JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 101/87

COR: The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

REGINA vs. STAFFORD CHIN

David Muirhead, Q.C., for applicant

Miss Paula Llewellyn for the Crown

September 29 & 30 &
December 17, 1987

WHITE, J.A.:

Stafford Chin was convicted by Morgan, J., in the Gun Court for the illegal possession of two semi-automatic pistols, contrary to section 20(1)(b) of the Firearms Act. He was fined $1,000.00, or in default, to serve 12 months imprisonment.

The charge resulted from the discovery by Detective Sergeant Hubert Miller on the 19th December, 1986, of the two firearms in question in a vault at the home of the applicant. These firearms were (a) a new .38 Browning pistol, serial number 425 PXO 5546, and (b) a new .38 Walther pistol, serial number 71402H. The Sergeant, who was the sole witness for the prosecution, said that he cautioned the applicant and asked him how he came in possession of the firearms. Chin

replied that a Mr. Ernest Hoo had asked him to clear them at the Airport, and he had done this in August 1986. Chin was later arrested at the Halfway Tree Police Station on this charge.

Under cross-examination, the Sergeant said that Mr. Hoo attended at the station in the evening of the 19th December, 1986. Enquiries disclosed that Mr. Hoo was a licensed firearm dealer and importer. He said "that these two licences were part of his stock." Sergeant Miller said he interviewed Mr. Hoo, who told him that on the morning of the 19th he had taken the two firearms to Mr. Chin, for him to express an opinion as to whether it was feasible to attach target sights to them. The firearms had been cleared by Mr. Chin, taken from him and brought back to him by Mr. Hoo on 19th December, 1986. Mr. Hoo asked Mr. Chin to keep the guns in safety in his vault that day as he was in Kingston for business. According to the Sergeant, Mr. Hoo did not tell him that he intended to collect it on that day.

After the learned trial judge had ruled that there was a case to answer the applicant gave sworn evidence, and called Mr. Ernest Hoo as his witness. The applicant spoke of Mr. Hoo coming to him on the 19th December, 1986, and asking him to advise whether the two guns exhibited in Court could be fitted with adjustable sights, instead of the fixed sights, which were then on the firearms. Mr. Hoo then requested him to keep the firearms in his vault. He added that he had cleared those firearms at the Airport in August 1986, and Mr. Hoo had then taken charge of them. He said that when Sergeant Miller and the other police officer came to his premises, upon enquiry by them, he informed them that he had cleared the firearms with Mr. Hoo in August, 1986.

He admitted that he informed the Sergeant that he had no licence for these two firearms. It was common ground that for other firearms found in his vaults, the applicant was properly licensed.

Because of his nervousness, the applicant said he did not mention to the police while they were at his house that Mr. Hoo had brought the guns to him on that morning. He is a member of the Gun Club, he knew that the guns came in legally, and he did not know that it was "illegal for him to just hold it for him." To a question from Crown Counsel, he added: "down at the Club ma'am, I have always overheard people say they keep guns for people once they have a firearm ..... If you are the holder of a fire-arm licence you can keep a gun for some other people."

Mr. Hoo's evidence tended to confirm how Mr. Chin came to be in possession of the firearms on the 19th December, 1986. He identified them as those which had been cleared at the Airport with the help of a Mr. Sasso, and the applicant at some earlier date.

Six Grounds of Appeal were formulated in writing, and argued before us by Mr. Muirhead. They are as follows:-

> "1. The finding of the Learned Trial Judge that the accused took possession of the firearm in August 1986 and remained in possession until 19 December 1986, is unreasonable and not supported by the evidence.
>
> 2. The finding of the Learned Trial Judge that the accused was in illegal possession of the firearms is contrary to the provisions of Section 20 of the Firearms Act as the accused was an agent of Ernest Hoo, an owner within the exceptions under the Act.
>
> 3. The Learned Trial Judge was in error in holding that the accused was in possession of the firearms as the evidence establishes that the accused had the barest custody or only custody thereof;

"4. The conduct of the accused was such that it did not constitute any offence within the provisions of the Act in accordance with the principles of law stated in R v RUPERT JOHNSON 31 WIR 297;

5. If contrary to the assertion of the accused, he had possession and not mere custody or custody of the firearms the said possession was not unlawful even if it was outside the exceptions created by the Firearms Act.

6. The Learned Trial Judge improperly rejected the submission of NO CASE TO ANSWER and contrary to law, failed and/or declined to properly consider the submission before ruling thereon."

Before this Court, Mr. Muirhead urged, firstly, that the learned trial judge improperly rejected the submission of No Case to answer, and, contrary to law, failed and/or declined to properly consider the submission before ruling thereon. This stricture refers to the ruling by Morgan, J., at the end of submissions by Mr. Muirhead, for the applicant, and Miss Strawe for the Crown. The learned trial judge ruled as follows:

> "I had a look at the section. I have had to look at the other sections in the Act, and I have come to the conclusion that before I consider the submissions I ought to hear evidence - Case to answer."

This, Mr. Muirhead contended, indicated a misdirection of herself, because she said that evidence was requisite before she could rule. He adverted us to the well-known and frequently cited Practice Note by Lord Parker, L.C.J., published in [1962] 1 All E.R. 448 D.C. To this, he added the decision of the Court of Appeal (Criminal Division), in R. v. Galbraith [1981] 2 All E.R. 1060. In that judgment, Lord Lane, C.J., at page 1061d-e, indentified:

> "..... two schools of thought: (1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence on which a jury properly directly could properly convict. Although in many cases the question is one of semantics, and though in many cases each test would produce the same result, this is not necessarily so. A balance has to be struck between on the one hand a usurpation by the judge of the jury's functions and on the other the danger of an unjust conviction."

Notwithstanding, the judgment sets out what the approach of the judge should be when there is a submission of 'no case'. He says at page 1062e-g:

> ".....(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

Bearing these views in mind, we apply these criteria to this case. First of all, at the end of the prosecution case, the position was that the appellant, upon the evidence which had been given up to then, was found in possession of

two firearms for which he had produced no licences. Despite the fact that the Crown witness related what he had been told by Mr. Hoo, the fact is that at that stage the real question in the case was: was the appellant prima facie in illegal possession of the firearms? The legal arguments propounded to the trial judge were intended to show that on the interpretation of the relevant statutory provisions, the appellant should not have been called upon, and the law applicable should have been interpreted favourably to him with the consequence of the accused being discharged.

Remarkably, Lord Goddard, C.J., noted in R. v. Abbot [1955] 2 All E.R. 899 cited by Mr. Muirhead, the opinion of all members of that Court was that at the close of the case for the prosecution, there was no evidence against the appellant at all, and that was the opinion of the learned trial judge. That case fell squarely within (1) set out in R. v. Galbraith (supra). In R. v. Galbraith the evidence was such that, on the Crown's evidence, there was a case for the appellant to answer in that, in the circumstances presented by the evidence, it seems to us that this was eminently a case where the jury should be left to decide the weight of the evidence on which the Crown had based their case. It was not a case where the judge would have been justified in saying that the Crown's evidence, taken at its highest, was such that the jury properly directed could not properly convict.

In the case before us this Court is of the opinion that the learned trial judge properly ruled that there was a case to answer. On the facts, as we have already pointed out, there was possession in fact without the supporting licence which was requisite. This evidence was not of a tenuous

character, and certainly in the final analysis it would be a question of fact on the totality of evidence for the decision of the learned trial judge.

We, accordingly, now look at the other grounds of appeal which posited the role of the applicant as the agent or servant of Mr. Hoo, a role which arose from the circumstances in which the firearms were left with the applicant. The submission was that in any event he had mere custody, and not possession. In sum, he was not in illegal possession of the two firearms seized by Detective Sergeant Miller on the 19th December, 1986.

In the course of his argument, Mr. Muirhead depended, firstly, on section 20(1), and (2)(a) & (f) of the Firearms Act. These provisions are as follows:

> "20.—(1) A person shall not -
>
> (a) save as authorized by a licence which continues in force by virtue of any enactment, be in possession of a prohibited weapon; or
>
> (b) subject to subsection (2), be in possession of any other firearm or ammunition except under and in accordance with the terms and conditions of a Firearm User's Licence.
>
> (2) Subsection (1), except in so far as it relates to a prohibited weapon, shall not apply—
>
> (a) to any holder of a Firearm Manufacturer's Licence or a Firearm Dealer's Licence in respect of any firearm or ammunition manufactured by him or forming part of his stock in trade as a firearm manufacturer or a firearm dealer; or
>
> (b) .....
>
> (c) .....
>
> (d) .....
>
> (e) .....
>
> (f) to any servant or agent of any of the persons referred to in paragraphs (a) to (e) (both inclusive) in respect of any firearm or ammunition entrusted to him for delivery to the owner or to some person who is about to become the owner thereof in accordance with this Act; or ....."

He incorporated into his arguments sections 41A and 45(2) of the Firearms Act. The first relates to the liability for loss of a firearm through the negligence of any holder of any licence, certificate or permit in respect of a firearm, or who is lawfully in possession of a firearm by virtue of subsection (2) of section 20. The second section provides for the custody of firearms and ammunition where the holder of a Firearm User's Licence is about to leave Jamaica, and does not desire to take the firearm or ammunition with him. The section specifically states that before leaving Jamaica the holder should make arrangements for the safe-keeping thereof subject to the approval of the chief officer of the police or deliver such firearm or ammunition either "(a) to some person who is the holder of a Firearm User's Licence in respect of such firearm or ammunition as the case may be; or (b) to the sub-officer in charge of any police station specified in the Second Schedule."

Mr. Muirhead's argument was that the effect of those sections taken together is that firstly, having regard to the scheme and intendment of the Act, firearms and ammunition should not be lost or stolen by negligence; secondly, the holder of a Firearm User's Licence in the circumstances set out in section 45(2) is an approved person lawfully entitled to hold the firearm as a licenced holder thereof. This seems to be an unjustified extension of the provisions of section 45(2) to the facts of this case. By no accepted canon of interpretation can provisions relating to a citizen leaving the country be beneficially applied to that citizen who is merely going about his business in Kingston. If Mr. Hoo's fears and the need for safe-keeping of these new guns were

genuine or to be creditable, he could have taken the firearms to the police station at Halfway Tree, and there left them in the custody of a sub-officer.

Considering the premises of the applicant, the two large vaults, the house grilled, and the presence of guard dogs, do not by themselves indicate that the applicant fell within the terms of the interpretation submitted by Mr. Muirhead. Nor did the expression of belief by the Sergeant in what he was told by Mr. Hoo exonerate the applicant from being in illegal possession of the firearms.

The decision of this Court in the appeal of R. v. Rupert Johnson SCCA No. 236/76, judgment delivered on February 15, 1980, was projected by Mr. Muirhead as germane to this case. In particular he directed the Court's attention to question 2 posed by Kerr, J.A., in giving the judgment of the Court, that -

> "(2) Apart from the exceptions created by the [Firearms] Act, can one be in possession without contravening the provisions of section 20 of the Firearms Act? The answer was that a person may be in possession for a lawful purpose other than the exceptions created by the Act."

Mr. Muirhead further argued that, basing himself on the Johnson judgment, the statute does not create absolute offences. Accordingly, mens rea must be established in order to establish guilt. What must not be lost sight of, however, is that on the factual picture in Johnson, the Court of Appeal decided that -

> "the sudden and temporary handling of a firearm for the sole purpose of defending one's self from an attack which is actual or imminent is not possession within the contemplation of section 20. There would be no intention to exercise dominion over the firearm as the handling was for a brief moment and purely incidental."

Clearly, Johnson does not sanction an interpretation which is repugnant to the intendment of the Act which is controlling and regulating all aspects of dealing with firearms. Thus in the particular circumstances of that case there was no -

> "deliberately exercising the necessary dominion or control to make him a possessor or within the meaning of the particular statutory provisions."

In the instant case, the guns were given to Mr. Chin and he received them for safe-keeping if even for a few hours. He did not tell the police so, when he was first spoken to by them. He accounted for his failure when he gave a lame excuse about his being nervous at the time. The temporary nature of his possession, as described by Mr. Hoo, does not preclude the Court's finding that the possession was interpretable on the basis that he had cleared the guns from the Airport in August 1986. The learned trial judge did not have to accept the explanation given by the defence, nor even if she accepted it, did it provide a defence in the circumstances of this case.

It is clear that the further argument of Mr. Muirhead, while acknowledging the factual possession, still argued that there was no possession in law. The act of the applicant, he urged, would not constitute that possession, on the basis that he acted as the servant or agent for Mr. Hoo, a licensed firearm dealer. He emphasised that Mr. Chin was the agent for delivery to Mr. Hoo, the owner, who in virtue of his character as a Licenced Firearms Dealer and Importer, had entrusted the firearms to the applicant for later delivery to Mr. Hoo, qua owner.

The applicant, the argument runs, falls squarely within the provisions of section 20(2)(a) & (f), being in fact a Licenced Firearms Dealer for the purposes of section 20 (2)(a). The relationship between the two men was that of bailor and bailee, the two firearms being the subject of the bailment, in which the applicant had no interest except for a limited period within one day. During this period Mr. Hoo still retained possession.

These general submissions were supported by the authorities of Woodage v. Moss [1974] 1 All E.R. 585 and Sullivan v. Earl of Caithness [1976] 1 All E.R. 844.

The headnote to the report of Woodage v. Moss summarizes the facts and the decision:

> "An unknown man called at the accused's house and offered to sell him a revolver. The unknown man had no firearm certificate. The accused thereupon telephoned B, a firearms dealer who had authority under s 8(1)[a] of the Firearms Act 1968 to carry on business as a dealer without holding a certificate. The accused asked B whether he would accept the revolver as a surrendered weapon. B agreed and the unknown man thereupon agreed to surrender the weapon. B then asked the accused to bring the weapon to him. The accused agreed. The unknown man handed the weapon to the accused who then took it to B. On one previous occasion the accused had, with B's written authority, brought a weapon to him but otherwise the accused had never performed any services for B. The accused was charged with being in possession of a firearm without holding a firearm certificate in force at the time, contrary to s 1(1)[b] of the 1968 Act. The accused contended (i) that he had not had 'possession' of the weapon, within s 1(i), since, before the unknown man had surrendered possession, the accused had reached the agreement with B whereupon B had become the owner and possessor of it; and (ii) that alternatively, if the accused had had possession, he was to be regarded as B's 'servant' within s 8(1) of the 1968 Act.
>
> HELD—The accused was guilty of the offence charged because—
>
> (i) At the moment when the accused took the weapon from the unknown man and proceeded on his journey to B he was in fact and in

> "law in possession of it. B had not bailed it to the accused but merely requested that the weapon be brought to him (see p 588 f and g and p 589 e, post); dictum of Lord Parker CJ in Towers & Co Ltd v Gray [1961] 2 All E.R. at 71 applied.
>
> (ii) Since the accused was under no obligation to carry out B's request, and received no remuneration for it, he could not be described as B's 'servant' within s 8(1) (see p 588 j to p 589 a and c, post)."

This judgment is important in that there was here no fact which could turn the request to take the revolver to Oxford into a master and servant relationship. Just as in that case, the applicant here was under no obligation to keep the guns even for the temporary arrangement, and what he was in fact doing was a good turn to Mr. Hoo. He took the firearms into his possession, knowing that he had no licence to so do.

Sullivan v. Caithness (supra) is an interesting case. Here again, the headnote gives the essence of the facts and the judgment of the Queen's Bench Division -

> "In March 1971 D was issued, by the chief officer of police for Gloucestershire where he lived, with a firearms certificate in respect of firearms which were stored for safety at his mother's flat in Surrey. D moved to Oxfordshire, but the firearms remained in Surrey. The firearms certificate expired in March 1974 and was not renewed. In August 1974 D was charged with having in his possession at Swalcliffe, Oxfordshire, firearms without holding a firearms certificate, contrary to s 1(1)[a] of the Firearms Act 1968. The justices dismissed the information on the ground that D was not in possession of the firearms in Oxfordshire. On appeal by the prosecutor.
>
> HELD - Since D was at all material times the owner of the firearms, and could obtain them from his mother's flat at any time he wanted them, the firearms were 'in his possession' in

> "Oxfordshire for the purposes of s 1(1) of the 1968 Act, even though he did not have physical custody of them. Moreover, he could properly be convicted of the offence of unlawful possession by justices in either Oxfordshire or Surrey. Accordingly, the justices had come to a wrong decision and the case would be remitted to them with a direction to convict (see p 847 b c and f to j and p 848 e to h, post).
>
> Dicta of Earl Jowitt in United States of America v Dollfus Mieg et Cie SA [1952] 1 All ER at 581 and of Lord Parker CJ in Towers & Co Ltd v Gray [1961] 2 All ER at 71 applied."

Although the judgment delivered by May, J., recognised what "is by no means an easy point", he was of the firm opinion that -

> "for the purposes of section 1 of the Firearms Act 1968, a person who is at a given time in Oxford can there have possession of firearms which are themselves at that time physically in Surrey."

He then continues, pages 846(g) to 847(e):

> "The Act itself contains no definition of the word 'possession'. This is not unusual in statutes creating this type of criminal offence. As a result, as Lord Parker CJ said in Towers & Co Ltd v Gray [1961] 2 All E.R. 68 at 71, [1961] 2 QB 351 at 361,362: "The term 'possession' is always giving rise to trouble." He then went on to quote briefly from a speech of Earl Jowitt in the earlier case of United States of America v Dollfus Mieg et Cie SA [1952] 1 All ER 572 at 581, [1952] AC 582 at 605:
>
> > "The person having the right to immediate possession is, however, frequently referred to in English law as being the 'possessor'—in truth, the English law has never worked out a completely logical and exhaustive definition of 'possession'."
>
> A little later in Lord Parker CJ's judgment appears the passage quoted by Ashworth J in Woodage v Moss [1974] 1 All ER 584, [1974] 1 WLR 411, a decision of this court to which we have also been referred:

> " 'For my part I approach this case on the basis that the meaning of "possession" depends on the context in which it is used ... In some contexts, no doubt, a bailment for reward subject to a lien, where, perhaps, some period of notice has to be given before the goods can be removed, could be of such a nature that the only possession that there could be said to be, would be possession in the bailee. In other cases it may well be that the nature of the bailment is such that the owner of the goods who has parted with the physical possession of them can truly be said still to be in possession.'
>
> Looking at the context of the word 'possession' in s 1 of the 1968 Act in the present case, I have no doubt that one can be in possession of a firearm even though one is at a place other than that at which the firearm physically is. To agree with the justices' decision in the present case would in my view effectively be to equate the word 'possession' in s 1 with custody, and this I am satisfied would be wrong."

Mr. Muirhead used this case to argue that Mr. Hoo was still in possession of the Firearms, and by force of reasoning there was no legal possession in the applicant. The mother of the defendant in Sullivan v. Caithness had the barest custody of them not because she had any interest in them but because her flat was safer than in the respondent's home in Oxford.' By analogy, Chin, the applicant here, had the barest custody bearing in mind that his holding was temporary. But, as Miss Llewellyn pointed out, Caithness does not preclude a finding that possession was also in Chin, and one must note that there was no charge against the mother in Caithness. The ratio of the judgment focussed on the appellant in that case. In addition, the burden of proving that Chin fell within the exception was not discharged by evidence either from him or from Mr. Hoo. There was no positive proof that Hoo, as a gun dealer, had

employed Mr. Chin as his servant or agent. As was said earlier in this judgment, the convolutions of argument could not possibly create the situation contemplated by the Act. Even assuming that the two firearms formed part of Mr. Hoo's stock in trade as a Firearms Dealer, we do not see that the applicant was in any way the servant or agent of Mr. Hoo in respect of any firearm entrusted to him for delivery to the owner, or to some person who is about to become the owner thereof in accordance with this Act. We are of the view that this envisages a transaction, not a mere request to keep and secure.

We do not see any strength in the complaint that whereas the indictment charges illegal possession of the firearms on the 19th day of December, 1986, the learned trial judge found as a fact "that he cleared them in August 1986, with the inference that he has kept them since that time." "I find as a fact that the accused had the firearms in his possession from the date of clearance at the Airport, that is, August 1986." She went on to say at page 47:

> "Assuming I am wrong on that fact and should have accepted the defence that it was left there on the morning of the 19th December, 1986, I find that the exception in Section 20 (2)(f) does not avail the accused. Whilst a 'dealer' can be an 'owner' for the purposes of the Act, a 'dealer' cannot include an 'owner', they are distinct and separate persons."

We agree with those remarks and with her final observations on page 49:

> "I find that the accused Chin had knowledge, custody, dominion and control, that is, that he had possession of the firearms and inasmuch as Mr. Hoo was to

> "return for them, Mr. Hoo still retained possession; they were both in possession.
>
> On the facts presented it may be that the apparent safety of Chin's premises, the impregnability of Derrymore Road with vaults, grills and dogs, appealed to Mr. Hoo, but this must be measured against the statutory provisions. The articles might have been very safe there but if the Law was left as wide open as this a series of miscarriages of justice could emanate as a result and the entire purpose of the Law defeated.
>
> On the facts for the Crown and on the case for the defence I find the accused guilty as charged for Illegal Possession of Firearm."

Accordingly, the application which has raised points of law is treated as the appeal. The appeal is dismissed, and the conviction and sentence are affirmed.