

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL No. 91/75

BEFORE: The Hon. Mr. Justice Luckhoo, P.(Ag.).
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Watkins, J.A.(Ag.).

REGINA v. NEVILLE PURRIER
and
TYRONE BAILEY

~~Mr. J.S. Kerr Q.C.~~ and Mr. F.A. Smith for the Crown. *Mr. M. Morgan*

Mr. D. Daley for the Appellant Purrier.

Mrs. M. MacIntosh for the Appellant Bailey.

December 10 and 11, 1975

February 4, 1976

WATKINS, J.A.(Ag.):

The appellants were convicted on December 6, 1974 and sentenced to be detained at hard labour during the Governor General's pleasure by Mr. V.D. Gordon, a judge of the Gun Court on an information which charged that on the 20th day of November 1974 they unlawfully had in their possession one firearm not under and in accordance with the terms and conditions of a Firearm's User's Licence as required by section 20 (1)(b) of Act 1 of 1967, the Firearms Act, hereinafter referred to as the Act.

The relevant evidence at trial was as follows: Amy Tate, a bar attendant, was on the afternoon of November 20, 1974 at the intersection of Chancery Lane and Beeston Street, intending to proceed towards King Street, when the appellant Purrier whom she had not known before called to her "Hi Gal, gi me the money you have in you busom". Purrier then held her in the neck of her dress, and the other appellant Bailey, also hitherto unknown to her, appeared on the scene, gun in hand, and said "You don't hear the man say you fi give him the money you have in your busom you want you (expletive) head blow off." As he spoke Bailey, according to the testimony of Tate, held the gun at her right ear. Fearing for her life Tate extracted money from her bosom, \$100 in all, which Purrier quickly snatched from her hand and ran, followed by Bailey. Six days later whilst outside her workplace on Constant Spring Road Tate saw the two appellants. She called the Police who took them into custody

and in their presence and hearing Tate accused them of having robbed her on November 20. When formally charged on November 27 Purrier is supposed to have said "Me no use no gun Sir". Bailey said nothing.

In their sworn evidence at trial both appellants acknowledged meeting the complainant on the date and in the general vicinity alleged. They said that they got money from Tate pursuant to a transaction freely entered into by her and that they had no firearm whatever. Tate, they said, apparently no longer wished to carry out the transaction and desiring to recover her money, made these false accusations against them.

As neither the instrument alleged to be a firearm was recovered, nor was there inflicted with it any injury or damage of a nature consistent with a reasonable inference that the instrument was a firearm, nor any bullet, noxious liquid, gas, grenade, bomb, missile or other thing ejected therefrom, it was common ground between the parties that the convictions, if sustainable at all, would have to rest upon evidence satisfying the necessary standard of proof in a criminal case and coming within the requirements of section 20 subsection 5 of the Act as amended by the Jun Court Act. Specifically, in relation to the appellant Bailey to whom alone the complainant Tate attributed actual possession of the instrument which she called a gun, the Crown sought to uphold the conviction on the basis of section 20 subsection 5(c) of the Act, whilst in relation to the appellant Purrier in whose hands the evidence for the prosecution placed no firearm, the Crown sought to justify his conviction either on the basis of the said section 20 subsection 5 (c) or on a combination of that subsection with section 20 subsection 5 (a). As Crown Counsel Mr. Smith urged, if the conviction of Bailey were sustainable pursuant to section 20 subsection 5 (c) of the Act, then section 20 subsection 5 (a) would have been breached also, as the holding-up of an individual would be an act prejudicial to public safety and public order, and accordingly Purrier, having been found without reasonable excuse in the company of Bailey in the circumstances as alleged by the prosecution, if believed, would have been equally guilty of unlawful possession of the firearm.

Section 20 subsection 5 of the Act is in these terms:

"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
- (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."

Section 25 so far as relevant is in these terms:

"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 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."

For the purposes of section 25 of the Act, and therefore for the purposes of section 20 subsection 5(c) as well, "firearm" and "imitation firearm" are thus respectively defined:

- (a) "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"
- (b) "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".

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

- (i) Commission of an offence referred to in section 25 subsection 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 section 25 offence, for example, a section 25 subsection 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.

Turning now to the evidence led by the prosecution in the instant case, that evidence, if believed, would support the commission of the felony of robbery with aggravation (vide section 34 of the Larceny Law Cap. 212 of the 1953 Revised Edition of the Laws of Jamaica or section 37 of the Larceny Act). To make this crime an offence under section 25 subsection 1 of the Act proof of the facts latterly adverted to becomes necessary, that is to say, proof that the appellants or one of them used, attempted to use, or had in their/his possession a firearm or imitation firearm as defined by section 25 with one or other of the intents required by the subsection. Still further, in order to complete the offence under section 20 subsection 5(c) that subsection provides that in addition to proof of the commission of a section 25 offence, it must also be proved that in the commission thereof the persons charged, namely the appellants or one of them, used, attempted to use, or had in his possession a firearm or imitation firearm as defined in section 25 of the Act.

On the assumption that the evidence for the prosecution established beyond reasonable doubt proof of the commission of the felony of robbery with aggravation by the appellants upon the complainant Tate, the single remaining issue on appeal must be as to whether the totality of the evidence could reasonably support the finding of the learned judge of the

Gun Court that in the course of the commission of the felony the appellants or either of them used, attempted to use or had a firearm or imitation firearm as defined by section 25 in possession.

In this case the instrument, whatever it was, was not recovered. No expert therefore gave evidence as to its conformity with the statutory definition of a firearm. There is no evidence that any bullet or other missile, or gas or other thing was ejected from it, nor was there any evidence of injury to person or damage to property inflicted with it of a nature such as to confirm inferentially that the instrument was a firearm within the meaning of the section. There was therefore in the opinion of this Court no evidence adduced sufficient to satisfy the relevant statutory definition of a firearm. The learned judge of the Gun Court not unaware of the evidential deficiency was not deterred by it. In his statement of his findings he said:- "No one in Jamaica with a scintilla of sense can fail to recognise a gun when he sees it, guns having received such publicity". The learned judge in short invoked the doctrine of judicial notice and without benefit of enquiry assumed as notorious throughout the length and breadth of Jamaica and throughout all sectors of the Jamaican society acquaintance with and knowledge of firearms as defined in section 25 of the Act. "Judicial Notice", it was said in *Commonwealth Shipping Representative v. Peninsular & Oriental Branch Service* (1923) A.C. 191 at p. 212, "refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer". Examples of the application of the doctrine by reference to facts which have been judicially noticed without inquiry indicate the nature and limitations of the doctrine, e.g. that Christmas Day is December 25, that a fortnight is too short a period for human gestation (*R. v. Luffe* (1807) 8 East 193, that cats are kept for domestic purposes (*Nye v. Niblett* (1918) 1 K.B. 23). The test of the applicability of the doctrine of Judicial notice has been stated in the alternative thus (a) that the matter is so notorious as not to be the subject of dispute among reasonable men, or (b) that the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy (See Morgan, *Some Problems*

of Proof under the Anglo-American System of Litigation also Cross on Evidence 3rd Ed. pp. 128 et seq. (1956) 52 - 56. Despite the increasing public display of guns in Jamaica we can find no credible factual basis for the assumption that the knowledge of them, or more particularly of them as defined in section 25 of the Act, is notorious, nor is such an assumption presently capable, it would seem, of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy. We therefore find that the invocation of the doctrine of judicial notice in the instant circumstances was unwarranted.

Was the instrument an imitation firearm within the meaning of section 25 of the Act, that is to say, something which had the appearance of being a firearm whether it was capable of discharging any shot, bullet missile or not? Apart from saying that the appellant Bailey had a gun which he placed at her right ear, the complainant Tate, the only eye-witness for the Crown, gave no description whatever of the instrument or weapon which she was supposed to have seen. Significantly Tate at no time expressly stated that she saw a gun and equally significantly she gave no testimony of having observed any of the outstanding characteristics of the traditional firearm such as the mouth, the barrel, the chamber or the trigger, nor did she even say that the instrument was so concealed, if indeed it were concealed, that any or all of these parts were concealed from view. Purrier's statement upon being formally charged to wit, "Me no have no gun" avails nothing. Being the statement of an accomplice it afforded no evidence from which it could be inferred that it was the co-accomplice Bailey who had a gun. Bailey's alleged threat "to blow off" the head of Tate is not evidence of the truth of the suggestion that the instrument was capable of lethal consequences. Accordingly this Court can find in the evidence at trial no foundation for the finding of the learned judge that "to the complainant it (the instrument) had appearance of a gun and she so described it." Whilst therefore the prosecution had furnished evidence which, if believed, could have supported a conviction for the felony of robbery with aggravation it failed to furnish the additional evidence requisite for a conviction either of a section 25(1) offence or of an offence under section 20(1) (b) of the Act pursuant to section 20 (5) (c).

The case against the appellant Bailey pursuant to section 20 (5) (c) therefore fails and accordingly that against the appellant Purrier must also fail.

The appeals of the appellants are therefore allowed. The convictions are quashed and the sentences set aside.