

44

REGINA v. ARTHUR MCKENZIE
AND ANTHONY MCKENZIE.

Re APPLICATION FOR BAIL.

BEFORE: THE HON. MR. JUSTICE EDUN

23rd August, 1974.

EDUN: J.A.

Both these appellants were convicted under section 20 of the Firearms Act 1967 as amended by the Gun Court Act 1974, for the illegal possession of firearms and sentenced to be detained at hard labour during the Governor-General's pleasure. They have appealed; they have now applied for bail pending the hearing of their appeals.

In answer to the very many points urged to the Court by Mr. Mahfood, Mr. Reckord for the Crown submitted that there is no jurisdiction to grant bail according to the provisions of the Gun Court Act. If, however, he was wrong, so far as the application of Arthur McKenzie was concerned, he would not oppose the granting of bail because in his view there is a real likelihood of his being acquitted at the end of the hearing of the appeals. However, he cannot say the same as to Anthony McKenzie. It is most important, therefore, that I first consider whether or not I have jurisdiction to hear the applications. Section 22 (1) of the Gun Court Act 1974 provides as follows:--

" Save as otherwise provided by section 90 of the Constitution of Jamaica, no person who is detained pursuant to sub-section (2) of section 8 shall be discharged except at the direction of the Governor-General who shall act in that behalf and in accordance with the advice of the Review Board established under the following provisions....."

Article 90 of the Constitution of Jamaica provides thus:--

" (1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf -

- (a) grant to any person convicted of any offence against the Law of Jamaica a

pardon, either free or subject to lawful conditions;

(b) grant to any person a respite either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;

(c)

(d)"

On the making of an Order referring any case involving a firearm offence in respect of any person, that person shall be remanded in custody to appear before the Gun Court - section 6 (3) of the Act. In other words, he could not before trial be granted bail. Upon a person being sentenced to be detained at hard labour during the Governor-General's pleasure there is no right of appeal against any such sentence.

Mr. Mahfood submitted that section 22 has nothing to do with bail pending hearing of the appeal, but is dealing with a discharge from indefinite detention by the Review Board; that bail does not amount to a discharge but a release from custody pending enquiry as to the validity of the conviction. On the other hand, it may well be contended that "respite" which is the word used in article 90 (1) (b) of the Constitution, ordinarily means, "delay permitted in the discharge of an obligation or suffering of a penalty." (See Concise Oxford Dictionary, 5th edition.) Hence, a petition to the Governor-General pending the hearing of an appeal may well be the appropriate relief, rather than an application for bail.

I am of the view:-

(1). Just as facilely as section 6 (3) of the Gun Court Act deprives a person charged from being granted bail even though there is a presumption of innocence in his favour, so easily could the Act have provided that an appeal against conviction would not entitle such a convicted person to bail. I can find no such provision.

(2). If the words "no person who is detained pursuant to sub-section (2) of section 8 shall be discharged except at the direction of the Governor-General" mean that no one else has a right to grant a release from indefinite detention, then an acquittal under due process or authority of Law would be denied, even though the provisions of the Gun Court Act have given a right of appeal against conviction. This could not have been the intention of Parliament.

(3). The granting of bail wherever that is possible does not de jure and de facto amount to the discharge of a person sentenced to indefinite detention.

For those reasons I hold that a Judge of Appeal has jurisdiction to hear and determine an application for bail in like circumstances of these applications.

The case against Arthur McKenzie

Let me see if I agree with Mr. Reckord that at the hearing of the appeal there is a real likelihood of his being acquitted. If that is so I will be no party to a miscarriage of justice by denying him bail at the earliest opportunity.

The two unlicensed firearms, exhibits 2 and 3, were found in a vault in the office of the Northern Realty Company at 77 Old Hope Road; both appellants were, at the time, Directors of that company. On Wednesday, April 24, 1974, at about 6:30 a.m. Inspector Richards went to the home of Arthur McKenzie, accompanied by Detective Sterling and other police constables. This appellant was told of the warrant to search the premises at 77 Old Hope Road for unlicensed firearms. On entering the premises the warrant was read. This appellant opened the vault by releasing the combination lock. Among other things in the vault were exhibits 2 and 3.

Inspector Richards asked this appellant, "Who these guns belong to?" He replied, "These are for my brother Tony you see both of us use the vault." About 10:00 a.m. the same day Inspector Richards told Anthony McKenzie that they found two guns in the vault earlier that day and his brother said they belonged to him. Anthony McKenzie corroborated this. He said, "Yes, they are mine, I have them from my boy days." When he was shown the two guns, he said, "Yes, these are the guns." Anthony McKenzie was thereby admitting exclusive possession in himself of those guns and Arthur McKenzie was denying any possession in himself. Both appellants were later arrested and charged with illegal possession of those firearms.

In his defence, Arthur McKenzie said on oath that about 7:50 a.m. on April 24, Inspector Richards, with other officers and policemen, went to his home at Aquilar Road, and with a warrant searched his premises. He gave the policeman a gun for which he had a licence. He was then taken to 77 Old Hope Road. He opened the vault in which were kept, filing cabinet, advertising matter, boxes, plans, and stationery, which he said were all over the place. In the vault he had firearms belonging to himself which he said were kept in one spot. He tagged three preparatory to handing them over to the police; he had licences for those firearms. The police found the two guns, exhibits 2 and 3 behind the safe; one of them was in a box and the other was exposed. He said he did not know that those guns were in the vault.

Anthony McKenzie also gave evidence on oath and he said he owned a number of guns and among them were exhibits 2 and 3. He owned exhibit 2 for over ten years and exhibit 3 since he was a boy. During the last week in March, 1974, he contacted an Inspector of Police and as a result of conversation he had with him in his office, Anthony McKenzie told the Inspector that he had the guns at one of his houses at Millsborough Crescent and not in his office. The Inspector then instructed him to bring the guns to his office and lock them up safely in his vault. He did this. His brother Arthur was not with him in any of his conversations with the Inspector. He was away

from the island for a while but on April 24, the police found the guns, exhibits 2 and 3 and charged both brothers for illegal possession of them. He said that exhibits 2 and 3, as well as other guns he owned, were never used by his brother Arthur.

The Inspector of Police gave evidence on oath supporting Anthony McKenzie. He said that nobody but Anthony and himself were present during the last week in March 1974 when he had discussions with him. He confirmed that Anthony McKenzie said that those guns were at Millsborough Crescent and that it was he who instructed him to take them to his office and lock them up safely. He went to the office twice for them but he did not get them. The important point about this aspect of the facts is that there is no contradiction about exhibits 2 and 3 being placed in the vault by Anthony McKenzie, without the knowledge or approval of Arthur McKenzie within four weeks previous to their being found.

In considering the case of Arthur McKenzie's possession of exhibits 2 and 3, the learned Resident Magistrate stated in his reasons for judgment:

" It seems to establish beyond the peradventure of a doubt that the accused Arthur McKenzie knew that exhibits 2 and 3 were guns, and if to the words 'Physical control' are to be attributed their plain ordinary meaning he knew that he had the things (i.e. the guns) in question then it seems clear beyond reasonable doubt that he had physical control over them.

One question remains unanswered: Did he know that he had the guns in question?

Well, the devil himself knows not the mind of man but since it is a vital link in the chain of proof which the Crown must forge, they have sought, as it seems to me to form that link by proof of what the accused Arthur McKenzie has said by what he has done, and by all the surrounding circumstances.

What has he said - at the end of the Crown's case - that

- (1) "These guns are for my brother Tony you see both of us use the vault."

What has he done?

- (1) He has opened the door to the office in which there is a vault.
- (2) He has opened the door to that vault by opening a combination lock affixed to it."

The learned Resident Magistrate then adverted to the decision in Warner v. Metropolitan Police Commissioner (1968) 52 Criminal Appeal Reports 373, and concluded: "Indeed, if though unaware of the contents of the package, a person did not open it at the first opportunity to ascertain what the contents were, the proper inference was that he had accepted possession of them provided he had a right to open the package." In that case, the police found in the back of the appellant's van, two cases, one containing scent and the other prohibited drugs. The appellant's defence was that he had gone to a cafe expecting to collect one case of scent which was to be left there for him by B. and he had assumed that both contained scent.

The judge directed the jury that if the appellant had control of the box which in fact turned out be full of drugs, the offence was committed, and that the fact that he did not know what the contents were, would be relevant only in mitigation. The jury convicted; the Court of Appeal affirmed the conviction. On appeal to the House of Lords, it was held that though the direction of the judge with regard to the contents of the parcel deprived the appellant of a possible defence, there was no miscarriage of justice, and the proviso to section 4 (1) of the Criminal Appeal Act 1907, should be applied on the ground that the offence was one of absolute liability, and that possession by the appellant of the prohibited article was proven.

Lord Reid said: "Taking into account the prevarications of the accused before he produced his final story and the whole circumstances, I cannot believe that any reasonable jury would accept

that story." (page 393). Lord Wilberforce said, "Secondly, it follows that the direction to the jury in the present case was not correct, for they were told in effect that possession meant control, that control was shown and not denied, and that they need not enquire any further. If this was the basis on which they were asked to decide - as they may well have thought so - it was insufficient and the verdict was unsustainable..... If the direction was defective, the facts were such, in my opinion, that a properly directed jury must have found the accused guilty and I would apply the proviso."

In the instant case, the learned Resident Magistrate had fallen into the same error as the judge did in that case, that the possession meant physical control only. In other words, he concluded that if Arthur McKenzie had physical control of the vault he was in possession of all the things therein. Opening a door by the combination lock might well be physical control of the vault but possession of its contents is only attributable if there was exclusive possession in him or joint possession with Anthony McKenzie. Joint possession must not be presumed and an omission to deal with the law on the point may be a misdirection resulting in a miscarriage of justice. See R. v. Arthur Flatman (1913) 8 Cr. A. R. 256.

The learned Resident Magistrate also relied on the fact that Arthur McKenzie said the guns belonged to his brother, but saying so can only mean that he, Arthur McKenzie, did not possess them; the guns must have belonged to his brother and that the physical control in both of them were of the vault only. That statement must be taken as true because Anthony McKenzie admitted that the guns were his, and he had placed them in the vault a few weeks before they were found. And nowhere in the whole of the case has knowledge or approval of the existence of exhibits 2 and 3 in Arthur McKenzie been proved. It has been contended that Arthur McKenzie knew that the guns belonged to Anthony McKenzie. In my view, having knowledge of the existence of an article belonging to someone else is insufficient to impute possession, unless there is also evidence of joint possession. If there was no evidence to support a case of joint possession in both

appellants of the particular articles in the vault, it would be an academic exercise for the learned Resident Magistrate to have directed himself on the law as to joint possession.

In Lockyer v. Gibb (1967) 2 Q.B. 243, (a case considered and approved in Warner's case) Regulation 20 of the Dangerous Drugs Regulation which defined possession in the following way: "For the purpose of these regulations a person shall be deemed to be in possession of a drug if it is in the actual custody or is held by some other person subject to his control for him and on his behalf", was considered. In regard to possession, Lord Parker C.J. in that case, said at page 248, "In my judgment it is quite clear that the person cannot be said to be in possession of some article which he or she does not realise is, for example, in her handbag, in her room, or in some other place over which she has control. That I have thought is elementary: if something were slipped into your basket and you had not the vaguest notion it was there at all you could not possibly be said to be in possession of it."

In the recent case of the Director of Public Prosecutions v. Brooks (1974) 2 A. E. R. 40, on evidence including the respondent's own statement to the police, the nineteen sacks of ganja in a van were clearly in the physical custody of the respondent and under his physical control. The only remaining issue to be considered was whether the inference should be drawn that the respondent knew that the sacks consisted of ganja. On all the evidence and in particular the fact that the respondent and other occupant of the van attempted to run away as soon as they saw the uniformed police, the magistrate was fully entitled to draw the inference that the respondent knew what he was carrying in the van.

The case against Arthur McKenzie cannot boast any fact which would entitle the learned Resident Magistrate to draw the inference that this appellant knew or had reason to believe that the unlicensed guns, exhibits 2 and 3, were in the vault where they were found, for the reasons I have given. I agree with Mr. Reckord that there is a real likelihood of Arthur McKenzie being acquitted at the hearing

of the appeal. I commend his attitude that in those circumstances he was not opposing the granting of bail, but in the finality the responsibility is, nevertheless, mine. And for those exceptional circumstances which I have explained, I am prepared to grant bail pending the hearing of this appeal.

The case against Anthony McKenzie

The same cannot be said of him as has been said of Arthur McKenzie. Anthony McKenzie has admitted possession of exhibits 2 and 3. There was evidence which the learned Resident Magistrate could reasonably have accepted, as he did, that those exhibits were firearms within the meaning of the Firearms Act. Those guns were unlicensed. If even the learned Resident Magistrate had accepted the evidence of the Inspector who was prepared to take in those guns into his custody, there was no evidence establishing that the said Inspector at the time when the guns were seized, had possession or control of them as to render the possession in Anthony McKenzie free from illegality: See A.G.'s Reference (No.1 of 1974) (1974) 2 W.L.R. 891.

Mr. Mahfood, in his submission, urged that Anthony McKenzie was guilty of a technical breach and the learned Resident Magistrate has made recommendations in respect of both appellants to the Review Board. I am of the view that once the learned Resident Magistrate was correct in his judgment convicting the appellant, Anthony McKenzie, his sentence of indefinite detention was mandatory and there being no appeal against sentence in that regard I would have no power to grant bail pending that appeal. However, Mr. Mahfood has submitted various points questioning the validity of the Gun Court. If the submissions are sound then no person ought to be convicted under the Gun Court Legislation. If that were so then it is a miscarriage of justice and a breach of the Constitution of Jamaica to deprive the appellants of their personal liberty, except by due process or authority of law. Those very same points of law have been submitted in four other appeals before a division of the Court of Appeal, and

the decisions are pending on the same subject of the Gun Court Legislation.

Whatever individual opinion as a Judge of Appeal in Chambers I may hold, I will be bound by the decision of that division on those points. It would, therefore, be a useless exercise for me on this point to research deeply into those matters. If, on the other hand, the division decides that those points are of no effective validity upon the Gun Court legislation, in those circumstances I would not be inclined to grant bail pending appeal because on all other grounds the applicant has made out ^{no} exceptional circumstances. I am, therefore, prepared to await the decisions of the Court of Appeal and to adjourn the application for bail of Anthony McKenzie sine die. For the reasons I have given, my decisions are:-

(1) The application for bail in respect of Anthony

McKenzie is adjourned sine die.

(2) The application for bail in respect of Arthur

McKenzie is granted. He is offered bail in the

sum of Five Thousand Dollars (\$5,000) with two

sureties in a like sum, upon the usual conditions

which will include:

(a) that he must appear by himself or by his attorney to **prosecute** his appeal when

called upon to do so;

(b) he must not leave the island except **with** the permission of the Commissioner of Police himself, and

(c) surrender to his Bond if and when called upon by lawful authority to do so.