

Neutral Citation Number: [2015] EWCA Crim 155

No: 20140101090/B3

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday, 20th January 2015

B e f o r e:

PRESIDENT OF THE QUEEN'S BENCH DIVISION

(SIR BRIAN LEVESON)

MR JEREMY BAKER

MRS JUSTICE McCOWAN DBE

R E G I N A

v

JOHN RHODES

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(Official Shorthand Writers to the Court)

Mr J Bourne-Arton appeared on behalf of the **Appellant**

Mr L Ingham appeared on behalf of the **Crown**

J U D G M E N T

(Approved)

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1. **PRESIDENT OF THE QUEEN'S BENCH DIVISION:** On 21st February 2014 in the Crown Court at Isleworth before Mr Recorder Hobson QC, this appellant was tried before a jury on 22 counts of possessing, purchasing or acquiring, manufacturing, selling or transferring a prohibited weapon, contrary to section 5(1) (b) of the Firearms Act 1968 ("the Act").
2. After the conclusion of the evidence Mr James Bourne-Arton, on behalf of the appellant, submitted that the conflict in expert evidence was such that the case ought to be stopped. The judge however determined that the difference of opinion flowed only from different interpretations of the law.
3. Having ruled in favour of the approach to the law argued by the prosecution the appellant pleaded guilty and on the judge's direction the jury entered guilty verdicts. In addition the appellant had previously pleaded guilty to a further count relating to a firearm.
4. On 28th March 2014, before the same judge, the appellant was sentenced concurrently on each count to 9 months' imprisonment suspended for 18 months. He was ordered to undertake unpaid work for 150 hours to be completed within 12 months and to be supervised for 12 months. Orders were made under section 52(1) of the Act for the forfeiture and destruction of the various prohibited weapons. He now appeals against conviction by leave of the Full Court.
5. The facts can be summarised shortly. Following the arrest of a third party in possession of a blank firing pistol the sale of the pistol was traced to the appellant who was unlicensed. It was then discovered that he had sold a number of similar pistols through two websites "Gunstar" and "Milweb". The buyers were located and the pistols manufactured by different companies were recovered and examined. The police firearms expert described all the weapons as "front venting multi purpose pistols with partially blocked barrels". Her evidence was that the barrels of these weapons would not permit the passage of a bullet but would allow irritant gases and hot burning gases fired from either a blank or a gas cartridge to pass through them. She concluded that the guns would be classified as designed to discharge a noxious gas under section 5(1)(b) of the Act.
6. In interview the appellant accepted that he had sold the guns but stated that he had done so in the belief that they were legal. In support of this proposition he called expert evidence from a Mr David Dyson, who concluded that while capable of discharging gas cartridge, this was not what they had been designed for. The manufacturers had developed a gas cartridge of the same calibre, so as to allow it to fit the pre-existing design of a blank firer.
7. Having said that, it was equally common ground that this pistol was sold in countries where it was not illegal to possess a weapon which can discharge a gas cartridge as a multiple purpose pistol specifically enabled to act as starter pistol, a CS gas cartridge firing pistol and, if fitted with the appropriate thread, equally capable of firing a flare.

8. The sole issue in dispute was whether the guns in this country were designed for the discharge of any noxious liquid gas or other thing and in particular the meaning of "design" in that context. The judge decided that this was an issue of law upon which he had to rule. In those circumstances his conclusion became dispositive. In that regard the view of the experts or indeed that of the manufacturers who had been contacted, obviously anxious to market their product wherever they could lawfully do so, as the proper construction of the statutory provision was irrelevant.
9. He was referred to a number of authorities to which we have also been referred; he decided that he would direct the jury that if they were satisfied the guns in question had the features which had been described as part of their design, that is forward venting, enabling discharge noxious liquids and gases, then they should consider the offence made out and find the appellant guilty. It was in that context that the appellant changed his plea.
10. In this court, both on paper and orally, Mr Bourne-Arton argues that the judge erred in his interpretation of the Act and should have concluded that the mere fact that a weapon which had not been designed for the purpose of discharging noxious gasses should be capable of doing so was not sufficient to bring it within the legislation. This was the case even if the weapon might be sold with that ability and specifically for that purpose in countries where it was lawful to do so.
11. We start therefore with section 5(1) of the Act, which having regard to the authorities on the section is worth setting out slightly more extensively than is necessary for this particular prosecution. It is in these terms:

"A person commits an offence if, without the authority... he has in his possession, or purchases or acquires, or manufactures, sells or transfers—

2(a) any firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger;...

(b) any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing ... "
12. The legislation was considered in R v Law [1999] Crim LR 837 which concerned section 5(1)(a) of the Act and whether a MAC 10 sub-machine gun was designed or adapted as such that two or more missiles could successfully be discharged without repeated pressure on a trigger.
13. The evidence was such that the gun had been adapted so it could not be utilised for automatic fire but that the adaptation was not fully effective, so it was still capable of automatic fire in the hands of an expert or someone with sufficient knowledge of the gun to use it for that purpose. It was argued that the words "designed or adapted" meant something more than a mere capability of burst fire. The judge did not agree. On appeal, reliance was placed on the decision of a circuit judge in a different case to the effect that phrase "so designed or adapted" were not words of sufficient width to

mean "capable of being so used". This court did not agree with that approach and endorsed the construction of the trial judge.

14. Swinton Thomas LJ put the matter in this way:

"Section 5 does not import either explicitly or implicitly any intention on the part of the designer or the adapter. The section is not framed using words such as 'designed or adapted for the purpose of' burst fire or repeated fire. The central and vital words, in our judgment, are the words 'can be successfully discharged'. On the agreed facts two or more missiles could be successfully discharged without repeated pressure on the trigger. Once that is proved, in our judgment, the firearm is so designed or adapted."

The analogy in this case is that the phrase "designed or adapted for the discharge of any noxious liquid, gas or other thing" means that the language of Swinton Thomas LJ is equally apposite. It is certainly difficult to see how the words "designed or adapted" could be construed differently within different subsections of the same statutory provision.

In any event, the same conclusion was also reached in Turek v Regional Court In Gliwice Poland [2011] EWHC 1556 (Admin). This was an extradition case where the issue was whether the conduct relied upon as justifying extradition to Poland would constitute a breach of UK law: see section 64(1) and (3) of the Extradition Act 2003. The relevant allegation was the possession of a gas gun referred to as an ROHM RG TB412 without the required licence. The relevant UK offence was said to be a breach of section 5(1)(b) of the Act. Mr Dyson, the same expert who gave evidence for the appellant in this case, was of the view that there was nothing to suggest that the pistol had been modified, that it would be capable of discharging gas cartridges. Mr Dyson went on:

"Although guns of this type are advertised as including the gas firing capability, it is my opinion that this is no more than the identification of a marketing opportunity by those selling such items in countries including Germany and France where it is permitted to possess CS cartridges for self-defence purposes; as the pistols could be used for this purpose in addition to firing blanks, why not highlight this capacity, and perhaps increase sales? This is not to say that pistols with barrel blockages are specifically designed for that purpose."

15. As Mr Ingram observed it was perfectly possible to construct a firearm pistol, the barrel of which is totally blocked and which vents in some other more innocuous manner. Silber J dealt with this argument in this way at paragraph 26:

"To my mind, the very fact that these weapons can be used for the discharge of gas and emergency bullets shows that they must have been designed for that purpose, otherwise it is difficult to see why they are capable of fulfilling this function, which seems to be an integral part of

it."

16. Mr Bourne-Arton readily accepts that these cases are against him but he strives to distinguish them by reference to another decision of the Court of Appeal namely R v Formosa R v Upton, in which a washing up liquid bottle was found to contain hydrochloride acid. The court rejected the proposition that this bottle with the acid fell foul of section 5(1)(b). It was held that the phrase "designed or adapted" meant that the relevant object had been altered so as to make it fit for use as a weapon. An empty bottle was not a weapon and filling with hydrochloride acid did not alter its nature and therefore the bottle not be described as "a weapon designed or adapted or discharge of any noxious liquid".
17. Mr Bourne-Arton argues that this decision is closer to the facts of this case than the authorities to which we have referred. We do not agree. The critical finding was that the empty bottle was not designed or adapted as a weapon of any sort, as a firearm of any sort or as an imitation firearm of any sort; it simply does not engage with the legislation.
18. Furthermore, if Mr Bourne-Arton's construction of the legislation is correct, a pistol specifically designed so it can discharge gas cartridges will be caught by section 5(1) (b) but one that was designed without gas cartridges and scope but for which gas cartridges were then specifically developed so they could be fired would not. This is notwithstanding that both the gun and the cartridge are identical and the mischief which the legislation, in this country seeks to address, is manifested by both in exactly the same way. We do not accept that conclusion.
19. Whatever might be lawful in other countries, sale of a pistol which has the design capability and must have the deliberate design capability of discharging gas cartridges is not. In the circumstances this appeal is dismissed.