J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 167/76

BEFORE: THE HON. MR. JUSTICE ROBINSON P.
THE HON. MR. JUSTICE ZACCA J.A.
THE HON. MR. JUSTICE MELVILLE J.A.

REGINA

v

MICHAEL LEWIS

Mr. S. Morris for the Appellant
Mr. D. McIntosh for the Crown

November 10, December 20, 1977

MELVILLE J.A.

This is an application for leave to appeal from a conviction recorded on the 30th July, 1976, against the applicant, Michael Lewis in the Gun Court for being illegally in possession of a firearm on the 5th of June, 1976.

The substantial and only ground argued before this Court was that the learned trial judge in his findings stated that the accused was under the age of fourteen years, and proceeded to convict the applicant without making any further reference to the necessity for proof of a mischievous propensity in the applicant. It was argued that the learned trial judge should have gone on to consider the further point as to whether the applicant had the necessary mens rea for a person under the age of fourteen years, before he could be convicted of a criminal offence.

The facts, very briefly, were that on the 5th of June, 1976, the applicant was seen sitting on a sidewalk in front of premises 66½ Spanish Town Road, and when he was accosted by the police a

home-made shot gun - which is commonly referred to in this country as 'a bucky' - was found in his pants waist. The circumstances clearly indicated an endeavour to conceal this firearm. Indeed, according to the evidence, he was reluctant to get up, and then when he did get up, after insistence by the police, he got up in a sort of crouching position - which position was clearly demonstrated before the court - and the circumstances were such as to clearly indicate that the applicant was concealing this firearm.

The learned trial judge, in his summary of the evidence before him had this to say at the very beginning. "Well this young lad who was around fourteen years of age, or will be come Independence Day, come the 2nd of August, was found in possession of this home-made firearm, which I understand bears the designation - it is called 'a bucky', presumably because it is manufactured to use buckshots." That was the only reference to the age of the applicant and nothing was said about proof of a mischievous propensity. In those circumstances it was the submission of Mr. Morris that the learned trial judge, having said nothing at all in his summation, insofar as mischievous propensity was concerned, he did not have this matter in mind when he made his summation. Mr. Morris frankly admitted in this Court that the point was not present to his mind when he appeared for the applicant in the Gun Court; therefore, it must have slipped the judge's mind also.

This Court is unable to agree with that submission. One has to remember that the summation by a trial judge in the Gun Court is far different from a summing-up in the strict sense. It is really a summation of the evidence accepted or rejected, and when a point of law is raised the trial judge usually deals with such point only, gearing his summary to the submissions made on behalf of the applicant. It was evident from what was said in the Gun Court, on the question of discrepancies and the fact that the defence was that this applicant did not have this firearm,

but that two men had run past him being chased by the police, and some little time after the police returned with the firearm and accused the applicant of being a 'Rema man' and as these men had come from Rema he must know something of the matter; that those were the circumstances and the issues raised to which the learned trial judge directed his attention. The fact that the specific point of mischievous propensity was not raised before the Court did not mean that the trial judge did not have it in mind. To the contrary, his opening gambit clearly indicated that the point must have been present to his mind but as he was not addressed on the point there was nothing further to be said about it.

Even if we are wrong on this point, and the learned trial judge did not have it in mind, yet the evidence was overwhelming and the circumstances were such as to show that this lad had this mischievous propensity. The circumstances in which this firearm was found, his endeavour to conceal it, clearly showed that he knew what he had and that it was wrong for him to have it.

The principle to be applied to offences where mens rea is required at common law, was well stated by Lord Parker, L.C.J.in B v R, (1960) 44, C.A.R. 1, at p. 3 when he said:-

> "There is no doubt in the case of a child between the age of eight and fourteen that there is a presumption that the child is not in possession of that knowledge of which mens rea is an essential ingredient, and it is to be observed that, the lower the child is in the scale between eight and fourteen; the stronger the evidence necessary to rebut that presumption, because in the case of a child under eight it is conclusively presumed he is incapable of committing a crime. It has often been put in this way, that in order to rebut the presumption, 'guilty knowledge must be proved and the evidence to that effect must be clear and beyond all reasonable doubt', or, as it has also been put, 'there must be strong and pregnant evidence that he understood what he did'".

There Lord Parker was referring to the English situation but our law was amended in 1975, I think, and twelve years was substituted for eight years, so that in our law what Lord Parker said should read 'between the ages of twelve and fourteen'. (See Section 3 of the Juvenile Act).

In the same way that the farther one is from age fourteen the stonger the evidence would have to be, so also the nearer one gets to age fourteen the less the evidence that would be required to rebut the presumption. Indeed, this offence was committed on the 5th of June, and it would be about the 2nd of August, a matter of two months or less, when this lad would have been fourteen years of age, and thereafter he would have been responsible in the criminal law like any adult person. F. v Padwick, (1959) Crim. L.R. 439 and Ex parte N, (1959) Crim. L.R. 523, to mention but two, are cases in which evidence was given which rebutted this presumption. As stated earlier, the circumstances in which the applicant was found with this firearm would clearly rebut that presumption. It would not be remiss to mention that it seems to be notorious in this country, that any child above the age of ten, having regard to the present deluge of firearm offences, is well aware of what a firearm is, particularly these home-made contraptions that are causing so much ruin and destruction in our midst, and is also well aware that being in possession of such a contraption is an offence against the law and is something which is wrong. However, in the present state of our law such a child remains immune from the sanctions of the criminal law.

In all the circumstances the application for leave to appeal is refused.