Court of Appeal

Hyatali, C.J., Phillips, J.A

Mag. App. No. 5 of 1973

Edmund et al
and
Morris (appeal)

G.J. Austin – for appellants

T. Lee for respondent

Criminal Law - Appeal against conviction (Firearms)

Criminal Law - Assault

Hyatali, C.J.
The three appellants were convicted for the following offences: **Errol** Edmund for having in his possession a firearm without being the holder of a Firearms User's Licence contrary to s.6(1) of the *Firearms Act*, 1970 ("the Act"); **Errol** Edmund and Winston Edmund for assaulting P.C. Deonarine in the execution of his duty contrary to s.33 of the *Offences Against the Person Ordinance* Ch. 4 No. 9 ("the Ordinance"); and **Errol Edmund,** Winston Edmund and Ellis Hendricks assaulting P.C. Lodge in the execution of his duty contrary to the same section of the Ordinance.

They all appealed against their respective convictions on the statutory around of not guilty but at the hearing of these appeals that ground was not pursued. Instead, counsel for the appellants sought and obtained leave to argue in relation to **Errol** Edmund that his conviction on the firearms charge was erroneous in point of law because (a) the weapon found in his possession was not a firearm within the meaning of the Act; and (b) in any event, opinion evidence was improperly accepted to prove that the weapon aforesaid was a firearm thereunder; and in relation to all the appellants that their convictions on the assault charges under s.33 of the Ordinance were in law bad because that section had been impliedly repeated by s.38 of the *Police Act*, 1965.

The point of law raised on behalf of all the appellants was considered by this Court recently in *Von Antoine v. Carrington and Matthews* (1974) 63 of 1973 and rejected for the reasons stated in its judgment delivered on 13 December 1974. It is fair to say however, that when instant appeal was argued, that judgment had not been given and consequently, counsel for the appellants was not aware of it. No other complaint was made against the magistrate's decision in finding the appellants guilty on the assault charges and, in our view, none could have been made with any hope of success. Accordingly, their appeals against their convictions on these charges must be rejected.

The incident which led to the firearms charge occurred at 9.30 p.m. on 29 August 1972 at the Midway Snackette at Freeport. In the course of their patrol duty that evening, P.C. Deonarine and Cpl. Lodge entered the Snackette. The first appellant

was seated at a table with some friends. Cpl. Lodge identified himself to one of them, requested him to empty his pockets and searched him, nothing was found.

The first appellant was infuriated by this search. He approached Cpl. Lodge as he was leaving the table, protested against the search of his friend and slapped Cpl. Lodge several times. All the other persons at the table surrounded Cpl. Lodge in a threatening manner. Cpl. Lodge drew his service revolver to defend himself, but this was to no avail. All the men started to beat him. While they were doing so, first appellant cornered Cpl. Lodge, forced him against a counter of the Snackette, held him across his neck with one hand and with the other, pressed a pistol against his neck. In the face of that situation P.C. Deonarine drew his service revolver, fired a few shots and rescued Cpl. Lodge from his assailants. The pistol which the first appellant had in his possession fell to the ground in the melee and it was in respect thereof that the firearms charge was laid against him.

That pistol however, proved to be a starting pistol commonly used at games. It was described as such by Cpl. Beckles of the Central Armoury Shop of the Police Training College. He had successfully fired. 22 blank caps from it. When asked for his opinion the nature and quality of the pistol he replied that it was a firearm and a prohibited weapon. He conceded nonetheless, that it was not a lethal weapon, was not made to kill and that live shots could not be used in it. Its only vice, he disclosed, was that it was capable of fusing powder burns.

Cpl. Beckles gave no evidence to establish that he was an expert either in small arms or ballistics, or that his experience at the Central Armoury Shop was such as to render him competent to express an opinion on the very question which the court had to decide, namely, whether the starting pistol was a firearm within the meaning of the Act. The point raised was whether the opinion of Cpl. Beckles was admissible in evidence in these circumstances. A useful, statement of the rule on opinion evidence and which we adopt for present purposes is to be found in Cross Evidence 3rd Edn. at p. 360. The learned author defines and discusses the rule thus:

“A witness may not give his opinion on matters calling for the special skill or knowledge of an expert unless he is an expert in such matters, and he may not give his opinion on other matters if the facts upon which it is based can be stated without reference to it in a manner equally conducive to the ascertainment of the truth, or if it would not assist the court in coming to a conclusion.

In the 1aw of evidence ‘opinion’ means any inference from observed facts, and the law on the subject derives from the general rule that witnesses must speak only to that which was directly observed by them. The treatment of evidence of opinion by English law is based on the assumption that it is possible to draw a sharp distinction between inferences and the facts on which they are based. The drawing of inferences is said to be the function of the judge or jury, while it is the business of a witness to state facts. But the law recognises that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily properly equipped to draw the proper inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion with regard to such matters provided he is expert in them.”

The opinion of Beckles therefore that the starting pistol firearm and a prohibited weapon was improperly received. In any event it was, if admissible, valueless because

he not only failed to state the facts on which it was based but omitted to furnish the court with the scientific criteria for testing the accuracy of his conclusion. He thus failed to discharge the duty which Lord President Cooper stated, was expected of experts, in the well-known case of *Davie v. Edinburgh Magistrates* (1953) S.C. 34.

"Their duty", he said, at p. 40 ibid, "is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."

Of equal interest in that case was the repudiation of the suggestion that the judge or jury was bound to adopt the views of an expert even if they should be uncontradicted. It was repudiated because, the court stated, "the parties [had] invoked the decision of the trial and not the oracular pronouncement of an expert". See also *R v. Turner* [1975] 1 All E.R. 70 per Lawton, L.J. at p.73 "g".

By s.2 of the Act the definition of "firearm" is stated to mean –

"any lethal barrelled weapon from which ammunition can be discharged or 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 Order made lay the Governor-General and of a calibre so prescribed."

And in the same section "prohibited weapon" is defined as meaning:

- "(a) any artillery or automatic firearm;
- (b) any grenade bomb or other like missile; or
- (c) any weapon of whatever description or design which is adapted for the discharge of any noxious liquid, gas or thing."

By the Firearms (Air Weapons) Order 1971 (see GN No. 3 of 1971) the definition of firearm was declared not to "include air weapons below. 177 calibre unless the barrel thereof is rifled." No question was raised before the magistrate to suggest that this pistol air weapon, but having regard to the terms of the definition, expert evidence, was in our view, necessary to assist the Court in deciding whether a starting pistol is a lethal barrelled weapon from which ammunition can be discharged, or is a component part of any such weapon.

In *Cafferata v. Wilson* [1936] 3 All E.R. 149 a divisional court in England considered whether a dummy revolver was a firearm within the meaning of the English Firearms Act 1920. The court held that it was, but it did so on the basis of evidence which established, that the article could by drilling for five minutes with an electric drill, or for thirty minutes with a hand drill, be converted into a weapon capable of firing bullet or other missile which could kill a man at a distance of five feet. In *R v. Freeman* (1970) 54 Cr. App. R. 251 the Court of Appeal had to consider whether a. 38 starting pistol was a "firearm" within the meaning of s. 57(1) of the *English Firearms Act*, 1968. The Court held that it was, but here too it was an the basis of evidence

which showed that the features in the pistol which were intended to prevent the discharge of missiles, could readily be removed by drilling, in which event, the pistol would be capable of firing bulleted ammunition with lethal force. The decision in *Cafferata's* case (supra) was approved and applied in *Freeman's* case (supra). There was no such evidence in the instant case. Consequently, it was impassible for the learned magistrate to have come to the conclusion, that the starting pistol which the first appellant had in his possession on the relevant date, was a lethal barrelled weapon from which ammunition could be discharged or was a component part of any such weapon. A residual but important question nevertheless remained to be determined. It remained because the definition of firearm embraces a prohibited weapon, which in turn means, among other things, "any weapon of whatever description or design which is adapted for the discharge of any noxious liquid, gas, or thing."

It was the evidence of Beckles whom the learned magistrate accepted as a incredible witness that the starting pistol discharged blank. 22 caps successfully and also that it could cause powder burns. In so testifying Beckles did not in our view speak as an expert. In any event, expert evidence was not needed to assist the magistrate in reaching the conclusion that gunpowder released from the discharge of blank. 22 caps could cause powder burns. That was a conclusion which as well within the competence of the magistrate to draw without the aid of an expert. The question to be answered therefore, is whether the starting pistol in this case, which is capable of causing powder burns when discharged, is a weapon which is adapted for the discharge of a noxious thing.

It is tolerably plain that "noxious" in this context does not carry a technical meaning. It must therefore be given its ordinary or popular meaning. In this sense it means harmful or unwholesome. Accordingly, the starting pistol in this case was not only adapted to discharge blank shots to start games but also to discharge gun powder capable of causing burns. The answer to the question posed therefore falls to be answered in the affirmative. For these reasons we hold that the first appellant had in his possession on the relevant date a firearm within the meaning of the Act and as he did not prove that he was the holder of a Firearm User's Licence or that he was within the exemptions prescribed in s.7 of the Act, he was rightly convicted. We therefore dismiss all the appeals and confirm the convictions and sentences.

Isaac E. Hyatali

Chief Justice

Clement E. Phillips

Justice of Appeal