J A M A I C A

IN THE COURT OF APPEAL

IN CHAMBERS

CRIMINAL APPEAL NO. 4 OF 1975

BEFORE: The Hon Mr. Justice Graham-Perkins

R. v. Rudolph Henry

M. Reckord for the Crown.

A. J. Nicholson for the applicant.

February 11, 18, 1975

GRAHAM-PERKINS, J.A.: The applicant was, on October 9, 1974, tried and convicted by Mr. U. D. Gordon, a resident magistrate, in the Gun Court on an information which had charged him with an offence contrary to s. 20 (1) (b) of The Firearms Act 1967 (hereinafter called 'the Act'). The particulars of that information were, so far as is here relevant, as follows:

> "On Saturday the 21st day of September 1974 .... Rudolph Henry .... had in his possession one firearm not under and in accordance with the terms and conditions of a Firearm User's Licence ..."

Upon his conviction he was sentenced to be detained during the Governor-Genral's pleasure.

On October 16, 1974 he gave notice of appeal against his conviction. He also filed grounds on which he proposes to rely at the hearing of his appeal. The combined effect of those grounds is the allegation that the magistrate's verdict was unreasonable in that "the prosecution produced no gun in support of the charge" so that "the Crown's case rested on the unsupported evidence of the complainant as to the existence of a gun."

The applicant now applies to be admitted to bail pending the determination of his appeal.

At the hearing of this application on Tuesday of last week Mr. Reckord, of the Office of the Director of Public Prosecutions, readily admitted that the only evidence led by the Crown in support of the charge

laid in the information was that of the complainant who testified as under.

> "I was in passageway of gate. I saw Tony come to gate. Accused said to Tony 'Pass it'. Tony took gun from his waist and handed it to the accused. Accused ... pointed the gun at me. I stepped backwards until I reached a step .... and ran upstairs. I made a report to the police. I went with police ... and pointed out (the accused)."

An examination of the magistrate's notes of evidence confirms the foregoing. For the purpose of this application it is unnecessary to go into the rest of the evidence but it is, indeed, revealing to look at the magistrate's findings which he recorded thus:

> "Court finds: (1) There was fuss between complainant and (a witness for the defence). (2) Complainant on road at corner of Tulip Lane and Oxford St. (3) Accused had words of happenings and hurried to the scene. (4) Accused accosted complainant .... (7) Accused called friend and asked him for thing. (8) Friend passed to accused a gun which accused pointed at complainant .... (10) Complainant a Home Guard knew a gun.
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> VERDICT: Accused guilty of illegal possession of firearm."

By virtue of the provisions of ss. 28 and 29 of the Judicature (Appellate Jurisdiction) Law 1962 the Court of Appeal, or a judge thereof, "may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal". The words "if it seems fit" are unmistakably clear. Their intendment is to vest in the Court, and the judges thereof, a discretion to admit an appellant to bail in circumstances in which, in the opinion of the Court, or a judge, such a course is desirable or just. This Court has never, as far as I am aware, sought to formulate a catalogue of principles by reference to which an application by an appellant to be admitted to bail is to be determined. It is to be hoped that no such attempt will ever be made. Parliament has, by the terms of ss. 28 and 29 (supra), and without equivocation, entrusted this Court, and its judges, with a discretion in the widest possible terms in the knowledge, it must be supposed, that that discretion will be responsibly exercised. For these and other reasons I am constrained to the conclusion that in the exercise of the discretion with which I am here concerned it is eminently desirable to avoid reference to such vague and indeterminate phrases as "in the exceptional circumstances of the case" from which, by their very nature, no common statement of principle can be extracted.

I entertain not the least doubt, however, that where it is manifest that a verdict adverse to an appellant is unlikely to be sustained by reason of the total absence of proof of those matters which it is essential to establish in order to constitute the offence

charged, an applicant ought, without the least delay, to be admitted to bail. It is my firm view that in this case the prosecution did not lead any evidence to cast even the shadow of a prima facie case of possession of a firearm by the applicant.

The Gun Court Act, 1974, by s. 2, attributes to "firearm" the meaning assigned thereto by s. 2 (1) of the Act. By this latter section "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;"

In the face of the foregoing definition I find it not a little difficult to understand how the resident magistrate came to regard himself as being satisfied beyond a reasonable doubt as to the nature and identity of "the thing friend passed to accused" and which "accused pointed at complainant." Could he have been satisfied in the absence of the production of the thing described by the complainant as a "gun", and in the absence of expert evidence, that that thing was a firearm as defined by the Act? Was he able to conclude that it was a "lethal barrelled weapon from which a shot, bullet or other missile" could be discharged? The affirmative answer he found to this question appears to have been predicated on an acceptance of the evidence of the complainant that he was a Home Guard and had seen the applicant with a gun. From that evidence the magistrate inferred that the complainant "knew a gun".

In R. v. Pryce, Supreme Court Criminal Appeal No. 114 of 1967, judgment in which was handed down by this Court on October 12, 1967, and appeal against conviction of an offence under s. 20 (1) (b) of the Act was allowed because the prosecution had failed to prove that the gun - in that case the gun, the subject of the charge, was produced in evidence and, indeed, inspected by the jury at the invitation of the trial judge who had read part of the definition of a firearm to them - was a "firearm" as defined in the Act. It is unnecessary to dwell on R. v. Pryce. Let it be sufficient for me to say that I incline to the view that the affirmative answer found by the magistrate raises an appealable issue which is more than likely to be resolved in favour of the applicant.

Mr. Beckord submitted, in answer to the application, that the

conviction of the applicant having displaced the presumption of innocence in his favour, the onus was on the applicant to show some exceptional circumstance requiring the exercise of my discretion in favour of his admission to bail. As already indicated I eschew that approach, and I do so here because it assumes, for all purposes, the validity of a conviction which, in my view, is demonstrably wrong.

Mr. Reckord then drew my attention to s. 19 of the Gun Court Act which effected an amendment to the Act by inserting in s. 20 a fifth sub-section which provides, as far as he asserts it to be material, that:

> "In any prosecution for an offence under this section -
>
> (c) any person who is proved to have used or attempted to use or to have been in possession of a firearm, or or 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."

Let it suffice to say that although the applicant was prosecuted for an offence under s. 20, he was not proved to have used or attempted to use or to have been in possession of a firearm, or an imitation firearm, as defined in s. 25 of the Act, in any of the circumstances which constitute an offence under that section. There are two categories of offence specified in s. 25, none of which is here relevant.

The applicant will be admitted to bail in the sum of FIFTY DOLLARS with one Surety pending the determination.