

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 42/78

BEFORE: The Hon. Mr. Justice Kerr, J.A.  
The Hon. Mr. Justice Rowe, J.A.  
The Hon. Mr. Justice Campbell, J.A. (Ag.)

R. v. HENRY CLARKE

Dr. Lloyd Barnett & Dr. Adolph Edwards for the applicant

Mr. Mario Ducille for the Crown

December 15, 16, 1982 & April 12, 1984

ROWE J.A.

In an ugly display of ungoverned temper Henry Clarke shot Austin Dawkins in the chest, the entry wound being in the second left intercostal space five inches from the midline and he went on to shoot Astley Birch four times, injuring him in the chest, in the abdomen and on the right arm. Both men survived and testified at the trial of the applicant in the Gun Court at which he was convicted of illegal possession of a firearm, shooting with intent to do grievous bodily harm, wounding with intent to do grievous bodily harm, shooting with intent to murder and wounding with intent to murder. The trial judge in rejecting his defence of self-defence, repeatedly stigmatized it as "a cock-and-bull story". When the applications for leave to appeal were heard counsel for the applicant could find no arguable point in relation to the facts of the case. The grounds which were urged upon us concerned the jurisdiction of the Gun Court to hear and determine the particular case and the invalidity of the indictment. We held that the High Court Division of the Gun Court was properly seized of the jurisdiction which it exercised, that the indictment was sufficiently particularised, and in dismissing the appeal we promised to put our reasons in writing. That promise we now keep.

Henry Clarke was the holder of a Firearm User's Licence in respect of a Smith and Wesson revolver. He had his revolver with him on October 6, 1977, as he drove his minibus at Curney's Mount Road in Hanover. There was a minor traffic accident between the applicant's minibus and that of Astley Birch

and arising therefrom was an altercation which culminated in the applicant going to his minibus and getting hold of the revolver and proceeding to fire at point blank range at Dawkins and Birch. Clarke was arrested; a preliminary examination was held and he was committed to the Circuit Court to stand trial. The case was transferred to the High Court Division of the Gun Court for trial before a Judge alone, and by the Gun Court (Appointment of Place of Sitting) Order of February 10, 1978, the Lucea Court House was appointed as the place for the trial of the applicant.

In the absence of any evidence at the trial that the case was formally transferred from the Hanover Circuit Court to the High Court Division of the Gun Court, Dr. Barnett argued that the Gun Court had no jurisdiction to hear and determine the case. He submitted that there are paralleled jurisdictions for the trial of indictments under section 20 of the Firearms Act. Trial may be conducted in the ordinary Courts of the land and also in the Gun Court by virtue of very special legislation designed to deal with a particular criminal phenomenon which describes in statutory terms the specific method by which the special court is to assume and exercise jurisdiction. Section 6 of the Gun Court Act was relied upon in support of these propositions.

It is not a matter for debate that the power of the Circuit Court to try firearms offences created by the Firearms Act was not taken away by the Gun Court Act. But the practical administrative effect of the Gun Court Act has been to cause all such offences to be sent to the Gun Court for trial. The requirement in section 6 of the Gun Court Act that:

"Any court before which any case involving a firearm offence is brought shall forthwith transfer such case for trial by the Court and the record shall be endorsed accordingly."

does not mean that if the case is in fact transferred into the Gun Court but the record is not endorsed to that effect this would affect the jurisdiction of the Gun Court to hear and determine the case. The provision for endorsement is merely to provide evidence that no further proceedings pertaining to the same indictment remain for disposal by the transferring Court.

Under powers conferred by section 7 of the Gun Court Act, the Acting Chief Justice designated the Hanover Court House as the place of trial of the Applicant. We are of the view that the only reasonable inference to be drawn from that designation is that the Chief Justice was satisfied that an order transferring the case for trial before a Gun Court was indeed in force.

But of greater significance are the provisions of section 12 (2) of the Gun Court Act. The applicant was tried by virtue of an indictment signed on behalf of the Director of Public Prosecutions and there was no suggestion at his trial that the defence was in any way prejudiced or embarrassed in its conduct of the case by virtue of being supplied with depositions rather than copies of the police statements taken from witnesses. There could be no challenge that the Director of Public Prosecutions had authority by virtue of section 12 (2) of the Gun Court Act, to prefer an indictment against the applicant and this application did not proceed on that basis. Therefore in the face of the indictment actually preferred, we could detect no merit in that portion of Dr. Barnett's submissions. Indeed the procedure before the Gun Court in the instant case did not admit of the participation of a jury, nor was there a discretion in the Judge as to the sentence for the firearm's offence but that cannot be urged as a disadvantage when the stated policy of the law was to inflict condign punishment of that nature for illegal possession of a firearm.

The Particulars of Offence of Count 1 of the Indictment were that:

"Henry Clarke, on the 6th day of October, 1977, in the parish of Hanover, unlawfully had in his possession a firearm not under and in accordance with the terms and conditions of a Firearm User's Licence."

He was found guilty on this Count notwithstanding that he was in fact the holder of a Firearm User's Licence in respect of the very firearm which he used to shoot the two men. Dr. Barnett's main submissions were that on a proper construction of section 25 of the Firearms Act, jurisdiction is not vested in the Gun Court in the circumstances of this case and further that there were no averments in the relevant count of the indictment by which the provisions of

section 25 could be invoked for the purposes of granting jurisdiction to the Gun Court.

So far as is material, section 20 (1) (b) prohibits anyone from having in his possession a firearm except he is the holder of a licence, called a Firearm User's Licence. A number of persons are exempted from that prohibition and they are listed in section 20 (2) (a) - (j) and 20 (3) and possession by any of these persons or classes of persons for the purposes enumerated in that sub-section, of firearms or ammunition, would not attract the penalty provided for in section 20 (4) of the Act. These exceptions show that Parliament intended that persons who were in possession of firearms and ammunition in the course of their trade or business as manufacturers of Gun-Smiths, or as officers of the government e.g. bailiffs, customs officers, constables; or on transmission, e.g. to executors and administrators or for theatrical or sporting purposes, did not require Firearm's User's Licences. Such authorization as these persons required is either inherent in their offices or obtainable through other specified processes.

Section 25 of the Firearms Act introduced a separate and distinct offence from that enacted in section 20 (1) (b). Under section 25 the existence of a licence is not a relevant consideration. The first subsection reads:

"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."

For the purposes of this subsection, then, it is immaterial if the felon had had his firearm for a lifetime, paying the appropriate licence duty and was well-known to the police to be the holder of a licenced firearm. The gravamen of the offence under this subsection is the use or attempted use which was made of the firearm. This section provides its own peculiar definition of "firearm" and "imitation firearm" not at all synonymous with the definition of "firearm" in section 2 of the Firearms Act.

One of the central objectives of the Firearms Act was the prohibition of the possession of unlicensed firearms. To achieve this objective, the legislature in its wisdom, decided to equate a use or attempted use of a firearm, including the use of a duly licensed one, with the possession of a firearm without a firearm user's licence. This intent is contained in section 20 (5) of the Act which provides:

"In any prosecution for an offence under this section:

"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."

An immediate effect of this section is that if a man uses his licensed revolver to rob a bank, he can be convicted of the robbery, of making use of the firearm to commit a felony under section 25 and of illegal possession of the revolver under section 20 (1) (b) of the Act. Without the deeming provision, the possession of the licensed firearm would be lawful and although it was used for an illegal purpose, that would not without statutory enablement transform the possession into an illegal one.

Dr. Barnett acknowledged the force of section 20 (5) (c) as a net which ensnares a person who has in his possession a firearm for the specific purpose of committing or attempting to commit a felony but submitted that a distinction should be drawn between that factual situation and one in which the possession of the firearm is both normal and lawful and its use to commit the felony the subject matter of the prosecution's case, is only accidental. He submitted further that it is only by virtue of such facts as would bring the applicant within the provisions of section 20 (5) (c) that he could be found guilty on Count 1 of the Indictment, charging him with illegal possession of the firearm, and consequently his attention should be specifically directed to those facts which for the purposes of the statute were essential ingredients of the charge and therefore ought to be averred in the indictment. Since in the

instant case the averments were limited to possession simpliciter, no reference having been made in the indictment to section 20 (5) (c), Dr. Barnett submitted that the mere adducing of evidence could not cure the defect.

In our view, and Dr. Barnett did not submit to the contrary, section 20 (5) (c) does not create an offence. 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 out 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.

We think, however, that the distinction sought to be drawn by Dr. Barnett between the instant case and the decision of the Full Court in R. v. Clinton Jarrett, R. v. Michael James, R. v. Oliver Whyllie (1975) 14 J.L.R. 35 is not well founded. We adhere in the entirety to the judgment of Luckhoo J. (Ag.) at page 42:

"In my view the submission made by the learned Director of Public Prosecutions is well founded. The provisions of s. 20 (5) (c) themselves make it abundantly clear that they are evidential and do not create any offence. It is a contravention of s. 20 (1) which, by virtue of s. 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 s. 20 (5) (c) are invoked by the prosecution in proof of an offence charged under s. 20 (1) (b) of the Act if the defendant did in fact have possession of the firearm (as defined by s. 25) under lawful authority he is deemed to have had possession of a firearm (as defined by s. 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 s. 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 s. 2 held without lawful authority. A charge alleging contravention of s. 20 (1) would in such a case be proved by adducing such evidence as would be necessary to show that the defendant committed a s. 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 s. 25 offence as such."

As in our view the Particulars of Offence to which reference was made earlier in this judgment were sufficiently drawn and in the light of the decision of the Full Court Bench of five Judges in R. v. Jarrett supra, we did not require the assistance of the Crown and proceeded to treat the applications for Leave to Appeal, as the hearing of the appeals and we dismissed the appeals.