

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCR 2018/0029

BETWEEN:

THE QUEEN

and

ISABELLA MERTON

Appearances: Ms. Angel Flax Crown Counsel, for the Crown
Mr. Nicholas Saunders for the Defendant

**2020: 24th January
20th March**

RULING – NO CASE SUBMISSION

[1] **WARD, J:** The defendant was arraigned on a two (2) count indictment. The first count alleged that she was in possession of a firearm with intent to endanger life; the second count charged her with inflicting grievous bodily harm with intent. At the close of the prosecution's case, learned counsel for the defendant, Mr. Nicholas Saunders, submitted that the defendant had no case to answer in respect of count 1. The court upheld that submission and promised to deliver its written reasons at a later date. I do so now.

[2] The evidence on which the Crown relied to ground count 1 came exclusively from the virtual complainant. He testified that following an altercation with the defendant's brother he set out along Greenland Road and was making his way home when the defendant followed him and ran over his ankle with her jeep. As he got up and was hobbling along she turned the jeep around and came at him again, forcing him to dive into a nearby ghaut in order to avoid being run over again. As he lay

injured in the ghaut, the defendant stood on the edge of the ghaut brandishing a black barrelled gun in her hand which he said was about 9 inches in length. He said he knew it was a gun because when he was a cadet at about age 13 he would see soldiers and police officers with guns and he would also see guns in the movies. He said she pointed the object at him and made two firing motions at him but the gun did not go off.

- [3] In this state of the evidence, learned counsel, Mr. Saunders, hinged a no case submission on the first limb of the well-known case of **R. v. Galbraith**¹ and submitted that there was no evidence that the defendant was in possession of a firearm. Counsel submitted that such evidence as was adduced failed to establish that the object was a firearm within the meaning of the law. In particular, there was no evidence capable of establishing that the object was a lethal barrelled weapon from which any shot, bullet or other missile could be discharged. Learned counsel further submitted that since the object was not recovered, there must be some factual basis on which a reasonable inference can be drawn that the object was a firearm within the meaning of the law. An example would be evidence that the firearm was actually discharged. Counsel relied on **Grace v DPP**² for this proposition.
- [4] On behalf of the Crown, Learned Crown Counsel, Ms. Flax, submitted that the virtual complainant's level of familiarity with firearms was sufficient to establish a prima facie case that the object was a firearm. Crown Counsel relied on the Jamaican case of **Julian Powell v R**³ as authority for this proposition:

Law and analysis

- [5] The circumstances under which a trial judge may uphold a no case submission are settled: (a) when there has been no evidence to prove an essential element of the alleged offence or (b) when the evidence adduced by the prosecution is of a tenuous character or has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal properly

¹ [1981] 1 WLR, 1039 at 1042

² (1989) 153 JP491, 2

³ [2010] JMCA 14

directed could safely convict on it. **R. v. Galbraith**. This application was grounded on the first limb only.

- [6] It follows therefore that the elements necessary to constitute an object a firearm within the statutory definition must be identified. To this end, the definition of firearm contained in section 2 of the Firearms Ordinance requires consideration. It defines a firearm as:

“Any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged and includes –

(a) any weapon which is so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty; and

(b) any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or thing;

and 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.”

- [7] Based on this definition, the Crown must first prove that the object is a lethal barrelled weapon. A lethal weapon is one which when misused is capable of causing injury from which death may result: **Read v Donovan**⁴. Secondly, in order to prove that a weapon is a firearm, it is essential to call evidence that it is one from which any shot, bullet or other missile can be discharged or which can be adapted to discharge any missile: **Grace v DPP**⁵. The learned authors of **Archbold (2015)** further state that such evidence need not necessarily come from an expert; it could also come from someone who has seen the weapon being fired or who was familiar with the weapon and could indicate that it did work and what its observed effect was: **Archbold 2015, 24-124**.

- [8] Crown Counsel submitted that the evidence given by the virtual complainant was sufficient to establish a prima facie case that the object said to be in the defendant's possession met this statutory definition of firearm. Reliance is placed on the case of **Julian Powell**. In this case, the Jamaica Court of Appeal held that it is for the tribunal of fact to determine whether the evidence adduced by the prosecution is sufficient to support a finding that the instrument described as a gun

⁴ (1947) 111 JP 246, 548; [1947] 1 ALL ER 371

⁵ (1988) 153 JP 491

meets the statutory definition of a firearm and that in assessing that evidence the court is entitled to take into account the relatively high visibility of guns in the country and any special reason for being able to recognize guns put forward by the witness. In that case, the witness testified that she knew the object was a gun because she knew guns and many times when she saw police officers with guns she would take a good look at them; and at the time in question had seen the object at a distance of 15 feet. The Court of Appeal held that this was plainly sufficient evidence to support the judge's finding that what the complainant described as a gun was in fact a firearm within the statutory meaning.

- [9] This approach was seemingly not taken in a subsequent decision of the Jamaica Court of Appeal. In **Stevon Reece v R**⁶, the appellant was convicted of possession of a firearm. No firearm was recovered. On appeal, he contended that the learned trial judge had erred in relying on the description of what appeared to be a firearm by the complainant who could not say for sure what kind of firearm it was. His appeal was allowed. The Court of Appeal followed another Jamaican Court of Appeal case: **R v Jarrett, R v James, R v Whyllie**⁷. This case held that in the absence of a ballistic expert's certificate to prove that an object is a firearm, that is to say, a lethal barrelled weapon from which any shot, bullet or other missile can be discharged, this may be proved by evidence of a direct injury to a person which on medical evidence is a bullet wound; or that there was some damage to property shortly after which a bullet was recovered and bullet marks found. The Court of appeal therefore held:

"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) in the Act. 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."

- [10] As a foot note, it is perhaps prudent to indicate that in considering these Jamaican cases, one must bear in mind that the Judge in those cases was both tribunal of fact and law.

⁶ [2014] JMCA Crim 56

⁷ (1975) 14 JLR 35

[11] The decision in **Stevon Reece** case accords with decisions from authorities from other jurisdictions dealing with the issue as to what evidence may suffice to establish that an object meets the statutory definition of firearm where none is recovered. In **Sean Alleyne v The State**⁸ the appellant was convicted of shooting with intent to do grievous bodily harm, possession of firearms and ammunition and possession of firearms and ammunition with intent to endanger life. The facts were that a party of armed police officers went to an abandoned house in search of the appellant. They testified that as they approached the house the appellant emerged with what appeared to be a revolver in his hand. It was described as a silver object about 12 inches long. The appellant aimed it at the officers who heard at least one explosion (one witness said more than one). There was a flash from what appeared to be the gun in the appellant's hand and one witness said he saw smoke come from the object. The officers were forced to take cover and the appellant made good his escape. He was eventually arrested one year later. No gun or spent cartridge was ever recovered. The prosecution's case depended entirely on the evidence of the police officers. The appellant challenged his conviction. One ground of appeal asserted that the evidence that the appellant had discharged a firearm within the meaning of the Firearms Act was insufficient. The court rejected that submission, stating:

“It is clear that if the jury accepted the evidence of the police officers as to the nature of the object in the appellant's hand, his action in pointing it at them, and what sounded like a gunshot, as well as the flash and the smoke emanating from the gun, all of these taken together could reasonably lead to only one inference i.e. that what the appellant was holding was a gun within the definition of the Firearms Act and that he fired at least one round of ammunition from it.”

[12] That case is illustrative of the cogent type of evidence that is required to ground an inference that an object described as a firearm, meets the statutory definition of firearm when the object has not been recovered. This is not to say that in the absence of such physical features, a description of the object by a witness will never suffice. An apt illustration of this is provided by the case of **Keishon Roberts v The State**⁹ decided by the Court of Appeal of Trinidad and Tobago. In that case the appellant was convicted, inter alia, of possession of a firearm and possession of ammunition. This arose out of a robbery of a Holiday Foods sales van. The driver and his sales assistant were accompanied by Jankey Manickram, a security guard employed by Citizens

⁸ No.9 of 1998

⁹ Cr. App. No 40 of 2002

Security Limited. He was carrying his company issued .38 Smith and Wesson revolver and 6 rounds of ammunition. The evidence was that at about 2:45 p.m. they had just completed conducting sales at an establishment and were about to leave the premises. As Manickram was about to enter the truck he heard a voice behind him say, "Raise your hand." He turned around and saw a man pointing a firearm at him. The appellant stood next to that man. The other man instructed the appellant to take Manickram's firearm. The appellant removed Manickram's firearm from its holster, pointed it at the salesman and demanded money. Having obtained the cash, they fled.

- [13] The issue on appeal was whether the trial judge erred in suggesting to the jury that they could rely on the evidence of the security guard, Manickram, that he was issued with a Smith & Wesson revolver and ammunition as being sufficient evidence to support a finding that the item that the appellant took from him was a firearm and ammunition within the meaning of the Firearms Act. The appellant contended that the evidence of Manickram was insufficient for this purpose.
- [14] The Court of Appeal, in rejecting this ground of appeal, held that Smith & Wesson being a well-known manufacturer of firearms, the evidence of Manickram that he was issued with a .38 Smith and Wesson revolver bearing a certain serial number was strong evidence that he was issued a firearm within the meaning of the law as it would be an affront to common sense to think that Manickram would have been issued with anything other than a firearm to perform security duties.
- [15] **Grace v DPP** serves to further illustrate how stringent is the requirement that evidence must be called which establishes the capacity of the object said to be a firearm to discharge a shot, bullet or other missiles. In that case, the appellant was convicted of trespassing on land with a firearm and having a firearm with him. A gamekeeper gave evidence that on three occasions when the appellant's car stopped, he saw a gun protruding from the car window and on one occasion a bird rose and flew away. No ammunition was found in the car. There was no evidence before the justices as to whether the weapon worked or was capable of being made to work or as to its capacity. No tests were performed in court although the justices saw and examined the weapon. A no case submission was made on the basis that there was no evidence capable of establishing that the object was lethal within the meaning of the Firearms Act. The justices overruled the

submission. On appeal, the court held that the justices had erred in their approach, which ought to have been to first consider whether the weapon was one from which any shot, bullet or other missile could be discharged or whether it could be adapted so as to be capable of discharging such a missile; and secondly, if so satisfied, whether it was a lethal barrelled weapon. The court held that there was no evidence before the justices that the weapon had been fired or as to whether it worked or was capable of being made to work, or as to what its capacity was. The appeal was therefore allowed.

[16] In approaching this no case submission, the issue was whether there was evidence on which a properly directed jury could find that the object said to be in the possession of the defendant was (1) a lethal barrelled; and (2) from which any shot, bullet or other missile could be discharged. At its highest, the evidence of the virtual complainant amounted to nothing more than his lay man's opinion that the object in the defendant's possession had the appearance of a firearm. This opinion was grounded on his sighting of guns in the possession of police and soldiers when he was a lad of 13 and from seeing guns in the movies. As has been demonstrated, merely having the appearance of a firearm does not suffice to establish that the object is in fact capable of discharging any shot, bullet or other missile. Indeed, on the virtual complainant's evidence, the object failed to discharge when the defendant motioned as if firing at him.

[17] It was for all of the foregoing reasons that I upheld the no case submission in respect of Count 1.

Trevor M. Ward, QC
High Court Judge

By the Court

Registrar