JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 129/77

BEFORE: The Hon. Mr. Justice Robinson, President
The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Kerr, J. A.
The Hon. Mr. Justice Melville, J.A.
The Hon. Mr. Justice Robotham, J.A.

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REGINA v. ELLISTON WATSON

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Frank Phipps, Q.C., E. Delisser, Arthur Williams for Appellant.

Henderson Downer, Mrs. Holness for the Crown.

February 12, 13, 14, 1979;
May 14, 1979

HENRY, J.A.:

The appellant was convicted in the High Court Division of the Gun Court for unlawful possession of a firearm. Evidence from the prosecution indicated that three Police Officers on foot patrol saw the appellant and another man sitting beside a house on or near a log. He had in his hand an object which he put behind him at the approach of the Police. This object described as a home-made shotgun forms the subject matter of the charge. The appellant in his evidence denied having the object and stated that one of the Police Officers had gone behind the house and returned with the object.

/The grounds of .....

Two grounds of appeal were argued before us. The first was that the verdict was unreasonable because there was no evidence to establish that the object in question was a firearm within the meaning of the Firearms Act. So far as is relevant the definition of a Firearm in Section 2 of the Firearms Act is as follows: "Firearm" means any lethal barrelled weapon from which any shot, bullet or other missile can be discharged ... and includes any component part of any such weapon ... "

At the trial a certificate from the ballistics expert was tendered in evidence but at the request of counsel for the appellant the ballistics expert was also called to give evidence. It is sufficient to say that counsel for the appellant has conceded that on the basis of the evidence given in court by the ballistics expert a court could properly find that the object in question was a firearm. He however submitted that the ballistics certificate discloses the test firing carried out by the ballistics expert, and that test firing (with a cartridge from which the load had been removed) could not support the conclusion that the weapon was "capable of discharging deadly missiles through its barrel". He relied on the decision of this Court in R. v. Kenneth Rose et al, R.M.C.A. 108/74 (unreported). That case is similar to the instant case in that the ballistics expert had conducted a test firing of the weapon with a cartridge from which the bullet had been removed. In relation to this test Graham-Perkins J.A. commented:

> " I confess no little difficulty in identifying the basis of Wray's opinion that the gun he examined was capable of discharging deadly missiles! He had removed the bullet from the cartridge albeit as a safety measure. He did not in fact fire a missile from the gun. Indeed he said that the effect of his evidence was that he had not tested the gun with a deadly missile. How could he say, therefore, that this home-made gun was a lethal barrelled weapon from which 'any shot, bullet or other missile can be discharged' so as to enable it to be brought within the definition of a firearm in S.2 of the Firearms Act, 1967?"

He concluded: "In my respectful view the evidence adduced was singularly incapable of sustaining a conclusion beyond a reasonable doubt that this home-made thing was a firearm". In a judgment with which Zacca J.A. agreed Swaby, J.A. stated:

> " I have had the opportunity of reading the judgment of Graham-Perkins J.A. I agree with his reasoning in holding that on the evidence adduced before the learned resident magistrate it was incapable of sustaining a conclusion beyond reasonable doubt that the home-made gun exhibited at the trial was a lethal barrelled weapon capable of discharging a deadly missile ..... It is solely for the reason that the ballistics expert who tested this weapon testified that he had not attempted to discharge a bullet through its barrel that this Court can disturb the finding of the resident magistrate that it was a firearm within S.2."

On the face of it these passages would appear to support the conclusion that in the case of a home-made weapon unless the ballistics expert conducts a test in which a shot, bullet or other missile is actually discharged through its barrel, the opinion of the expert, and consequently the finding of a court based on that opinion, that the weapon is capable of discharging a shot, bullet or other missile cannot be sustained. That this is not so however is made clear in a later passage in the judgment of Graham-Perkins J.A. where he states:

> " The fact that Wray had not tested the gun with a deadly missile was perhaps, not necessarily fatal. It may be that he could have given some evidence as to the nature of the metal from which the barrel was shaped and the capacity of this metal to withstand the passage of a bullet propelled by the explosive force of the charge in the cartridge and the heat following thereupon. "

In fact the expert in Rose's case had stated in cross-examination that "It is because I heard that explosion (of the primer in the cartridge) that I say the gun ("2" for identity) is capable of discharging a deadly missile". It seems therefore that what Rose's case really decided was that, at least in relation to a home-made weapon, where the evidence discloses that <u>the only</u> basis for the expert's opinion as to the capability of a weapon to discharge deadly missiles is a test in which such

missiles have not been discharged, then his opinion and a court's finding based on it cannot be supported.

If the expert in Rose's case, having been challenged as he was in cross-examination, had been able to say or had said that a barrel which could withstand the force of the explosion of the cartridge without the bullet would most certainly be able to accommodate the discharge of a missile of sufficient potency as to be capable of causing death, or indeed, that the force of the explosion which had actually occurred without the bullet could be equated to the force of an explosion with the bullet by a mere reduction in the quantum or quality of the powder in the cartridge but which would still generate more than enough force to enable a discharge of the bullet with sufficient momentum for it to qualify as a deadly missile, then obviously different consequences would have ensued.

In this regard it should be observed that a test firing need not be conducted in order to establish that the weapon in question is or is not a firearm (vide Errol Hewitt v. R., R.M.C.A. 129 of 1971; R. v. Michael Shadeed, R.M.C.A. 112/74). At the same time where a home-made weapon is involved more evidence will generally be required to enable a court to draw inferences as distinct from indulging in mere speculation as to its capability. In order to qualify as a firearm a weapon must be lethal, barrelled and capable of discharging a shot, bullet or other missile. That it is barrelled may be determined by mere observation. That it is lethal will have to be determined by having regard to the possible effect of any shot, bullet or missile it discharges. That it is capable of discharging a shot, bullet or missile must where a cartridge is involved be determined by having regard to its ability to accommodate the cartridge, and to contain the explosive force involved in the firing of the cartridge and to ensure the discharge through the barrel of any shot, bullet or missile contained in the cartridge. A ballistics expert, in the light of his knowledge and experience of firearms, may well be able

upon examination of a weapon to express a valid opinion as to its potential ability to discharge deadly missiles and if that opinion is unchallenged a court would be entitled although not obliged to act upon it. Where however that opinion is challenged and it appears from the evidence that there is no sound foundation for the opinion, then clearly a court is not entitled to act upon it.

In the instant case the basis of the ballistics expert's opinion was never questioned. It is true that his certificate contained evidence of a test firing which might not by itself have justified his opinion that the weapon was "capable of discharging deadly missile" but there is nothing to indicate that this opinion was based only on that test firing. It is in this respect that the case is distinguishable from R. v. Kenneth Rose et al, because in this case no question or challenge was ever directed to the basis of the expert's opinion.

The next matter which engaged our attention was the meaning of the expression "component part" in the definition of firearm. It was necessary to consider this because the weapon as it stood was devoid of a firing pin and therefore incapable of firing a cartridge. Counsel for the Crown submitted and counsel for the appellant eventually agreed, that the words "any such weapon" refer to "any lethal barrelled weapon ...." and therefore a "component part of any such weapon" means a part necessary to make the weapon a lethal barrelled weapon from which a shot, bullet or missile can be discharged. Applying that interpretation, if the court accepted the ballistics expert's evidence that with the addition of the firing pin the weapon was capable of discharging deadly missiles then in its existing form it would clearly be a "component part" and therefore within the definition of firearm.

The second ground of appeal relates to a comment made by the learned trial judge. The comment occurs in the following passage, at the end of the re-examination of the ballistics expert

and just before the close of the Crown's case:

"Mr. Gayle:	I think he said the exhibit here was test fired. What I want to know is, could it be capable of injuring anyone?
Mr. Wolfe:	How can you say that?
Her Ladyship:	If you are objecting, object.
Mr. Wolfe:	I was not objecting, but I was avoiding my friend creating the necessity of my objecting, however, it is my respectful submission, M'Lady, that ......
Her Ladyship:	I don't know that that question makes any difference actually.
Mr. Gayle:	It is neither here nor there, and surely the effect could depend on the result when it is fired.
Her Ladyship:	His opinion is that it is capable of firing cartridges. It does not matter if it can injure or not. "

The learned trial judge was clearly in error if this comment indicated her view of the law, because one of the essential attributes of a firearm as defined in S. 2 of the Firearms Act is that it be "lethal". Counsel for the Crown conceded that if the passage had occurred in the learned trial judge's summing-up it would have been fatal to the conviction but he submitted that in the context in which it occurs it is intended merely as a rebuke to Crown Counsel for seeking to elicit what had already been given in evidence by the expert in his certificate and in his viva voce evidence. I cannot accept this. It seems to me that the passage constitutes a misdirection in law necessitating the setting aside of the conviction. This is not in my view an appropriate case for the application of the proviso. There was evidence on which it was open to the learned trial judge to convict the appellant. Clearly she accepted the evidence of the police witnesses in preference to that of the appellant and his witness as to the circumstances in which the home-made weapon was found. She has however made no specific findings as regards the evidence of the ballistics expert and it cannot be said that on her apparent view of the law the conviction of the appellant necessarily implied an acceptance of all of the expert's testimony, and in particular that the weapon was capable of discharging deadly missiles.

It cannot therefore be said that conviction would inevitably have resulted if there had been no misdirection. The appellant had been in custody for almost two years, but the offence is one for which the law prescribes mandatory life imprisonment. It was appropriate that a new trial be ordered.

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