

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL Nos. 55/79 & 57/79

BEFORE: The Hon. Mr. Justice Zacca, P. (Ag.)
The Hon. Mr. Justice Melville, J.A.
The Hon. Mr. Justice Carberry, J.A.

ERIC SAMUDA & ANTHONY MILLER vs. THE QUEEN

Mr. F. Phipps, Q.C. and Mr. A. Williams for
appellant Miller.

Mr. E. DeLisser for appellant Samuda.

Mrs. V. Gayle for Crown.

May 28, 29, 30;
& July 18, 1980

ZACCA, P. (Ag.):

This is an appeal from conviction in the High Court Division of the Gun Court. The appellants were convicted on two counts: (1) Illegal Possession of Firearm and (2) Shooting with Intent.

At the end of the hearing of the appeal the appeal of Samuda was allowed and his convictions quashed and sentences set aside. This was on the basis that the evidence failed to disclose a common design between the appellant Samuda and the appellant Miller who it is alleged had the firearm and who it is alleged shot at Constable Williams.

The facts are that the appellants were seen Constable Williams in a yard at Waterloo District in the parish of St. Catherine. The two appellants were seen carrying clothes in a brown weekend bag. On reaching about

15 feet from the men the Constable shouted "Police". Both appellants looked in his direction, dropped the bag and the appellant Miller was seen to reach for his waist. Several explosions were heard and the Constable threw himself to the ground and fired two shots in the direction of the men. Appellant Miller ran away and the appellant Samuda received gunshot wounds in both legs.

There was some evidence that the appellants were also charged for Housebreaking but there was no evidence as to what was the outcome of the charge. Neither was it established that any of the clothing in the bag nor two cassette tapes taken from the appellant Samuda were stolen goods.

Two main grounds of appeal were argued on behalf of the appellant Miller. These were in the form of supplementary grounds of appeal for which leave to argue was granted. It is only necessary to deal with the second ground of appeal as the Court found no merit in the arguments with respect to the first ground. Ground 2 was as follows: "There was no proof of a firearm as defined by the statute."

It was submitted that there was no evidence led on behalf of the Crown that could properly justify a finding by the learned trial judge that the alleged object in appellant Miller's hand was a firearm. In order to establish either or both of the charges it was necessary for the Crown to establish by evidence that the object which was seen in the hand of appellant Miller was a firearm as defined by Section 2 of the Firearms Act.

It will, therefore, be necessary to state the definition of a firearm and to examine the evidence which accepted as being sufficient to hold that the object was a firearm.

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For the purposes of this appeal, Section 2 of the Firearms Act defines "Firearm" as "any lethal barrelled weapon from which any shot, bullet or other missile can be discharged,"

No firearm was recovered by the police and therefore no expert evidence was forthcoming. The Crown relied mainly on the evidence of Constable Williams. What then was the evidence on which the Crown based its case? It may be summarised as follows:

- (1) Saw appellant Miller reach for his waist.
- (2) Took something out of his waist and pointed it in the direction of Constable Williams.
- (3) Saw something shaped like a firearm.
- (4) Object was shining in the light (daylight).
- (5) It was black and it had a handle and also a muzzle.
- (6) Heard explosions which sounded like gunshots and saw smoke.

In examining the learned trial judge's summing-up, there appeared to be some confusion in his mind as to whether it was necessary for him to decide whether the object was a firearm within the meaning of the statute. However, in the final analysis, he came to the conclusion that the object was a firearm. Was the evidence as summarised above sufficient to establish that the object in appellant Miller's hand was a firearm in the absence of the firearm being recovered?

In Regina v. Clinton Jarrett et al R.M.C.A. No.101/74, December 8, 1975, Lukchoo, P. (Ag.) stated:

"As to the nature of proof required to show that the object was a firearm as defined or an imitation firearm 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. Part of such evidence may be the opinion of a non-expert as to the appearance of the object provided he describes the facts upon which he relied for his conclusion. "

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In Regina v. Neville Purrier and Tyrone Bailey,

R.M.C.A. No. 91/75, February 4, 1976, Watkins, J.A. in discussing evidence required to establish proof of a firearm, pointed out the lack of such evidence in that case by stating at page 5:

" 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. "

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.

In the case now before us we are of the opinion that the evidence as summarised above, which was accepted by the learned trial judge, was evidence on which he could come to a finding that the object in the appellant's hand was a firearm as defined by the statute. The learned trial judge quite properly convicted the appellant Miller on both counts of the Indictment.

For these reasons the appeal of Miller is dismissed and his convictions and sentences affirmed.

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