[2014] JMCA Crim 56

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 40/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)

STEVON REECE v R

Delano Harrison QC for the applicant

Mrs Paula-Rosanne Archer-Hall for the Crown

5 November and 19 December 2014

McDONALD-BISHOP JA (Ag)

[1] Between 2 and 5 April 2012, the applicant, Stevon Reece, was tried in the High Court Division of the Western Regional Gun Court on an indictment containing two counts. The first count charged him with the offence of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act. The particulars of that offence alleged that he, on 11 April 2011, in the parish of Saint James, had in his possession a firearm not under and in accordance with the terms and conditions of a Firearm User's Licence. The second count charged him with the offence of robbery with aggravation contrary to section 37(1)(a) of the Larceny Act with the particulars being that he, on the said date in

the parish of Saint James, being armed with a firearm, robbed Dwayne Hinds of his shirt, pants and wallet, all valued at $12,500.00.

[2] The applicant was found guilty of illegal possession of firearm and was sentenced to seven years imprisonment at hard labour. He was, however, found not guilty of the charge of robbery with aggravation and was, accordingly, acquitted.

[3] He filed his application for leave to appeal against his conviction and sentence for illegal possession of firearm which was considered and refused by a single judge on 13 March 2014. On 5 November, he renewed his application before this court. We heard the application and upon the conclusion of the hearing, we granted the application for leave to appeal and treated the application as the hearing of the appeal. The appeal was allowed, the conviction was quashed, sentence set aside and a judgment and verdict of acquittal was entered. We promised then to reduce into writing our reasons for doing so. This is a fulfillment of that promise.

The evidence at trial

The prosecution's case

[4] A synopsis of the prominent features of the evidence adduced by the prosecution will now be provided commencing with the testimony of the virtual complainant, Constable Dwayne Hinds. Constable Hinds testified that on or around 11 April 2011, he was a serving member of the Jamaica Constabulary Force and stationed at the Summit Police Station in the parish of Saint James. At about 6:10 p.m. that day, he drove his

private motorcar to Lilliput in the parish of Saint James to play football at a playing field. He wore a blue t-shirt and blue jeans pants and had his wallet in one of his pants' pockets. He was armed with his service pistol. Upon his arrival at the playfield, he changed the clothes he was wearing into his football gear. He put the clothes, with the wallet in the pocket of the pants, on the armrest in the car and went to play football. He played for about two hours. On completion of the game, he went to his car where he was joined by a female companion. Both were seated in the front of the car. He was in the driver's seat and the female companion was in the passenger's seat.

[5] At about 9:00 p.m., while he was there seated in a reclined position in the driver's seat, with the roof light on, he heard a coarse voice said: "Don't move gi mi weh you have". This voice was coming from the direction of the window to the driver's side, which was down at the time. He looked towards the direction of the voice and saw the face of the applicant whom he knew before at the window. The applicant was in a crouching position and armed with an object that resembled a 9 mm pistol. The nozzle of the object was pointing at the complainant's upper body and the applicant was gesticulating. He was able to see the applicant and the firearm with the aid of the roof light. The complainant testified that he was in fear of his life and that of his companion and so he went for his firearm that was in the driver's door. At the same time, he grasped his clothes that were on the armrest with an intention to give them to the applicant to serve as a distraction while he retrieved his firearm. He threw his clothes at the applicant, with the wallet in the pants pocket, and used the opportunity to fire

repeatedly at the applicant. He did so until the applicant left from beside the car. The applicant ran away.

[6] The complainant proceeded to the back of the car where he saw his clothes on the ground, about 15 feet from the car. His wallet was still in the pants' pocket. He observed bullet holes and what appeared to be bloodstains on the t-shirt. He retrieved them and proceeded to the Barrett Road Police Station where he made a report to Constable Ricardo Brown. Upon instructions, he handed over his firearm, the clothes and the wallet to Constable Brown. He subsequently made a report to Detective Sergeant Everton Ferguson at the same police station. The clothes and wallet were valued at $12,500.00.

[7] The complainant said that he knew the applicant for about two weeks prior to the incident. He would see him at the playfield but he did not know him by name but only by face. The applicant would fetch the ball for him whenever he called out to him to do so by using the term 'yow'. Apart from saying 'yow' in such circumstances, he never spoke to the applicant prior to the night of the incident. He pointed out the applicant on 28 April 2011 at an identification parade conducted at the Montego Bay Police Station by Sergeant Hugh Peccoo.

[8] The complainant denied suggestions of defence counsel that he was telling lies on the applicant when he said he saw him with a gun and that the applicant pointed the gun at him and uttered the words, "don't move gi mi weh you have". He also did not agree with the applicant's version of the incident put to him under cross-examination.

[9] Constable Brown confirmed that he received a report from the complainant at the Barrett Road Police Station at about 9:30 p.m. He also confirmed that the complainant handed over to him his clothes and the wallet in question as well as his service pistol. He later handed over the items of clothing and the wallet to scenes of crime personnel. He told the court on cross-examination that the complainant was in the company of a female when he arrived at the station that night and that he obtained particulars from the female as to her name, address and contact numbers. He, however, did not receive a written report from her relating to the incident.

[10] Detective Sergeant Ferguson was the investigating officer. He gave evidence that on 12 April 2011, he received instructions from the crime officer for Saint James that led him to the Barrett Town Police Station. There, he saw and spoke to the complainant who made a report to him. He commenced investigations into a case of illegal possession of firearm and robbery with aggravation. He subsequently accompanied the complainant during the night to the area that the incident allegedly occurred. With the aid of the roof light of the complainant's car, he was able to make certain observations at the location.

[11] On 19 April 2011, he received information that led him to the Cornwall Regional Hospital. There, he saw and spoke to the applicant whom he knew before. He advised him of the report and he cautioned him. The applicant responded, "[o]n the instruction of my lawyer, Mr. Morgan, mi nuh have nutten fi seh to yuh". In the presence and hearing of the applicant, he spoke to a nurse who told him that the applicant was

transferred from the Falmouth Hospital suffering from a gunshot wound that entered his chest and exited his back.

[12] After receiving information concerning the conduct of the identification parade held in relation to the applicant, he went to the applicant and informed him of the offences of illegal possession of firearm and robbery with aggravation. He cautioned him and he responded, "[o]fficer is a little misunderstanding. Mi did inna di dark a smoke a spliff an mi went up to the car fi beg di people inna it money. It look like dem feel seh mi a goh rob dem so di man throw out him clothes and beat some shot, one of which caught me in my chest." It was suggested to him in cross-examination that the applicant did not utter those words to him after he was cautioned as alleged. He, however, maintained that the applicant uttered those words.

[13] Sergeant Peccoo also gave evidence for the prosecution concerning the conduct of the identification parade but nothing turned on his evidence as he was never challenged by the defence.

The applicant's case

[14] At the end of the Crown's case, the applicant proceeded immediately to give sworn evidence in his defence. He testified briefly in his evidence-in-chief that at about 9:30 p.m. on 11 April 2011, he was at a beach on the old road in Lilliput smoking a ganja spliff at a place called Grape Tree. Whilst there sitting down, he saw the car come there. He told the person in the car to dim the headlights. While he was telling the

person to dim the lights, he went over to the person in the car and said "[h]ey [expletives], yuh a shine yuh light pon mi" and he started "cuss' some bad words." The man in the car threw out his pants on him and shot him. He ran off. He had no gun on him and he did not tell the man "don't move gi mi weh you have".

[15] Upon cross-examination, the applicant agreed that at the time, he was close to the playfield where persons would play football. He denied, however, that he played football there and that he would fetch the ball for persons playing, including the complainant. He did not see the complainant on the night in question when he was shot. He saw the complainant for the first time in court on the day the trial began. He did not go 'right up' to the car and he was never at the window. He did not tell Detective Sergeant Ferguson, after he was cautioned, that he went to beg the persons in the car 'a money'. He maintained that the only thing that he said to Detective Sergeant Ferguson was "I have a gunshot wound weh giving me problem."

[16] The applicant also testified that no light was turned on in the car. He said that it was while the car was driving towards him that the headlights were on and that was when he started to quarrel about the dimming of the lights. He denied being armed with a gun and demanding anything from the complainant. It was the complainant, he said, who threw his clothes at him and proceeded to run him down and "empty the clip on him". He denied the prosecution's case that he was armed with a gun and that he approached the complainant in the manner the complainant described.

The learned trial judge's findings

[17] In the light of the questions that arose for determination in this appeal, it is considered useful, at this juncture, to provide an insight into some material aspects of the reasoning and findings of the learned trial judge in arriving at the verdicts in relation to both counts of the indictment.

Count one - Illegal possession of firearm

[18] The learned trial judge, upon embarking on his comprehensive review of the evidence, correctly directed himself as to the burden and standard of proof. In keeping with those directions in law, he identified the duty of the prosecution thus:

> "The prosecution must establish the existence of a firearm and that the firearm was used to commit a robbery against the complainant and the prosecution must establish the accused before the Court who is indicted as Stevon Reece, is [sic] the person who had the possession of this firearm."

[19] Having stated that, he then declared very early in his deliberations that identification was not in issue in the circumstances. He identified the issue before him in the following terms:

> "Where the challenge lies is whether the accused man had a gun that night and so, therefore, I must look at the evidence of the officer, to see if the prosecution has led evidence to satisfy me of the accused man's guilt.
>
> In this trial, no firearm was recovered, therefore, the nature of the evidence to support the presence and the existence of the firearm is essentially the description and the account of the officer, about a firearm. I take into account and I have to take into account the following factors where there is no firearm recovered.

> A: Does the person who give evidence, the witness who give evidence of the firearm, does that person have knowledge of firearms?
>
> B: Did the witness have the opportunity to see the object that they [sic] refer to as the firearm?
>
> And C: Did the witness describe the firearm so that the tribunal which is this court, can form a view that there was a firearm?
>
> Those are the factors that the Court has to look at. And, of course, when I say opportunity, I mean the lighting, and the length of time that the witness had, in regards to seeing a firearm. The same question about lighting and length of time, is relevant to the question of visual identification, which I am saying is not in issue, but those factors will have to be taken into account when we talk about the accused man having a firearm."

[20] The learned trial judge, immediately thereafter, embarked on a thorough examination of the evidence concerning the alleged firearm, taking into account the matters he identified above as being relevant to his consideration of the question whether the applicant was in possession of a firearm. He then concluded, after examining the case for both the prosecution and the applicant:

> "So, on the totality of the evidence, I am satisfied so that I feel sure that the prosecution has established that the accused had in his possession, a firearm on the night of the 11th of April, 2011 in the parish of St. James. He was seen with it. He had it in his hands. The officer reacted quickly. His identity is established and unchallenged and, therefore, I find that he is guilty of Count 1, Illegal Possession of Firearm."

Count two: Robbery with aggravation

[21] The following represents the main planks of the learned trial judge's reasoning in coming to his verdict in relation to the charge of robbery with aggravation:

> "He went up there with the gun and pointed it at the occupants there. And, at the side where the officer was and then the officer reacted. The officer reacted very quickly and very speedily and he said when he realized what happened and he came up from the recline, he took up his clothes, which was [sic] on the armrest, bearing in mind that he had changed his regular clothes into his playing gear [sic] and throwing it [sic] out to distract the person who had come to the side of the car, with the gun. His t-shirt, the shorts – blue t-shirt and a blue jeans and inside it was a wallet, black wallet. The circumstances that the officer said how he throw [sic] out these items and the reason why he said he threw [sic] out these items and the reason why he said he throw [sic] out these items. It doesn't support a finding of Robbery with Aggravation. It does not support a finding of Robbery with Aggravation. The officer said he throw [sic] out his clothes. Yes. The man come and say [sic] that to him. Yes, he throw [sic] out his clothes to try to distract him and I find he reacted quickly, as an officer and alert as an officer and was, inspite of whatever position he was in and because he was able to throw out the clothes, the upper part of the man's body, he then was able to quickly get his gun, which I said was the right side of the car door, and begin to fire shots. Upper part of the person's body and person ran. Afterwards, the officer, twenty yards away, found his shirt, his pants, bloodstains, that means the person was injured. But, I do not find that that satisfy [sic] the definition that a person who takes and carry [sic] away the property with the intention to deprive them permanently thereof. It is true, and I think it was what, to [sic] put to the accused in cross-examination, it may be, the circumstances may go to an attempt robbery, but I do not find that--- the prosecution must prove the element [sic] of Robbery with Aggravation. But the use of a firearm on these items were [sic] made out in the circumstances described. So, that is my position in respect to the Robbery charge…"

Later, he concluded:

> "As I said, in relation to Count 2, the circumstances doesn't [sic] show that the substantive offence was made out, so therefore, I do not find him guilty of Robbery with Aggravation… I find the accused not guilty for [sic] count 2."

The grounds of appeal

[22] The applicant originally filed a single ground of appeal, which was unfair trial. Mr Harrison QC, on his behalf, however, sought and obtained leave to argue four supplementary grounds. They were stated as follows:

> "1. The learned trial judge erred, fatally, in law, in his conviction of the application [sic] for the offence of illegal possession of firearm (count 1 on the indictment), having regard to the following circumstances:
>
> (a) he found that neither the offence of robbery with aggravation (count 2 on the indictment) nor attempt [sic] robbery with aggravation, was "made out" (see pages 103-104);
>
> (b) no firearm nor abject/instrument [sic] appearing to be a firearm was recovered or produced in Court;
>
> (c) in light of (b) **supra**, he relied merely on "the description" (of "what appeared to be a firearm") by the complainant who "could not say for sure what kind" of firearm (see pages 90-91; see also **Jarrett** (1975) 14 JLR 35; **Purrier** (1976) 14 JLR 97).
>
> 2. The verdict is unreasonable or cannot be supported, having regard to the evidence (principally relating to (a) the poor quality of the identification evidence and

(b) the patent lack of credibility of the complainant as a witness).

3. The learned trial judge erred in law in his failure to direct himself that the fact that the applicant, in advancing his defence, had given evidence upon oath, argued for his being of good character, the more particularly as it relates to the issue of his credibility (see **Holmes** [2010] JMCA Crim 19; SSCA 52/2008 delivered 23.4. 2010: **paras. 47-49**).

4. The learned trial judge's treatment of the applicant's defence was grossly unfair and unbalanced (see pages 96-101; cf pages 65-83)."

Part (a) of ground two that speaks to the verdict being unreasonable, having regard to the poor quality of the identification evidence, was abandoned.

Ground one

Whether the learned trial judge erred in convicting the applicant for illegal possession of firearm

The relevant legislative framework

[23] The applicant was charged for illegal possession of a firearm contrary to section 20(1)(b) of the Firearm's Act (the "Act") on count one. 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" thus:

> "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] The learned trial judge, specifically and quite correctly, noted that no firearm was recovered in the case. However, in coming to his finding that the applicant was in possession of a firearm, he relied on the complainant's description of the object that he allegedly saw in the hand of the applicant and which he said was a firearm. There was, therefore, no expert evidence attesting to the object being a firearm within the meaning of section 2(1). There was no evidence of it being fired resulting in injury to person or damage to property from which a reasonable and inescapable inference could have been drawn that the object used was a firearm within the meaning of section 2(1).

[26] In **R v Jarrett, R v James, R v 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, that is to say, a lethal barrelled weapon from which any shot, bullet or other missile can be discharged, might otherwise be given where there is evidence of the following:

> "(a) 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."

[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.

[28] Given that the object did not fit within the definition of a firearm within section 2(1), the only other provision in the Act that the prosecution would have had to invoke in order to successfully pursue a case of illegal possession of firearm against the applicant was section 25. This is the only section that makes provision not only in relation to the possession and use of a firearm but also in relation to the possession and use of an imitation firearm. A look at section 25 is now warranted given its import to our analysis. It reads, in so far as is relevant:

"25. - (1) Every person who makes or attempts to make any use whatever of 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) On the trial of any person for an offence against subsection (1) the Resident Magistrate 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.
>
> (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 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."

[29] An examination of section 25 shows that where there is no evidence to establish that the object in question is a firearm in the sense of it being a "lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged", the prosecution could still mount a successful prosecution by establishing that the object in question was, at least, an imitation firearm by evidence that shows that it had the appearance of a firearm and that it was in the possession of the offender or used by him in circumstances which constitute an offence under section 25. It is also clear, as established on the authorities, that section 25 does create offences that are separate

and distinct from the offences created under section 20 under which the applicant was charged.

[30] The applicant was not charged under section 25 but, rather, under section 20(1)(b). The logical question that now arises is what is the relevance of section 25 to section 20(1)(b). The provisions of section 25 becomes relevant to a consideration of a charge under section 20(1)(b) by virtue of 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."

[31] Section 20(5)(c) is thus an important provision in section 20 that connects section 20 and section 25 offences together and this is so whether a firearm is recovered or not or whether the object in question is a real or imitation firearm. The interplay between sections 20 and 25, through the operation of section 20(5)(c), has been the subject of judicial enquiry in this court starting with the authoritative discourse on the subject by a bench of five judges in **R v Jarrett, James and Whylie** and ending with a more recent comprehensive restatement of the principles in **Everton Lynton v R** [2014] JMCA Crim 17.

[32] The instructive dicta from those authorities have been well-documented and have provided invaluable guidance to this court in these deliberations. In **R v Henry Clarke** (1984) 21 JLR 72, Rowe JA, in delivering the decision of the court, after, similarly,

treating with the interplay between sections 20 and 25, through the operation of section 20(5)(c), stated: "We adhere in the entirety to the judgment of Luckhoo P (Ag) at page 42 [in **R v Jarrett**]". Given the obvious constraints with which we are now faced to repeat in full the various dicta on the subject, we will, simply, say too that we have adhered to the relevant principles enunciated in the earlier authorities regarding the application of and effect of section 20(5)(c) in relation to a charge of illegal possession of firearm under section 20 which is under consideration in this case.

[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."

The submissions

[36] Mr Harrison, after highlighting the relevant statutory framework and the relevant principles extracted from the authorities, helpfully submitted that: in a trial of the offences of illegal possession of firearm and a felony, where neither the firearm nor the object appearing to be a firearm is recovered or produced at trial, proof of the commission of a felony is an essential pre-requisite in order for a conviction for illegal possession of firearm to be obtained. Proof of the commission of the felony is the condition precedent to the operation of the statutory fiction created by section 20(5)(c)

whereby the offender, in the relevant circumstances, shall then be deemed to have been in contravention of section 20 of the Act.

[37] He maintained that in this case, the condition precedent, that is, proof of the commission of the felony of robbery with aggravation, failed or was "not made out" as the learned trial judge, himself, observed. Therefore, as no firearm was recovered, the description and account of the complainant about a firearm, at its highest, would have disclosed an imitation firearm. So, in those circumstances, with the collapse of the felony charged with the illegal possession of firearm, there was no legal basis for the conviction of the applicant for the offence of illegal possession of firearm. Accordingly, the learned trial judge erred in law in convicting the applicant of illegal possession of firearm having acquitted him of robbery with aggravation.

[38] Mrs Archer-Hall, with admirable tenacity, advanced the argument that the prosecution had adduced evidence as would be necessary to show that the applicant had committed a section 25 offence. She argued that despite the fact that the offence of robbery with aggravation, for which the applicant was charged, was not proved by the prosecution, the learned trial judge found as a fact that the elements of assault had been proved. She relied on two separate portions of the transcript (see paragraph 48) to advance her arguments that there was evidence of an assault on the prosecution's case, which the learned judge found.

[39] She also submitted that it is unfortunate that no attempt was made at the trial to amend the indictment to reflect the offence of assault that had clearly been proved by

the prosecution. She maintained, however, that in the circumstances, the omission does not render the conviction for illegal possession of firearm without legal basis and so the application for leave to appeal should be refused and the conviction upheld or, in the alternative, that a re-trial be ordered.

Analysis and findings

[40] Mr Harrison's submissions on the relevant law applicable to this case are, indeed, flawless and have been found not to be without merit when the law is applied to the circumstances of the case. It is evident that the prosecution did not charge any offence under section 25 which they could have done. However, they were, obviously, relying on the operation of section 20(5)(c) to ground the commission of the offence of illegal possession of firearm for which the applicant was charged under section 20(1)(b) on the basis that he committed a felony, being the robbery with aggravation, with the use of a firearm or an imitation firearm in contravention of section 25(1).

[41] For the prosecution to have succeeded in prosecuting the applicant for illegal possession of firearm under section 20(1)(b), as charged, they would have had to prove, not only that the object in the possession of the applicant was, at minimum, an imitation firearm, but also that the applicant made use of it, or attempted to make use of it with intent to commit or to aid the commission of the robbery with aggravation.

[42] In **R v Neville Purrier and Anor** (1976) 14 JLR 97 at 100, this court, after a consideration of the same statutory provisions under scrutiny in this case, stated:

> "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."

[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.

[44] Given the fact that the applicant could only have been found to have had an imitation firearm (once the description of the object was accepted) then, it would have had to be proved that he had committed the section 25(1) offence in order for him to be found guilty for the possession of that imitation firearm. Therefore, the issue whether the applicant was in illegal possession of a firearm for the purposes of the law in such circumstances was intricately and inextricably bound up with the question whether there

was proof that he committed the robbery with aggravation for which he was charged on count two. The robbery with aggravation was thus the predicate offence, proof of which was, to borrow Mr Harrison's words, the condition precedent for the conviction of the applicant for illegal possession of firearm.

[45] It follows from this premise that the learned trial judge, having found that there was no robbery with aggravation, would have been left without a proper basis on the indictment to convict the applicant. For the charge of illegal possession of firearm to stand, in circumstances where the applicant was acquitted of the robbery with aggravation charged in the indictment, the learned trial judge would have had to find either that he was guilty of another felony not charged in the indictment (but which arose on the evidence) necessary to ground a section 25(1) offence or that he was guilty of a section 25(2) offence (that arose on the evidence).

[46] The learned judge did give some consideration, albeit in passing, as to whether the applicant was guilty of attempted robbery but he said expressly that he did not so find. He could have considered too whether the applicant was guilty of the felony of assault with intent to rob, which was open for consideration based on the case advanced by the prosecution, but he did not do so. In effect, then, the learned trial judge gave no thought to any other felony that might have arisen on the evidence so that an appropriate predicate felony under section 25(1) could have been used to invoke the statutory fiction thereby validating the offence of illegal possession of firearm charged on count one of the indictment. It means that without proof of the commission of the

robbery, an attempted robbery or another section 25(1) felony, the condition precedent for a conviction for illegal possession of firearm contrary to section 20(1)(b) on the basis of section 25(1) was absent.

[47] Similarly, he did not consider whether the applicant was guilty of a section 25(2) offence, as he was entitled to do, and to demonstrate by his reasoning that he so found. In the end, the learned trial judge made no finding of guilt in relation to any other offence and when he concluded that robbery with aggravation was not made out, he did not invite counsel at trial to make further submissions with respect to him returning a verdict of guilty on any other offence not charged in the indictment but which he found had arisen on the evidence. The Crown Counsel at trial, also, did not seek to do so of her own motion. At that stage, an amendment to the indictment could, at least, have been considered. The operative question, then, would have been whether an amendment could have been made at that stage in the proceedings without prejudice to the applicant. Both counsel for the prosecution and counsel for the defence would have been in a position to make the necessary submissions in the interests of justice. That was the proper course that could have been adopted before the verdicts were formally entered.

[48] Notwithstanding what transpired at the trial and the verdicts returned on the indictment, Mrs Archer-Hall, in a courageous effort to preserve the conviction, pointed to two portions of the learned trial judge's summation which she said would indicate that the learned trial judge had found that an assault was made out. That finding, she urged,

would have provided the necessary legal basis for the charge of illegal possession of firearm to stand. She pointed to page 102 of the transcript where the learned trial judge stated, in part:

> "I find that he had the gun and that he went up to the car and that there was no argument about bright light to [sic] the occupant of the car. He went up there with the gun and pointed it at the occupants there. And, at the side where the officer was and then the officer reacted. The officer reacted very quickly and very speedily…"

She also drew attention to pages 103-104 where the learned trial judge later stated:

> "But, the fact that I find that the Robbery was not made out, doesn't mean that because of the circumstances he throw [sic] out items, doesn't mean that I don't find that there was a firearm. He wasn't charged for the assault, but at least he was charged for the firearm. I just see a fault of Illegal Possession of Firearm."

[49] On the basis of those portions of the learned trial judge's reasoning, Mrs Archer–Hall submitted that the reference by the learned trial judge to "the assault", when he said that "he was not charged for it", is a clear indication that he had found as a fact that the offence of assault had been proved. Mrs Archer-Hall was, indeed, correct in saying that the case advanced by the prosecution involved an assault because inherent in the applicant's alleged act of robbery with aggravation would have been an assault if that evidence was accepted as credible and reliable. But the question that arose for consideration by this court was whether the learned trial judge had, in fact, found an assault based on the case advanced by the prosecution, especially, in light of the fact that he gave no consideration to the offence of assault with intent to rob which would

have been the clear case of an assault that would have arisen on the case for the prosecution and, further, in light of the fact that he did not find attempted robbery. Those are kindred offences that would involve an assault.

[50] On a close examination of the portions of the learned trial judge's summation relied on by Mrs Archer-Hall, it is obvious that there was no specific and definitive finding by him of an assault based on the version of events advanced on the prosecution's case. Those portions relied on cannot be viewed in isolation from preceding portions of the learned trial judge's reasoning that might have led him to express those findings. It is only then that the true picture emerged as to what he might have meant when he referred to the applicant not being charged for "the assault". It is to an examination of those relevant portions of the transcript that we will now turn.

[51] At page 97-99, after reviewing the case for the defence, the learned trial judge reasoned:

> "So there was an approach by the accused to the occupants of the car, which could have been the officer out where the car was parked that night in Lilliput old road, and the approach to the officer and to the occupants in the car, he didn't know he was an officer he just went to the car, the approach to the car was not a non-violent approach. He did not say he had any firearm or any weapon but it was an aggressive approach to that car. It was an approach where the accused, the words he was using was verbal, verbal assault. All I'm pointing out is that that action indicated aggression, force towards the occupants of the car. Indecent language, saying all of these things, bad words to the persons, the reason is for what? He says its because the car shining this bright light on him. Well, I draw the inference that the accused thinks that he had sole privacy of that place too, that no car shouldn't come there at all, that is what he is saying. He is complaining that the car shines the light at him. That is what I would infer that these people shouldn't come and shine any

> car light there. But, nonetheless, his approach was one, as I said at least some aggression verbally and I am looking at his case and I am of the view that he was in an aggressive state towards the person in the car, and I find as fact, I do not find as a fact that that level of aggression was mere verbal aggression and that approach at that time of the night, a car comes into that road dark [sic] and you are under a tree and you approached the persons unarmed and you are going to confront them and challenge them, that is what I was asked to interpret and I don't accept that interpretation of this conduct in an unarmed way, in an aggressive style because light shine on him, he goes there by the car. I find he was aggressive, forceful but that he was armed and that he was armed and to carry out his aggression to the occupants of the car, armed as how the officer said he was armed, that's what I find as a fact."

Then at page 101-102, he continued:

> "But as I said, I don't find that he would approach in that way, at night, car park, don't know [him] and then suddenly start to go curse bad word to the occupants of the car for shining bright light, not knowing who was therein; that forceful way, in an unharmed [sic] way, I find that he had the gun and that he went up to the car and that there was no argument about bright light to the occupant of the car. He went up there with the gun and pointed it at the occupants there. And, at the side where the officer was and then the officer reacted. The officer reacted very quickly…"

[52] It is clear that the learned trial judge had seen what he said was the assault in a totally different context from that advanced by the prosecution. In other words, the circumstances in which he said the applicant assaulted the complainant were different from what the prosecution alleged. The prosecution's case was an approach by the applicant, armed with a firearm, with an intention to rob the persons in the car, pure and simple. Nowhere did the prosecution advance a case of verbal assault or aggression laced with profanities towards the occupants beyond the mere words of "don't move gi mi weh you have".

[53] The learned trial judge did not, at any time, indicate whether he accepted or not that the applicant had only said those words, as the prosecution alleged, and that the words were used in the context of any intended mission to rob the occupants of the car. He found, instead, that the applicant was aggressive, cursing indecent language and verbally assaulting the occupants not because of any argument about bright lights (as the applicant contended) but, as he inferred, "the accused thinks [sic] that he had sole privacy of that place too, that no car should come there, that is what he is saying". He concluded that the applicant was "armed and to carry out his aggression to [sic] the occupants of the car, armed as how the officer said he was armed".

[54] This inference made by the learned trial judge that the applicant believed that he had sole privacy of the place and that he responded aggressively towards the occupants in the car as a result of them coming there, was not advanced by the prosecution and it, certainly, was not advanced by the defence. It does give rise to the question as to whether he might have rejected the complainant's evidence describing the approach of the applicant by the car and the circumstances in which he allegedly brandished this firearm.

[55] Mr Harrison, in ground four of the appeal, had challenged the learned trial judge's findings and conclusions in this regard. He argued that the defence was a simple and straightforward defence but that the learned trial judge had "unfairly rejected the uncomplicated defence and found facts that were based on certain glaringly unreasonable and unfounded inferences". This complaint was, not at all, baseless.

[56] The learned trial judge's failure to return a verdict on attempted robbery or assault with intent to rob has rendered his reasoning even more incomprehensible given the case advanced by the prosecution. As such, the basis, or the facts on which he would have found an assault, is not demonstrated with the desired clarity for us to say that it was on the evidence adduced by the prosecution that he would have found an assault. It would be unfair for this court to uphold the findings of the learned trial judge that were based on inferences that were drawn from facts not supported by the evidence. This led to the reluctance of this court to conclude that the learned trial judge had found as a fact that assault was proved by the prosecution.

[57] With all due respect to Mrs Archer-Hall's effort in seeking to persuade this court that the conviction should not be disturbed, we find that we could not agree with her submissions. We agreed, instead, with the submissions of Mr Harrison, and concluded, that the learned trial judge, having found the applicant not guilty of robbery with aggravation, and of no other offence under section 25, would have lacked the legal basis on which to convict him for illegal possession of firearm in the circumstances he did. The statutory fiction created by section 20(5)(c) was not invoked to come to the aid of the prosecution in order to ground the charge under section 20(1)(b).

[58] The conviction for illegal possession of firearm, in the circumstances was, therefore, wrong as a matter of law. Ground one of the appeal, therefore, succeeded.

Conclusion

[59] We concluded that the success of the applicant on ground one, which was the most substantial and pivotal ground, was enough to be determinative of the appeal. Out of deference to the industry of learned counsel on both sides, however, we must indicate that we have considered the remaining grounds, but we have found nothing in them that could be of any further assistance to the applicant and nothing that could outweigh or neutralise the ramifications of our finding on ground one that could enure to the benefit of the prosecution.

[60] It is for the foregoing reasons that we allowed the application for leave to appeal and made the necessary orders for the acquittal of the applicant for illegal possession of firearm as stated in paragraph [3] above. We saw no proper basis in law to order a retrial in light of the fact that the applicant was acquitted of robbery with aggravation in circumstances in which he could have been indicted at the trial for any other offence that arose on the evidence and which the prosecution now view as appropriate.