. 91(1) of the *Criminal Code* (counts 1 – 4);
- Four counts of possession while knowingly not being the holder of a license, contrary to s. 92(1) of the *Criminal Code* (counts 11 – 14);
- Four counts of careless storage of a firearm, contrary to s. 86(1) of the *Criminal Code* (counts 5 – 8) and,
- Four counts of possession of a firearm for a purpose dangerous to the public peace, contrary to s. 88(1) of the *Criminal Code* (counts 17 – 20).

[5] Mr. Lye, Mr. Owusu and Ms Reddon Barrow were additionally jointly charged with the following:

- Two counts of possession of a loaded firearm without being the holder of a license in relation to the Iver Johnson handgun and the Glock 19, contrary to s. 95 of the *Criminal Code* (counts 15 – 16);
- Two counts of careless storage of ammunition in relation to both the Iver Johnson handgun and the Glock 19, contrary to s. 86(1) of the *Criminal Code* (counts 9 - 10)
- Two counts of possession of ammunition for a purpose dangerous to the public peace in relation to both the Iver Johnson handgun and the Glock 19, contrary to s. 88(1) of the *Criminal Code* (counts 21 – 22)
- Two counts of possession of a firearm knowing that the serial number had been defaced in relation to both the Glock 45 and the Glock 17, contrary to s. 108(1) of the *Criminal Code* (counts 23 – 24);
- Six counts of possession of a prohibited device, a magazine, in relation to the magazine found alongside the Glock 19, the Glock 45, the Glock 17 and the three magazines found in the warming drawer, contrary to s. 92(2) of the *Criminal Code* (counts 25 – 30).

[6] Finally, Mr. Lye was additionally charged with:

- Eight counts of possession of a firearm while prohibited by a prohibition order in relation to the Iver Johnson, the Glock 19 and the two Glock 45's, contrary to s. 117.01(1) of the *Criminal Code* (counts 31 – 38); and,
- Two counts of being in possession of ammunition in relation to both the Iver Johnson handgun and the Glock 19, contrary to s. 117.01(1) of the *Criminal Code* (counts 39 40).

II. Rimzan Lye

[7] Mr. Lye brought an application to exclude the results of the search warrant which was dismissed. He then made the following admissions pursuant to s. 655 of the *Criminal Code*:

Accused Rimzan Baba Lye was in possession of the following items on April 9, 2021 secured by Toronto Police during the investigation of this matter:

- a) In relation to Count 13 on the information – section 92 of the *Criminal Code* – prohibited firearm Glock 45 found on the kitchen island of unit 315.
- b) In relation to Count 14 on the information – section 92 of the *Criminal Code* – restricted firearm Glock 17 found on the kitchen counter of unit 315.
- c) In relation to Count 16 on the information – section 95 of the *Criminal Code* – prohibited firearm Glock 19 which was thrown by accused Rimzan Baba Lye from the balcony and discovered by Toronto Police officers on the pavement in front of that unit.
- d) In relation to Count 25 – section 92 of the *Criminal Code* – prohibited device, three magazines found in the stove drawer in the kitchen of unit 315.

The three firearms listed in points 3 a, b, and c have been test fired and are firearms per definition in the *Criminal Code*. The ammunition found inside Glock 19 (item 3c) has also been tested is ammunition as per definition in the *Criminal Code*. The magazines mentioned (item 3d) have been examined and are prohibited devices as per definition in the *Criminal Code*.

Accused Rimzan Baba Lye was subject to two section 109 of the *Criminal Code* weapon prohibitions on April 9, 2021, and as such he was breaching both of these prohibitions while in possession of items listed in 3 a, b, c, and d.

Accused Rimzan Baba Lye admits that all the essential elements in relation to counts 13, 14, 16, 25, 33 and 36 are met by the Crown.¹

[8] On the basis of the admitted facts, I am making findings of guilt in respect of Mr. Lye on counts 13, 14, 16, 25, 33 and 36.

III. Benjamin Owusu and Rikisha Reddon Barrow

[9] Mr. Benjamin Owusu and Ms. Rikisha Reddon Barrow did not join Mr. Lye in these admissions. The Crown called members of the Emergency Task Force (“ETF”) who breached the door and secured the unit as well as the officers who searched the unit. Various individuals testified as to seeing two Glock 45’s and magazines in plain sight as

¹ Ex. 7, Facts Admitted at Trial.

well as finding another firearm inside a satchel containing Mr. Owusu's identification as well as three additional magazines in the stove drawer.

[10] In addition to hearing evidence from ETF officers who cleared and secured the unit and Toronto Police Service (TPS) officers who conducted the search and found the items noted above, the following facts were also admitted at trial:

- The Glock 45 and Glock 17 function properly as semi-automatic handguns and the Iver Johnson functions properly as a revolver. All three firearms are prohibited firearms as defined in s. 84 of the *Criminal Code*.²
- The ammunition found inside the Iver Johnson revolver was test fired and is ammunition as defined in s. 84 of the *Criminal Code*.³
- All magazines were prohibited devices as defined in s. 84 of the *Criminal Code*.⁴
- Neither Mr. Owusu⁵ nor Ms Reddon Barrow⁶ possess a license or registration certificate to possess a firearm.

[11] At the conclusion of the Crown's case, Ms Reddon Barrow brought a motion for a directed verdict of acquittal on all counts. Mr. Owusu also sought a directed verdict but only in relation to the counts not relating to the Iver Johnson handgun found in the satchel.

[12] I granted the directed verdict, in part, and directed verdicts of acquittal for both Ms Reddon Barrow and Mr. Owusu for:

- all counts relating to the items thrown off the balcony by Mr. Lye which consists of counts 2, 6, 10, 12, 16, 20, 22, and count 25.

[13] I further directed verdicts of acquittal for Ms Reddon Barrow for:

- all counts relating to the Iver Johnson handgun and ammunition found in the satchel with Mr. Owusu's identification which consists of counts 1, 5, 9, 11, 15, 19 and 21.

[14] Following that ruling, both Ms. Reddon Barrow and Mr. Owusu testified. Ms. Reddon Barrow testified she arrived at Mr. Lye's condominium a short time before the police arrived. She testified she had no knowledge of any guns or magazines in the condominium unit and saw no such items.

[15] Mr. Benjamin Owusu testified he was also visiting Mr. Lye at his condominium and had arrived sometime before Ms. Reddon Barrow. He testified he had no knowledge of any guns or magazines in the condominium unit. He testified he had never seen any such items. In respect of the firearm in the satchel, he acknowledged owning the satchel but denied any knowledge of the firearm the police testified was found in it.

² Ex. 21, Certificate of Analysis.

³ Ex. 22, Certificate of Analysis.

⁴ Ex. 21, Certificate of Analysis.

⁵ Ex. 23C, 23D, Affidavits.

⁶ Ex. 23E, 23F, Affidavits.

IV. Issues

[16] The issue then in relation to both Mr. Owusu and Ms Reddon Barrow comes down to one of possession. Has the Crown proven beyond a reasonable doubt that Mr. Owusu and Ms Reddon Barrow had possession of the firearms and magazines found in the unit?

[17] The *Criminal Code* creates three types of possession:

Personal possession: a person has anything in possession when he has it in his personal possession (s. 4(3)(a));

Constructive possession: a person has anything in possession when he knowingly has it in the actual possession or custody of another person or has it in any place, whether or not that place belongs to or is occupied by him, for the use of benefit of himself or another person (s. 4(3)(a)(i) and (ii)); and,

Joint possession: where two or more persons with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them (s. 4(3)(b)).⁷

[18] It is common ground that *knowledge* and *control* are essential elements common to all three forms of possession. Our Court of Appeal provided the following guidance when interpreting the statutory forms of possession:

In order to constitute constructive possession, which is sometimes referred to as attributed possession, there must be knowledge which extends beyond mere quiescent knowledge and discloses some measure of control over the item to be possessed. [cites omitted].

In order to constitute joint possession pursuant to s. 4(3)(b) of the *Code* there must be knowledge, consent, and a measure of control on the part of the person deemed to be in possession. [cites omitted].

The element of knowledge is dealt with by Watt J. in the case of *R. v. Sparling*, [1988] O.J. No. 107 (H.C.J.), at p. 6 (QL):

There is no direct evidence of the applicant's knowledge of the presence of narcotics in the residence. It is not essential that there be such evidence for as with any other issue of fact in a criminal proceeding, it may be established by circumstantial evidence. In combination, the finding of narcotics in plain view in the common areas of the residence, the presence of a scale in a bedroom apparently occupied by the applicant, and the applicant's apparent occupation of the premises may serve to found an inference of the requisite knowledge.

.....

The onus is on the Crown to prove beyond a reasonable doubt, all of the essential elements of the offence of possession. This can be accomplished by direct evidence or may be inferred from circumstantial evidence. In *R. v. Chambers*, *supra*, at p. 448 C.C.C., Martin J.A. noted that the court may draw "appropriate inferences from evidence that a prohibited drug is found in a room under the control

⁷ Section 4(3), *Criminal Code*, R.S.C. 1985, c. C-46.

of an accused and where there is also evidence from which an inference may properly be drawn that the accused was aware of the presence of the drug".⁸

[19] This is also a case of circumstantial evidence. Where evidence on one or more of the essential elements of an offence rests primarily or wholly on circumstantial evidence, the trier must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn is that the accused is guilty. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the proof beyond the reasonable doubt standard. A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense. The trier of fact should consider other plausible theories and other reasonable possibilities which are inconsistent with guilt. Other plausible theories or other reasonable possibilities must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.⁹

[20] In determining whether the Crown has proven that either Mr. Owusu or Ms Reddon Barrow possessed the firearms and magazines beyond a reasonable doubt, credibility is critical. Both Mr. Owusu and Ms. Reddon Barrow have testified that they had no knowledge of the firearms and magazines that various officers testified were either in plain sight, found in Mr. Owusu's satchel or contained in the warming drawer.

[21] In determining all of these issues, I am guided by the following fundamental principles underlying our criminal law.

[22] Mr. Owusu and Ms Reddon Barrow are presumed innocent of the criminal allegations made against them. They have nothing to prove. The Crown must prove the charges beyond a reasonable doubt.

[23] Reasonable doubt requires more than a belief that either Mr. Owusu or Ms Reddon Barrow is possibly or even probably guilty. As a standard, reasonable doubt lies far closer to absolute certainty than it does to a balance of probabilities. At the same time, reasonable doubt does not require proof beyond all doubt, nor is it proof to an absolute certainty.

[24] The Supreme Court of Canada has given the following framework when making determinations of reliability and credibility:

- If I believe Mr. Owusu or Ms Reddon Barrow or the evidence favouring their defence or even if I don't believe that evidence but am left in a reasonable doubt by it, then I must acquit; and

⁸ *R. v. Pham*, [2005] O.J. No. 5127 (C.A.) at paras. 15 – 17, aff'd [2006] S.C.J. No. 26; *R. v. Morelli*, 2010 SCC 8 at paras. 16 – 17.

⁹ *R. v. Villaroman*, 2016 SCC 33 at paras. 30, 37.

- Further, even if I am not left in a reasonable doubt by the evidence favouring the defence, I must ask myself whether on the evidence I do accept, I am convinced beyond a reasonable doubt of either of their guilt.¹⁰

[25] I will first set out the evidence and my findings followed by my conclusions

V. The Evidence Called at Trial

A. ETF Officers

[26] There were two teams of officers assigned to the search of Unit 315 at 31 Tippet Road on April 9, 2021. The ETF team was led by Sergeant Eric Reimer and included Officers Matthew Harding, Ron Willers, Thomas Flowers, and Sebastian Aciu. Their task was to breach the door and then clear the unit of any occupants prior to handing the unit over to the search team.

[27] The second team was the team of police officers whose task it was to search the apartment for evidence. That team was led by Detective Victoria Morse along with Officers Rod Black, Manparette Kharbar and Brian Nishikawa.

[28] Sergeant Reimer testified that he had a tactical briefing to discuss the execution of the search warrant. ETF officers would be responsible for breaching the unit front door while other officers were positioned outside the apartment in front of the balconies. After the door was breached, the plan was to call any occupants out of the unit first before entering the unit to ensure that no occupants were inside.

[29] Sgt. Reimer was at the back of a line of officers at the apartment door. Officers Flowers and Aciu were positioned on the left side of the door frame and Officers Harding and Willers were positioned on the right side.

[30] Sgt. Reimer testified that the door was breached at 1:22 a.m. Officer Harding was responsible for announcing the police presence as the door was being breached and afterwards. During the door breach, the ETF officers received information from officers outside the unit that someone was scaling down the balcony to the unit immediately below it. Officers Harding, Willers, Flowers and Aciu remained positioned at the door while Sgt. Reimer took other ETF officers downstairs to breach that unit door in order to protect any occupants inside as well as arresting the individual who scaled down the balcony. As noted, that individual was Mr. Lye.

[31] Officers Harding, Willers, Flowers and Aciu¹¹ testified that they remained at the door while all occupants were called out. Officer Harding heard a voice come from deep within the apartment but could not see any individuals. Officer Aciu's evidence was that after Officer Harding made several call outs, a female came out of the back bedroom followed by a male wearing an orange shirt. There is no issue that the male was Benjamin Owusu, and the female was Rikisha Reddon Barrow.

¹⁰ *R. v. W.(D.)*, (1991), 63 C.C.C. (3d) 397.

¹¹ Officer Aciu's evidence was admitted at trial through an agreed statement of facts. *Ex. 20*.

[32] Officer Harding testified Officer Acui called out the male occupant first. Officer Willers testified that he took physical control of Mr. Owusu, handcuffed him, and handed him over to Det. Morse. Officer Acui then called out the female occupant who was handcuffed by Officer Willers and handed over to Det. Morse.

[33] At that point, Officer Harding went downstairs to assist with the arrest of Mr. Lye. Officers Flowers, Willers and Acui testified they remained at the doorway to the unit until Officer Harding and Sgt. Reimer returned. At 1:37 am, ETF entered the unit and secured it. The officers testified that no one entered the apartment until Sgt. Reimer ordered them inside.

[34] Sgt. Reimer entered the unit. He testified that he recalled seeing two black pistols, one on the kitchen counter and one on the kitchen island. Officer Flowers saw the two firearms in the kitchen as he was exiting the unit. He made a notation that there were two firearms located on the kitchen island that appeared to be black Glocks. Officer Flowers testified that he made a mistake in his notes and that one firearm was on the kitchen counter and the other was on the kitchen island. Officer Willers testified that he recalled seeing two firearms in plain sight in the kitchen on a countertop. He called them Glocks because they looked like Glocks, but he didn't confirm what make the firearms were. Officer Harding did not see the firearms but recalled being told by another officer that there were two firearms, one on the kitchen counter and one on the kitchen island. Officer Acui noted that he saw a Glock firearm with an empty magazine beside it on the kitchen island and another Glock firearm with an empty magazine on the kitchen counter. None of the ETF officers testified that they noted a satchel.

[35] At 1:40 a.m., the ETF declared the unit cleared and they handed it over to the search team.

B. Search Officers

[36] Officer Kharbar testified that he was part of the search team that arrived at 31 Tippet Road on April 8, 2021. Officer Kharbar testified that he saw the target vehicle enter the building underground parking lot at 10:15 p.m. but that he could not see how many occupants were inside the vehicle.

[37] Officer Kharbar was outside the building when ETF breached the door to Unit #315 and was advised that someone from the target unit had scaled down the balcony. Officer Kharbar was later directed to go back to the target apartment and he testified he saw Mr. Owusu and Ms Reddon Barrow in the hallway outside Unit 315 as he arrived and testified that the ETF officers were exiting the unit. One of the ETF officers told Officer Kharbar that there were a couple of firearms in plain view in the kitchen. Officer Kharbar didn't recognize who the officer was as they were wearing full gear with helmets.

[38] At 1:59 a.m., Officer Kharbar made an entry video of Unit 315. That video captured a black handgun and magazine on the kitchen island, a black handgun and magazine on the kitchen counter as well as a satchel on the kitchen counter. At 2:23 a.m., after the search was complete, Officer Kharbar made an exit video.

[39] Officer Nishikawa was also part of the search team. He was in the third-floor hallway but around a corner from Unit #315 when ETF breached the door. He stood by as ETF brought out the occupants of the unit. Officer Nishikawa testified that Benjamin Owusu was handed over to him by ETF at 1:32 a.m. Mr. Owusu identified himself verbally to Officer Nishikawa who advised Mr. Owusu that he was being detained in relation to a search warrant for a firearm and gave him rights to counsel.

[40] Officer Nishikawa also dealt with Ms Rishika Reddon Barrow when she came out of the apartment some three to four minutes later. Officer Nishikawa advised Ms Reddon Barrow that she was being detained in relation to a search warrant pertaining to a firearm and read her rights to counsel.

[41] Officer Nishikawa testified that he stood in the hallway with both Mr. Owusu and Ms Reddon Barrow until Detectives Morse and Joshi came up. He testified that Mr. Owusu was handed over to Det. Cst. Joshi and that Ms Reddon Barrow was handed over to Det. Morse.

[42] Officer Nishikawa testified that he then entered unit #315 where he saw the two Glock pistols with magazines beside them on the kitchen counter and island. He then stood outside the unit until Officer Kharbar made the entry video at 1:59 a.m. Officer Nishikawa testified that he did not disturb or move anything in the unit before Officer Kharbar did the entry video.

[43] Officer Nishikawa searched the kitchen after the entry video was finished. He photographed and seized a Glock 45 with a magazine beside it on the kitchen island. He testified that there was no ammunition in either the firearm or magazine. He also photographed and seized a Glock 17 with a magazine beside it on the kitchen counter. He testified that there was no ammunition in either the firearm or magazine.

[44] Officer Nishikawa searched a Gucci satchel he found on the kitchen counter on the other side of the sink from the Glock 17. He photographed and seized a silver Iver Johnson revolver he found inside the Gucci satchel. That firearm was loaded with three rounds of ammunition and Officer Nishikawa proved it safe. Officer Nishikawa also photographed and seized a wallet or card holder he found inside the Gucci satchel that contained a number of bank cards, including a Capitol One bank card issued in the name of Benjamin Owusu that was valid until November 2023.

[45] Officer Nishikawa photographed and seized three extended magazines that he found in the warming drawer of the stove.

[46] Detective Morse came up to the third floor after the unit had been breached. She saw Mr. Owusu and Ms Reddon Barrow in the hallway and handcuffed. She testified that Officer Nishikawa turned Ms. Reddon Barrow over to her custody. Detective Morse was also present when ETF advised the search team that they could go in. Detective Morse testified that the entry video was done and when completed, the apartment was searched. Detective Morse searched the area of the balcony and recalled seeing the firearms in the kitchen as she went to that location.

C. Evidence of Rikisha Reddon Barrow

[47] Ms Reddon Barrow testified that she had known Mr. Lye for about a week before being arrested at his residence on April 9, 2021. They had spoken on the phone a few times and gone out for dinner. They continued to communicate and Mr. Lye invited her to come over to his place. Ms Reddon Barrow drove to the address Mr. Lye provided. She testified that she didn't know what time it was other than it was evening. She then testified that it could be "between eleven and midnight that I was there." Ms Reddon Barrow also testified that she was at the apartment for less than an hour before the police arrived.

[48] Ms Reddon Barrow testified she waited at the entrance to the underground parking lot until she was let in. She parked in the underground visitor's parking area and Mr. Lye brought her upstairs to his apartment.

[49] Ms Reddon Barrow testified that when she came into the unlocked apartment with Mr. Lye, she saw that there was an individual sitting on the couch whom she didn't know. That individual turned out to be Mr. Owusu. She wasn't expecting anyone else to be there and became upset. She asked Mr. Lye "Why is he here?" and Mr. Lye told her to go into the bedroom and gestured towards it. She testified that she went into the bedroom and watched Tik Tok videos on her cellphone. She testified that she then went into the bedroom bathroom when she heard "Toronto Police" with a big bang. She testified that when she exited the bathroom, Mr. Owusu was in the bedroom and told her to go out first because the police won't shoot a girl.

[50] Ms Reddon Barrow testified that she complied with the police directions to exit the unit where she was then arrested. She testified that she did not see firearms at any point, either when she came into the apartment or when she exited the apartment. She testified that had she seen firearms when she entered the apartment, she would have left immediately.

D. Evidence of Mr. Owusu

[51] Mr. Owusu had known Mr. Lye for a number of years although they didn't see each other often. He testified that he saw Mr. Lye at parties hosted by mutual friends and that they also hung out sometimes. On April 8, 2021, Mr. Owusu got an invite from Mr. Lye to hang out at Mr. Lye's place with some girls. Mr. Owusu testified that he arrived there just after midnight and parked in the underground parking lot which was open. Mr. Lye brought him upstairs to the unit.

[52] Mr. Owusu testified that he brought a Gucci satchel with him. He testified that he had bought himself the bag for his 30th birthday and acknowledged that this was the satchel later identified by the search team that contained his card holder with his bank cards in it. He also brought a bottle of Hennessy cognac and some take-out pasta in a gray plastic bag. Mr. Owusu testified that he had a charger, his phone, marijuana, and the card holder in the satchel. Mr. Owusu testified, however, that he did not bring a revolver into the unit with him and that he has never seen the revolver the police testified was found in his satchel.

[53] Mr. Owusu testified that there were a few people in Mr. Lye's unit when he arrived but that he didn't know any of them. They were standing around the kitchen island and Mr. Owusu greeted them as well as another woman who was sitting on the couch in the living room area. Mr. Owusu also sat down on the couch and testified that he put his belongings – the bottle, the bag of food, the satchel – onto an ottoman in the centre of the living room. Mr. Owusu testified that he reached into his satchel to pull out his marijuana and phone and after a few minutes, discovered that he had missed some phone calls. Mr. Owusu wanted to return the calls, so he took his marijuana and phone, gestured towards the bedroom and when Mr. Lye said "yeah", he went into the bedroom when he partially closed the door to block the sound of music playing. He rolled and lit his marijuana and then made his calls. He wanted to invite a couple of girlfriends over.

[54] Mr. Owusu testified that he stayed in the bedroom for about ten to fifteen minutes and that when he came out of the bedroom, there was no one in the apartment. He was surprised but testified that he decided to eat his food from the ottoman and watch a video on TV. A couple of minutes later, Mr. Lye came back into the apartment, this time with Ms Reddon Barrow. He had a discussion with Mr. Lye about everyone leaving after which Mr. Lye and Ms Reddon Barrow went into the bedroom where they stayed for a few minutes. When they came out, Mr. Owusu offered shots of cognac from his bottle on the ottoman which they all drank. He testified that they also smoked marijuana in the living room.

[55] Mr. Owusu testified that he got another call and went into the bedroom again to take it while Mr. Lye and Ms Reddon Barrow stayed in the living room. As he was on the phone talking to his friend, Ms Reddon Barrow walked through the bedroom and into the bathroom. Mr. Owusu testified that he finished his phone call and was smoking marijuana when he heard three bangs. Ms Reddon Barrow came out of the washroom and Mr. Owusu heard "Toronto Police" Mr. Owusu testified he told Ms Reddon Barrow to go out first because the police won't do anything to a female.

[56] Mr. Owusu testified he followed the police direction to exit the apartment where he was then arrested. Mr. Owusu testified that he saw no firearms in the apartment at any point, including when he was exiting the apartment. Mr. Owusu testified that if he had known there were firearms in the apartment, he would not have gone there.

[57] Mr. Owusu testified that he left his satchel on the ottoman in the living room and that he had never put any firearm in that satchel. Mr. Owusu testified he had no idea how his satchel ended up on the kitchen counter. Mr. Owusu agreed that there was a Hennessey bottle on the kitchen island that could be the bottle of cognac he brought. Mr. Owusu further agreed that there was a bag of food on the kitchen counter that could be the bag of food he brought.

VI. Findings

[58] I accept the evidence of the ETF officers as to how they breached the door to unit #315, directed the occupants out and the manner and nature of their search, including the firearms and magazines that they noted.

[59] The evidence of the ETF officers was clear, consistent, and largely unchallenged. The manner in which they breached the door to unit #315, including their call outs, was confirmed by other officers who were standing outside the building and who intercepted Mr. Lye as he scaled down the balcony. That evidence was also largely confirmed by Ms Reddon Barrow and Mr. Owusu who acknowledged hearing the noise of the door being breached, followed by the police callouts and directions to exit the apartment.

[60] I accept the evidence of the ETF officers that after Ms Reddon Barrow and Mr. Owusu were called out, they then went in to search for any other individuals who might still be in the apartment. The officers were searching for occupants, however, and not evidence and they searched only to the extent where an individual could possibly be hiding. That evidence was consistent and largely unchallenged.

[61] I accept the evidence of the ETF officers that during the course of that search, they noticed the firearms and magazines in plain sight on the kitchen island and counter. The ETF officers knew that they were executing a search warrant in relation to firearms and Mr. Lye had already been arrested having thrown a firearm off the balcony before scaling down it. The ETF officers would have been on high alert for firearms, and I accept their evidence that they saw the firearms and they communicated that finding so that other officers would know that guns were readily accessible in the unit.

[62] Officers Willers and Flowers both made notations that there were two firearms in plain sight on the kitchen island. Officer Willers testified that he made his notes independently and that was his recollection of the scene but acknowledged that he may have made a mistake. He testified that he looked at the scene quickly and that it was very cluttered. Officer Flowers testified that he also made his notes independently and that he made a mistake in his notes. He had an independent recollection of seeing the two firearms, one on the left, one on the right as he exited the unit between the kitchen counter and island.

[63] I accept Officer Flowers' account that he simply made a mistake in his notes and that he had an independent recollection of seeing the firearms on the counter and island respectively. That accords with the evidence of both Sgt. Reimer and Officer Aciu as to the location of the firearms. It also accords with the evidence of Officer Harding that one of the ETF officers advised that there were two firearms in plain view in the kitchen, one on the kitchen island and one on the kitchen counter. Officer Harding testified that he did not see the firearms himself as his attention was focused on the balcony and the bedroom doors. As Officer Harding testified, he was wearing a helmet, a respirator and carrying a shield in front of him that had a 3"x5" window in it. It is not surprising that in those circumstances, he would not have personally seen those items.

[64] It would be unreasonable to expect that every ETF officer would note the same observations, particularly when they were there to search for occupants, not for evidence. I accept that Officers Flowers and Willers simply made a mistake in their notes, and, in my view, nothing flows from the similar nature of that error.

[65] Similarly, I do not interpret the evidence of the various ETF officers that they did not note a satchel on the kitchen counter to mean that the satchel was not there. Rather that it was simply not notable for their purposes. Again, they were searching for

occupants, not evidence. They noted firearms in plain sight and, accordingly, readily accessible. They were not looking for hidden firearms, however, or any other potential contraband that might be secured somewhere in the unit.

[66] Officer Kharbar made an entry video at 1:59 a.m. Counsel challenged the credibility of Officer Kharbar on the basis of two prior judgments in which he was the subject of adverse credibility findings.¹² I have taken those judgments into account, but I accept Officer Kharbar's evidence that the entry video he made captured the apartment unit as it existed after the ETF officers left.

[67] The ETF officers were clear that no other officers, including officers from the search team, were allowed into the apartment until ETF cleared it. Officer Nishikawa testified that he entered the unit at 1:34 a.m. which was prior to the time that ETF cleared the unit and prior to Officer Kharbar taking the entry video. While I accept Officer Nishikawa's evidence that he entered the unit before Officer Kharbar took the entry video, it could not have happened before ETF cleared the unit at 1:40 a.m. That said, I also accept Officer Nishikawa's evidence that he did not touch or disturb any items. That testimony was not seriously disputed and the firearms and magazines in plain sight in the kitchen were already seen and noted by multiple ETF officers.

[68] I accept that the entry video is an accurate representation of the apartment after the ETF cleared it. The entry video captures what appears to be the effects of a gathering of several people in the kitchen. The entry video captures the following:

A kitchen island littered with various items, including:

- drinking vessels in various states of consumption including cups, water bottles, cans, and liquor bottles, including a bottle of Hennessy;
- Napkins, bags of food as well as candy bars and other food items;
- Cellphones; and,
- a black handgun and magazine.

A kitchen counter littered with various items, including:

- more liquor bottles;
- a black handgun and magazine adjacent to the sink;
- an open satchel on the other side of the sink.

A living room with a couch with overturned cushions and a TV on a table.

An open sliding glass door to the balcony.

[69] It is apparent from the scene of the kitchen that there had been a gathering at the unit in which people were drinking. That much is evident from the array of cans and bottles on the kitchen island and counter. It is also apparent that the items that Mr. Owusu testified he brought into the apartment – his Gucci satchel, a bottle of Hennessy and a bag of food – are either on the kitchen island or counter. I find that those items are there

¹² *R. v. Taylor*, 2010 ONCJ 396 and *R. v. Van*, 2021 ONSC 4491.

because Mr. Owusu placed them there, contrary to his evidence that he put all of these items onto an ottoman in the middle of the living room.

[70] Mr. Owusu testified that he had bought the satchel for himself as a 30th birthday present. It contained a number of personal items, including his card holder. I do not accept that Mr. Owusu would have left his satchel in a living room with a number of people he did not know for a significant period of time while he went to make a phone call. If such an event occurred, Mr. Owusu would have taken his bag with him. This was, in my view, a pretext to account for how a revolver may have gotten into his bag.

[71] It is quite notable that the entry and exit videos do not capture any ottoman. Mr. Owusu suggested that the ottoman was hidden by couch cushions, adding that it was quite small. While it might possibly explain why the ottoman is not apparent in the video, it somewhat conflicts with his evidence that the ottoman was big enough for him to place his bag of food, his satchel, and a bottle of Hennessy on it. I simply do not accept Mr. Owusu's account that he placed his satchel onto an ottoman and left it there while he went into a bedroom to place phone calls and smoke marijuana.

[72] It is self-evident from the scene captured on video that Mr. Owusu was in the kitchen with his bottle of Hennessy and bag of food, drinking and smoking along with any other occupants. It makes complete sense that he would have his satchel nearby. It follows that I do not accept Mr. Owusu's evidence that he spent all of his time while in the apartment either in the living room or the bedroom. It is apparent from the location of his personal belongings that he was in the kitchen and, given the clear consumption of alcohol there, including his bottle of Hennessy, he spent considerable time there.

[73] I do not accept Mr. Owusu's evidence that he had no knowledge of the revolver found in the satchel by Officer Nishikawa. Mr. Owusu clearly had both knowledge and control over the Iver Johnson firearm that I find he placed at some point into his satchel. It would be simply speculative to suggest that another occupant, whether Mr. Lye or another person in the unit, would have put a firearm into Mr. Owusu's bag. There would be no reason to do so. Moreover, Mr. Lye or Ms Reddon Barrow would have had no reason or opportunity to put a handgun into Mr. Owusu's satchel at the point that the police were breaching the door. To the extent that Mr. Lye had an opportunity, it was clear that he took that opportunity to exit the apartment on to the balcony. In my view, there is no other conceivable explanation for the firearm being found in the satchel other than it was in Mr. Owusu's personal possession.

[74] Mr. Owusu went some considerable length in his testimony to distance himself from the kitchen in order to disavow any knowledge of the items in plain view there. I also find that he contradicted himself. On the first occasion, he clearly agreed that his items were on the island.

Q. I am going to suggest to you that you remember your items being in the same location?

A. At that point I wasn't really paying attention to that area, but it should have been right there.

Q. On the island?

A. Yes, correct.

[75] On the second occasion, Mr. Owusu stated that he put his Gucci bag on the kitchen island, albeit he then corrected himself.

Q. Your position is, just to get this right, and this is in relation to the Gucci bag, once you get into the unit, you put that Gucci bag where exactly again?

A. On centre piece island, I mean, centre piece, whatever was in the middle, ottoman, yes.

[76] Mr. Owusu is simply not being honest with the court. He is not telling the truth about the firearm in his satchel or his knowledge of the Glock firearms and magazines on the kitchen counter and island.

[77] There was little evidence lead by the Crown that tied Mr. Owusu to the unit beyond being at the scene prior to and when the police entered. Mr. Owusu was not a leaseholder and while there was evidence of occupancy, the Crown did not lead evidence linking that occupancy to Mr. Owusu. There was no evidence that the clothing, for example, was Mr. Owusu's clothing or that there was mail or other items in the unit that could be linked to him. The only items were his satchel containing his identification that was found on the kitchen counter. Mr. Lye, on the other hand, was believed to be residing in the unit.

[78] It is also the case, however, that Mr. Owusu had knowledge of the Glocks and magazines on the kitchen counter over what was clearly an extended period of time. These items were in close proximity to his satchel that also contained a firearm. Mr. Owusu was clearly positioned to exert control over the firearms and magazines on the countertops, in much the same fashion as he controlled the firearm inside his satchel. In my view, the only reasonable inference on consideration of all of the evidence is that Mr. Owusu had both knowledge and control over the Glocks and magazines found on the kitchen counter and island.

[79] When I consider the gaps in the evidence, however, I cannot reasonably infer knowledge and control over the items that were otherwise not visible or as close at hand in the apartment. While I appreciate Mr. Owusu was in close proximity to the magazines in the warming drawer, it cannot be said on this record that he was in joint possession of them.

[80] I find that Mr. Owusu was in personal possession of the Iver Johnson handgun and in joint possession of the Glocks and magazines found on the kitchen counter and island.

[81] Mr. Owusu will be found guilty of the following in relation to all counts relating to the Glock 45, the Glock 17, the loaded Iver Johnson handgun and the magazines, subject to hearing from the parties on which counts should be stayed pursuant to the principles set out in *Keinapple*.

[82] Mr. Owusu will be acquitted on the counts relating to the three magazines found in the warming drawer, contrary to s. 92(2) of the Criminal Code (counts 26 – 30).

[83] My findings in relation to Ms Reddon Barrow are different. Ms Reddon Barrow testified that Mr. Owusu was the only individual present in the apartment when she came

in with Mr. Lye and that she almost immediately went into the bedroom where she stayed by herself until the apartment was breached by the police.

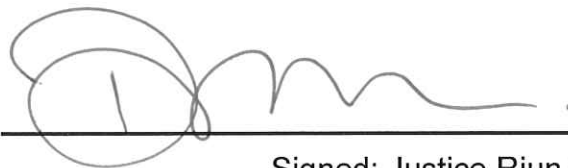
[84] I note that Mr. Owusu and Ms Reddon Barrow's accounts conflict significantly on who was alone in the bedroom. Mr. Owusu testified that Ms Reddon Barrow was drinking and smoking marijuana in the living room with him and Mr. Lye. Mr. Owusu testified that he was the one in the bedroom for significant periods of time and that Ms Reddon Barrow only came in to use the bathroom moments before the police breached the door. I have grave reservations about either of their accounts.

[85] On Ms Reddon Barrow's account, she spent upwards of an hour and twenty minutes to two hours and twenty minutes alone in that bedroom. On her evidence, she could have arrived "between eleven and midnight" and the police did not breach the unit until 1:22 a.m. I have significant doubts that Ms Reddon Barrow would have spent that amount of time in an empty bedroom while Mr. Lye and Mr. Owusu were in the apartment, particularly when she was invited over for a date.

[86] That said, much like Mr. Owusu, there was little evidence lead by the Crown that tied her to the unit beyond being at the scene prior to and when the police entered. There was no evidence of her personal items being anywhere in the apartment other than on her person. There was no evidence, for example, linking one of the cell phones on the kitchen island to Ms Reddon Barrow. Moreover, while there was evidence of occupancy, the Crown did not lead evidence linking Ms Reddon Barrow to those items of occupancy.

[87] While I have significant reservations about Ms Reddon Barrow's account and, in particular, her awareness of guns in the apartment, when I consider the gaps in the evidence, I cannot state with the requisite certainty that the only available inference is anything beyond knowledge of the visible firearms in the unit. I am not satisfied that the Crown has proven that Ms Reddon Barrow had the requisite control over these visible items and, accordingly, she will be acquitted on those charges. My same findings extend to the hidden magazines in the warming drawer. Ms Reddon Barrow is acquitted on all charges.

Released: January 25, 2023

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a series of connected loops and a long horizontal stroke extending to the right.

Signed: Justice Riun Shandler