

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 30/91

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.  
THE HON. MISS JUSTICE MORGAN, J.A.  
THE HON. MR. JUSTICE GORDON, J.A.

R. v. CONRAD REYNOLDS

Dr. Paul Ashley for Appellant

Miss Carol Malcolm for Crown

February 3 & March 23, 1992

GORDON, J.A.

Is the offence of shopbreaking and larceny a "Firearm Offence" as defined by Section 20 (5) (a) of the Firearms Act? That is the main question that fell to be resolved in this appeal as the appellant challenged the correctness of his conviction for this offence in the High Court Division of the Gun Court in Kingston on the 22nd March, 1991.

The appellant was convicted on all three counts of an indictment on which he was charged with illegal possession of firearm, count I, shopbreaking and larceny count II and shooting with intent count III. On each of counts I and III a sentence of ten years imprisonment at hard labour was imposed to run consecutively and on count II five years to be served concurrently with the other sentences imposed. All the convictions were challenged but the evidence on which the Crown relied was convincing, the primary issue therefore was the question posed.

The evidence which Pitter, J., heard came mainly from District Constable Rodney Ellis, who was attached to the City Centre Police Station. This witness and one Cpl. Green were

patrolling along Princess Street in plain clothes at about 3:15 a.m. on 26th July, 1988. On reaching about six chains from premises No. 46 Princess Street which housed "Churchill's Haberdashery" this witness saw a group of about fourteen men carrying boxes and bags away from Churchill's Haberdashery. The shutter was rolled up half way and District Constable Ellis concluded they had arrived at the scene of a crime. Proceeding on their way they were met by a hail of bullets as gunfire erupted from this group as the looters ran in different directions. District Constable Ellis and Cpl. Green sought cover and returned the fire. When the shooting subsided and the gun-smoke cleared District Constable Ellis and Cpl. Green approached the building and entered same. District Constable Ellis saw one man mortally struck on the piazza and in the shop there were three others in a similar condition. All four subsequently died. A homemade shotgun with one live cartridge was found on the floor of the shop. The shop was searched and the appellant was found hiding under a counter. He was asked what he was doing there and he replied:

"Me cna me bed a sleep and them boy come call me and ask me fi follow them and the devil fool me mek me go in deh."

He was arrested and charged with the offences detailed above and upon caution he said:

"Missa Green, a di devil fool me sah. 'A de boy dem did have the gun."

The appellant in his defence said he was not discovered in the building but was walking on the street when he was taken into custody by the police, taken to the Haberdashery and charged with the crimes.

Under the Gun Court Act "Firearm Offence" is defined in section 2 as -

- (a) any offence contrary to section 20 of the Firearms Act;
- (b) any other offence whatsoever involving a firearm and in which the offender's possession of the firearm is contrary to section 20 of the Firearms Act.

The High Court Division of the Gun Court has jurisdiction to hear and determine any firearm offence other than a capital offence and any other offence specified in the schedule (section 5 (2)). Shopbreaking and larceny is not one of the offences specified in the schedule so to qualify as a firearm offence it must be caught by the definition. Section 20 of the Firearms Act deals with possession of a firearm for which the holder thereof does not have a licence thus the offence of illegal possession of firearm in count 1 is charged under this section.

Section 20 (5) is a deeming section, it provides:

"In any prosecution for an offence under this section -

- (a) any person who is in the company of someone who uses or attempts to use a firearm to commit -

- (i) any felony; or

- (ii) any offence involving either an assault or the resisting of lawful apprehension of any person,

shall, if the circumstances give rise to a reasonable presumption that he was present to aid or abet the commission of the felony or offence aforesaid, be treated, in the absence of reasonable excuse, as being also in possession of the firearm; ..."

This section provides for "Guilt by Association." The firearm must be used by the 'possessor' to commit a felony in the presence of the associate or to assault someone or resist the lawful apprehension of anyone. Possessor and associate must be acting in concert. When therefore the thieves were surprised by the arrival of District Constable Ellis and Cpl. Green and the thieves shot at them, the offence of shooting with intent was committed and the applicant being numbered with the thieves is caught in the web of circumstances and is deemed by this section to be in possession of the firearm and by association to have shot at the policemen, hence the charge in count III for shooting with intent.

Miss Malcolm submitted that the gun was used to prevent anyone from interrupting the breaking and larceny. In this respect she said the offence is caught up in the provisions of section 25 of the Firearms Act:

Section 25 of the Firearms Act provides as follows:

"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."

Shopbreaking and larceny contrary to section 40 (1) of the Larceny Act is an offence specified in the first schedule and as the appellant was found in possession of the firearm recovered at the scene of this offence he fell under the provisions of section

25 (2) (supra). The section creates a specific offence and provides the penalty on conviction before a Circuit Court punishable in a manner similar to conviction for illegal possession of a firearm contrary to section 20 of the Act.

As an offence it falls within the definition of "Firearm Offence" under the provisions of the Gun Court Act because the appellant's possession of the firearm contravened the provisions of section 20 of the Firearms Act. For these reasons we agree with the submissions of Crown Counsel; this ground fails.

Mr. Ashley submitted that the sentence imposed was excessive and argued that the offences arose out of one incident and consecutive sentences of ten years at hard labour, on counts I and III was unduly harsh despite the fact that the appellant had a previous conviction for a gun crime.

We have given due consideration to these submissions and find that notwithstanding the antecedent of the appellant, the sentences should be reduced. The application for leave to appeal against count I, II and III is treated as the hearing of the appeal and is dismissed. Appeal against sentence on counts I and III is allowed, the sentences of 10 years hard labour on each count remains but are ordered to run concurrently and with the sentence of five years hard labour imposed on count II to commence on 22nd June, 1991.