

REGINA,
v.
HUSSEIN AHMED KOUTCHOUK.
(Criminal Appeal No. 2079).

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v.
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AHMED
KOUTCHOUK.

Emergency Regulations—Possessing firearm—Lawful authority or lawful excuse—Standard of proof required to establish it—Emergency Powers (Public Safety and Order) Regulations, 1955 to (No. 16) 1956, Regulation 52 (c).

Evidence in criminal cases—Onus of proof on accused—Standard of proof—Burden discharged by evidence of probability.

The appellant was convicted of the offence of possessing a revolver without lawful authority contrary to Regulation 52 (c) of the Emergency Powers (Public Safety and Order) Regulations, 1955 to (No. 16) 1956.

The appellant admitted finding the weapon in the road and carrying it to his house with the intention of delivering it to the police.

Held : (1) that, once possession of a firearm was established, the burden of proof was cast on the person in possession to prove either lawful authority or lawful excuse ;

(2) that this burden may be discharged by evidence satisfying the trial court of the probability of that which the accused was called upon to establish ;

R. v. Carr-Briant (1943) K.B. 607, referred to :

(3) that, having regard to the evidence adduced, the appellant's version was a probable one, and the conviction must accordingly be quashed.

Conviction and sentence quashed.

Cases referred to :

- (1) *Wong PooH Yin v. Public Prosecutor* (1954) 3 All E.R. 31.
- (2) *R. v. Carr-Briant* (1943) K.B. 607.

Appeal against conviction.

The appellant was convicted at the Special Court of Nicosia (Case No. 593/57) on the 5th February, 1957, of the offence of possessing a revolver contrary to Regulation 52 (c) of the Emergency Powers (Public Safety and Order) Regulations, 1955 to (No. 16) of 1956, and was sentenced, by John J., to death.

O. Orek for the appellant.

M. Griffith-Jones for the Crown.

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The facts of this case sufficiently appear in the judgment of the Court which was delivered by :—

ZEKIA, J. : This is an appeal from the Special Court of Nicosia which on the 5th February, 1957, convicted and sentenced to death the appellant for possessing a revolver contrary to Regulation 52 (c) of the Emergency Powers (Public Safety and Order) Regulations, 1955 to (No. 16) of 1956.

The facts of the case are as follows : The prisoner is a young shepherd, 18 years old, from the village of Mari. On the 3rd December last he was grazing his flock out in the fields and in the evening returned to his village and after folding his flock went home and placed a pistol on his bed. He was about changing his clothes, as he used to do, when his 8 years old brother entered his bedroom, took up the pistol which accidentally went off and wounded him in the shoulder. The prisoner at once took his injured brother to Nicosia Hospital for treatment and it appears that he has since completely recovered. The appellant on the same day at midnight returned home from the hospital. On his arrival he found Police Superintendent Ali Radji in his house—who was there to enquire into the accident—to whom he related at once that on the previous afternoon he found a pistol on the side of an asphalt road and had taken it home with the object of delivering it to the Police after folding his flock and changing his clothes, and soon after he spoke to the Superintendent he walked out of the house and came back with the pistol, exhibited in Court, and immediately handed it over to the Superintendent.

The prisoner in his account as to how, when and why he came to possess this pistol was consistent throughout. In his statement to the police officer he met that night, in his reply to the formal charge and in his evidence before the trial Court his version was the same. His evidence does not appear to have been shaken at all. The crux of the case, as the learned Judge observed in his summing up, was whether the prisoner came to possess this pistol with an intention to deliver it to the Police. On this crucial point the trial Court found against the appellant for reasons stated in its judgment which we proceed to read :

“ The whole of this case is one of actual facts, and depends solely if the story of the accused is believed, i.e. that he intended to hand over Exhibit 1 to the Police. I do not accept that story as true. I am satisfied that, if he did find it and intended to do with it as he states, he would have left it on the spot. The excuse he gives is so feeble. He says that he could not have left his flock of sheep alone. He could have left the gun alone, however. Even though he is illiterate, he shows by his own evidence that he knows the danger attached to bombs, and that such articles and weapons

must be reported to the police when discovered. I am satisfied that if the unfortunate incident of his 8-year-old brother had not taken place Exhibit 1 would never have come into the hands of the police on the 4.12.56. I find the charge proved against the accused as stated on the information. I find you guilty."

The grounds of appeal on facts are reducible to one, namely, that the verdict is unreasonable. On a question of law, grounds 2 and 3 might be taken together. We propose to deal first with the grounds of appeal on a question of law : Ground 1 is " that the evidence adduced on behalf of the Prosecution does not in law amount to possession." We think this ground cannot stand. The prisoner admitted finding the pistol and carrying it to his house. He later in the day produced it to the Police. This evidence no doubt constitutes possession of a fire-arm.

Grounds 2 and 3 relate to the failure of the trial Judge to take into account what has been submitted by the learned Counsel of the Prosecution in his opening address in favour of the prisoner. This is what the Prosecuting Counsel stated in his opening according to transcript note :

" My Lord, I think it would be evident that what happened on the evening in question agrees with the story told by the accused and there is no reason to doubt it. He was grazing his flock when he came upon a pistol which will be produced in evidence and very foolishly he picked it up and put it in his pocket.

When he returned home that evening he put the pistol on his bed whilst he was changing his clothes and he says, and I have no reason to doubt his word, that it was his intention to deliver it to the police."

It is true that the trial Court did not refer to these statements in its summing up but evidently refused to share the view taken by the Prosecution. From the opening address the Prosecution appears to have held the view that the picking up of the pistol by the prisoner with an intention to carry it to the Police could not amount to a lawful excuse for possessing it. This is clear from his words " very foolishly picked it up and put it in his pocket ", in the passage just quoted from the opening.

By the 3rd ground of appeal it is contended that this statement in the opening speech prejudiced the defence inasmuch as it was not expected from the Court to reject something favourable to the prisoner which the Prosecution had accepted in advance. The defence thought their case was simply to persuade the Court that the picking up of the pistol with the object of delivering it to the Police would amount to a lawful excuse. They did not think the intention of the prisoner to do so was disputed. It is very unusual for a trial Court to reject a favourable view taken by the Prosecution, on facts and inferences agreeable to

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the Defence in the opening address—especially when such statements of facts remain uncontradicted and unaffected by evidence adduced up to the end of the trial—unless there is a strong reason for the Court to find such views unacceptable. However, it is a different matter to accede to a proposition that in the circumstances the Court was wrong in law. We don't think, therefore, that what the Court did amounts to a misdirection or that even if the defence was prejudiced by an unexpected adverse finding by the Court due to the statements in the opening speech, this could amount to a miscarriage of justice. We think, therefore, that Ground 3 should also fail.

We pass now to the main ground of appeal, namely whether the conviction in this case should be set aside on the ground that it was, having regard to the evidence adduced, unreasonable in accordance with section 142 (1) (b) of the Criminal Procedure Law.

The offence under review is committed when a person is in possession of a firearm, without authority and lawful excuse. Once possession of a firearm is established the onus is cast on the person in possession to prove either lawful authority or lawful excuse. In dealing with such phrases—lawful authority and excuse—in a similar legislation in Malaya—Malaya Emergency Regulations, 1951, Reg. 4 as amended by the Emergency (Amendment No. 11) Regulations, 1952, Reg. 2—Lord Macdermott in giving the judgment of the Privy Council in the case *Wong Poooh Yin v. Public Prosecutor* (1954) 3 All E.R. 31, at p. 34 said :—

“ Their Lordships doubt if it is possible to define the expression “lawful excuse” in a comprehensive and satisfactory manner and they do not propose to make the attempt. They agree with the Court of Appeal that it would be undesirable to do so, and that each case requires to be examined on its individual facts. There are, however, two general conclusions on the contraction and effect of the regulation which are relevant to such an examination and which may be appropriately stated at this point. The first of these is that the defence of “lawful excuse” may be sufficiently proved although no “lawful authority” exists for doing what is charged against the accused. The terms of Reg. 4 (1) clearly contemplate this and, accordingly, make “lawful excuse” an expression of wider import than “lawful authority”, as defined in Reg. 4 (2) (which enumerates the persons who have “lawful authority” for the purposes of Reg. 4). It follows from this that, in proving a “lawful excuse”, which falls short of “lawful authority”, it is the excuse or exculpatory reason put forward by the accused, rather than the carrying, possession or control of the firearm, that must be shown to be lawful. And, secondly, it is to be noted that Reg. 4 (1) does not call for any special intent on the part of the accused.”

Further down in page 35 :

“ While they apprehend that every overt act by an accused person may not suffice to make the defence of “lawful excuse” available, they think it undesirable to decide this particular matter in advance of an instance which makes such a decision necessary. The latitude of the expression under discussion, the infinite variety of circumstance in relation to which it may be invoked, the tendency in this field to confusion between considerations of relevance and weight, and the difficulty which may be experienced in isolating the conduct of an accused person from the impact of external events, are but some of the reasons for leaving this question until it can be settled in the light of a situation that demands an answer.”

As to the discharge of the onus cast on the person in possession of a firearm to prove lawful excuse we may usefully refer to the concluding passage in the judgment of the Court of Criminal Appeal in the case of *R. v. Carr-Briant* (1943) K.B. 607, at page 612 :

“ In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person “unless the contrary is proved”, the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.”

From the excerpts of the above authorities it follows that the appellant in order to succeed in his defence, had to satisfy the trial Court that his excuse or his exculpatory reason for possessing the weapon, in other words his version as to why he came to possess the pistol in the afternoon of the 3rd December last, was a probable one.

It is difficult to dispute the story of the appellant as to how and when he came to possess this pistol. The charge relates to the possession on the 3rd December. There was no evidence to indicate or reason to suggest that the appellant had this weapon in his possession earlier than the day of its delivery to the police. On the contrary the evidence of the prisoner that he came to possess this pistol on the day of its delivery stands uncontradicted and even unchallenged. Likewise his account on oath that he picked it up from the side of the road in the afternoon of the same day, in the absence of an adequate, sound reason for its not being believed, is entitled to credit. Moreover Prosecution witness F. W. Bird, Senior Superintendent in charge of the Forensic Laboratory, who examined the

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weapon, found that it was subjected to climatic changes and certain amount of rustiness existed on it. This is not inconsistent with the weapon being found in the open.

In this case the gravamen against the prisoner as it appears from the passage quoted from the judgment of the learned trial judge is the picking up of the pistol from the ground. In his words,

“ if he did find it and intended to do with it as he states he would have left it on the spot. The excuse he gives is so feeble.”

In the opinion of the trial Court if a pistol is found on the ground and is picked up and carried away, an alleged intention on the part of the finder to deliver it to the police could not possibly be accepted, since such a conduct is not susceptible of such an explanation. The Court below in reaching this conclusion and for not satisfying itself that the prisoner had a lawful excuse, relied almost entirely on this argument. The multiple circumstances which might present themselves in consideration for a defence of lawful excuse in cases like this were alluded to in the judgment of the Privy Council we cited earlier. It is unsafe to come to a conclusion on a crucial point in the case by relying only on such an argument.

We are unable to subscribe to the view taken by the Court in interpreting acts and conduct of the accused, and for doing so we propose to give briefly our reasons. It is not clear from the summing up whether the learned Judge directed himself correctly as to the burden of proof required to satisfy himself for the existence of lawful excuse. However :—

- (i) The version of the appellant as to why he picked up the pistol and carried it home is not improbable in itself. There is nothing in the evidence, and indeed nothing in the summing up, to indicate that the account given by the accused was discarded because by his demeanour in Court or for some other reason demonstrated he was giving false evidence. So far as the judgment goes the verdict was based on an inference of fact to which we already referred. A young shepherd boy of 18 who is described by the prosecution as perfectly honest and who does not appear to have been involved in any way in acts of violence and on the contrary by his past conduct he showed how anxious he was to assist the police in the find of bombs (this is a fact which transpired in the evidence) might very well collect a pistol he comes across on the side of the road in order to hand over the same to security

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authorities. A bit of encouragement given on the occasion of the find of the bombs plus the expectation of a small reward might easily have tempted this uneducated country boy to collect the pistol for giving it to the police. The removal of a bomb cannot be compared with the picking up of a pistol and the argument that the prisoner ought to have left the pistol on the ground, in the same way as the bomb was left on the site if his intention was not to keep the pistol for himself, in our view is a very unconvincing one.

- (ii) The learned counsel for the prosecution in his opening, as well as the investigation officer in his evidence in the trial, stated clearly that they had no reason to doubt the word of the prisoner that he had intended to deliver it to the police. The Court was not justified in the circumstances of the case to overlook or treat Prosecution's view as unworthy of consideration.
- (iii) Finally his conduct in promptly delivering the pistol to the police and concealing nothing as to how the incident of the wounding of his younger brother had occurred earlier in the evening is a point which might reasonably be taken in his favour.

We are of opinion therefore that the conviction in this case cannot stand and that the appeal should be allowed on the last ground. Conviction and sentence are quashed accordingly.

Conviction and sentence quashed.