IN THE SUPREME COURT OF BELIZE, A.D. 2004

(APPELLANT JURISDICTION)

INFERIOR COURT OF APPEAL No. 4 of 2004

	(DERRICK KUYLEN	APPELLANT
BETWEEN	(AND	
	(CPL. #38 DENROY BARROW	RESPONDENT

Appearances:

Ms. Sandra Garoy of Arnold and Company for the Appellant

Ms. Kamar Henry of the Director of Public Prosecutions Office for the Respondent

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

JUDGEMENT

1. This is an appeal against a decision of Magistrate Sandra Arnold of the Belize Family Court in which Derrick Kuylen, a 15 year old high school student was found Guilty of the offence of "Keeping An Unlicensed Firearm" contrary to section 3(1) of the Firearms Act, Chapter 143 of the Laws of Belize, Revised Edition 2000. He was sentenced to pay a fine of $1000 to be paid by April 30th, 2004 and in default he was to be imprisoned for 12 months. The Magistrate also found Kuylen Guilty of the offence of "Keeping Ammunition without a License", Contrary to Section 3(1) of the Firearms Act, Chapter 143 of the Laws of Belize Revised Edition 2000. He was sentenced to pay a fine of $1000 by April 30th 2004 and in default he was to serve a term of 12 months imprisonment.

2. The Appellant has appealed against this decision on the following grounds:

   (1) The decision was unreasonable or could not be supported having regard to the evidence.

(2) The decision was erroneous in point of law.

(3) The decision was based on a wrong principle or was such that the Inferior Court viewing the circumstances reasonably could not properly have so decided.

3. The Evidence

The Respondent, Cpl.38 Denroy Barrow, testified that on September 9th, 2003 he and PC 17 Aldo Ayuso were on foot patrol off Baghdad Street into Trench Alley in Belize City while heading towards Orange Street, when he observed the Appellant and another male person standing at the alley mouth of Orange Street. He said that these two persons continued to walk for a distance of three yards when he saw the Appellant take a bicycle and quickly push it into Orange Street in the direction of Albert Street. Both the Respondent and the other officer followed the Appellant, who ran into an Indian store near the alley. The officers entered the store and identified themselves as policemen and informed the accused that they were going to conduct a search on his body. The Respondent said that the Appellant offered no resistance to the search, and upon searching the Appellant's pants waist, he found a small hand gun tucked on the left side of the waist. The Respondent said that the handgun was about 7 inches in length with a magazine containing 2 small rounds of ammunition attached to it. The gun was a .22 pistol with two .22 rounds of ammunition. The Appellant told the Respondent that he did not have a license for the weapon. The Prosecution called two other witnesses, PC Ayuso who accompanied the Respondent at the time of the incident, and Albert Ciego, the Police Force Armourer. The evidence of PC Ayuso confirmed the testimony of Cpl Barrow while the force armourer testified as to the caliber of the gun and ammunition and stated that he tested the gun with one of the live rounds and found that it was capable of firing.

For the defence, two witnesses were called, the Appellant and his mother. The Appellant gave a brief unsworn statement from the dock in which he said that on the day in question he was with a friend called "Errol" who found a rusty old gun. He went home and told his mother about the gun, and his mother advised him to take the gun to the police station. He contacted Errol and they were going to the station when the police met them. The Appellant's mother, Ms. Burdette Kuylen confirmed what her son told the court. She said the Appellant told her that he had found a gun and she told him to take the gun to the police. She visited the police station after she learnt that her son had been arrested and spoke to Cpl. Barrow. Ms Kuylen said that she explained to Cpl. Barrow that she told her son to bring the gun to them because of an ongoing amnesty program. According to Ms. Kuylen, Cpl Barrow told her to tell that to the Magistrate, and at that point she left the police station. It was on this evidence that the learned Magistrate found the Appellant Guilty of the offences of "Keeping an unlicensed firearm" and "Keeping ammunition without a license."

4. In addressing the court on the first ground, that the decision was unreasonable and could not be supported having regard to the evidence, Counsel for the Appellant took issue with lines 2 to 5 of the second page of the Magistrate's Reasons for Decision which reads as follows:

"The onus rests on the prosecution to prove that the accused had the firearm in his possession. The prosecution need not call any evidence to prove that the defendant did not hold a license for the firearm, or for what length of time he 'kept' the firearm. It is for the defense to prove that the defendant was the holder of a license for such a firearm."

Ms. Garoy argued that the Magistrate erred by this statement, because the onus of proving whether or not the accused had a license was always on the prosecution, not on the defence. She drew the court's attention to section 29 of the Firearm's Act, Chapter 143 of the Laws of Belize:

"Whenever in any prosecution under this Act the defendant claims to be licensed or claims any qualification or exemption from liability, the burden of proving such license, qualification or exemption shall lie on him."

Ms. Garoy stated that the Magistrate disregarded this provision because the burden of proof is on the prosecution to prove that the Appellant did not have a license for this gun.

5. In rebutting this argument by the Appellant, Ms. Kamar Henry for the Respondent stated that while the normal rule at common law is that it is the prosecution to bear the burden of proof in a criminal trial, there are certain statutory exceptions to this general rule. Where a particular set of facts lie within the knowledge of the accused person the burden of proof shifts to the accused person. It is for the accused to know and to prove whether or not he has a license for the firearm, and section 29 of the Firearms Act confirms this. Ms. Henry argues that the only defence that the Appellant could have had to these charges was to produce a license. She further states that an offence of this nature is a strict liability offence and cited the case of **R v Steele [1993] Crim. L.R. 298** where the Court of Appeal refused leave to appeal against a conviction for possession of a firearm without a firearm certificate contrary to section 1(1) (a) of the Firearms Act 1968. In giving the decision, the court said:

"That the legislation thus viewed was draconian in its nature must be accepted. It was no doubt intended to be so. If Parliament had thought its effect should be mitigated in

some way, then the appropriate wording could have been incorporated either originally or by way of amendment. The mischief aimed at was obvious and serious. It was also obvious that it was easy for someone found in possession of a firearm in a holdall or similar container to say that he had been asked to look after it for a short or a longer time by a friend or acquaintance."

Counsel for the Respondent also cited the case of **Liam Christopher Braddish (1990) 90 Cr. App. Rep. 271** in which the Court of Appeal dismissed an appeal against conviction for possession of a weapon designed or adapted for the discharge of gas contrary to section 5(1) of the Firearms Act 1968. In dismissing the appeal the Court stated:

"It was plain by the wording of section 5 of the Firearms Act 1968 that the offence created by that section was one of strict liability for it was the clear purpose of the firearms legislation to impose a tight control on the use of highly dangerous weapons. To achieve effective control and to prevent potentially disastrous consequences of their misuse, strict liability was necessary."

Counsel for the Respondent asserts that it is easy for persons to concoct a defence which would be difficult for the prosecution to disprove and that is the reason for the shift of the burden of proof to the accused in these exceptional instances. In this case the Appellant is saying he did not have a license for the gun because he found the gun, and Ms. Henry submits that this type of defence is no defence at all to these charges. She submits that the fact of possession simpliciter suffices to prove guilt as in **Woodage v Moss 1973 (1) W.L.R. 411**, where the defendant was found in possession of a revolver when he took it from X to take to a dealer in response to the request of the dealer, without any obligation or remuneration. In dismissing his appeal against a conviction

for possession of the revolver without a firearm certificate contrary to section 8 of the Firearms Act 1968, the court held that the appellant did not fall within the exemption of master and servant conferred by section 8 and therefore the offence was proved.

Ms. Henry further submits that it is very rare for an appellate court to overturn the decision of a judge of the facts who has had the benefit of seeing the witnesses firsthand and assessing their credibility **Arthur Fred Hancox** 1913 Cr.App.Rep. 193

6. I agree with the submissions made by Counsel for the Respondent. While it is true that the general rule is that the burden of proving each and every element of a criminal offence lies on the prosecution, there are occasions when there is a shift in the evidential burden to the defence. A perusal of the sidenote of section 29 of the Firearms Act reveals that it is entitled "evidence." This indicates that the section places the evidential burden squarely on the Appellant to prove whether or not he held a license for the gun. When he was apprehended, the Appellant told the police he did not have a license for the gun. He was unable to discharge this evidential burden placed upon him by statute and the Magistrate found him Guilty. For these reasons, this ground of appeal does not succeed.

7. The second and third grounds of appeal were argued together:

2) that the decision was erroneous in point of law; and

3) that the decision was based on a wrong principle or was such that the Inferior Court viewing the circumstances reasonably could not have properly so decided.

Ms. Garoy argued that the offence of "keeping" an unlicensed firearm differs materially from the offence of "being in possession" of an unlicensed firearm. She compared section 3(1) of the Firearms Act with section 21(b) of the same act.

Section 3(1) Subject to subsection (2), no person shall own, keep, carry, discharge, or use any firearm or ammunition unless he has been granted a gun license in Form 1.

Section 21 (b) Any police officer, or any other person authorized by the Minister, may-

(b) arrest without a warrant any person possessing, carrying or using firearms or ammunition without a license as provided by this Act who does not satisfactorily account for the non-production of his license.

Counsel for the Appellant argued that these sections show that "possession" and "keeping" are two different offences under the law, a point which had been raised unsuccessfully by defence counsel in his closing arguments before the lower court. In her view, "possessing" imports that the individual is simply found with the firearm and no time span has elapsed, whereas "keeping" means that the prosecution has to bring evidence to prove that the accused had the firearm within a certain timeframe. As the prosecution never produced any evidence as to a time frame, they failed to prove that the Appellant was "keeping" the firearm.

Ms. Garoy further argues that since section 7(2) (a) of the Firearms Act expressly prohibits the granting of a license for a firearm to any person under the age of sixteen years, and the Appellant was 15 years old at the time of this incident, then it was impossible for him to produce a license.

Section 7(2)- No license shall be granted –

(a) to any person under the age of sixteen years of age

Section 34 –

(1) No person under the age of 16 years shall carry, keep, use or own or have in his possession any firearm or ammunition.

She submits that the Appellant should have been charged under section 34 of the Act and not section 3, and since he was charged under the wrong section of the law the convictions cannot stand because the evidence does not support the decision that was handed down.

8. In her response to this submission by Counsel for the Appellant, Ms. Kamar Henry for the Respondent stated that applying the statutory rule of interpretation, words in a statute are given their ordinary meaning, unless otherwise stated as having a different meaning. Citing the 10th Edition of the Concise Oxford English Dictionary, she stated that the word "keep" means to have or retain possession of something and that "keeping" a firearm as in section 3(1) includes being in possession of it.

On the question of the Appellant being charged under the wrong section, Ms. Henry argues that section 3(1) and section 34 of the Firearms Act are not mutually exclusive. The evidence shows that the Appellant was under the age of 16 and that he had a firearm for which he had no license. This means that the Appellant was Guilty of the offences for which he was charged.

9. I am not persuaded by the submissions made on behalf of the Appellant to distinguish between the words "keep" and "possess". I agree with the submissions made on behalf of the Respondent that this is a strict liability offence, and that section 3(1) and section 34 are not mutually exclusive. While it might have been more appropriate to charge the Appellant under section 34 instead of section 3, having regard to his age, it is my view that the mischief which parliament had in mind by enacting each of these provisions was the

protection of the public from dangerous weapons. In my view, the learned Magistrate had sufficient evidence on which to find the Appellant guilty. Grounds 2 and 3 of the appeal cannot succeed.

10. The Appeal against conviction is dismissed and the conviction and sentence of the Magistrate is hereby confirmed.

MICHELLE ARANA

SUPREME COURT JUDGE