

CRIMINAL LAW
Resident Magistrate's Court
D Larceny
Receiving stolen property viz
a revolver - whether R.M. should have upheld the case submission
or whether verdict unnecessary and could be substituted by order,
Appal unduly allays
appellant discharged from custody
JAMAICA Appeal dismissed but
IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 59/86

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.

REGINA

VS.

AINSWORTH ANDERSON

Mr. Delroy Chuck for the Appellant

Mr. Walter Scott for the Crown

July 31, 1986 and March 12, 1987

WRIGHT J.A.:

On July 31, 1986 we heard and dismissed this appeal, affirmed the conviction but varied the sentence to permit of the discharge of the appellant on that said day. The following are our reasons.

The facts of the case which was tried by His Honour Mr. Derrick Hugh, Resident Magistrate for the parish of Kingston in the Sutton Street Court on the 12th September, 1985 and 28th October, 1985 are that the appellant and Howard Richards with whom he was jointly charged, the one for Larceny and the other for Receiving stolen property, viz. a .38 Smith and Wesson revolver No. D67799, the property of the Commissioner of Police, were at the material time members of the Jamaica Constabulary Force, stationed at the Motorised Patrol Division at 16 Lower Elletson Road in the parish of Kingston.

The evidence shows that on the 9th August, 1984 the appellant was the Station Guard on the 3 p.m. to 11 p.m. shift under the immediate supervision of Sergeant Noel Martin, the Station Officer. Among the duties of the appellant was the issuing of firearms and ammunition to men going on duty and receiving firearms and ammunition from those coming off duty.

Entry No. 66 in the Firearms Register supports the testimony of Constable James Forbes that at 8 a.m. the said day he was issued with the subject firearm and twelve .38 cartridges by one Constable McKenzie who was then on Station Guard Duty. However, when he returned off duty at 4 p.m. Constable McKenzie had been replaced by the appellant as the Station Guard, and it is Constable Forbes' evidence that it was to the appellant, in accordance with the system, that he handed over both the subject revolver and the twelve rounds of ammunition.

As between Constable Forbes and his Senior Officer, Sergeant Martin, the records reveal a disparity in ability to describe a system, which, as may be expected, is uncomplicated. As understood from Constable Forbes' testimony the system was that the Station Guard issuing a firearm to an officer going on duty would enter the serial number thereof in the Firearms Register. This entry is then checked by the receiving officer to ensure that the entry is correct. Thereafter he signs. The receiving officer also signs for the number of cartridges issued to him. When he returns off duty he delivers both firearm and ammunition to the Station Guard who is then charged with the responsibility of ensuring that the correct firearm is being returned. Upon being so satisfied he signs the Firearms Register indicating the receipt by him.

It is Constable Forbes' evidence that the relevant procedure was observed when he returned the firearm and ammunition to the appellant and that the appellant signed the Register. However, when Constable Forbes subsequently checked the Register he observed that the appellant had omitted to enter the serial number of the firearm for which he signed. The evidence reveals that the handing-over by Forbes to the appellant was the last time that that firearm was regularly accounted for.

It was the duty of Inspector Reginald Gray to make a daily check of the firearms and ammunition on the Register. There seems to be some uncertainty as to whether he did check the Register on August 10. He retracted his evidence that he did not and then said he did. However, on August 11 when he checked he discovered that firearm D67799 was missing and he observed that entry No. 66 (supra) was the last entry in relation thereto. He reported his discovery to Detective Inspector Winston Hall on August 22, 1984. Up to this point therefore, the last accounting, if accepted, left the firearm in the hands of the appellant.

The firearm was next encountered in rather strange and uncharacteristic circumstances. At one o'clock in the early morning of October 11, 1984, several miles from the Elletson Road Police Station where the firearm belonged, Constable Carney and two Special Constables, Samuel Riley and Leslie Fullerton were on foot patrol along French Street, Spanish Town, when they saw a man dressed in plain clothes walking in circumstances that caused them to challenge his presence on the road at that time. The person turned out to be Howard Richards, the other constable who was charged along with this appellant. It transpired that Richards was known to

Fullerton. However, the circumstances were such that they searched Richards and in his waist was found revolver D67799 - two months and three days after its disappearance - and in it one live round and one spent shell. Richards was asked to account for his possession of the firearm and the missing rounds. As a consequence of the account he gave, contact was made with the Motorised Patrol Division at Elletson Road. Sergeant Clement McFarquhar responded to the call and went to Spanish Town where Constable Richards, the firearm, live ammunition and spent shell were handed over to him. Constable Richards' account of having been issued with the firearm and ammunition three weeks earlier was not reflected in the Firearms Register. Taken to the Patrol Division, he was cautioned by Detective Inspector Winston Hall to whom Richards gave the account that he had borrowed the firearm and twelve rounds of ammunition from the appellant who was then summoned, cautioned and told of Richards' account involving him. The appellant's response was: "Me nuh lend him nu firearm sah", to which Richards retorted: "Yes, you lend me de firearm and come in di barrack room and ask me for it". Both were then advised of further investigation to be made.

The appellant's defence was given by way of a short unsworn statement:

"At no time did I receive the firearm of which I was charged. Neither did I issue the same firearm, legal or illegal since it was not my duty."

This followed upon the over-ruling of a no-case submission by his defence attorney Mr. C. Williams.

The defence of Howard Richards, stated in five lines appears also to have been by way of an unsworn statement.

Accordingly, nothing said by him could be regarded as prejudicing the appellant.

The two Grounds of Appeal filed are as follows:

1. That the learned Resident Magistrate should have upheld the no-case submission on behalf of the Applicant.
2. That the verdict is unreasonable and cannot be supported by the evidence.

In support of Grounds 1 & 2, it is submitted that the only material evidence against the applicant are -

(a) That he had opportunity to take the gun, he having received it from Cpl. Forbes.

(b) That the second accused alleged that he received the gun from the applicant.

Material evidence (a) cannot be relied on because others had similar opportunities to take the gun. It cannot be said that the gun was solely in the possession of the applicant nor that anyone saw him with it.

Material evidence (b) must not be given sufficient weight to uphold a case against the applicant as the co-accused cannot be believed in the light of his several stories as to how he received the gun."

However, the actual submissions rivalled the statement of the appellant's defence for brevity. After recounting the evidence of Constable Forbes that the appellant signed for the return of the firearm but omitted to enter the serial number, the evidence of Inspector Gray and the evidence as to the recovery of the firearm, Mr. Chuck found himself able only to submit:

"The Resident Magistrate should have upheld the no-case submission. The only evidence in support of the conviction is that Anderson received the firearm from Constable Forbes and so had opportunity to take it."

There were no findings of fact in favour of the appellant and what is more certain, findings of fact by the learned Resident Magistrate are fatal to Mr. Chuck's submission. Having seen the witness Constable Forbes as well as the entry No. 66 in the Fire-

arms Register, he accepted the evidence of Constable Forbes that he did hand over the firearm to the appellant on August 9, 1934, that the appellant made the critical entry, that the firearm was not issued to anyone else and that the firearm was missing when Inspector Gray made his check on August 11. Further he specifically rejected the appellant's defence that he at no time received the firearm from Constable Forbes. The findings of fact are from the prosecution's case as it stood at the close of that case and no argument has been advanced to discredit those facts. At the end of the day those facts remained unimpeached. Rather than advancing any evidential challenge, which he was not obliged to do, the appellant distanced himself from the case. According to him he had had no involvement with this firearm in the line of duty or otherwise. Why then should the evidence of Constable Forbes and the entry in the Register of August 9 be rejected simply because such a course would redound to the benefit of the appellant? That is certainly not what trials are for nor would such a course be consonant with the requirements of justice.

In the result Counsel for the Crown was not called upon and the appeal was dismissed as stated earlier.

However, before parting with the case we wish to advert to the unfortunate circumstances which occasioned the delay in the hearing of this appeal. It appears from the records that the co-accused Howard Richards gave verbal notice of appeal at the conclusion of the day's proceedings and thereafter the notes of evidence were prepared for his appeal. Then on October 30, 1935, the appellant from the confines of the St. Catherine District Prison gave written notice of appeal which bears the seal of the Resident Magistrate's Court for Kingston but no date as to when it was received at that Court. But Richards did not pursue his appeal and the Resident Magistrate was unaware of this appellant's

appeal. Indeed, neither was the Registrar of this Court until after the receipt of an undated and not-too-clear letter on May 8, 1986. Thereafter, that officer moved with commendable alacrity to bring the appellant's case to the Court's attention, to the extent of issuing a writ to bring him before the Court so he could be offered bail on June 5, 1986, in advance of the receipt of the necessary records from the learned Resident Magistrate, who by then was stationed in the parish of Manchester. As it transpired, had he not appealed, the appellant's sentence would have been served by the time the records were received, to enable the appeal to be dealt with on July 31, 1986. Hence the course adopted regarding the sentence.