[2014] JMCA Crim 54

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 17/2014

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

CHEDDI CREIGHTON v R

Peter Champagnie for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Gavin Stewart for the Crown

24 November and 19 December 2014

PANTON P

[1] The appellant was convicted on 12 March 2014 of a breach of the Firearms Act, that is, for losing his licensed firearm through negligence. His Hon Mr Wilson Smith, Resident Magistrate, Saint James, who presided at the trial in Montego Bay, imposed a fine of $80,000.00 with an alternative of three months imprisonment. The fine was paid on that date.

[2] The focus of the appeal is on the circumstances which gave rise to the loss of the firearm, and whether there was a need for the appellant to have had a safe in which to keep the firearm.

[3] On 20 May 2013 at about 7:00 pm the appellant made a telephone report to Corporal Rohan McFarlane of the Coral Gardens Police Station. As a result, Cpl McFarlane went to the residence of the appellant in Ironshore, Saint James. The corporal noted that the residence, a second floor apartment, had an entrance door that was damaged in the area where it "would normally be bolted in". However, he stated that the house "did not look like it was broken into". Detective Corporal Jason Jackson, who joined Cpl McFarlane at the scene, noticed that a portion of the door jam had been damaged "as if there was a forced entry". However, he said that he realized "that there was no impression on the outside to create this force". As Det. Cpl Jackson walked through the apartment, he observed "a medium size screw driver on a counter in the kitchen which is in close proximity to the door".

[4] There were clothes and other articles on the floor of the living room. In the bedroom, there were items of clothing strewn on the bed and floor. The appellant showed Cpl McFarlane a laptop computer bag in which he said the computer and the firearm had been placed. The latter items were missing. Nothing was missed from the bathroom in which there were jewellery and cash.

[5] Both corporals testified that they did not see a safe in the apartment, and the absence of one was confirmed by the appellant.

[6] The apartment is located in a "gated community" which has about 30 apartments, and a guard house. The premises are secured by a wall, and a code is

needed to enter the property. There is a pedestrian gate beside the main entrance. There is a guard on duty at nights, but there is none during the day.

[7] Det. Special Cons. Worrell Grey, a certified crime scene investigator, visited the premises on the said night of the report and took photographs of the scene. He noticed a screwdriver and an aerosol can on the kitchen counter. He did not secure that screwdriver. He developed "several latent [finger] prints on both sides of the front door". The appellant was requested to provide his own fingerprints in order to eliminate him from consideration as regards the housebreaking. The appellant complied. However, up to the time of trial, the result of the comparisons had not been provided.

[8] On 27 May 2013, Det. Cpl. Jackson telephoned the appellant and informed him that he was investigating a case of negligent loss of the firearm and invited him to attend at the police station. The appellant attended at the station and Det. Cpl Jackson cautioned him. The detective corporal then asked the appellant why he had left the firearm in the apartment knowing that there was no firearm safe there. The appellant replied that he thought he had the firearm at work with him, and that he normally has it locked up at his house in Kingston.

[9] The appellant, who said that he was a manager at the Jamaica Observer and temporarily on assignment in Montego Bay, made an unsworn statement. He said that he had on that day secured his firearm in his house. On his return he noticed that his house had been broken into, so he called the police. He said that the premises were

secured "by security patrol, a remote control gate, a secure wall, a high wall that secure the perimeter".

The case for the defence

[10] The appellant stated that he had never been convicted of a criminal offence, and that he has exhibited nothing but caution over the 13 years that he had been the holder of a firearm's licence. He is a director of the Chamber of Commerce and a member of the Saint James police civic committee with specific oversight of the Mount Salem police station.

[11] The learned Resident Magistrate, in his "finding of facts", said that the prosecution witnesses spoke the truth and corroborated each other. He referred to those portions of their evidence which dealt with the absence of a safe in which to secure the firearm, as well as the statement of the appellant under caution that he thought he had the firearm with him at work. In concluding his findings, the learned Resident Magistrate referred to the evidence that the appellant had showed Cpl McFarlane a bag on the floor in which the gun and the lap top computer had been, and added:

> "It is my finding that by no means could it be considered safe to leave the gun in that manner and consider it safe. I therefore accept that the Prosecution has proved its case beyond reasonable doubt that the Accused Negligently loss [sic] his Firearm which is still not recovered."

[12] At the commencement of the hearing before us, Mr Champagnie sought and received permission to argue the following supplemental amended grounds of appeal:

"**Ground 1**

The Learned Magistrate erred in law by failing to address his mind to the contents of the unsworn statement given by the Appellant in so far as the Appellant said in the said unsworn statement that:

i. "on the day in question I secured my firearm safely"

"On the day in question my premises were secured by security patrol, a remote control gate, a secure wall, a high wall that secure the perimeter.

Ground 2

The Learned Magistrate by his finding of guilt placed reliance only on the state of evidence that revealed that there was no safe to be found in the premises of the appellant. This is evident by his finding of fact in which he emphasized the absence of a safe:

i "there was no safe in the house"

ii "Corporal McFarlane said he went into all the apartments and did not see a safe"

iii. "Corporal Jackson said he walked through the entire apartment and notice [sic] that there was no safe throughout the entire apartment"

iv. "Detective Special Constable Worrell Gray gave sworn evidence that he photograph the entire apartment and that he did not see a safe anywhere"

v. "Mr Cheddi Creighton gave an unsworn statement and did not challenge the evidence of the 3 prosecutions witnesses that there was no safe in the premises"

Ground 3

By predicating his finding of guilt only on the absence of a safe, the Learned Magistrate erred in law by failing to take into account other evidence that suggested a case of house breaking a [sic] larceny, in particular no consideration was given to the fact that the evidence revealed:

i. "at the time of trial the Special Detective Worrell Gray had not yet received result of test of finger print of the appellant" (see page 11)

ii. "that there was damaged [sic] to the wooden door"
iii. "that Detective Corporal Jason Jackson said in cross examination that he did not put everything what he learnt from his investigation because it would have been disadvantageous to his case."

[13] In his submissions, Mr Champagnie said that it seemed that the learned Resident Magistrate concluded that the case was one of strict liability as he concentrated on the absence of a safe in the apartment, and did not address the contents of the unsworn statement. He said that there were other issues, which, had they been considered, the appellant would have been vindicated. He referred the court to the oft-cited case **R v Aziz** [1995] 3 WLR 53 which deals with the treatment that a court should give to the good character of an accused person. In this regard, he said the learned Resident Magistrate had fallen well short.

[14] In response, Mr Stewart said that a safe was the best place for a firearm to be kept. It cannot be kept in a laptop bag which is something that attracts thieves. Furthermore, there should be no uncertainty on the part of a firearm holder as to where his firearm is. As regards the failure to deal with the appellant's good character, Mr Stewart said that it was not fatal to the conviction.

[15] Mr Stewart submitted that it was a question of fact whether a reasonable man would forget his firearm in his house and thus leave himself open to be a victim of theft. The test, he submitted, was not whether he had taken steps that render futile any measure aimed at divesting him of that firearm, but rather whether he did all that a

reasonable man would do to forestall this possibility. In the instant case, Mr Stewart said that the appellant had not. While the security arrangements that had been made would be reasonable for securing average household items, he argued, they could not suffice for "an item that is as easily carried, concealed and deadly as a firearm". Mr Stewart referred to the recent decision of this court in **Merrick Miller v R** [2013] JMCA Crim 5, and placed reliance on paragraph [18] thereof which reads thus:

> "The right granted to the appellant to hold a firearm user's licence is one that carries with it heavy responsibilities. The holder of such a licence must ensure at all times that the firearm is in a secure place, if not on his person. A firearm ought not to be left in a manner that will attract thieves and murderers, or even merely curious persons. When the holder of a firearm user's licence is going to engage in the activity of picking plums, or anything else that does not allow for the firearm to be under his personal watch, it should be in a secure place where neither evil nor idle hands will have access to it."

[16] It is quite obvious that the learned Resident Magistrate gave attention only to the fact that the firearm had not been left in a safe. In so doing, he gave no thought to the security arrangements at the premises which ought to have guided his consideration of whether there was negligence on the part of the appellant. His total acceptance of the evidence of the prosecution witnesses does not leave room for appreciating whether he accepted the view of Cpl McFarlane that the house did not appear to have been broken into or that of Det Cpl Jackson that there had been forced entry. This is so, particularly when it is considered that the learned Resident Magistrate found that the witnesses corroborated each other.

[17] Mr Champagnie was correct in submitting that there were issues that the learned Resident Magistrate did not address. For example, the fingerprints of the appellant were taken with a view to eliminating him from the prints found on the front door. At trial, there was no evidence as to the result of that exercise, and there was no comment on that aspect of the case by the Resident Magistrate. There was also the question of the good character of the appellant who happens to be a member of the police civic committee for the parish. Those are not matters that the learned Resident Magistrate could have ignored. They were critical in determining the veracity of the appellant's position that his apartment, which was in a secure setting, had been broken into in daylight hours while he was at work, and his firearm which was in a computer bag in the apartment stolen. We do not agree with Mr Stewart that the credibility of the appellant was never in issue. The evidence of Cpl. McFarlane sought to cast doubt on the report that there had been a forced entry. In the circumstances, the appellant's good character ought to have been considered.

[18] Reference to the **Miller** case is unhelpful to the cause of the prosecution in this matter. The circumstances in **Miller** were very different from those in the instant case. In **Miller**, the appellant had left his car unsecured with his firearm therein, in the vicinity of a playfield with many persons around, and had gone off to pick plums. That may be likened to an opportunity to treat. In the instant case, the appellant left his firearm in his house, a place described by Sir Edward Coke as a man's castle. Indeed, the instant apartment even seems to have been fortified like a castle. The breach of the fortification was clearly not due to any negligence on the part of the appellant. There

is, in addition, no evidence of anyone else occupying the apartment with him, who could have interfered with the weapon.

[19] In the circumstances, we feel that the appropriate determination of this matter requires us to allow the appeal, quash the conviction and set aside the sentence. We so order, and a judgment and verdict of acquittal is hereby entered.