C.A. CRIMINAL LAW – Gun Court (1) Illegal possession of firearm (2) Robbery with aggravation (3) Shooting with intent) Proof required to establish offence of shooting with intent – Each case must depend on own facts and proper inference to be drawn from those facts – APPEAL DISMISSED

Cases referred to:

R v Brown (1967) 10 J.L.R. 234

R v Jarrett & Ors (1975) 14 J.L.R. 35

Samuda & Anor v R (Unreported) S.C.C.A. 55257/79 dated 18/7/80

R v Purnell & Anor 14 J.L.R. 97

w/ cond.

CRIMINAL EVIDENCE

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 99/85

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

R. vs. PHILLIP McKenzie

Application for leave to appeal.

Garth McBean for Crown

October 24, 1988

CAREY, P. (Ag.):

In the High Court Division of the Gun Court before Bingham, J., sitting alone on the 12th November, 1985 this applicant, Phillip McKenzie, was convicted on an indictment which contained three (3) counts; namely, Illegal possession of firearm, robbery with aggravation, and shooting with intent. He was only convicted, however, of the first two, and for reasons that are difficult to appreciate, was acquitted on the third count for shooting with intent. He was sentenced to terms of five (5) years imprisonment at hard labour, and seven (7) years imprisonment at hard labour, respectively. He now applies for leave to appeal his conviction.

This is one of those run-of-the-mill cases, we must now say, which is rather unfortunate, but alarmingly frequent. On the 7th of August, 1984, which is some considerable time ago, a delivery man,

Mr. Bagaloo, was on his rounds, in remote Gimmi-mi-bit, in the parish of Clarendon. At about 2:30 in the afternoon he was engaged in delivering chicken-backs and other things, when he observed two men, one of whom was armed with a gun, the other with a knife. There was a demand for money. In the result, he was relieved of a considerable amount of money. He identified the gunman as being this applicant whom he said, had come quite close to him and thus affording him ample opportunity of observing him. After that incident, the delivery man and his sideman made a report to the police, who went post-haste in pursuit of their assailants. There was a shoot-out, which gave rise to the count for shooting with intent. One of the men was hit and fell. He was brought to the police station and identified by Mr. Bagaloo as one of his assailants. It was the applicant and he admitted that he had held up the truck. However, when he came to give his defence, it was an alibi.

This was a clear question of fact for the learned trial judge, and there really was no difficulty in the case. He had to consider the identification evidence and the admission made by the appellant. The difficulty was imported into it by the learned trial judge's approach to the evidence in proof of a charge of shooting with intent. At pages 85-86 of the record, he is recorded as making these observations -

> "So far as Count Three is concerned, I won't go into Count Three much but in relation to Count 3, the Crown has the burden to prove to the extent that I feel satisfied that every ingredient as far as shooting with intent is proven. The evidence of Mr. O'Connor is [Mr. O'Connor being a police officer who was shot at] that he really did not discern the instrument that this man had in his hand and although Mr. Bagaloo and Mr. Meredith have described what would amount to a gun, it did not go to the extent to establish beyond any reasonable doubt that what this gunman had was a real gun and not, as you say, an imitation firearm. The gun was not fired at the time, nobody fortunately was injured by any bullet and when the shooting was taking place, the exchange of gunfire as described by Mr. O'Connor, he has not said that he <u>heard</u> bullets."

We must emphasise HEARD. The learned trial judge then continued -

> "There is clear authority which would indicate that in order to establish such a charge of shooting with intent the witness or witnesses would have to describe in some particular evidence. In other words, the evidence would have to go to the extent as to establish that bullets, real bullets were fired from the gun which made this indentation, a mark on object or objects or some surface or somebody would have got to be shot, struck by one of these live bullets or some firearm would have to be recovered. Now the evidence doesn't go that far, so in relation to count three, I am going to find the accused not guilty on count three."

That exposition is not our understanding of the law, and indeed is wholly misconceived. It states the law too narrowly. In R. v. Brown [1967] 10 J.L.R. 234, Duffus, P., expressed the view that in the offence of shooting with intent, the Crown was obliged to prove (a) that the article or thing used by an accused was a firearm, and (b) did in fact discharge a missile. The only evidence in that case that the applicant had fired at the witness, was that "smoke came from the gun mouth". The principle stated in that case is unexceptionable but its application to the facts in the case appears to us, dubious. The proof of the offence must depend in general, on inference and the logical result of that case would be the disappearance of that offence from the statute books. This was clearly recognized by the Court in R. v. Jarrett & Ors. [1975] 14 J.L.R. 35 which dealt with the question as the nature of proof required to show that the object was a firearm as defined or an imitation firearm. Luckhoo, P. (Ag.) said this at page 43:

> "..... it is not possible to lay down any hard and fast rules. It is indeed for the resident magistrate or the jury as the case may be to decide whether as a matter of fact the object in question has been shown to be a firearm as defined or an imitation firearm."

The headnote to the case is somewhat misleading as it states as follows (p. 36):

> "However, proof that the object was a firearm, a lethal barrelled weapon from which any shot, bullet or other missile could be discharged might otherwise be given where there was evidence (a) of a direct injury to a person or persons which, on medical evidence, was caused by a bullet wound, or (b) that there was some damage to property shortly after which a bullet was recovered and bullet marks found."

It might be thought that this was an exhaustive list. Bingham, J., apparently, thought so.

Zacca, P. (Ag) in Samuda & Anor. v. R. (Unreported) S.C.C.A. 55 & 57/79 dated 18th July, 1980 referred to R. v. Purrier & Anor. 14 J.L.R. 97 at page 101 where Watkins, J.A., in discussing the proof required to show that the weapon was a firearm within the meaning of the firearms Act, stated as follows:

> "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."

and continued at page 4, thus:

> "Here Watkins, J.A. was citing examples of evidence which might satisfy the statutory definition of a firearm. However, it cannot be said to be conclusive of the evidence which might be considered in each case.
>
> Each case must depend on its own particular facts and circumstances and it is a matter for the judge or jury to consider the evidence and to say whether it is sufficient to satisfy the statutory definition of a firearm."

None of these cases lays it down that there is a closed category of facts, the proof of which will show that a firearm within the meaning of the Act was used to commit the offences, e.g., shooting with intent.

Each case must depend on its own facts and the proper inferences to be drawn from those facts. It is more a matter of common sense than abstruse reasoning.

In this case, the police officer gave evidence that he was shot at and he returned the fire resulting in the applicant being shot. If the learned judge accepted the evidence that the applicant had held up and robbed Mr. Bagaloo with a firearm and fired at the police who were in pursuit, there were facts on which a judge could find the offence of shooting with intent, proved. The verdict returned by the trial judge does seem inconsistent, but all that redounded to the benefit of this applicant, who can hardly complain.

The application for leave to appeal must, therefore, be refused. Sentence is to run from the date of his conviction.