[2020] JMCA Crim 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 92 & 93/2014

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

EVERTON BARRETT v R

RYAN BLACK

Cecil J Mitchell for the applicant Everton Barrett

Raymond Samuels for the applicant Ryan Black

Mrs Andrea Martin-Swaby for the respondent

1 May 2017 and 31 July 2020

MCDONALD-BISHOP JA

[1] These proceedings concern two renewed applications for leave to appeal convictions and sentences brought by Messrs Everton Barrett and Ryan Black ("the applicants"). They were tried and convicted by a judge sitting alone in the High Court Division of the Gun Court held in Port Maria, in the parish of Saint Mary on divers days between July and September 2014. They were charged on an indictment containing four counts: counts one and three charged them with the offence of illegal possession

of a firearm; count two, robbery with aggravation; and count four, shooting with intent. Following pleas of not guilty by the applicants to all counts, they were convicted only on count three, which charged them with the offence of illegal possession of firearm.

[2] The learned trial judge upheld a no-case submission in respect of counts one and two, relating to the offences of illegal possession of firearm and robbery with aggravation, and as a result, the applicants were acquitted on those charges. At the end of the trial, they were also acquitted on count four, which charged them with the offence of shooting with intent. They were, however, found guilty on the related offence of illegal possession of firearm that was charged in count three of the indictment.

[3] On 24 October 2014, the applicants were each sentenced to seven years' imprisonment at hard labour in respect of the single offence of illegal possession of firearm.

[4] The applicants, by way of separate applications, applied for leave to appeal their convictions and sentences and the applications were considered on paper by a single judge of this court. The grounds on which the applications were made, in outline, were: (i) "misidentify" by the witness; (ii) unfair trial; (iii) lack of evidence; and (iv) miscarriage of justice. The single judge found no merit in these grounds and refused leave to appeal. As they were entitled to do, the applicants renewed their applications for leave to be considered by the court.

[5] On 1 May 2017, when the renewed applications for leave to appeal came before this court for hearing, counsel for the applicant Everton Barrett, Mr Cecil Mitchell, sought and obtained the permission of the court to abandon the original grounds of appeal and to argue, instead, four supplemental grounds of appeal. Mr Raymond Samuels, who appeared for the applicant Ryan Black, sought and obtained permission to advance the same grounds in relation to that applicant.

[6] The supplemental grounds were:

> "1. That the evidence led by the Crown in support of the charge of Illegal Possession of Firearm on Count 3 of the indictment was insufficient to support a conviction on that charge;
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> 2. That the evidence led by the Crown as to the sufficiency of time and opportunity for the identification of the applicant[s] was wholly inadequate bearing in mind the circumstances of the case;
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> 3. That the learned trial judge misdirected herself [on several matters as to the evidence and]...the cumulative effect of those misdirections deprived the applicant[s] of a verdict favourable to [them]; and
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> 4. That the sentences [were] manifestly excessive."

[7] Following the submissions of counsel on behalf of the applicants that the conviction for the offence of illegal possession of firearm was not sustainable, the Crown rightly conceded.

[8] Having listened to the arguments of counsel, and given the inevitable concession of the Crown in relation to ground one, the court found that the resolution of that issue

as to the sufficiency of the evidence to sustain a conviction on count three of the indictment was dispositive of the appeal. Accordingly, it formed the view that there was no real benefit to be derived from a consideration of the other grounds of appeal, and the following orders were made:

> "1. Applications for leave to appeal convictions and sentences for both applicants are granted.
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> 2. The applications are treated as the hearing of the appeal.
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> 3. The appeals are allowed.
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> 4. The convictions and sentences are quashed.
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> 5. Judgments and verdicts of acquittal are entered in respect to both applicants."

[9] We promised then to reduce our reasons for our decision to writing at a later date. These are the reasons as promised, with sincerest apologies for the delay.

The factual background

[10] The case presented by the prosecution against the applicants was as follows. On Tuesday 8 May 2012, at about 11:00 am, a party of police personnel were on mobile patrol in the parish of Saint Mary. Based on a report, they went to Ramble District in that parish. While there, they saw a white Nissan motor car approaching from the opposite direction at a fast rate of speed. The majority of the patrol exited their vehicle, and one of them signalled the Nissan motor car to stop. The Nissan motor car slowed but did not stop. Several of the officers recognised the driver and the passenger, who was in the front of the vehicle, as persons whom they knew before. They were

identified respectively to be the applicant Ryan Black, who was the driver, and the applicant Everton Barrett, the passenger.

[11] Everton Barrett produced a pistol, pointed it outside of the vehicle and fired it; at the same time, Ryan Black sped off. It was also noticed that a third man, who was a passenger of the rear seat of the Nissan, also pointed a firearm outside of the vehicle and fired. The police officers returned the fire but the car sped away. The police officers re-boarded their vehicle and went in chase of the Nissan. They, however, lost sight of it somewhere in the Geddes Town area of the parish. It was out of their sight for approximately 15-20 minutes.

[12] The police eventually saw the vehicle again at Brimmer Hall in the parish. At that time, however, only Ryan Black was seen. Everton Barrett was subsequently accosted in the Geddes Town area and taken to Brimmer Hall. They were both arrested and charged for the various offences mentioned above.

[13] Both applicants made unsworn statements. Everton Barrett, in his defence, said that he had nothing to do with the incident at Ramble. He said that he was in the Free Hill area of Saint Mary when men approached him with machetes and asked him who he was. He said that he identified himself to them, but while that was going on, a crowd gathered, and a police patrol came along and intervened. The police took him to the Port Maria Police Station for processing and he was later told that he was being charged for these offences. He said that he had nothing to do with any robbery or shooting at the police.

[14] Ryan Black, for his part, stated that he had rented the Nissan motor car the previous day to take someone on a trip. On the day in question, the person could not make the trip, and he left her house in the vehicle to go home. On reaching the Ramble area, he was passing a police vehicle that was on the side of the road, when gunshots were fired at his car. He said that he was afraid. He ducked his head and drove fast out of the area. The police followed him and were behind him every time that he looked. He said that when he got to Brimmer Hall he saw some people at the side of the road and he stopped right where they were.

[15] He said the police then accosted and handcuffed him, and accused him of being in a shootout. He said that he told them that they were lying.

[16] He denied having anyone in his car that morning, that he was involved in any robbery or that he was in involved in any shootout with the police.

[17] The learned trial judge considered the cases advanced by the prosecution and the applicants. She identified the major issues to be the credibility of the police witnesses and the identification of the occupants of the motor car at Ramble. She accepted that, although the Nissan had tinted windows and a portion of the windscreen was tinted, the occupants could have been seen from outside because the windows were in fact open. She found that there was sufficient time and opportunity for the police witnesses to see the faces of the occupants to the front of the Nissan motor car and to recognise them as persons who were known before. She found that the distance also facilitated that viewing.

[18] Although there were some discrepancies in the evidence of the witnesses for the prosecution, which the learned trial judge identified, she accepted the account of the police officers, in the main. She found there was shooting from the Nissan motor car and that both applicants were in the vehicle at the time.

[19] The learned trial judge rejected the respective accounts of the applicants and found that they were afforded the opportunity to separate during the time the police had lost sight of the vehicle.

[20] The offence of illegal possession of firearm, for which the applicants were convicted, was connected to the charge of shooting with intent, which was found not to have been made out at the end of the case. Although the learned trial judge accepted that Everton Barrett was armed with a gun that he fired, while extending his arm through the open car window, she found that there was no evidence that he specifically pointed the firearm at the police officers and was shooting at them. On that basis, she found them not guilty of shooting with intent.

Ground one

Whether the evidence was insufficient to sustain the conviction for illegal possession of firearm

[21] The applicants' bone of contention, embodied in ground one, was that the evidence led by the Crown in support of the charge of illegal possession of firearm on count three of the indictment was insufficient for the following reasons:

i. No firearm was recovered from the applicant or the Nissan motor car.

ii. Although the Crown's case is that the applicants were held between 10 minutes to half an hour after the police lost sight of the Nissan, no gunpowder residue was found on the hands of the applicant, Everton Barrett or recovered from the inside of the Nissan motor car.

iii. Although the Crown witnesses testified that several shots were fired by the applicant Everton Barrett and the third person who was to the rear of the Nissan, none of the police party sustained any injury. It was not shown that any "ballistic damage" was done to the police vehicle as a result of the shooting, and no spent shell or warhead was recovered.

iv. There was no independent evidence to support the testimony of the police witnesses that there was a shooting incident and that shots were fired at them. Hence, the applicant Everton Barrett, was not in possession of a firearm.

[22] The appropriate starting point, in assessing the strength of the arguments advanced by the applicants on this ground, must be the law as it relates to illegal

possession of firearm. As such, the legislative framework within which the charges were brought against the applicants now commands close attention.

[23] The applicants were charged with the offence of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act (the "Act") on count three. The subsection reads, in so far as is relevant:

> "20. – (1) A person shall not –
>
> (a) …
>
> (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."

[24] Section 2(1) of the Act defines "firearm" in these terms:

> "'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;"

[25] Based on section 2(1) of the Act, the learned trial judge would have had to have evidence to satisfy her, to the extent that she was sure, that, at least, one of the men in the car had a "lethal barrelled weapon from which any shot, bullet or other missile can be discharged" or that he was in possession of a restricted or prohibited weapon or component part of any such weapon.

[26] No firearm, shot, bullet or other missile was recovered. There was also no expert examination of any weapon to provide evidence that the object seen in the hands of the men (as the learned trial judge accepted) was a firearm within the meaning of section 2(1) of the Act. Also, there was no injury to anyone or damage to property which could point to the use of an object that must have been a firearm within the meaning of the Act.

[27] In the oft-cited case of **R v Clinton Jarrett, R v Michael James, R v Oliver Whylie** (1975) 14 JLR 35, it was established that where there is no ballistic expert's certificate to prove that an object is a firearm, proof that the object was a firearm, 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."

[28] The law relative to this issue was affirmed in a more recent decision of this court in **Stevon Reece v R** [2014] JMCA Crim 56. In that case, the appellant was charged with illegal possession of firearm and robbery with aggravation. No firearm was recovered and, as in this case, there was no damage to property or injury to person. The trial judge acquitted the appellant of the robbery charge but convicted him for illegal possession of firearm, without there being any evidence that he had committed any other offence by using what was alleged to have been a firearm. In concluding that the conviction was unsustainable in law, the court found, among other things, that

there was no evidence that the object described by the complainant was a firearm within the meaning of section 2(1) of the Act.

[29] Having considered **R v Jarrett, James and Whylie**, against the background of the legislative framework within which the charge for illegal possession of firearm was brought, the court opined on this issue:

> "[27] It follows from all this that there was no evidence to establish that the object in question was a lethal barrelled weapon capable of discharging shot, bullet or other missiles from the barrel or that it was any other weapon described under section 2(1). There was no proof, then, that the object was a firearm as defined under section 2(1). Mr Harrison was, indeed, correct when he stated that the description of the object by the complainant, which the learned trial judge accepted as describing a firearm, could only have established, at highest, that the object was an imitation firearm."

[30] This finding of the court applies with equal force to the case at bar. There was no acceptable evidence that the objects that were, allegedly, seen by the police in the hands of the applicant Ryan Black and the third man, were firearms within the meaning of section 2(1) for the purposes of section 20(1)(b), under which the applicants were charged. At the highest, they could only have been in possession of objects that resembled firearms. This situation directs attention to section 25 of the Act, which affords another basis on which a person may properly be held to be in possession of a firearm, even if that object is not proved to be a firearm within the meaning of section 2(1).

[31] Section 25 of the Act states, in so far as is immediately relevant:

> "25. - (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) …
>
> (4) ...
>
> (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 is 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**." (Emphasis added)

[29] An examination of the selected portions of section 25 above clearly reveals that where there is no evidence to establish that the object in question is a firearm, within the meaning of section 2(1), the prosecution can, nevertheless, pray in aid the definition of an imitation firearm within section 25(5), once the object has the appearance of being a firearm and was used in circumstances which constitute an

offence under section 25. Section 25 creates offences that are separate and distinct from the offences created under section 20 under which the applicants were charged.

[32] The applicability of section 25 was also considered in appreciable detail in **Stevon Reece v R**, and it was found that the conviction for illegal possession of firearm simpliciter in that case could not stand on the basis of section 25. The reasoning of the court on this issue, in that case, would also apply with equal force to the determination of the same point in the instant case.

[33] The applicants were not charged for committing an offence in contravention of section 25, which the prosecution could have done: **R v Henry Clarke** (1984) 21 JLR 72. There is, however, a symbiotic relationship between section 25 and section 20 (1)(b), under which the applicants were charged on count three. The bridge that connects section 25 to section 20 is section 20(5)(c), which states:

> "(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."

[34] This court in **Stevon Reece v R** had seen it fit to emphasise that section 20(5)(c) is an important provision in section 20, in that, it connects section 20 and section 25 offences and that this is so whether or not a firearm is recovered or whether the object in question is a real or imitation firearm (paragraph [31]). After re-stating dicta from such instructive authorities as **R v Jarrett, James and Whylie**; **R v Henry Clarke**; and **Everton LLoyd Lynton v R** [2014] JMCA Crim 17, the court reasoned:

"[33] Accordingly, in following on the path of reasoning in those authorities, it is considered sufficient, for present purposes, to merely summarise some of the relevant principles that have been distilled from them as follows: Section 20(5)(c) is not an offence-creating section but rather an evidential one. The subsection is an extraordinary section that creates a statutory fiction by virtue of the use of the word, 'deemed' so that a person who uses, attempts to use or who is in possession of a firearm or an imitation firearm, in circumstances that amount to the commission of an offence under section 25, will be taken, by law, as being in illegal possession of a firearm in contravention of section 20.

[34] By virtue of this statutory fiction, the lawful possession of a firearm in certain circumstances can be rendered unlawful. In other words, the legality of the possession can be affected by the use of the firearm or the circumstances in which the person was found to be in possession of it. Therefore, a licensed firearm holder, for instance, can get caught in contravention of the law as being in illegal possession of a firearm for which he holds a valid Firearm User's Licence.

[35] Similarly, the statutory fiction created by the provision operates to render an imitation firearm, a firearm within the meaning of the Act, thereby making it the subject of a charge of illegal possession of a firearm within the ambit of section 20(1)(b) in prescribed circumstances. Within this context, Luckhoo P (Ag) in R v Jarrett, James, Whylie, stated:

> '… If the weapon used is an imitation firearm a statutory fiction is introduced whereby it is to be regarded as a firearm defined by section 2 held without lawful authority. A charge alleging contravention of section 20 (1) would in such a case be proved by adducing such evidence as would be necessary to show that the defendant committed a section 25 offence. There can 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 section 25 offence as such.' "

[35] The court at paragraph [42] also referenced the case of **R v Neville Purrier and another** (1976) 14 JLR 97 at 100, in which the effect of section 20(5)(c) on a charge for illegal possession of firearm was explained in these terms:

> "In order to establish illegal possession of a firearm pursuant to s 20(5)(c) of the Act that section requires that the following be established:
>
> (i) Commission of an offence referred to in s 25 (1) or (2) of the Act, and
>
> (ii) proof, meaning proof beyond reasonable doubt, that in the commission of such offence, the person charged used, or attempted to use, or was in possession of a firearm or imitation firearm as defined above.
>
> Further, in order to establish the commission of a s 25 offence, for example, a s 25 (1) offence, it is necessary to prove not only the commission of a felony but also that the person charged made, or attempted to make, use, whatever, of a firearm or imitation firearm with intent to commit or aid the commission of the felony or to resist or prevent the lawful apprehension or detention of himself or some other person."

[36] With all that having been said concerning the applicable law, the court in **Stevon Reece v R** then concluded:

> "[43] It follows that the prosecution, of necessity, would have had to successfully invoke the statutory fiction created by section 20(5)(c) in order to ground a conviction for the section 20(1)(b) offence for which the applicant was charged. To do so, there would have had to be proof beyond a reasonable doubt that he had committed the robbery with aggravation as charged."

[37] When the applicable law is applied to the facts of the instant case, it becomes quite clear that the prosecution, having not charged the applicants for contravening

section 25(1) or (2), was relying on the operation of section 20(5)(c) to ground the offence of illegal possession of firearm for which the applicants were charged under section 20(1)(b). This charge of illegal possession of firearm would have been on the basis that the applicant, Everton Barrett (and the third man in the motor car), had used objects which were, at least, imitation firearms to commit a felony, being shooting with intent. It was that offence which was the subject of count four. This means, in effect, that the prosecution had preferred the charge on count three based on what it perceived to have been sufficient evidence to establish that a felony was committed in contravention of section 25(1).

[38] There was no evidence that could have satisfied the court of the commission of any other section 25(1) offence, especially given the learned trial judge's findings that the applicants were not guilty of robbery with aggravation, which, it was alleged, was committed before the alleged shooting incident. There was also no proper evidential basis for the learned trial judge to consider a section 25(2) offence as she would have been empowered to do by section 25(4). This subsection states:

> "(4) On the trial of any person for an offence against subsection (1) the [Parish Court Judge] 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."

[39] On the case, as the learned trial judge found it to be at the end of her assessment, the section 25(1) offence alleged by the prosecution had not been made out. Therefore, without any evidence in proof of the commission of the predicate

section 25(1) offence that was charged in count four (or a section 25(2) offence, having not been charged in the indictment), the condition-precedent for the conviction of the applicants for illegal possession of firearm on count three, was not established.

Conclusion

[40] The court concluded that the learned trial judge erred when she convicted the applicants for illegal possession of firearm on evidence that was not sufficient to ground the charge. Having found the applicants not guilty of shooting with intent, and in the absence of evidence establishing the commission of any other section 25 offence, the statutory fiction, created by section 20(5)(c) of the Act, could not have been properly invoked to aid the prosecution to ground the charge of illegal possession of firearm contrary to section 20(1)(b). The learned trial judge would have lacked the legal basis on which to convict the applicants for illegal possession of firearm. Accordingly, the conviction for that offence could not stand.

[41] Ground one, therefore, succeeded.

[42] It is for the reasons above that the applications for leave to appeal were granted and the consequential orders detailed above, at paragraph [8], made.