IN THE CAYMAN ISLANDS COURT OF APPEAL

CACR005/2013
(Ind. 61/12)
C#00657/20129

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

Steve Marcus Manderson

Appellant

The Hon John Martin QC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal
The Rt Hon Sir Alan Moses, Justice of Appeal

Appearances: Clyde Allen for the Appellant and Nicole Petit for the Crown.

JUDGMENT

Revised from transcript of oral judgment 3 November 2015 and Approved
Released 28 March 2017

MOSES, JA (Orally)

1. This is an appeal against conviction of this appellant who on the 15th of February 2013 after a trial before Justice Quin and a jury was convicted of an unlawful possession of an unlicensed firearm contrary to section 15 (1) (5) of the Firearms Law (2008 revision).

2. The central issue is whether was before the jury amongst other issues this assertion and before us is whether the object in question, a modified Orion flare gun, was in fact a firearm. So that the circumstances in which he came to be in possession of this flare gun are only marginally germane to the issue on the appeal.

3. He was seen at Windsor Park, George Town Grand Cayman on the fifth of February 2012 by police officers who commanded him to stop. He tried to escape, threw away what turned out to be a modified Orion flare gun and was then captured. There was a dispute as to whether he had ever been in possession of it. The prosecution contended that DNA matched material found in the interior of the weapon and subsequently it was found it did match his DNA.

4. There was a point raised on the appeal as to whether some mistake had been made at the laboratory in the United States because although his DNA, a pre-profile, was retained there from another case, the expert reported that she failed to defect on the profile within the gun anything similar to that sample whilst finding a perfect match to him in relation to the material in the gun, but that point has now gone and is not being pursued by counsel.

5. The point that is being pursued by counsel turns on the terms of the law under the Firearms Law (2008 revision). The relevant provisions of that provision define firearm as meaning:

> "Artillery machine-gun, sub-machine gun, rifle, shotgun, pistol, air gun, air pistol or any lethal-barrelled weapon from which any shot, bullet or other missile can be discharged".

6. The prosecution had to prove both that a shot, bullet or other missile could be discharged from the flare gun and that it was a lethal-barrelled weapon; in other words, that the shot, bullet or other missile in question could either kill or could inflict a serious injury on any person at which it was aimed.

7. The modified flare gun is shown in photographs and is difficult to describe without seeing those photographs but it was a short-snubbed flare gun that could be opened and loaded with the flare when used as it was first intended - to fire off a signal - into which had been inserted a copper tube so as to extend the muzzle giving it a more realistic appearance as a revolver and, if one wished to take an unkind view of the weapon, so as to give a longer distance down which the missile could be propelled and therefore increase its force as one of the witnesses Mr. Greenspan described.

8. The flare gun had a hammer in order to discharge the flare but it could not work with any energy unless there was attached to it a rubber band and indeed there was found in the vicinity in a part of an inner tube of a tyre, which when tied around the hammer would increase the force with which it would potentially strike any object within the gun.

9. The appeal turns on whether any missile could be expelled from the flare gun with sufficient force or velocity so as to cause really serious injury or death. And we have to note at the outset that no one during the case, neither the expert called by the defence Mr.

Boyce nor the experts called by the prosecution, were ever in a position to measure the velocity with which anything could be expelled from the flare gun when it was fired. It is in those circumstances that counsel for the appellant, in his cogent and forceful submissions, Mr. Allen contends that it was not open to any jury to convict absent measurement of that velocity. That was submitted to the judge at the close of the prosecution case and rejected, wrongly submits Mr. Allen, and again left to the jury in circumstances where no jury properly directed could or should have convicted.

10. The evidence that was called was partly from an experienced Royal Cayman Islands Police Service firearms instructor, a PC Stewart. He had substantial experience but was, as Mr. Allen emphasised, not proffered as an expert. In fact of course he was an expert witness because he gave his opinion as how the firing of the flare gun appeared to him. What was agreed on all sides was that unless ammunition was adapted it would not fit sufficiently closely within the muzzle and the body of the flare gun so as to be struck with sufficient force and expelled down the tube with sufficient velocity as to do anything other than trickle out of the bottom; in other words, an ordinary .38 bullet could not be fired from the flare gun, but PC Stewart placed rubber bands around the weapon so as to fire the hammer with sufficient force and then adapted the ammunition so that it would fit tightly within the tubing. He then, in order to avoid injury to himself, placed the flare gun in a vice and secured it to a piece of wood above a barrel of water. The water was some four foot in height. He then managed to fire it and his evidence was that the backlash from the water came up, hit him in the face, he had to remove his glasses so as to clean them and he also importantly observed there was the usual bang and recoil.

11. There was further evidence called by the prosecution. Mr. Greenspan who gave evidence as to - the firearms expert - as to his testing of the flare gun, he gave evidence as to what the dimensions of the flare gun were and then tested it without a projectile in the flare gun when he fired it. The only thing that had left the gun was some burnt and unburnt gunpowder, so fearful was he of the consequences if he tested it with live ammunition. But he concluded that the gun was capable of expending a projectile at a force capable of causing death or serious injury. But again, he was unable to test the velocity of any missile projected from the flare gun because indeed he hadn't tested it with such, anything within it adapted or not.

12. There was further expert evidence adduced by Mr. Boyce for the defence. He took the view that the flare gun was not a firearm within the meaning of the law because it couldn't accommodate conventional ammunition and even with modifying ammunition he took the view that absent the ability to test the velocity of any projectile he could not say whether it was potentially lethal or not.

13. In most cases the standard test would be of an expulsion at the force of four foot per pound and that could be potentially lethal and yet there was no means of being able to say whether any projectile could be ejected from this flare gun with such a potentiality. His evidence perhaps charged somewhat when he was cross-examined when he did make various concessions to prosecution counsel as to the fact that with modified ammunition then it might be capable of causing injury, but essentially what he was saying was no one could say. It is in those circumstances that the submissions we have identified were advanced both before the judge and before this Court.

14. In our judgment there was ample evidence on which the jury could decide that this was a lethal instrument so as to fall within the meaning of "firearm" under the Firearms Law. The combination of all the expert witnesses and of the experienced firearms officer was that with the elastic tied around the hammer and with modified ammunition this was capable of expelling a missile with sufficient force even though its precise velocity was not felt.

15. We agree with Mr. Clyde Allen that the case of Grace and the DPP, 1989 Criminal Law Review 365 - has little if anything to do with this case. In that case the Court pointed out that expert evidence might not be necessary in the case of an air gun which the divisional Court, somewhat surprisingly, thought was not necessarily lethal. The case is subject to considerable criticism from Professor Smith. But the reality in this case was that the evidence, even if taking PC Stewart alone, was fatal to the argument. There was this experienced police officer who fired a very small object indeed into a large barrel of water which caused the propulsion of the water back into his face. One can only imagine dropping that small object into the water by hand or at a slow rate to realise that the power to do more than create a ripple. Firing this flare gun clearly did more than that. If one adds to it the evidence from the expert Mr. Greenspan as to the force with which the hammer fell when tied up with the elastic, the purpose of which could only have been to drive that hammer into whatever was placed within the flare gun for greater force, then the evidence can be seen to be ample to justify the jury's conclusion. In those circumstances we dismiss this appeal.

16. The final point that I should deal with was the point raised, accurately, that the judge had misdirected himself both in his ruling and to the jury as to the evidence from Mr. Boyce. Mr. Boyce had said that in order to be lethal one would expect the velocity to be more than four foot per pound. In fact the judge in his ruling which he repeated to the jury got it exactly the wrong way around, saying to the jury and directing them that it could only be lethal if it was less than four foot per pound. That of course was a nonsense since you

do not need to be an expert to appreciate that the slower something is expelled the less harm it is likely to do and it is quite obviously that this was merely a lapse of the tongue which was repeated. It has nothing to do with the conclusion that the jury reached because there was no evidence of velocity one way or the other and cannot in that single sentence have misled the jury in any way. For that additional reason I repeat we dismiss this appeal against conviction.

Appeal against sentence then heard and ruling given:

MOSES, J.A.:

17. This is an appeal against the sentence of ten years - the mandatory sentence passed in respect of the possession of the firearm that we have already described in our judgment in relation to the appeal.

18. The argument advanced by Mr. Clyde Allen is that bearing in mind the changes that were required both in regard to the ammunition and indeed the hammer with the elastic, this could have been and should have been charged as an imitation firearm so that the question of whether it was capable to fire a lethal missile or not didn't arise and in those circumstances the mandatory ten-year period would not have applied. The problem with that argument is that he was charged with possession of a firearm in respect of which that sentence is mandatory and as the jury have found, and as we have upheld in this appeal, it was properly described as a firearm and not an imitation firearm.

19. No other ground demonstrating that this was an exceptional case has been advanced, nor have we been able to find one. In those circumstances the appeal against sentence is dismissed.

20. Conviction and sentence affirmed.

Martin JA

Field JA

Moses JA

CAYMAN ISLANDS
CRIMINAL FORM 18
RULE 50(1) & 51(1)

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NOTIFICATION TO AUTHORITIES OF RESULT OF APPEAL

To: The Attorney General

This is to give you notice that **Steve Marcus Manderson** having sought leave to appeal against *his* CONVICTION and SENTENCE passed upon *him* by the Grand Court on the 15 February 2013 as set out below:

IND0061/2012 Possession of unlicensed firearm

10 years imprisonment.

Time in custody to be taken into account to be deducted.

The Court of Appeal has this **3 November 2015** given judgment therein to the effect following:

1. Appeal against conviction and sentence dismissed.
2. Conviction and sentence affirmed.
3. Transcript of the oral judgment to be released.

Dated this 4 day of November, 2015

Registrar

Clyde Allen for the Appellant for sentence only
Nicole Petit DPP for the Director of Public Prosecution