



IN THE COURT OF APPEAL

R.M.C.A. No. **101** of 1974  
" No. 39 of 1975  
" No. **97** of 1975

BEFORE: The Hon. Mr. Justice Luckhoo, P. (Ag.)  
The Hon. Mr. Justice Graham-Perkins, J.A.  
The Hon. Mr. Justice Hercules, J.A.  
The Hon. Mr. Justice Swaby, J.A.  
The Hon. Mr. Justice Zacca, J.A. (Ag.)

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R. v. CLINTON JARRETT  
R. v. MICHAEL JAMES also called CHARLES ALLEN  
R. v. OLIVER WHYLLIE

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B. Macaulay, Q.C. and K. St. Bernard for the appellant Jarrett.  
K. St. Bernard for the appellant Michael James also called  
Charles Allen.  
B. Macaulay, Q.C. for the appellant Oliver Whyllie.  
J.L. Kerr, Q.C., Director of Public Prosecutions and  
F.A. Smith for the Crown.

November 3, December 8, 1975<sup>4/5</sup>

Luckhoo, P. (Ag.):

These appeals originally came on for hearing before three judges of the Court (Graham-Perkins, J.A., Hercules, J.A., and Zacca, J.A. (Ag.)) who, being of the view that certain questions arise therein for determination which render it expedient for a bench of five judges of the Court to be constituted to hear the

appeals adjourned the further hearing of those matters for this to be done. The questions in respect of which the bench of three considered it desirable to hear argument were formulated by Mr. Justice Graham-Perkins and circulated to counsel engaged in the appeals. These appeals have accordingly come on for hearing before a bench of five judges.

The appellant Jarrett was convicted in the resident magistrate's division of the Gun Court on May 24, 1974 on an information which charged that he unlawfully had in his possession one revolver not under and in accordance with the terms and conditions of a Firearm User's Licence, contrary to section 20 (1)(b) of the Firearms Act, 1967, in contravention of section 20 (4)(c)(i) of that Act as amended. He was sentenced to be detained at hard labour during the Governor General's pleasure.

The appellant Michael James also called Charles Allen was convicted in the resident magistrate's division of the Gun Court on June 19, 1974 on an information which charged that he had in his possession one firearm not under and in accordance with the terms of a Firearm User's Licence, contrary to s. 20 (1)(b) of the Firearms Act, 1967. He was sentenced to be detained at hard labour during the Governor General's pleasure.

The appellant Oliver Whyllie was convicted on August 7, 1974 in the resident magistrate's division of the Gun Court on an information charging that he had in his possession a firearm not under and in accordance with a Firearm User's Licence, contrary to section 20 (1)(b) of the Firearms Act, 1967. He was sentenced to be detained at hard labour during the Governor General's pleasure.

The appellants have all appealed against their convictions and sentences.

The evidence in the cases is outlined hereunder.

In Jarrett's case the evidence for the prosecution was to the effect that on April 14, 1974, one Delroy Anthony was on Love Lane, Kingston, counting some money when three men whom he later identified as Eva, "Rat Ears" and the appellant Jarrett came up to him. Jarrett pushed what the witness Anthony said was

a gun in his side and demanded to be given the money. Anthony refused to hand over the money whereupon Eva asked Jarrett why he did not shoot the boy (meaning Anthony). Thereupon Jarrett "Pull back with the gun pointing at me like he going to shoot me and I let go the money into Jarrett's hand." The men then made good their escape. Anthony made a report to the police and shortly thereafter the appellant Jarrett was apprehended and charged on the information in respect of which he was eventually convicted. The weapon Anthony said he saw in the appellant's hand and which he described as a gun was never recovered. According to Anthony it was a short gun with a white handle. He said he saw four shots at one side in the barrel of the gun. The gun had a trigger and it had a "little something" on the top. It resembled guns he had seen carried by two policemen. Jarrett in his defence spoke of observing a fight between Anthony on the one hand and "Rat Ears" and Eva on the other. He (Jarrett) intervened in an endeavour to stop the fight. He denied having a gun or demanding or taking any money from Anthony. The learned resident magistrate accepted Anthony as a witness of truth and found that he had been "held up with a gun" - in the manner he described - by the appellant and the two other men.

In the case of Michael James also called Charles Allen the complainant Denzil Knight testified that he was relieved of his wallet at gunpoint by the appellant James after he had been surrounded by a number of men who came up to him in the company of the appellant. Some of these men also had guns. Knight described the weapon he said he saw in the appellant's hand as a black gun about 6" to 7" long. He said he saw the mouth of the gun and the trigger. The appellant held the gun towards him (Knight) with a finger on the trigger. The gun resembled one he had seen in the possession of a Security Guard. The matter was reported to the police that night. The appellant was later apprehended and charged with the offence stated in the information. No firearm was produced in evidence. The appellant's defence was an alibi.

The learned resident magistrate in accepting the testimony given by Knight found that the appellant had an object which the witness described as a gun at the time of the commission of the offence (of robbery) and that in the circumstances the appellant was guilty of "having an illegal firearm under section 20 (1)(b) of the Firearms Act, 1967 by virtue of the amendment to the said section by section 19 of the Gun Court Act - to wit sub-section 5 (c)."

In the case of Whyllie the evidence for the prosecution was to the effect that at about 12.15 p.m. on June 1, 1974, Raphael Rose the operator of the Golden Horse Betting shop at 207 Spanish Town Road, Kingston was behind the counter of his shop. A girl named Pauline Thompson and a man were in the shop. Two men entered the shop. One of them, the appellant Whyllie, had a short gun in his right hand. The appellant pointed the gun at Rose and demanded to be given money. The appellant kicked open the counter and came to where Rose was standing. He took money from a drawer behind the counter. He kept pointing the gun in Rose's face and demanded more money. He also demanded money from Pauline Thompson. She gave him money. Rose told the appellant that he had no more money and the appellant struck him on the head with the gun. Rose fell to the ground. He then heard an explosion and saw Pauline Thompson fall to the ground. The appellant was standing over Pauline Thompson. He still held the gun in his hand. The explosion according to Rose had come from the gun. Rose called for help. The appellant and the other men ran away. Pauline Thompson was taken to the Kingston Public Hospital. She died later on that day. At 5.30 p.m. that same day Det. Sgt. Bevan Simpson went to the appellant's home where he spoke to the appellant. He told him that he had received information that he (appellant) had shot and killed Pauline. Thereupon the appellant said "She dead sir?" The appellant was then taken into custody. On June 26, 1974, Rose pointed out the appellant at an identification parade as the person who shot Pauline Thompson.

A post mortem examination on the deceased's body revealed a firearm entry wound just above and to the outer side of the right eye  $\frac{1}{4}$ " in diameter. On dissection a bullet was found embedded in the occipital lobe of the right side of the brain. It had passed through the frontal bone, the base of the right temporal bone, the brain substance and the right occipital bone causing a depressed fracture. Examination of the bullet by Asst. Supt. of Police Wray attached to the Ballistics Section of the Police Forensic Laboratory, Kingston, disclosed that it was a .38 calibre lead bullet of a type loaded in .38 calibre special revolver cartridges and that it had been fired through the bore of a firearm which contained rifling of a certain type. Comparison with standard bullets fired from Colt revolvers disclosed that it had been fired from a revolver manufactured by the Colt Firearm Company of Hartford, Connecticut, U.S.A.

The appellant's defence was an alibi.

The learned resident magistrate in convicting the appellant on the information as laid said he accepted the evidence adduced by the prosecution.

It is common ground that in each case the object alleged to have been seen in the hand of the respective appellant at the material times was never produced at his trial. That object was referred to by the complainant in each case as a gun, the physical features of which were described in the complainant's testimony. In each case the learned trial magistrate came to the conclusion that the object as described was a firearm as contemplated by the provisions of s. 20 (1) of the Firearms Act, 1967 as amended from time to time.

It is common ground also that in alleging a contravention of s. 20 (1) of that Act the prosecution in the cases of Jarrett and James relied upon the operation of the provisions of s. 20 (5)(c) of the Act as inserted by s. 19 (a) of the Gun Court Act, 1974 (No. 8) in proof of the offence charged.

Before setting out the questions in respect of which the the Court desired the assistance of counsel (and which in the Court's opinion arise for determination on the provisions of s. 20 (5)(c) of the Firearms Act, 1967) and the grounds of appeal taken in the several cases it will be convenient to refer to the provisions of s. 20 of the Firearms Act as they stood immediately prior to the enactment of s. 19 of the Gun Court Act, 1974, as well as to s. 25 of the Firearms Act, 1967.

The position before the enactment of s. 19 of the Gun Court Act, 1974.

Section 20 (1) of the Firearms Act, 1967 provides as follows -

" A person shall not -

- (a) save as authorised by a Licence which continues in force by virtue of section 55, 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.

Subsection (2) of s. 20 provides that subsection (1), except in so far as it relates to a prohibited weapon, shall not apply to certain persons of specified classes or with special qualifications and subsection (3) defines the persons to whom one of those classes apply. Subsection (4) provides that every person who contravenes s. 20 shall be guilty of an offence and shall be liable to the penalties specified therein upon summary conviction before a Resident Magistrate or before a Circuit Court as the case may be. The penalties specified therein differ in so far as the offence relates to the possession of a prohibited weapon or a restricted weapon or restricted ammunition or a weapon or ammunition other than a prohibited or restricted weapon or restricted ammunition. Section 20 (1)(a) of the Firearms Act (which relates to the possession of a prohibited weapon) is not germane to the present appeals and nothing further need be said about

that provision. Section 20 (1)(b) is an enactment which makes the possession of a firearm or ammunition an offence save in the case of certain persons of specified classes or with special qualifications or in accordance with the the terms and conditions of the licence of specified authorities.

The expressions "firearm" "ammunition" and

"Firearm User's Licence" are defined by s. 2 of the 1967 Act as follows -

"firearm" means any lethal barrelled weapon from which any shot, bullet or other missile can be discharged, or any restricted weapon or, unless the context otherwise requires, any prohibited weapon, and includes any component part of any such weapon and any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon, but does not include any air rifle, air gun, or air pistol of a type prescribed by the Minister and of a calibre so prescribed;

"ammunition" means ammunition for any firearm and includes restricted ammunition;

"Firearm User's Licence" means a licence authorising the holder thereof, subject to section 22 and to the terms and conditions specified in the licence, to be in possession of a firearm or ammunition so specified;

Section 25 provides as follows -

- (1) Every person who makes or attempts to make any use whatever of a firearm or imitation firearm with intent to commit or to aid the commission of a felony or to resist or prevent the lawful apprehension or detention of himself or some other person, shall be guilty of an offence against this subsection.
- (2) Every person who, at the time of committing or at the time of his apprehension for, any offence specified in the First Schedule, has in his possession any firearm or imitation firearm, shall unless he shows that he had it in his possession for a lawful object, be guilty of an offence against this subsection and, in addition to any penalty to which he may be sentenced for the first mentioned offence, shall be liable to be punished accordingly.

- (3) Any person guilty of an offence against subsection (1) or (2) shall be liable on conviction on indictment -
- (a) before a Resident Magistrate to a fine not exceeding \$1,000 or to imprisonment with or without hard labour for a term not exceeding five years; or
  - (b) before a Circuit Court to imprisonment with or without hard labour for a term not exceeding fourteen years,
- and where any person commits an offence against subsection (1) in respect of the commission of a felony or the lawful apprehension or detention of himself for any other offence committed by him, he shall be liable to the penalty provided by this subsection in addition to any penalty to which he may be sentenced for that felony or other offence.

(4) On the trial of any person for an offence against subsection (1) the Resident Magistrate or jury not being satisfied that that person is guilty of that offence, but being satisfied that he is guilty of an offence against subsection (2), may find him guilty of the offence against subsection (2) and thereupon he shall be liable to be punished accordingly.

(5) In this section -

"firearm" means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged and includes any prohibited weapon and any restricted weapon, whether such a lethal weapon or not;

"imitation firearm" means anything which has the appearance of being a firearm within the meaning of this section whether it is capable of discharging any shot, bullet or missile or not."

A comparison of the definition of "firearm" in s.2

and in s. 25(5) of the Firearms Act, 1967 discloses that in the latter that term includes<sup>any</sup>air rifle, air gun or pistol of a type prescribed by the Minister and of a calibre so prescribed whereas in the former it does not. The reason for this difference is apparent when the mischief sought to be countered by the provisions of s. 25 is considered. That section as the marginal note accurately states provides a penalty for the use and possession of firearm or imitation firearm (as defined in the section) in certain circumstances. An offence **under** and by virtue of section 25 is a distinct and different offence from one under and by virtue of s. 20. Whereas the offence under s. 20 is possession of a firearm (or ammunition) without lawful authority, under s. 25 the user or possession of a firearm (or imitation

firearm) in certain circumstances is an offence regardless of the fact that the possession of the firearm may have been under lawful authority in the sense that the possessor is within one of the classes or with qualifications specified by s. 20 (2) or (3) or that his possession of the firearm is in accordance with the terms and conditions of a Firearm User's Licence.

The position after the enactment of s. 19 (a) of the Gun Court Act, 1974.

On April 1, 1974, there was enacted and brought into force an Act intituled the Gun Court Act, 1974 (No. 8) which as the long title thereto states is "an Act to provide for the establishment of a Court to deal particularly with firearm offences and for purposes incidental thereto or connected therewith." One of the firearm offences cognizable by the Gun Court is an offence contrary to s. 20 of the Firearms Act, 1967 and the term "firearm" in the provisions of that Act has the meaning assigned to it by s. 2 (1) of the Firearms Act, 1967. Section 19 of the Gun Court Act amended the Firearms Act, 1967 by inserting in s. 20 next after subsection (4) thereof the following subsection -

"(5) In any prosecution for an offence under this section -

- (a) if any person has in his possession, contrary to this section, any firearm in circumstances which raise a reasonable presumption that such firearm was intended or was about to be used in a manner prejudicial to public order, or public safety, any other person who is found in the company of that person in those circumstances shall, in the absence of reasonable excuse, be treated as being also in possession of such firearm;
- (b) any person who is proved to have in his possession or under his control any vehicle or other thing in or on which is found any firearm shall, in the absence of a reasonable explanation, be deemed to have in his possession such firearm;
- (c) any person who is proved to have used or attempted to use or to have been in possession of a firearm, or an imitation firearm, as defined in section 25 of this Act in any of the circumstances which constitute an offence under that section shall be deemed to be in possession of a firearm in contravention of this section."

Section 19 of the Gun Court Act also amended the Firearm Act, 1967 by inserting after s. 46 a new section numbered 46A relating to the admissibility in evidence of ballistics certificates.

It is the objects, meaning and effect of s. 20 (5) (c) of the Firearms Act, 1967 as inserted by s. 19 of the Gun Court Act, 1974 that form the subject of the questions raised in these appeals.

Without doubt one of the objects of the enactment of s. 20 (5)(c) is to enable what would be s. 25 offences to be tried in the Gun Court so that the penalty of detention at hard labour during the Governor General's pleasure (since declared unconstitutional by the Judicial Committee of the Privy Council) might be imposed upon conviction.

As to the meaning and effect of the provision Mr. Macaulay has submitted, and Mr. St. Bernard has adopted his submission in this regard, that -

(i) the provision has created an offence separate and distinct from that existing under s. 20 prior to the enactment of s. 19 of the Gun Court Act, 1974, and that the charges as laid are bad for duplicity;

(ii) alternatively, if the provision is regarded as evidential only, it makes nonsense of the scheme of the Firearms Act and gives rise to conflicts within the same section.

In respect of (i) above it is contended that a charge cannot be laid as being a contravention of s. 20 (1)(b) as well as of s. 20 (5)(c) as that would be bad for duplicity. Further, if a person is tried for an offence being a contravention of s. 20 (5)(c) and no particulars are given save that he is in possession the charge laid would be bad for duplicity. Again s. 25 creates two classes of offence, one in s. 25 (1) and the other in s. 25 (2) and this is borne out by the words in s. 25 (3) and (4). So the charge would be bad for duplicity for its embraces two distinct offences.

In respect of (ii) above it is contended that if s. 20 (5)(c) is evidential then this would mean that that provision does not become operative until there has actually been commenced a prosecution

under the section and so the only offence to which that provision would apply would be a contravention of s. 20 (1). That would make nonsense of the provision for it would be unnecessary to call that provision in aid where the possession of the firearm was unauthorised, the prosecution in such a case being only required to prove possession of a firearm in a defendant and in the case where possession of the firearm was authorised the offence being the result of a contravention of s. 20 (1) would not require proof of any of the intents contemplated by s. 25. On the assumption that s. 20 (5)(c) is evidential if at the close of the prosecution's case it appears that the evidence relied on is evidence relating to two or more of the offences under s. 25 of the Act the charge would again be bad for duplicity (R. v. Johns John (1974) Industrial Court Reports 310). Mr. Macaulay contended that unless the provisions of s. 20 (5)(c) are interpreted to imply that the defence (of possession being in lawful authority) is taken away by some words or the other in that paragraph any argument that the provision is evidential destroys itself and there is then apparent conflict between the provisions of s. 20 (1) and s. 20 (5)(c). In those circumstances the section should be construed in such a way to make it workable and not result in absurdity and injustice. If so done it will be clear that the paragraph itself creates an offence and is not evidential and was so intended by the legislature.

The Learned Director of Public Prosecutions on the other hand submitted that the provisions of s. 20 (5)(c) like those of s. 20 (1) (a) and (b) are evidential and do not create a separate offence and that this is made clear by the opening words of the Subsection - "In any prosecution for an offence under this section" - which govern all three paragraphs of the subsection. Further, the words "shall be deemed to be in possession of a firearm in contravention of this section" at the end of paragraph (c) clearly indicate that the provisions of paragraph (c) were never intended to create and do not create a separate offence and those words are intended to take away and do have the effect of taking away such a defence as might otherwise have been open to a defendant under s. 20 (2) or (3) of

the Act or by virtue of his being the holder of a Firearm User's Licence. The provisions of s. 20 (5)(c) are in their nature an **irrebuttable** presumption of law while those in s. 20 (5)(a) and (b) by virtue of the words "in the absence of reasonable excuse" and "in the absence of reasonable explanation" therein respectively are in the nature of rebuttable presumptions of law. So that in an information charging a contravention of s. 20(1), once evidence is adduced on the part of the prosecution which would be sufficient to show that the defendant had committed a s. 25 offence an **irrebuttable** presumption of law arises that he is in possession of a firearm in contravention of s. 20 by reason of the deeming provision contained in the paragraph and not by virtue of the contravention of any provision contained in s. 20 (5)(c) which was required to be observed.

In my view the submission made by the learned Director of Public Prosecutions is well founded. The provisions of s. 20 (5)(c) themselves make it abundantly clear that they are evidential and do not create any offence. It is a contravention of s. 20 (1) which, by virtue of s. 20 (4) results in the commission of an offence. The gist of the offence is possession of a firearm (or ammunition) without lawful authority. When the provisions of s. 20 (5)(c) are invoked by the prosecution in proof of an offence charged under s. 20 (1)(b) of the Act if the defendant did in fact have possession of the firearm (as defined by s. 25) under lawful authority he is deemed to have had possession of a firearm (as defined by s. 2) and to have had **it at the material time not under lawful authority**. In effect a statutory **fiction is** introduced by the use of the word "deemed" in s. 20 (5) (c) whereby lawful authority for possession of the firearm is by operation of law to be regarded as of no avail to the defendant on such a charge and further, if the weapon used is an imitation firearm a statutory fiction is introduced whereby it is to be regarded as a firearm as defined by s. 2 held without lawful authority. A charge alleging contravention of s.20 (1) would in such a case be proved by adducing such evidence as would be necessary to show that the defendant committed a s.25 offence. There could be no question of such a charge or of the evidence

adduced in support of such a charge rendering the information bad for duplicity. The defendant would in no case be on trial for the commission of a s. 25 offence as such.

One of the questions raised in these appeals is the nature of the proof required to show that the object in the possession of the appellant was a firearm or an imitation firearm as defined by s. 25 (5) of the Act. It was conceded by Mr. Macaulay that although where the object was recovered the testimony or certificate of a ballistic expert should be offered by the prosecution yet proof that the object was a firearm was a lethal barrelled weapon from which any shot, bullet or other missile can be discharged might otherwise be given where there is evidence -

- (a) of a direct injury to a person or persons which may or may not have resulted in death and which on medical evidence is a bullet wound; or
- (b) that there was some damage to property shortly after which a bullet was recovered and bullet marks found.

In so far as an imitation firearm is concerned Mr. St. Bernard submitted that it must appear to the resident magistrate or the jury as the case may be as opposed to a witness that the object seen in the appellant's hand bore the resemblance of a firearm as defined in s. 25 (5).

In my view where by reason of s. 20 (5)(c) of the Act the prosecution adduces such evidence as would be necessary to show that the defendant committed a s. 25 offence it is not necessary that it shall be shown that the object in the possession of the defendant at the material time was a firearm as distinct from an imitation firearm or vice versa. The prosecution may show it is one or the other. The gist of the offences under s. 25 (1) is the putting of a person in fear of death or injury from a shot discharged from a lethal barrelled weapon or an attempt so to do by another person with one of the intents specified in the subsection and it matters not whether the weapon employed is a real or imitation firearm. Similarly the gist of the offences under s. 25 (2) is the finding in possession of a defendant an object of that nature real

or imitation when a specified offence is being committed by the defendant or at the time of his apprehension for such an offence and which he might well be expected to bring into use for purposes connected with the commission of such an offence or to resist apprehension in respect thereof. In such circumstances it would be proper to charge the commission of any such offence with reference to a firearm or imitation firearm in the disjunctive. Where the object is incapable of production by the prosecution for one reason or another in criminal proceedings/brought under the section <sup>a prosecution</sup> can hardly be negated because although it may be shown that the object was clearly one or the other it could not be shown which of the two it was.

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 relies for his conclusion.

I turn now to the questions put by the Court for the consideration of counsel.

Q. 1. Does the firearm mentioned in s. 20 (5) mean a "licensed" firearm?

Having regard to the arguments advanced before us and to the conclusions I have reached thereon it appears to me that the term "firearm" in s. 20 (5)(a) and (b) is not/<sup>to be</sup> confined to a "licensed" firearm in the sense that there is a holder of a Firearm User's Licence or that any of the provisions of s. 20 (2) or (3) are in point. Where that term appears in s. 20 (5)(c) that is also the case even though it is open to the prosecution to rely upon the provisions of s. 20 (1) simpliciter without resort to the provisions of s. 20 (5)(c). The prosecution is not bound to anticipate that the defendant will be unable to show his possession to be with lawful

authority either by reason of s. 20 (2), (3) or under the terms and conditions of a Firearm User's Licence.

Q.2. If reference was intended to a licensed firearm why was it necessary, on proof of either one or other of the matters mentioned in the sub-section for an accused to be deemed to be in possession of a firearm in contravention of the section?

In so far as the firearm may be in the possession of a person with lawful authority as abovementioned the reason for an accused person to be deemed to be in possession of a firearm in contravention of the section has already been given in deciding what is the object, nature and effect of the provision.

Q. 3. If the answer to Q. 1 is in the affirmative what is the Crown required to prove where s. 20 (5) (c) is called in aid?

This has already been stated in deciding what is the object, nature and effect of the provision.

Q. 4. Where the firearm is not produced in evidence because it was not recovered so that the magistrate does not have the benefit of expert opinion, how can he be satisfied - be sure - that an accused used, or attempted to use or was in possession of a firearm as defined in s. 25? See the decision of this Court in R. v. Pryce S.C.C.A. 114/67 October 12, 1967 holding that a firearm as defined must be proved to be such by expert evidence.

Q. 5. Is the position not the same in relation to an imitation firearm as defined?

Q. 6. Where it is sought to prove the use, or attempted use or possession of an imitation firearm, as defined, in the circumstances mentioned in s. 20 (5) (c) so that the deeming provision becomes applicable, to whom must that imitation firearm have the appearance of being a firearm within the meaning of the section? Is it to any non-expert witness, an expert witness, or to the magistrate? If it is permissible for a non-expert witness to testify that the thing he saw had the "appearance" of a firearm (as defined) does this not involve, assuming the acceptance of that non-expert opinion, a decision on a fundamental issue by the witness and not the magistrate?

Q. 7. Must the prosecution prove, *inter alia*, the use or attempted use or possession, in the circumstances mentioned in s. 20 (5) (c) of a firearm or an imitation firearm, or is it permissible to prove through a non-expert witness, that an accused used, or attempted to use, or was in possession of, some object which in the opinion of that witness was a firearm (as defined) or an imitation firearm (as defined). In this latter case how can a magistrate be sure that the object was a firearm (as defined) or an imitation firearm as defined? Who, in effect; would have decided the issue?

The answers to these questions also appear earlier in this judgment.

Turning now to the cases of the three appellants the evidence already referred to clearly prove the offences charged.

There is no question that at the close of the case for the prosecution in the cases of Jarrett and James the appellants appreciated that the prosecution was calling in aid the provisions of s. 20 (5)(c) in proof of the allegation of a contravention of s. 20 (1) of the Act. Indeed it has never been suggested to the contrary. In each case the defence led amounted to an alibi which the resident magistrate rejected. In each case the resident magistrate accepted and acted upon the testimony of the complainant.

In the case of Whyllie the testimony for the prosecution proved clearly, if accepted, and it was accepted by the learned resident magistrate, that Whyllie discharged a weapon referred to by one of the prosecuting witnesses as a gun in the course of committing the offence of robbery with aggravation. As a result of the discharge a bullet entered the deceased's brain resulting in her death. There could be no doubt in an acceptance of the testimony of Dr. Ramu and Supt. Wray that the weapon so discharged by Whyllie was a firearm within the meaning of that term in s. 2 of the Firearms Act. While it was necessary to adduce evidence of the transaction resulting in the deceased's death in proof of the information laid it was not necessary for the prosecution to call in aid the provisions of s. 20 (5)(c) of Act.

For these reasons I would hold that the appeals of the appellants against their convictions should be dismissed and their convictions affirmed.

It is conceded that the sentences of detention during the Governor General's pleasure cannot stand. Instead each appellant should be sentenced to imprisonment for a term of 3 years at hard labour commencing from the respective date of their convictions.

Graham-Perkins, J.A.:

I agree.

Hercules, J.A.:

I agree.

Swaby, J.A.:

I agree.

Zacca, J.A. (Ag.):

I agree.