[2013] JMCA Crim 5

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 3/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McINTOSH JA

MERRICK MILLER v R

Robert Fletcher for the appellant

Miss Paula Llewellyn, QC Director of Public Prosecutions, and Miss Yanique Gardener for the Crown

17 December 2012 and 8 February 2013

PANTON P

[1] The appellant was convicted in the Resident Magistrate's Court for the Corporate Area, held at Half Way Tree, of the offence of losing a firearm through negligence. The record of appeal submitted from the Resident Magistrate's Court does not indicate the date on which the conviction was recorded and the reasons for judgment given. However, it discloses that the trial commenced on 18 August 2011, and the appellant was sentenced on 26 October 2011 to pay a fine of $80,000.00 or serve a term of imprisonment of three months. The appellant has paid the fine.

The facts

[2] There is no dispute on the facts. The prosecution's case and the unsworn statement of the appellant are at one. On 22 January 2011, at about 6:30 pm the appellant and his daughter went to pick plums at the Shortwood Practising Primary and Junior High Schools playing field at Olivier Road, Kingston 8. He had with him in a pouch his loaded licensed firearm, three additional cartridges and the firearm booklet. He left the pouch with these items on the floor of the vehicle, while he picked plums. Having completed the picking, he set out for home. While he was on his way, he discovered the pouch and contents missing. He had returned to the car at the playing field to get wire to pick the plums. He did not recall though whether he had secured the car after this visit.

[3] The appellant attended at the Constant Spring Police Station at about 7:30 pm on the said evening and made a report of what had happened to Detective Corporal Brendon Armstrong. The corporal and the appellant then visited the location. The corporal made observations of the scene and gave evidence as to the nature of the premises and the means of access thereto.

[4] On their return to the Constant Spring Police Station, the corporal recorded a statement from the appellant and, at trial, he said that at that stage he commenced investigation into a case of simple larceny. He further informed the appellant that he may be charged for negligence. Objection was taken at the trial to the admission into evidence of the written statement given by the appellant to the corporal. The objection

was on the basis that the statement ought to have been under caution, rather than being a regular witness statement. The learned Resident Magistrate acceded to the objection.

The reasoning and findings of the Resident Magistrate

[5] In convicting the appellant, the learned Resident Magistrate took note of the fact that the appellant had nothing to prove. She accepted that which the corporal said the appellant had reported to him. She agreed with the appellant's counsel at trial that the negligence that the prosecution had to prove was negligence simpliciter as opposed to willful negligence, and the test was one of reasonableness. She found that the appellant "failed to exercise such care skill and foresight as a reasonable man in his situation would exercise and that it is an objective test". She found that "a reasonable man would foresee that if he did not secure the weapon it would get lost for example being stolen and as it is a lethal weapon he would need to take special care to prevent such loss".

[6] In concluding, the learned Resident Magistrate said that the lighting at the field would not have been good at the time the appellant parked his car. She noted that the appellant had returned to the vehicle to get the wire and was unable to say whether he had secured it after this visit. The perimeter fencing was defective in that it allowed for free unsupervised passage of persons on the premises. In the view of the Resident Magistrate, taking all these matters into consideration, the appellant was guilty of gross negligence, deserving of criminal sanction.

The ground of appeal

[7] It is noted that the undated notice of appeal that was filed by the appellant's attorney-at-law was in the form of a Resident Magistrate's Court civil appeal, and the Resident Magistrate and the Attorney-General were named as respondents. The grounds of appeal attached to that notice were abandoned by Mr Robert Fletcher who argued the appeal. However, he sought and was granted permission to argue the following ground filed on 13 December 2012:

> "That the Learned Trial Judge erred in admitting and receiving the oral evidence of Constable Brendon Armstrong having excluded the statement the contents of which formed the substance of the oral testimony. This error denied the appellant a fair trial."

The submissions

[8] Mr Fletcher submitted that the ruling of the Resident Magistrate excluding the written statement, but allowing the oral report of the appellant to stand, was an error which "goes to the crux of the case". He said that the exclusion of the written statement negated the Resident Magistrate's earlier decision to accept the oral report. The prosecution's case, he claimed, was therefore based wholly on improperly admitted evidence (that is, the oral report). In the circumstances, he argued, the conviction ought to be quashed and a judgment and verdict of acquittal entered.

[9] "The very relaxed state of merely receiving a report without an alertness as to the legal implications of what is being said is not an option open to the officer in this case", Mr Fletcher submitted. Having omitted the statement, if the Resident Magistrate

was aware of the anomaly of having brought it in by oral evidence, she could have corrected the anomaly in her summation, Mr Fletcher argued. "That anomaly", he said, "is bereft of any sensitivity to this contradiction". And that, in itself, he said, was a valid complaint that goes to the issue of fairness.

[10] In response, the learned Director of Public Prosecutions, Miss Paula Llewellyn, QC submitted that a review of the transcript of the trial reveals that the statements by the appellant were at different stages, and are therefore governed by different considerations. Consequently, this argument by the appellant cannot be sustained. The starting point in any discussion on this matter is, she said, an examination of the Judges' Rules, 1964. She referred to the case ***Regina v Osbourne and Virtue*** [1973] QB 678, and the recent decision of the full court in ***Williams et al v INDECOM,*** decided on 25 May 2012. Particular emphasis was placed by the Director on the following passage in the judgment of Lawton LJ in **Osbourne** at page 680:

> "The rules contemplate three stages in the investigations leading up to somebody being brought before a court for a criminal offence. The first is the gathering of information, and that can be gathered from anybody, including persons in custody provided they have not been charged. At the gathering of information stage no caution of any kind need be administered. The final stage, the one contemplated by rule III of the Judges' Rules, is when the police officer has got enough (and I stress the word 'enough') evidence to prefer a charge. That is clear from the introduction to the Judges' Rules which sets out the principle. But a police officer when carrying out an investigation meets a stage in between the mere gathering of information and the getting of enough evidence to prefer the charge. He reaches a stage where he has got the beginnings of evidence. It is at that stage that he must caution. In the judgment of this court, he is not bound to caution until he has got some information

> which he can put before the court as the beginnings of a case."

[11] Miss Llewellyn submitted that at the relevant time when the oral statement was made the appellant was not a suspect; rather, he was viewed by Detective Corporal Armstrong as a complainant in a case of simple larceny of the firearm. By virtue of section 41A of the Firearms Act, she argued, it is only after the making of a statement that an assessment can be made by the relevant officer as to whether an individual has been negligent. Prior to that, she said, the individual can only be viewed as a complainant in a case of larceny. There was, therefore, no requirement in the circumstances of this case for the administering of a caution.

Decision

[12] There is merit in Miss Llewellyn's submissions. Section 41(1) of the Firearms Act reads:

> "The holder of a licence, certificate or permit in respect of any firearm or ammunition and any other person lawfully in possession of any firearm or ammunition by virtue of subsection (2) of section 20 shall, within forty-eight hours after he discovers the loss or theft of such firearm or ammunition, report the loss or theft at a police station."

Section 41A reads:

> "Any person who, being the holder of any licence, certificate or permit in respect of a firearm or being lawfully in possession of a firearm by virtue of subsection (2) of section 20, loses such firearm through negligence on his part shall be guilty of an offence and on summary conviction thereof before a Resident Magistrate, shall be liable to a fine not exceeding one hundred thousand dollars or to imprisonment with or without hard labour for a term not exceeding twelve

months."

[13] Section 41(1) requires the reporting of the loss or theft of the firearm, whereas section 41A makes it an offence if the firearm is lost through negligence by the holder of the licence. A police officer to whom a report is made is obliged to receive and record the report. At the stage at which the report is being made, the officer would not have had any evidence of any offence having been committed by the licence holder; hence, there would be no need for a caution. In the instant case, the officer commenced investigations after the report was made. It was only after he had completed those investigations that he would have been in a position to consider that an offence may have been committed by the appellant. It was in those circumstances that the learned Resident Magistrate thought that a written statement thereafter from the appellant ought to have been under caution. She may well have been right in such thinking, granted that the statement given after the completion of the investigations could have been different from that which was reported in the initial stages.

[14] The Judges' Rules require that an individual be cautioned "as soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence" (Judges' Rules 1964, No 2). However, the rules also require that:

> "when a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has

> not been charged with the offence or informed that he may be prosecuted for it" (Judges' Rules 1964, No 1).

[15] In the instant matter, the oral report made by the appellant to the officer was not even as a result of any questioning by the officer. It was in keeping with an obligation that the law imposed on the appellant, and was made without any prompting or urging by the officer. For it now to be argued on behalf of the appellant that the content of the report ought not to have been admitted in evidence is fallacious, to say the least.

[16] Although only one ground of appeal was relied on, Mr Fletcher sought to question in an oblique way, the validity of section 41(1) of the Firearms Act. He submitted that although the issue was not raised before the Resident Magistrate, "a view might be taken that the issue of the constitutionality of the section itself foreshadows this matter certainly as it relates to the use of such statement". However, Mr Fletcher was keen to point out that the cases do suggest that "statutory provisions requiring compulsory reporting and the giving of statements in certain circumstances are not per se unconstitutional". He brought to the court's attention the decision of the Court of Appeal of Trinidad and Tobago in the case ***Toney v Corraspe*** [MAG. APP. NO. 68 OF 2008] delivered on 26 February 2010. In that case, a member of the Bar of Trinidad and Tobago reported to the police that money amounting to $6,000.00, his licensed pistol and 22 rounds of ammunition had been stolen from under the front seat of his locked motor car, which he had parked for several hours just outside his office door in Port of Spain, Trinidad. The compound on which the vehicle had been parked

was enclosed with a concrete fence and at the entrance there was a guard booth, and a guard would normally open and close the gate to facilitate entry on the premises. The appellant said that when he had come out of the car, he had heard it lock automatically. There was no evidence that the car was broken into, and when he eventually re-entered the vehicle he had done so by using the automatic control.

[17] The same point as to the admissibility of the oral report to the police as has been made in the instant appeal was raised in ***Toney.*** In addition, it was argued that the right to silence and the rule against self-incrimination had been breached, and generally that there had been a violation of the constitutional rights of that appellant. The Trinidadian Court of Appeal upheld the magistrate's decision to convict the appellant, and dismissed the arguments that there had been constitutional breaches.

[18] In the instant appeal, had those arguments been raised before us, the result would have had to be the same. The right granted to the appellant to hold a firearm user's licence is one that carries with it heavy responsibilities. The holder of such a licence must ensure at all times that the firearm is in a secure place, if not on his person. A firearm ought not to be left in a manner that will attract thieves and murderers, or even merely curious persons. When the holder of a firearm user's licence is going to engage in the activity of picking plums, or anything else that does not allow for the firearm to be under his personal watch, it should be in a secure place where neither evil nor idle hands will have access to it. In the instant case, it seems that the learned Resident Magistrate for the Corporate Area was justified in concluding that the

appellant was grossly negligent in how he dealt with his firearm on this occasion.

[19] In the circumstances, the appeal is dismissed. The conviction and sentence are affirmed.