

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 49/90

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

R. v. HENRY RHODEN

Howard Hamilton Q.C., & Kenneth McLean for Appellant

Miss Carol Malcolm for Crown

October 17, 1990

ROWE, P.:

Upon his plea of guilty to the illegal possession of a .22 rifle and a quantity of ammunition, the appellant was sentenced by the Resident Magistrate for St. James to imprisonment for two years at hard labour on each information, and was declared to be a Restricted person under Section 3 of the Firearm's Act. The single ground of appeal was that the sentence was excessive having regard to the circumstances.

When the appellant pleaded guilty, Counsel outlined the prosecution's case. Thereafter the defence called as a witness to character a retired Senior Superintendent of Police. So far as is material the following facts emerged. Carl Rhoden a brother of the appellant owned the .22 Anschutz rifle which was duly licensed. Sometime in 1986 he loaned this rifle to the appellant together with some ammunition. On October 29, 1989 one Fitzroy Smart was killed by the police in an exchange of gunfire and from his body this .22 Anschutz rifle was recovered. The purpose of the loan was said to be to enable the appellant to protect himself and his family, including his mother, who

lived with him. Carl Rhoden lived on the same stretch of land some two chains away and there was no restriction upon him as to the possession of this firearm.

The appellant, it was said, never used the firearm but kept it in an unlocked wardrobe together with the ammunition. In 1988 after Hurricane Gilbert, numerous homeless villagers were sheltered in the Rhoden house for months. As there was no evidence of a breaking-in either to the house or the wardrobe, the court was left to draw the inference that some person abused the Rhoden's hospitality by removing the firearm.

The appellant once held a firearm's users licence but it was revoked in 1986 and his appeal was never finally disposed of. At Easter in 1963 there was an uprising in Coral Gardens in which several police officers were killed. The appellant, his father and Carl Rhoden rendered assistance to the police in capturing some of the criminals who took part in the uprising and as a consequence threats were issued against the lives of the Rhodens. It was then that a firearm's licence was issued to Carl Rhoden. The Rhodens had remained co-operative citizens with the police.

Mr. Hamilton submitted that the Resident Magistrate applied the wrong test in passing sentence in that she took extraneous matters into consideration and went outside the statement of facts as admitted by the defence. He said that the principles applicable to sentencing on a plea of guilty should be:

- (1) the plea should be taken into consideration in mitigation of the penalty;
- (2) where upon such a plea a dispute occurs between the prosecution and the defence, as to the facts the following considerations should apply:

- (a) if there is a jury trial and the dispute is substantial, the court may empanel a jury to determine the facts;
 - (b) if the trial is by a judge alone, the judge may himself hear the evidence from both sides and himself determine the facts;
 - (c) without hearing evidence, the court may hear submissions of opposing counsel and then determine the facts. In such a case, however, the court must in so far as possible accept the version of the defence. If the Crown's case consists wholly of statements from the defence, the court is obliged to accept those statements.
- (3) The court should not use the occasion to find the accused guilty of a more serious offence than that to which he has pleaded guilty nor should the court use the occasion to determine that the offender has committed similar offences with which he has not been charged.

The propositions advanced in (2) above are founded upon the decision of the Court of Appeal in R. v. Newton (1983) 77 Cr. App. R. 13 where it was held that:

"Where there is a plea of guilty but a conflict between the prosecution and defence as to the facts, the trial judge should approach the task of sentencing in one of three ways: a plea of not guilty can be entered to enable the jury to determine the issue, or the judge himself may hear evidence and come to his own conclusions, or the judge may hear no evidence and listen to the submissions of counsel, but if that course is taken and there is a substantial conflict between the two sides, the version of the defendant must so far as possible be accepted."

This court adopted and applied the decision in Newton's case to R.M.C.A. 17/88 R. v. Pearlina Wright (unreported) - judgment delivered on 3rd February 1988.

We are grateful to Mr. Hamilton for bringing to our attention not only Newton's case, but that of Williams v. R. (1983) 77 Cr. App. R. which applied the principles in Newton's case and also R. v. Courtie (1984) A.C. 463 which decided that an accused ought not to be sentenced for a more serious offence than that to which he has pleaded guilty, but do not find them particularly helpful in the instant appeal. There were no substantial disputed facts as between the prosecution and the defence nor did the Magistrate indicate that she was sentencing the appellant for an offence more serious in nature or carrying a higher maximum penalty than that covered by his guilty plea.

A remark made by the learned Magistrate when passing sentence suggests that she was influenced by the character of the person with whom the firearm was found on October 29, 1989 and inferentially had doubt as to how he came into possession of the firearm. She said:

"This man who is so fearful for his life has open house to which a notorious gunman or someone on behalf of this gunman has such easy access that he is able to remove not a revolver but a rifle from the house without detection."

The appellant was not being tried for any such offence and indeed a charge preferred by the prosecution associating the appellant with Fitzroy Smart had been withdrawn. To base the period of incarceration upon the gross negligence of the appellant in securing the possession of the firearm was an improper consideration.

This **is** a case in which the appellant flagrantly accepted a firearm when that which he had been licensed to keep and carry had been withdrawn by the police and his licence therefor revoked. On that basis the appellant's possession of an unlicensed firearm

was of an aggravated nature and warranted an exemplary custodial sentence. Such a sentence would in our opinion be imprisonment for 18 months. Accordingly, we will allow the appeal against sentence and vary the term of 2 years imprisonment to one of 18 months imprisonment on each count, to commence on April 17, 1990.