J A M A I C A

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL No. 129 of 1975

BEFORE: The Hon. Mr. Justice Luckhoo, P. (Ag.) Presiding
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Watkins, J.A. (Ag.)

R. v. BRYAN LEVY

K.D. Knight for the appellant.

J.L. Kerr, Q.C., Director of Public Prosecutions
and F.A. Smith for the Crown.

December 10, 11, 1975;
& March 25, 1976

Luckhoo, P. (Ag.):

On December 11, 1975, at the conclusion of the arguments in this appeal we announced that we would give our judgment at a later date. Thereafter, the appeal in R. v. Michael Shadeed R.M.C.A. No. 12 of 1974 was listed for hearing. As the latter appeal involved the determination of a question which also arose for determination in the instant appeal we considered that the interests of justice would be better served if we had the benefit of the arguments to be addressed to us in the latter appeal on that question before proceeding to give our judgment in the instant appeal. Learned counsel for the appellant and for the Crown agreed to that course being adopted and the appeal in R. v. Michael Shadeed was heard by us on March 11, 12, 1976.

In each case the respective appellant was charged on information that he unlawfully had in his possession a revolver not under and in accordance with the terms and conditions of a Firearm User's Licence as required by s. 20 (1)(b) of the Firearms Act, 1967 (No.1). In each appeal one of the questions raised related to the proper construction to be placed on the word "adapted" in the definition of the expression "restricted weapon" in s. 2 of the Firearms Act, 1967. In each appeal the contentions raised in that regard were the same. The revolver in the instant case was a .22 calibre Beevettata model 99X blank and was capable of firing tear gas cartridges of the same calibre.

For the reasons given in the appeal in R. v. Michael Shadeed we are of the view that the weapon, the subject matter of the charge in the instant case is a restricted weapon, and accordingly falls within the definition of "firearm" in s. 2 of the Act. The appellant was proved to be in possession of that weapon without the necessary licence and accordingly his appeal is dismissed.

A further question which arose for determination was whether the weapon was a lethal barrelled weapon from which any shot, bullet or other missile could be discharged. The testimony of Asst. Supt of Police Daniel Wray upon which the prosecution relied established that in its present form the weapon was incapable of discharging any shot, bullet or other missile, that if certain alterations were made to it - drilling through the chambers and barrel - it would be capable of discharging a missile but that having regard to the soft nature of the material from which the revolver was made an attempt to discharge a regular bullet from the altered weapon might result in a breaking or a gradual loosening of the parts to a point where it may no longer discharge a missile. He also said that if a missile were discharged upon firing the altered weapon the effectiveness would be greatly

reduced as much of the propellant which provides the driving force would escape through the open and unrestricted forward end of the cylinder without entering the barrel. It was apparently not suggested to the witness that any such discharge would be capable of causing serious injury to some vulnerable organ e.g. the eyeball. In cross-examination Asst. Supt. Wray said that if by converting the weapon it were to blow up when fired it would not be capable of discharging anything. In the state of the evidence on this aspect of the matter and having due regard to the onus of proof it was not open to the learned resident magistrate to make a finding, as he did, that the weapon in its original form could be converted into a lethal barrelled weapon from which any shot, bullet or other missile might be discharged.

The sentence of detention during the Governor General's pleasure cannot stand and is set aside. The appellant has spent nearly a year in custody. In the circumstances we think that he should be sentenced to such a term of imprisonment effective from the date of his conviction on October 18, 1974 as would result in his immediate release and we so order.