

12/70

## SUPREME COURT OF VICTORIA

**O'LOUGHLIN v LOGUANCIO**

Gowans J

29 May 1970

**FIREARMS – PISTOL WITH A .410 GAUGE AND CARTRIDGES FOUND IN DEFENDANT'S HOUSE – DEFENDANT DID NOT POSSESS A FIREARMS CERTIFICATE – DEFENDANT CHARGED WITH POSSESSION OF A PISTOL WITHOUT BEING THE HOLDER OF A FIREARMS CERTIFICATE – CHARGE DISMISSED BECAUSE THE WEAPON DID NOT COME WITHIN THE DEFINITION AS DESCRIBED IN THE FIREARMS ACT – WHETHER MAGISTRATE IN ERROR: FIREARMS ACT 1958, SS3, 21, 23(1).**

**HELD:** Order nisi absolute. Dismissal set aside. Remitted to the Magistrates' Court with a direction that the defendant be convicted and a penalty fixed.

1. In order to establish the offence charged in s23(1) of the *Firearms Act* 1958 it was only necessary to show conformity with the definition of "pistol" in s3; that is to say it was only necessary to show that the instrument or weapon with which the charge was concerned was a lethal weapon, or other weapon of any description, which was capable of being concealed about the person and was not a sporting or military weapon, the overall length of which exceeded 30 inches and the barrel length of which exceeded 16 inches.

2. Having regard to the fact that the pistol was put in evidence and having regard to the measurements which it obviously presented, it was clear that the weapon was one answering to the description of a weapon, the overall length of which was about 16 inches and the barrel length of which was about 10 inches.

3. It was apparent that it was a lethal firearm, within the ordinary meaning of the language, or that it was a weapon, and that it was capable of being concealed about the person. That being so, having regard to the contents of s40 of the Act, and s26, the evidence clearly established the ingredients of the offence which was charged.

**GOWANS J:** The respondent to this order nisi to review, Antonio Loguancio, appeared as a defendant in the Court of Petty Sessions at Northcote before Mr Pfeiffer SM on 22 May 1969, charged that he "did have in his possession a pistol, to wit a 410 H&R Handy gun without being the holder of a Firearm Certificate authorising him so to do."

The evidence given before the Court of Petty Sessions showed that on 14 April 1969, the police found at premises, which were admittedly the defendant's residence, an instrument, (to use a neutral term,) which was put in as an exhibit before the Court. The evidence was that with that instrument was found a box containing cartridges branded .410 gauge. The defendant admitted, according to the evidence, that they were both his, and that he had put them under a wardrobe, and that he had no Firearms certificate. It was further said in evidence that that defendant was questioned at the Northcote CIB offices and that in the course of the questioning he said that the eleven bullets that were missing from the packet of bullets found had been used by him to shoot rabbits. He also said that the last time he had fired it was at Wangaratta about two years before. In answer to a question as to why he had kept it concealed under the wardrobe, he said, "I don't want to get the kids to get it, it is dangerous".

One of the police witnesses also said that the weapon had been tested by himself and found to be capable of firing and discharging a missile. In the course of cross-examination it was put to him that the pistol had a calibre exceeding .229, and the witness agreed and, stated that it was a .410 calibre.

At the conclusion of the case for the prosecution the defendant, through his counsel, elected not to call evidence, but argued that the weapon did not fall within the meaning of s21(b) as the wording of that part of the section exempted all pistols of a calibre over .229 of an inch. It

was argued that the section should be read as follows:

"Firearm means any firearm within the meaning of section 3 but does not include...  
(b) a firearm other than a pistol of calibre not exceeding .229 of an inch", etc.

After hearing this argument the Stipendiary Magistrate dismissed the information saying:

"Information is dismissed. Firearm Certificate does not apply in this case because the weapon as described and the calibre do not come within the definition of firearms as described in this Act."

The provision under which the charge was laid was s23(1) of the *Firearms Act* 1958. The material parts of that section which seem to be read are sub-sections (1), (2), (4) and (5). They read as follows:

"23(1) Any person who, not being the holder of a Firearm Certificate, or other authority authorising him so to do, purchases or has in his possession any pistol, shall be guilty of an offence and liable to a penalty of not less than \$10 and not more than \$200, or to be imprisoned for a term of not more than six months.

(2) Any person who not being the holder of a Firearm Certificate or other authority authorising him so to do, purchases or has in his possession any firearm other than a pistol shall be guilty of an offence and liable to a penalty of not more than \$100 or to be imprisoned for a term of not more than three months.

...

(4) Any person who not being the holder of a Firearms Certificate or other authority authorising him so to do carries a pistol shall be guilty of an offence and liable..." (then follow differential penalties for first and subsequent offences).

"(5) Any person who not being the holder of a Firearm Certificate or other authority authorising him so to carries any firearm other than a pistol shall be guilty of an offence and liable to a penalty of not more than \$100 or to be imprisoned for a term of not more than three months".

It is clear, of course, from these provisions, that different penalties are imposed in respect of being in possession of certain types of firearms and in respect of carrying certain types of firearms. But that is not the distinction that is relevant for the purposes of the present case.

The distinction that is relevant is the distinction between "a firearm other than a pistol," on the one hand, and "a pistol" on the other. It is necessary to go into the definitions of these terms "firearm" and "pistol". Going back to the general definition of firearm" contained in s3 it is found that it reads:

"'Firearm' means any lethal firearm or other weapon of any description from which any shot, bullet or other missile can be discharged, and includes a pistol and also includes",

(then follows certain matter relating to defective firearms).

The definition in itself makes it clear that there are firearms which are pistols and there are firearms which are not pistols.

Then there is a further definition in s3 of the word "pistol". It reads:

"'Pistol' means any lethal firearm or other weapon of other description which is capable of being concealed about the person and includes (then follows certain matter about defective weapons, and the definition continues)" but does not include any sporting or military weapon the length of which overall is not less than 30 inches and the length of the barrel of which is not less than 16 inches."

The next definition it is necessary to refer to is that which has caused the trouble here. It is that contained s21, a section which is at the beginning of Part III headed "Firearms Certificates". Section 21 reads:

"In this part 'firearm' means any firearm within the meaning of section 3 but does not include a smooth bore shotgun" (then follows a certain description) "or a firearm other than a pistol of calibre

not exceeding .229 of an inch that is capable of taking ringfire cartridges," (and then follows certain other matter).

The interpretation that has been placed on para (b) of s21 treats it as concerning itself with firearms and pistols of a certain calibre. I think it is quite clear that para. (b) of s21 is not concerning itself with pistols at all; it is concerning itself with 'firearms other than pistols', and in that way it has a bearing upon so much of s23 as deals with firearms other than pistols, and not at all with so much of s23 as deals with pistols *simpliciter*, s21 starts off concerning itself with all firearms within the meaning of s3, and then excludes certain types of firearms. From the exclusion there is an exception of pistols. Thus read, s21 has nothing to say about pistols at all.

In my view, the interpretation which is placed on s21 is erroneous from the point of view of grammatical construction, and moreover it would produce a contrariety between the subject matter contained in para. (b) of s21 and the subject matter contained in the proviso to s22(2). In para. (b) of s21 the words "other than a pistol" should really be read "(not being a pistol)", and that in fact is the way in which the paragraph has now been amended by Act 7922. I take the view that that amendment effected by 7922 is designed to make clear, what in my view was already clear, that the paragraph was not concerning itself with pistols at all.

Although the definitions contained in the Act were different then, to some extent, from what they are now, a perusal of the judgment of Sholl J in *McCullagh v La Toss* [1963] VicRp 25; [1963] VR 153 shows clearly the distinction which I have been drawing between firearms other than pistols, and pistols.

My conclusion is that in order to establish the offence charged in s23(1) it was only necessary to show conformity with the definition of "pistol" in s3; that is to say it was only necessary to show that the instrument or weapon with which the charge was concerned was a lethal weapon, or other weapon of any description, which was capable of being concealed about the person and was not a sporting or military weapon, the overall length of which exceeded 30 inches and the barrel length of which exceeded 16 inches.

Having regard to the fact that the pistol was put in evidence as now appears from the supplementary affidavit, and having regard to the measurements which it obviously presents, it is clear that the weapon was one answering to the description (which was sought to be added in the supplementary affidavit in material which I excluded) of a weapon, the overall length of which was about 16 inches and the barrel length of which was about 10 inches.

It is apparent that it is a lethal firearm, within the ordinary meaning of the language, or that it is a weapon, and that it is capable of being concealed about the person. That being so, having regard to the contents of s40 of the Act, and s26, the evidence clearly established the ingredients of the offence which was charged.

The grounds upon which the order nisi was granted are these.

"(a) That the Stipendiary Magistrate was wrong in holding that the pistol found in the house of the defendant was not a firearm as defined in s21 of the *Firearms Act* 1958 because it was a calibre of .410 inches.

(b) That the Stipendiary Magistrate should have held that the exemption of firearms not exceeding .229 of an inch in calibre contained in para. (b) of the said section did not apply to any firearm which was a pistol as defined in the said Act and should have therefore convicted the defendant."

So far as the first ground is concerned I think it is irrelevant, even if the Magistrate did find as is alleged there. So far as the second ground is concerned, I think that ground has been made out. The order nisi will therefore be made absolute. But having regard to the history that has been recounted for me by Mr Neesham so far as the placing of material before the Court was concerned, it will be made absolute without costs. The order of dismissal in the Court of Petty Sessions will be set aside, and in lieu thereof the information will be remitted to the Court of Petty Sessions with the direction that the defendant be convicted and a penalty fixed.

**APPEARANCES:** For the applicant O'Loughlin: Mr TA Neesham, counsel. State Crown Solicitor. No appearance of or for the respondent Loguancio.