JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL No.108/74

BEFORE: The Hon. Mr. Justice Graham-Perkins, J.A.(Presiding).
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A.

R. v. Kenneth Rose)
Morris Dixon) Illegal Possession of a Firearm
Laurel Dixon)

Dennis Daley for appellant Kenneth Rose.
K.D. Knight for appellant Morris Dixon
Earl Witter for appellant Laurel Dixon.
Mrs. Velma Gayle for the Crown.

February 19, 1976 and January 28, 1977

[redacted]M-PERKINS, J.A.:

On Saturday, April 6, 1974, at about 11.00 p.m., Vivian Williams and his father, Percival Williams, were seated in a car at the gate leading to the home of Vivian Williams. Percival Williams had a few moments before driven that car up to the gate and brought it to a stop when he and his son were approached by three men. One of these men, the appellant, Kenneth Rose, put his head and hands through the window of the passenger side of the car where Vivian Williams was seated. In Rose's hands Vivian saw what he described as a black gun. Vivian immediately held on to this gu[redacted]d, after a struggle, he succeeded in taking it from Rose. While Vivian was engaged in the struggle with Rose the other two appellants, Morris Dixon and Laurel Dixon, were on the other side of the car "wrestling" w[redacted]th Pe[redacted]val Williams who had come out of the car.

Later the same evening Vivian Williams handed over the "gun" taken from Rose to a police officer at the May Pen Police Station. In due course Detective Inspector Daniel Gray of the Ballistics Section of the Police Forensic Laboratory examined this "gun". He described it as a home-made gun having as its barrel a $4\frac{3}{4}$ inch long piece of metal tubing $\frac{5}{8}$ths of an inch in diameter, the rear end of which was adapted to receive a .38 calibre revolver cartridge. This barrel was welded to a piece of flat iron shaped to form the stock of the gun. There was a strap hinge at the breech block. To the back of the block was attached a lever and to the breech face was attached a metal wire, this latter supposedly representing a firing pin. There was, however, no trigger or

spring. In his evidence Inspector Wray said:

> "I examined the gun and fired a .38 calibre cartridge. I had first removed the bullet from the cartridge as a safety measure. The firing was done by placing the cartridge in the chamber at the rear end of the gun and striking the breech end with a mallet. This was done as there was no spring provided for the purpose of firing the gun. I formed the opinion that the gun was capable of discharging deadly missiles but only by the application of external force."

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? Notwithstanding Wray's evidence the learned resident magistrate concluded:

> "In (Rose's) hand was a black home-made gun which I find to be a firearm within the meaning of the Law. Rose had no Firearm User's Licence to keep and carry that gun at that time."

There cannot be the least doubt that the resident magistrate was not confounding a "firearm" with an "imitation firearm" since the Law makes no provision for a Firearm User's Licence in respect of an imitation firearm. In my respectful view the evidence adduced before the resident magistrate was singularly incapable of sustaining a conclusion beyond a reasonable doubt that this home-made thing was a firearm within the meaning of that word in s.2 of the Act of 1967. 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. The truth is that Wray's opinion involved no more than a pure guess, hardly the sort of evidence capable of pointing to a conclusion beyond a reasonable doubt. Indeed, the fact that Wray thought it necessary to remove the bullet from the cartridge before firing the cartridge would tend to suggest that he was himself in doubt as to the capacity of the barrel to withstand the force of a bullet. It follows, in my view, that the conviction of Rose must be set aside.

This brings me to the question whether the conviction of the two Dixons, based as it undoubtedly was on the supposed applicability of s.20(5)(a) of the Firearm's Act 1967, can be upheld. Let me say at once that I have the greatest difficulty in understanding or identifying the principle on which it is said that the conviction of the Dixons can be held to be valid. It is said that although the finding of the resident magistrate that the home-made gun examined by Wray was a firearm within the meaning of the Law is quite untenable, it is, nevertheless, open to this Court to uphold the conviction of Rose on the ground that this home-made gun must have been an imitation firearm and that the resident magistrate could have so found. For myself, I find this proposition somewhat startling. It is true that by virtue of the provisions of s.20(5)(c) of the 1967 Act it was open to the prosecution to prove the use, or possession, by Rose of a firearm or an imitation firearm in the circumstances therein defined. Upon proof of such use or possession Rose would, by the statutory fiction defined in the paragraph, have attracted the consequence of being "deemed to be in possession of a firearm in contravention of the section." But the prosecution did not in this case set out to prove that this home-made gun was either a firearm or an imitation firearm. It deliberately sought to prove that the thing used or possessed by Rose was a firearm, and not merely an imitation firearm. In the result the court expressed itself as being satisfied beyond a reasonable doubt that this home-made gun was, indeed, a firearm.

In the foregoing circumstances I would have thought that an appellate court could not, either in principle or in logic, or as a

matter of law, substitute for that unequivocal finding by the resident magistrate, a finding that this home-made gun was not a firearm but rather an imitation firearm. I am not aware of any authority in this Court which empowers it to embark upon any such course. In any event this Court has not seen the thing identified as a firearm so as to be able to say whether it could, indeed, fairly come within the definition of an imitation firearm and thus whether it was open to the resident magistrate to so hold. Nor is the description in the printed record capable, in my view, of supporting any inference by which such a conclusion may be justified. But a more fundamental objection must be that any such substitution of a finding of fact by this Court necessarily involves a denial to the appellants of the undoubted right they had to challenge any suggestion by the prosecution, if such were the case, that this home-made gun was an imitation firearm. Thus it is that the defence advanced by the appellants at their trial was that they were not in any way concerned in the assault on Percival and Vivian Williams. This is nothing to the point. They were, nevertheless, entitled to say to the prosecution: 'Our defence to this charge is an alibi. In so far, however, as your case against us rests on proof that this thing you have produced in court is an imitation firearm we challenge this. We contend that it is not an imitation firearm within the meaning of the Law.' The question whether the "gun" was an imitation firearm as defined was, however, never mentioned or canvassed at the trial. The resident magistrate quite clearly did not advert to the question at any time during the trial or in his recorded findings. On what principle can it now be raised in, and a conclusion reached thereon by, this Court? It seems to me that the principle applicable here, with some modification, is that stated by Lord Goddard, C.J., in R. v. Abbott, (1955) 2 All E.R.899 at p.903 in the following terms:

> "Another point which it seems to me to be very necessary to take into consideration in deciding the present case is this, that with all respect it cannot be right for a judge to leave a case to the jury where the whole of the structure on which the prosecution has been built up to that moment collapses and falls, for that is what happened in this case."

It is important, I think, to notice certain matters that are self-evident in the language of s.20(5)(a), more particularly when read against the background of the provisions of para.(c). Para.(a) of the sub-section, by its very clear and precise terms makes particular reference to a person found in the company of another person who "has in his possession, contrary to this section", a firearm in the circumstances therein defined. The paragraph does not contemplate a person who, in the words of para.(c) of the sub-section, is, in very different circumstances, to be "deemed to be in possession of a firearm in contravention of this section." In this latter case proof of the mere possession, for example, of an imitation firearm, (which does not ordinarily constitute an offence) in the circumstances described in the paragraph incurs the consequence that the possessor is deemed to be in possession of a firearm in contravention of the section. Under para.(a), however, the non-possessor is to be treated as being in possession upon proof (i) that he was "found in the company" of a person in actual possession of a firearm, (ii) that the latter's possession in fact was contrary to the section and was a possession in circumstances which give rise to the presumption therein described, and (iii) that he had no reasonable excuse for being found in the company of the real possessor. The intent of para.(a) is clear. It seeks, in the case of a firearm, to abrogate the common law concept of possession for the purposes which the statute seeks to achieve. This it does by the use of a fiction by which it attributes unlawful possession to the non-possessor. Further, if language means anything, there is a very obvious distinction between a person who in a given set of circumstances, is to be deemed to be in possession of some article in contravention of a statute and a person who, in fact, has possession in contravention of that statute.

In Barclays Bank v. Inland Revenue Commissioners, (1961) A.C.509, Viscount Simonds said:

> "I regard its (the word 'deemed') primary function as to bring in something which would otherwise be excluded."

I respectfully adopt the view of Viscount Simonds as to the primary meaning of the word "deemed" and would hold that it is in that sense

that it is used in para.(c). And I would, parenthetically, seriously question, for what it is worth, whether the 'firearm' mentioned in para.(c) is a firearm in respect of which the holder does not have a licence.

If Parliament had intended no distinction between a person who is to be deemed to be in possession of a firearm in contravention of s.20 and a person who has possession in contravention of that section I would have expected it to say so in the clearest possible language. Such a result could quite easily have been achieved by the very simple device of having the opening words of para.(a) read: "if any person has, or is deemed to have, in his possession, contrary to this section ...". Parliament has not so declared.

In the result I would allow the appeal of Rose on the ground that the finding of the resident magistrate referred to above is not a reasonable finding having regard to the evidence. It follows, that the appeals of the Dixons must also be allowed on the ground that they were not shown to have come within the provisions of s.20(5)(a).

SWABY, J.A.:

I have had an 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 and so coming within the definition of "firearm" in s.2 of the Firearms Act.

It is solely for the reason that the ballistics expert called at the trial 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. The relevant evidence regarding this weapon given by Detective Superintendent Daniel Wray, Ballistics Expert of the Police Forensic Laboratory in his examination-in-chief is sufficiently set out in the judgment of Graham-Perkins, J.A. and so I shall not repeat it.

Cross-examined by Mr. Witter, he said inter alia -

"The breach block is separate from the breach in conventional weapons. I fired a .38 cartridge from the breach by inserting that cartridge in the breach end. The breach end is the rear end of the barrel.

I say that I fired the cartridge from which Exhibit 5 is the spent shell by placing the firing pin which is attached to the face of the breach block against the base of the cartridge - on the primer of the cartridge and striking the lever attached to the breach block of the gun with a mallet.

The breach and the breach block are separate things. I did say that it was the breach end of the gun "2" for identity that I struck with a mallet.

There is no difference between striking the breach block and striking the breach end of the gun. The breach block is at the breach end. When I placed the cartridge in the gun before firing it there was a live primer in it. I put the cartridge into the chamber at the breach end.

When I struck the lever at the rear of the breach block there was an explosion of the primer in the cartridge I heard a loud sound when the firing pin came in contact with the primer. That is why I say the

"primer exploded. It is also because I heard that explosion that I say the gun "2" for identity is capable of discharging a deadly missile. As well as the sound I heard smoke came from the muzzle of the gun "2" for identity when I struck the breach block with the mallet. I could see on the primer after I had hit the breach an impression."

Cross-examined by Mr. Daley, he said, inter alia -

"I did not say that I tested the gun "2" with a deadly missile. The effect of what I said is that I did not test the gun "2" for identity with a deadly missile. I hit it with a mallet because there was no spring attached to the gun. I hit it with a mallet to fire it. Any hard heavy object would have had similar effect as the mallet. A blow from ones hand could perhaps have fired the gun in a similar way. If I put a piece of metal tubing into a clamp put a bullet at one end place a nail behind the bullet and strike the nail with a hammer the bullet should fire..

The nail, the tubing and the clamps would not by themselves be capable of discharging a deadly missile. They would need in addition something with enough weight capable of applying the force necessary to discharge the missile.

If one puts a bullet in a clamp and strikes the primer with a hammer that should discharge the bullet. "2" for identity would not by itself be capable of firing a deadly missile."

The evidence not supporting the conclusion that the instrument was a "firearm" as statutorily defined in s.2 of the Firearms Act the question still remains to be decided whether the instrument answered the statutory description of an "imitation firearm". By definition an "imitation firearm" is anything which has the appearance of being a firearm within the meaning of s.25, whether it is capable of discharging any shot, bullet, missile or not. The evidence disclosed that the instrument had a barrel adapted to receive .38 cartridges, a home-made stock and a contraption serving as a firing pin. It had no spring or trigger. These visible characteristics of this instrument are similar to those of the conventional revolver and the inference therefore seems

irrestible that it bore the appearance of a firearm and accordingly fulfilled the statutory description of an "imitation firearm".

Now section 25 (2) of the Act provides -

> "(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 subsection and, in addition to any penalty to which he may be sentenced for the first mentioned offence, shall be liable to be punished accordingly."

The prosecution sought to established its case against the three appellants by adducing evidence that Kenneth Rose who was armed with the home-made gun had committed one or more of the offences specified in the First Schedule to s.25(2) of the Act and that the Dixons who were in his company were acting in concert with him and were present aiding one another in their common design.

In my view, the evidence adduced clearly established the commission by Kenneth Rose of the offences of (1) common assault against Vivian Williams and (2) wounding him by cutting him on his nose which caused it to bleed, both offences in the Schedule to s.25(2) of the Act under Item 3 "Offences against sections 18, ---- 38, ---- of the offences against the Person Law", as well as the commission of the offence of unlawfully wounding Percival Williams by the Dixons. According to the evidence of Vivian Williams Percival Williams was "washed in blood from the left side of his face down to his stomach." A portion of his left ear was cut out. He was detained in hospital for about 17 days before being discharged.

Section 20 (5) (a) and (c) of the Act provides as follows -

> "(5) In any prosecution for an offence under this section
>
> (a) If any person has in his possession, contrary to this section, any firearm in circumstances which raise a reasonable presumption that such firearm was intended or was about to be used in a manner prejudicial to public order, or public safety, any other person who is found in the company of that person in those

circumstances shall, in the absence of reasonable excuse, be treated as being also in possession of such firearm.

(b) ----------

(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 s.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."

If I am correct in the conclusion that the evidence clearly established the commission by the appellants of scheduled offences in s.25(2) and that the inescapable conclusion from the evidence adduced was that this home-made gun was at least an "imitation firearm" then it would follow that the irrebuttable presumption of law in s.20(5)(c) of the Act above quoted would become operative against Kenneth Rose who would therefore be guilty of a contravention of s.20, namely, the offence of being illegally in possession of a "firearm" without having a firearm user's licence so to do notwithstanding that the weapon in his possession was only an "imitation firearm". In this connection the judgment of the Full Court in R.M. Criminal Appeals Nos. 101/74, 39 & 97/75 R. v. Clinton Jarrett et al delivered on December 8, 1975 said in part -

> "In my view where by reason of s.20 (5)(c) of the Act the prosecution adduced such evidence as would be necessary to show that the defendant committed a s.25 offence it is not necessary that it shall be shown that the object in the possession of the defendant at the material time was a firearm as distinct from an imitation firearm or vice versa. The prosecution may show it is one or the other. The gist of the offences under s.25(1) is the putting of a person in fear of death or injury from a shot discharged from a lethal barrelled weapon or an attempt so to do by another person with one of the intents specified in the sub-section and it matters not whether the weapon employed is a real or imitation firearm. Similarly the gist of the offences under s.25(2) is the finding in possession of a defendant an object of that nature

> real or imitation when a specified offence is being committed by the defendant or at the time of his apprehension for such an offence and which he might well be expected to bring into use for purposes connected with the commission of such an offence or to resist apprehension in respect thereof.
> In such circumstances it would be proper to charge the commission of any such offence with reference to a firearm or imitation firearm in the disjunctive.
> Where the object is incapable of production by the prosecution for one reason or another in criminal proceedings a prosecution brought under the section can hardly be negated because although it may be shown that the object was clearly one or the other it could not be shown which of the two it was."

The evidence further clearly established that the Dixons were in company with and acting in concert with Kenneth Rose during the attacks on Vivian and Percival Williams They were present aiding and abetting each other in their criminal intent. These circumstances raised a reasonalbe presumption under s.20(5)(a) of the Act that this home-made gun was intended or was about to be used by Kenneth Rose in a manner prejudicial to public order or public safety. As neither of the Dixons, Rose's accomplices, had given a reasonable excuse, aceeptable to the learned resident magistrate for being in company with Kenneth Rose on the occasion of the assaults and wounding of Vivian and Percival Williams, the Dixons had failed to discharge the rebuttable presumption of law in s.20(5)(a) which arose against them. Both could therefore be "treated" also as having been illegally in possession of the "firearm" which Kenneth Rose had in his possession and was about to use. In the circumstances, they were therefore both guilty of a contravention of s.20(1)(b) of the Act, and liable to be punished accordingly.

Learned counsel for the Dixons had argued that the provisions of s.20(5)(a) could not apply to the Dixons as that sub-section they contended, is intended to apply only to cases of firearms as defined in s.2 of the Act and not to "imitation firearms" as defined in s.25 of the Act. I do not agree with this submission. The opening words of subsection 20(5)(a) make it clear that the rebuttable presumption in

that sub-section may arise in any prosecution for an offence under s.20, namely, of being in illegal possession of firearm without a firearm user's licence.

In this case the prosecution chose to establish its case by proving the commission of a s.25(2) offence against the three appellants. Upon proof establishing such an offence against them the irrebuttable presumption in s.20(5)(c) arose against Kenneth Rose who had been in possession of the home-made gun and who was about to use it in a manner prejudicial to public order or public safety. As the Dixons were found in the company of and acting in concert with Kenneth Rose in circumstances which raised a reasonable presumption that such firearm was intended or was about to be used in a manner prejudicial to public order or public safety, then in the absence of a reasonable excuse for their being in Kenneth Rose's company at the time, the Dixons are by virtue of the provisions of s.20(5)(a) to be treated as being also in illegal possession of the 'firearm' that Kenneth Rose had in his possession and therefore guilty of a contravention of s.20(1)(b) of the Act and liable to be punished under s.20(4) of the Act accordingly.

In the circumstances I would dismiss the three appeals and set aside the sentences of indefinite detention during the Governor-General's pleasure passed on each appellant and in lieu thereof impose a sentence of three years imprisonment at hard labour to commence from the date of his conviction, May 1, 1974, in respect of each appellant.

ZACCA, J.A.:

I agree with the reasons and decisions contained in the judgment of Swaby, J.A.

GRAHAM-PERKINS, J.A.:

In the result the appeals, by a majority, are dismissed, and the convictions affirmed but the sentences of indefinite detention during the Governor-General's pleasure passed on each appellant set aside. In lieu of those sentences each appellant is ordered to be imprisoned at hard labour for a space of three years to commence as from the date of his conviction on May 1, 1974.

The appellant Kenneth Rose was allowed bail on May 25 1976 and Morris Dixon and Laurel Dixon on June 8, 1967 pending the determination of their appeals herein