

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 14/2011

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (AG)**

EVERTON LLOYD LYNTON v R

Mrs Valerie Neita-Robertson, Robert Fletcher and Kashaka Smith for the appellant

Miss Sanchia Burrell for the Crown

Everton Lynton in attendance

17, 25, 27 February and 11 April 2014

PHILLIPS JA

[1] The appellant was tried in the High Court Division of the Gun Court in the parish of Kingston on 20, 21, 24 and 27 January 2011, by E Brown J, on an indictment charging him with two counts. The first count was for illegal possession of firearm, contrary to section 20 (1) (b) of the Firearms Act, the particulars of which were that on 27 April 2009, he had in his possession a firearm not under and in accordance with the terms and conditions of a Firearm User's Licence. The second count was for indecent assault, the particulars of which were that on the said day he had indecently

assaulted LBR. He was found guilty on 27 January 2011 on both counts and sentenced to four years and two years respectively. The sentences were ordered to run concurrently.

[2] His application for leave to appeal was refused by a single judge of this court in March of 2012, and for various reasons, the matter meandered through the court until it was eventually heard in February of this year, when by way of detailed examination of the transcript by the court, and at its request, the issue of the jurisdiction of the Gun Court to hear and determine the question of guilt in respect of the particular offences which had been before it, came up for serious discussion, consideration and resolution.

[3] On 27 February 2014, we made the following orders:

“[1] The application for leave to appeal is granted. The application is treated as the hearing of the appeal. The appeal is allowed. The convictions on counts 1 and 2 (illegal possession of firearm and indecent assault) are quashed and the sentences imposed are set aside.

[2] In respect of count one the appellant is discharged. A new trial is ordered in respect of count two. The matter is remitted to the Resident Magistrate’s Court in the parish of Saint Catherine holden at Spanish Town for mention on Tuesday, 4 March 2014.

[3] The appellant is granted bail in the sum of \$1,000.00 in his own surety to attend that court on Tuesday, 4 March 2014.

[4] The court recommends that in the circumstances of the period of time for which the appellant has been incarcerated, that there should be no further prosecution on count two and that the Director of Public Prosecutions enter an unconditional *nolle prosequi* in respect thereof as soon as possible.”

We promised that our reasons would follow. This is the fulfillment of that promise.

[4] Bearing in mind the decision of the court as set out above, it is unnecessary to examine in detail all the evidence adduced at the trial, but a brief summary would be helpful with emphasis on those facts pertinent to the outcome of the appeal.

The prosecution's case

[5] The complainant, LBR, gave evidence that on 27 April 2009, upon her request, the appellant agreed to give her a lift to visit a female friend of hers from Antigua who would be leaving the island the next day. As agreed, he arrived at her house later that evening driving a Honda Stream motor car and they drove to the house where the friend was staying on Washington Boulevard. At about 8:30pm, they left the premises where the friend was staying and with the help of the complainant's brother, a suitcase, given to the complainant by the friend, was put into the trunk of the vehicle. The complainant said as soon as she sat in the car, and the appellant began driving, he started cursing and accusing her of being a liar telling her that she had used him to "pick up [a] big ol' suitcase". He headed in the direction of Half Way Tree but instead of proceeding in that direction as the complainant expected, the appellant drove back onto Molyne's Road and then towards Washington Boulevard and further to an area where she could see "some houses and a hillside".

[6] The complainant said that the appellant took out a gun from his waistband and she heard a sound "like [he was] going to use it". He then put the gun on his right leg. She said that the appellant wound the car window down and started to wave the gun

saying, "You si over there suh, a pure gunman, thief and murderer over deh, and dem soon come over yah come shoot up the car and yah suh yuh fi come out mek dem kill you." She tried to escape but the doors of the vehicle were locked. The appellant then drove off the vehicle and upon approaching Spanish Town Road he told the complainant, "Mi a go rape yuh. Yes, mi a go rape yuh, you too wicked and lie." The complainant could not say where the firearm was at this point as, she stated, she had been looking through the window most of the time. He drove for some distance after that while the complainant tried to escape but was unsuccessful. On returning from that mission they quarrelled and instead of taking her home, he stopped the vehicle on a lonely road. He made several sexual requests to touch her intimately but she refused. The appellant then pushed his hand into her clothing and grabbed her breast. At that point, she said, that she was not paying attention to where he had his firearm but she "knew he had it out" because "[i]t was in his right hand while he does whatever he was doing". Eventually she managed to get the attention of a passing motorist by tooting the horn and after taking out her suitcase from the trunk, she left with the motorist. This motorist turned out to be District Constable Michael Robinson, who was stationed at the Spanish Town Police Station. He gave evidence for the defence.

The defence

[7] The appellant gave evidence that he had been a member of the Jamaica Constabulary Force for 20 years. He had an intimate relationship with the complainant; they had been to several places together and they had last had sexual relations about two months before the night of 27 April. On that date the complainant had asked him

to take her to visit her friend. He stated that on that night he had been carrying his personal firearm and that the complainant had had the opportunity of seeing it because, as he had always done while driving, he had placed it between his legs. The car which he had been driving that night was the same one he owned at the time of trial and it did not have a master lock. Therefore, someone sitting in the front passenger seat could get access out or exit freely without hindrance. This was borne out by a physical demonstration. He agreed that he had made certain sexual requests, that is, to fondle the complainant, and that she had refused but that he had not made any physical sexual contact. He stated though that he had told the police that at one point she had become hysterical and when he tried to restrain her he was not sure if he had accidentally touched her breast. He also testified that he asked the motorist/police who stopped at the roadside to assist, to take the virtual complainant to the nearest point to her house and he agreed.

The decision of the learned trial judge

[8] Against that evidential background the learned trial judge found the appellant guilty on both counts on the indictment. In doing so he made certain findings of fact. He accepted the agreed positions taken by both counsel and indicated that it was also the court's view that the issue to be resolved was one of credibility. He did not believe the evidence of the appellant nor that of his witness. He did not accept that there was any relationship of intimacy between the appellant and the complainant. He said after careful consideration that he believed the testimony of the complainant. He stated that he did not believe that the appellant had the firearm on the seat between his legs,

as stated by him, but that he had removed the firearm from his waist for intimidatory effect. He also accepted that the appellant had held the firearm outside of the vehicle and waved it when he spoke of the inhabitants of the community. He accepted that the firearm was in the appellant's hand when he grabbed her right breast. He stated that:

"The evidence is abundant that the presence of this firearm weighed heavily on the mind of the complainant to the point where she had thought that she might have been killed with it after he had his way with her body.

So, I accept the evidence that the firearm was used in [sic] commission of this offence."

He finally concluded:

"... I am in no doubt that his firearm was used to facilitate the commission of this offence and accordingly, I find him guilty on both counts of the indictment."

The appeal

[9] The appellant appealed. Counsel abandoned the original grounds of appeal filed and was granted leave to argue the following ground:

"The learned trial judge erred in finding that the handling of the firearm by the appellant evidenced the required intent to justify a conviction on count one of the indictment.

In so finding the learned Trial judge failed to give sufficient and/or adequate consideration to the evidence in respect of the said handling of the firearm by the Appellant.

As a consequence, these failures by the Learned Trial Judge denied the Appellant a real chance of acquittal."

[10] Counsel submitted that in order to ground the offence of illegal possession, it was incumbent on the prosecution to show that the behavior of the appellant was capable of amounting to an intent to use the firearm to commit the indecent assault and the handling of the firearm by the appellant never evinced any explicit or implied threat to the complainant. There were therefore no acts from which an inference could have been drawn that there was the necessary intention to use the firearm, he submitted.

[11] Counsel for the Crown responded to say that a mere assault without more was enough to ground the offence, once the complainant was able to give evidence that she felt apprehension that she was in immediate danger. Counsel said that in the instant case the presence of the firearm weighed heavily on the complainant's mind and therefore, it bolstered the appellant's hostile intent and facilitated the commission of the offence.

[12] The original grounds of appeal and the arguments in respect thereof became of little relevance to the outcome of the appeal since this court viewed the main issue before it as whether the Gun Court had jurisdiction to try the offences for which the appellant was charged, which issue was dependent on the proper interpretation to be accorded the particular provisions of the Gun Court Act and the Firearms Act. It is therefore necessary to set out the statutory framework within which that discussion occurred.

[13] Section 2 of The Gun Court Act defines "firearm" and "firearm offence" as follows:

"firearm" shall have the meaning assigned thereto by subsection (1) of section 2 of the Firearms Act;

'firearm offence' means –

- (a) any offence contrary to section 20 of the Firearms Act;
- (b) any other offence whatsoever involving a firearm and in which the offender's possession of the firearm is contrary to section 20 of the Firearms Act;"

Section 5(2) gives the jurisdiction to the High Court Division of the Gun Court to try firearm offences. It states:

- 5. (2) "A High Court Division of the Court shall have jurisdiction to hear and determine –
 - (a) any firearm offence, other than murder or treason;
 - (b) any other offence specified in the Schedule, whether committed in Kingston or St Andrew or any other parish, other than the parishes referred to in section 8A (3) or a parish designated under section 8D."

In section 2 of the Firearms Act, "ammunition", "firearm" and "firearm user's licence" are defined thus:

" 'ammunition' means ammunition for any firearm and includes restricted ammunition;

'firearm' means any lethal barrelled weapon from which any shot, bullet or other missile can be discharged, or any restricted weapon or, unless the context otherwise requires, any prohibited weapon, and includes any component part of any such weapon and any accessory to any such weapon

designed or adapted to diminish the noise or flash caused by firing the weapon, but does not include any air rifle, air gun, or air pistol of a type prescribed by the Minister and of a calibre so prescribed;

...‘Firearm User’s Licence’ means a licence authorizing the holder thereof, subject to section 22 and to the terms and conditions specified in the licence, to be in possession of the firearm or ammunition so specified;”

Sections 20 and 25 of the Firearms Act, in so far as relevant, provide:

“20.- (1) A person shall not –

- (a) save as authorized by a licence which continues in force by virtue of any enactment, be in possession of a prohibited weapon; or
- (b) subject to subsection (2), be in possession of any other firearm or ammunition except under and in accordance with the terms and conditions of a Firearm User’s Licence.

...

(4) Every person who contravenes this section shall be guilty of an offence, and shall be liable –

...

- (i) on summary conviction before a Resident Magistrate to a fine not exceeding three hundred thousand dollars or to imprisonment with or without hard labour for a term not exceeding three years;
 - (ii) or on conviction before a Circuit Court to imprisonment for life with or without hard labour; and
- (5) In any prosecution for an offence under this section –

...

(c) any person who is proved to have used or attempted to use or to have been in possession of a firearm, or an imitation firearm, as defined in section 25 of this Act in any of the circumstances which constitute an offence under that

section shall be deemed to be in possession of a firearm in contravention of this section.

...

25. (1) Every person who makes or attempts to make any use whatever of a firearm or imitation firearm with intent to commit or to aid the commission of a felony or to resist or prevent the lawful apprehension or detention of himself or some other person, shall be guilty of an offence against this subsection.

(2) Every person who, at the time of committing or at the time of his apprehension for, any offence specified in the First Schedule, has in his possession any firearm or imitation firearm, shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence against this sub-section and, in addition to any penalty to which he may be sentenced for the first mentioned offence, shall be liable to be punished accordingly.

...

(5) In this section –

‘firearm’ means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged and includes any prohibited weapon and any restricted weapon, whether such a lethal weapon or not;

‘imitation firearm’ means anything which has the appearance of being a firearm within the meaning of this section whether it is capable of discharging any shot, bullet or missile or not.”

[14] In dealing with this main issue as the court saw it, certain questions were posed by the court to counsel in an effort to dispose of the appeal. They were as follows:

- (i) Is indecent assault an offence incorporated by section 25 of the Firearms Act and indictable in the Gun Court?
- (ii) Is indecent assault a felony or a misdemeanour?

(iii) Whether a felony or misdemeanour, how does that affect the interpretation to be given to section 20(1)(b) of the Firearms Act, given its interconnection with section 20(5) and section 25 of the Act in respect of the particular offences which were before the Gun Court?

[15] Counsel made further submissions in an attempt to assist the court.

[16] Counsel for the appellant submitted that the offence of indecent assault is excluded from section 25(2) of the Firearms Act, as that subsection requires that an offence listed in the first schedule be committed and that a firearm is present at the time of the commission of that offence. Indecent assault is not one of the scheduled offences. The Sexual Offences Act promulgated on 27 April 2009 did not come into effect until 30 June 2011 and is therefore not applicable to the instant case. Counsel further submitted that indecent assault was not indictable under section 25(1) of the Firearms Act as it was not a firearm offence. He stated that there is no schedule of offences attached to that section. Additionally, counsel submitted that the proper interpretation of the section is that there is no requirement that an offence actually be committed for there to be a charge based on it. The section, he maintained, is concerned primarily with whether the handling of the firearm in a particular way is enough to ground the *mens rea* of a specific felony whether the felony is committed or not. The facts supporting the felony can be part of the charge but the felony cannot be a count on the indictment. Counsel submitted that with regard to misdemeanours and felonies, the distinction does not exist for any practical purpose any more in this

jurisdiction. Counsel relied on **Bank of Jamaica v Dextra Bank and Trust Co Ltd** (1994) 31 JLR, 361 at 364 g-h, for that submission.

[17] Counsel in referring to **R v Jarrett, James and Whyllie** (1975) 14 JLR 35, submitted that proof of an offence under section 25 is sufficient to ground a charge under section 20(1)(b) of the Firearms Act, for illegal possession of a firearm. The evidentiary confluence of section 25 and section 20 of the Act, he stated, enabled the prosecution to make a person charged under section 20(1)(b) be in unlawful possession of a firearm whether the person has a licence or not. Once the person has used the firearm in "the section 25 paradigm", illegal possession under section 20(1) may be grounded. However, he submitted, as the "section 25 paradigm" required that the firearm be used in a way that showed its role as demonstrating the intent to commit the offence, in the instant case, there had still not been any consideration whether the evidence of the use of the firearm had been sufficient to satisfy the threshold of proof of intent.

[18] Counsel for the Crown posited that the offence of indecent assault is indictable under common law. However in spite of not being listed in the first schedule to the Firearms Act, counsel submitted that indecent assault becomes indictable in the Gun Court the moment a firearm is used in the commission of the offence. It was further submitted that "the First Schedule does not exclude unlisted offences from being tried in the Gun Court as the provisions under section 5(2) of the Gun Court Act are unequivocal. It therefore means that as long as the firearm is used in circumstances

contemplated by section 25(1) an accused may be properly convicted once the evidentiary threshold has been satisfied”.

[19] Counsel further submitted that although the Offences Against the Person Act and the fairly new Sexual Offences Act are silent as to whether indecent assault is a felony or misdemeanour, the learning of the 36th edition of Archbold on Criminal Pleading Evidence and Practice suggests that indecent assault is in fact a felony. Counsel argued that under the Gun Court Act, there is no distinction between felonies and misdemeanours for a matter to be properly tried in the High Court Division of the Gun Court. There is no distinction whether the firearm is licensed or unlicensed when it is used to commit a felony or misdemeanour. Counsel therefore submitted that it is unnecessary to resolve whether an indecent assault is a misdemeanour or a felony as sections 2 and 5(2) of the Gun Court Act give the court jurisdiction to try any firearm offence other than murder or treason. Counsel however conceded that if the definition of “firearm offence” set out in section 2 of the Gun Court Act cannot apply to the particular set of circumstances, then the court would have no jurisdiction to try indecent assault as a misdemeanour.

Discussion and analysis

[20] The High Court Division of the Gun Court only has jurisdiction to hear and determine a “firearm offence” as defined in section 2 of the Firearms Act, other than murder or treason, and any other offence specified in the schedule, within the geographical limitations therein stated (see section 5(2) of the Gun Court Act).

“Firearm” and “firearm offence” are defined in the Gun Court Act as previously set out, and as stated in the definitions must be read in conjunction with sections 2 (where “firearm” is also defined) and 20 of the Firearms Act, to completely understand the meaning of the offence of illegal possession and thereby the jurisdiction of the Court.

[21] On any reading of section 20(1)(b) of the Firearms Act, it is clear that it is not an offence to be in possession simpliciter of a firearm, if one has a licence, which is in force, to do so. It prohibits anyone from being in possession of a firearm unless being the holder of such a licence or unless being a person exempted from that position as enunciated in section 20(2)(a)-(j) or 3. The penalty for such an offence is set out in section 20(4) of the Act.

[22] On a perusal of section 20(1)(b) and in section 25(1) and (2) of the Firearms Act, it is clear that whereas, the offence under section 20(1)(b) is possession of a firearm (or ammunition) without lawful authority, under section 25, the user or possession of a firearm (or imitation firearm) in certain circumstances is an offence regardless of the fact that the possession of the firearm may have been under lawful authority, that is, whether in possession pursuant to the classes or qualifications in section 20(2) or (3) (which are not relevant to this case), or in accordance with the terms and conditions of a Firearm User’s Licence.

[23] Section 20(5)(c) was enacted pursuant to the amending legislation to the Gun Court Act, Act 19 of 1974, to obviously enable section 25 offences to be tried in the Gun Court. It did not create an offence but was an evidential provision. Section 25 of the

Firearms Act introduced a separate and distinct offence from that enacted in section 20(1)(b) of the Act. Luckhoo P (Ag) (as he then was) speaking on behalf of a five member panel of this court, set out with great clarity in **R v Jarrett, James and Whyllie** the interplay of sections 20 and 25. To do justice to his reasoning I set out that aspect of his judgment in its entirety:

“The provisions of section 20(5) (c) themselves make it abundantly clear that they are evidential and do not create any offence. It is a contravention of section 20 (1) which, by virtue of section 20(4) results in the commission of an offence. The gist of the offence is possession of a firearm (or ammunition) without lawful authority. When the provisions of section 20(5)(c) are invoked by the prosecution in proof of an offence charged under section 20 (1) (b) of the Act if the defendant did in fact have possession of the firearm (as defined by section 25) under lawful authority he is deemed to have had possession of a firearm (as defined by section 2) and to have had it at the material time not under lawful authority. In effect a statutory fiction is introduced by the use of the word ‘deemed’ in section 20(5) (c) whereby lawful authority for possession of the firearm is by operation of law to be regarded as of no avail to the defendant on such a charge and further, if the weapon used is an imitation firearm a statutory fiction is introduced whereby it is to be regarded as a firearm as defined by section 2 held without lawful authority. A charge alleging contravention of section 20(1) would in such a case be proved by adducing such evidence as would be necessary to show that the defendant committed a section 25 offence. There could be no question of such a charge or of the evidence adduced in support of such a charge rendering the information bad for duplicity. The defendant would in no case be on trial for the commission of a section 25 offence as such.”

[24] In the operation of section 20(5)(a), (b) or (c) Luckhoo P (Ag) stated that the term “firearm” was not confined to a licensed firearm.

[25] In **R v Henry Clarke** (1984) 21 JLR 72, Rowe P in endorsing the dictum of Luckhoo P (Ag) in **R v Jarrett, James and Whyllie** in respect of the proper interpretation to be given to certain provisions of the Firearms Act referred to herein, and with particular reference to section 20(5)(c), said at page 75 c-e:

“It is an extra-ordinary section which stipulates that if at the trial evidence is led, proof is given, of a certain set of facts, viz that a firearm or imitation firearm was used to commit a felony, then an offence which might not otherwise have been made under section 20 (1) (b) is nevertheless to be deemed to have been committed. This requirement of proof does not add anything to the nature of the offence. It merely makes plain that the averment in section 20 (1) (b) may be satisfactorily proved by evidence either that the accused never had a valid licence for his possession of the firearm, or if he did have a valid licence, that he made use of the firearm in circumstances which contravened section 25.”

This is in keeping with the dictum of Watkins JA (Ag) in **R v Neville Purrier and Tyrone Bailey** (1976) 14 JLR 97 who dealt with the importance of section 25, when a person is charged under section 20(1)(b) of the Firearms Act. In that case, the court found that the judge ought not to have invoked the doctrine of judicial notice in respect of the description and knowledge of a firearm in the absence of any evidence thereof, in spite of the increasing display of guns in Jamaica, as there was no credible factual basis for the assumption that knowledge of them, and more particularly as defined in section 25, was notorious. This aspect of the decision is of no relevance to the case at bar. However of relevance, was the fact that the court held that the appellants' conviction of unlawfully having in their possession a firearm without a licence, could not stand, as to sustain the conviction, the prosecution was required to prove, inter

alia, that the appellants had used or attempted to use, a firearm or an imitation firearm as defined in section 25 of the Firearms Act, with intent to commit the felony of robbery with aggravation so as to invoke the provisions of section 20(5)(c) of the Act. The prosecution failed to do so, and as a consequence, the conviction was quashed. At page 100 D-F, Watkins JA (Ag) said:

“In order to establish illegal possession of a firearm pursuant to s 20(5)(c) of the Act that section requires that the following be established:

- (i) Commission of an offence referred to in s 25 (1) or (2) of the Act, and
- (ii) proof, meaning proof beyond reasonable doubt, that in the commission of such offence, the person charged used, or attempted to use, or was in possession of a firearm or imitation firearm as defined above.

Further, in order to establish the commission of a s 25 offence, for example, a s 25(1) offence, it is necessary to prove not only the commission of a felony, but also that the person charged made, or attempted to make, use, whatever, of a firearm or imitation firearm with intent to commit or aid the commission of the felony or to resist or prevent the lawful apprehension or detention of himself or some other person.”

[26] There are certain undisputed facts on this appeal. At all material times:

- (i) The appellant was a policeman, who had in his possession a licensed privately owned firearm.
- (ii) He was a Constable who was not acting as “such constable” at the material time.

Since the appellant was in possession of a licensed firearm and was charged under section 20(1)(b) of the Firearms Act, it was therefore necessary for the prosecution to prove that he used the firearm in such a manner that would constitute his possession an illegal one by virtue of section 20(5). The use of the firearm must be in circumstances which would constitute an offence under section 25 of the Act and would thus contravene the terms of his licence. As the authorities have indicated, section 25 creates the substantive offence of the use of a firearm in a particular way but, section 20(5)(c) allows the commission of that offence to constitute the offence of illegal possession of firearm. The relevant portions of section 25 are subsections (1) and (2). However, section 25(1) speaks to the use or attempted use of a firearm "with intent to commit a felony" (emphasis supplied). Section 25(2) speaks to a person having a firearm in his possession at the time of committing or at the time of his apprehension for "any offence specified in the First Schedule" of the Act. As agreed by all counsel "indecent assault" is not a first schedule offence, so section 25(2) would not be relevant for these purposes. The advent of the Sexual Offences Act (October 2011) also would not have affected that position.

[27] The main question therefore is whether for the purposes of section 25(1) the offence of indecent assault (the touching by the appellant of the complainant's breast) is a felony?

[28] In Halsbury's Laws of England Volume 10, 3rd edition at page 755, the learned editors state that "any person is by statute guilty of a misdemeanour who commits an indecent assault upon a female". They cite, as authority, section 52 of the Offences

Against the Person Act 1861 of England. That section is identical in its material terms to section 53 of our Offences Against the Person Act, which addresses indecent assault.

The relevant portion of section 53 states:

“Whosoever shall be convicted of any indecent assault upon any female... shall be liable to be imprisoned for a term not exceeding three years, with or without hard labour.”

Section 53 does not, however, create the offence; it only speaks to punishment for its commission. The offence had not been created by any other provision elsewhere in the statute or otherwise, at the material time. Therefore it was an offence at common law.

But was it a felony or a misdemeanour?

[29] Section 49 of the Offences Against the Person Act, gives much guidance in this respect. (It is acknowledged that this section has since been repealed by the Sexual Offences Act of 2009.) The side notes to the section read thus, “Power on indictments for certain felonies to find the defendant guilty of a minor offence.” The section states:

“49.- (1) If upon the trial of any indictment for rape, the jury are satisfied that the defendant is guilty of an offence under section 48 or 50, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in the indictment or of an attempt to commit the same, the jury may acquit the defendant of such felony and find him guilty of an offence under section 48 or 50 or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for the misdemeanour of indecent assault...” (emphasis added)

[30] So, although this section also did not create the offence, the Offences Against the Person Act recognised that a person can be tried on an indictment for a felony, and be found guilty of the minor offence, indecent assault (section 49) and be punished for it (section 53). In our view, however, from the reading of section 49 above, as it stood at the material time, it is clear that indecent assault was considered to be a misdemeanour and not a felony. As a consequence, since the offence charged in this case was not a felony, and is not a first schedule offence, there would be no offence committed pursuant to section 25 of the Act. As a section 25 offence is the prerequisite for a licensed firearm holder or other authorized person to be convicted through the operation of section 20(5)(c) of the offence of illegal possession of a firearm contrary to section 20(1)(b), there could be no offence under section 20(1)(b) in this case. As a result there is no "firearm offence" committed and the High Court Division of the Gun Court would therefore have no jurisdiction contemplated by section 5(2) of the Gun Court Act to try the appellant.

[31] What is of importance is the fact that by way of contrast, section 43 of the Offences Against the Person Act, which stipulates the punishment for the offences of common assault and assault occasioning actual bodily harm (which are also common law offences) is listed in the first schedule to the Firearms Act and is, therefore, incorporated by section 25 (2) of the Firearms Act to allow for a conviction for illegal possession of firearm.

[32] What is also of some significance is that section 52(e) of the Firearms Act does not apply to a constable in respect of a firearm in his possession in his capacity as "such

constable". This section is inapplicable in the instant case, for as indicated previously, on the facts, the appellant was not in possession of his firearm in the capacity of a constable (see **R v Osmond Williams** (1977) 25 WIR 458 and **Regina v Derrick Brown** (1992) 29 JLR 243).

[33] It is our view that on the basis of the clear provisions of the Firearms Act, the Gun Court Act, and the authorities, the Gun Court did not have jurisdiction to try the appellant for the offences for which he was indicted. Contrary to counsel's submissions it was not a question of the proof or lack thereof of the necessary intent to use the firearm to commit the offence. The offence of indecent assault could, however, be tried in the Resident Magistrate's Court for the parish of Saint Catherine.

[34] Having concluded that the Gun Court lacked jurisdiction, the next question for the determination of the court was what orders we should have made on this appeal. It was clear that as the trial was a nullity, the appeal had to be allowed, the convictions quashed and the sentences imposed set aside. The appellant was discharged in respect of count one. Since making that order we have had sight of the decision of this court in **Douglas Beckford v Regina** RMCA No 12/2008, delivered 9 October 2009, and conclude that pursuant to the provisions of section 14 of the Judicature (Appellate Jurisdiction) Act a judgment and verdict of acquittal should have been formally entered in respect of count one. A new trial subject to the recommendations as set out in paragraph [3] herein was ordered in respect of count two.