

32/84

SUPREME COURT OF VICTORIA

HALL v FOSTER

Hampel J

1 August 1984

CRIMINAL LAW – FIREARMS – UNLICENSED PERSON IN POSSESSION OF FIREARM – PERSON RENTING ROOM IN WHICH FIREARM FOUND – WHETHER PERSON IN "POSSESSION" OF FIREARM WITHIN STATUTORY DEFINITION – WHETHER PERSON OCCUPIER AND DEEMED IN POSSESSION OF FIREARM: FIREARMS ACT 1958, SS3, 40(1).

Section 3 of the *Firearms Act* 1958 provides:-

"In this Act unless inconsistent with the context or subject-matter—
'Possession' in relation to any firearm or prohibited weapon includes, as well as the actual physical possession thereof, the custody or control thereof or the having and exercising access thereto either solely or in common with others."

Section 40(1) of the *Firearms Act* 1958 provides:-

"Any person who occupies any land or premises or that part of any premises on or in which any firearm, pistol, machine gun or prohibited weapon is found shall for the purposes of this Act be deemed to be in possession of that firearm, pistol, machine gun or prohibited weapon unless the contrary is proved."

H. rented a room in premises used as a club house by a motor cycle club. His belongings were located in the room together with property belonging to others such as a bed, a mattress, a wardrobe and some weight-lifting equipment. When a police search of the room was carried out, a .223 rifle was discovered leaning against a record player. When H. was charged with possession of the firearm, he denied it was his, that he had no knowledge of its presence in his room, and evidence was given that it belonged to another club member. The magistrate concluded that as H. was an occupier of the room, he was deemed to be in possession of the firearm pursuant to s40(1) of the *Firearms Act* 1958, and he was convicted. Upon order nisi to review—

HELD: Order nisi absolute.

(1) As the Crown could not prove that H. either –

- (a) had actual physical possession, custody or control of the firearm; or**
- (b) had and exercised access to the firearm,**

H. was not in possession of the firearm within the meaning of s3(1) of the *Firearms Act* 1958.

Yeates v Hoare [1981] VicRp 91; [1981] VR 1034, discussed;

DPP v Brooks [1974] AC 862; [1974] 2 All ER 840; (1974) 59 Cr App R 185, applied.

(2) As there was no evidence that H. had a sufficient degree of control over his room so as to have the right or power to exclude others from entering or bringing unauthorised articles into his room, he did not fall within the deeming provisions of s40(1) of the *Firearms Act* 1958.

Yeates v Hoare (*supra*); and

Fox v Warde [1978] VicRp 37; [1978] VR 362 applied.

HAMPEL J: [After setting out the facts and the relevant provisions of the *Firearms Act* 1958, His Honour continued]: ... [4] Mr Barnett of Counsel who appeared on behalf of the applicant submitted that the evidence was incapable of supporting the conclusion that the applicant was in possession of the firearm within the meaning of the definition in s3(1). Mr Barnett also relied on a number of authorities to support the proposition that for criminal liability to attach to an occupier so as to attract the operation of s40(1) by his failure to control what occurs in or is brought on to the premises, he must have some significant measure of exclusivity of control in order to exclude mischief. He argued that the evidence could not support the conclusion that the applicant had this measure of control and accordingly he could not be found to be an occupier of the room in the relevant sense.

Mr Maguire of Counsel who appeared on behalf of the respondent submitted that the applicant was, on the evidence, an occupier of the room and that the Magistrate was entitled

to draw that conclusion from the evidence. He submitted that a degree of permanency [5] was indicated by the presence in the room of the applicant's belongings and that the situation was therefore more consistent with occupation than mere use. Mr Maguire conceded that on the facts there did not seem to be any evidence that the applicant had a right to exclude others from the room. It becomes necessary for me to determine whether the evidence was capable of supporting the proposition that the applicant was in possession of the rifle for the purpose of the *Firearms Act*. In *Yeates v Hoare* [1981] VicRp 91; [1981] VR 1034 at p1037, Kaye J, when dealing with the concept of possession, said:

"It is notorious that, apart from any statutory definition, there is no definitive meaning of the word "possession" where it is used in a statute which provides criminal sanctions for a breach of its provisions. The meaning to be attributed to such an expression depends upon the context in which it appears and the policy of the statute disclosed by its provisions read as whole: *DPP v Brooks* [1974] AC 862 at p865; [1974] 2 All ER 840; (1974) 59 Cr App R 185."

His Honour, in *Yeates v Hoare*, referred to the judgment of Lord Pearce in *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; [1968] 2 All ER 356 at p387; (1968) 52 Cr App R 373; [1968] 2 WLR 1303 where His Lordship said:

"One must, therefore, attempt from the apparent intention of the Act itself to reach a construction of the word 'possession' which is not so narrow as to stultify the practical efficacy of the Act or so broad that it creates absurdity or injustice."

Kaye J concluded that:

"From the wide ambit of the meaning of "possession" as defined by the Act, together with the penal [6] sanctions for contravention of its provisions, it is clear that the object of the *Firearms Act* 1958 is to restrict and control the availability of any lethal firearms."

It is therefore necessary, in the light of the purpose of the Act, to determine whether, given the facts as found by the Magistrate in the present case, the applicant can be found to have been in possession of the firearm either within the definition contained in s3(1) or the deeming provisions contained in s40(1). Section 3(1) requires that the Crown must prove one or more of the following requirements, namely: actual physical possession of the firearm or custody or control thereof or the having and exercising access thereto. The term "actual possession" was considered by the High Court in *Moors v Burke* [1919] HCA 32; [1919] 26 CLR 265, where at p274; 25 ALR 213, the Court said:

"Having actual possession means ... simply having at the time, in actual fact and without the necessity of taking any further step, the complete present personal physical control of the property to the exclusion of others not acting in concert with the accused, and whether he has that control by having that property in his present manual custody, or by having it where he alone has the exclusive right or power to place his hands on it, and so have manual custody when he wishes."

In my opinion, the facts in the present case fall far short of these requirements. In *Yeates v Hoare* (*supra*) at p1038, Kaye J, when considering the words "custody" or "control" said:

"The word "custody" in the definition does not have any legal or technical connotation. Its meaning in this statute is the ordinary dictionary one of safe keeping, protection, charge or care: see *Oxford Shorter Dictionary*, 3rd ed, Vol 1, p442. Similarly, control denotes actual power to deal [7] with the article in question by restraint or direction: cf. *Williams v Douglas* [1949] HCA 40; [1949] 78 CLR 521 at p528; [1950] ALR 223."

In my opinion, there is nothing in the present case to suggest that the applicant had either custody or control of the weapon in that sense. Finally, it is to be noted that the presence of the word "and" in the expression "having and exercising access thereto" shows that both requirements must be proved. In the present case it may be said that the applicant had access to the firearm, but there is nothing to suggest in the evidence that he exercised any such access. Accordingly, I find that the applicant was not in possession of the firearm within the meaning of s3(1). In so holding, I am conscious of the fact that, in *Yeates v Hoare* (*supra*), Kaye J said that the words 'custody' and 'control' and 'access' are not limited by any legal doctrine of possessory rights, and that there is no justification for importing the need for some physical act in connection with the weapon consistent with ownership or dominion. Nevertheless, in my opinion, it would create both

an absurdity and an injustice in the sense referred to by Lord Pearce to hold otherwise in the present case.

I now turn to the question whether the applicant was an occupier of the room and therefore deemed to be in possession of the firearm pursuant to s40(1). This appears to be the basis on which the learned Magistrate convicted the applicant in the present case. In considering this question, the authorities [8] referred by Mr Barnett, which I find most helpful, are *R v Tao* [1976] 3 All ER 65; [1976] 3 WLR 25; [1977] 1 QB 141; *Fox v Warde* [1978] VicRp 37; [1978] VR 362 and *Yeates v Hoare* (*supra*).

In *Tao's case*, a Cambridge undergraduate who lived in a hostel owned by his college was convicted of permitting his room to be used for the smoking of cannabis. The relevant English legislation made it an offence for the occupier of premises knowingly to permit or suffer certain activities to take place on the premises. Roskill LJ delivered the judgment of the Court of Criminal Appeal and said:

"the occupier' was to be regarded as someone who, on the facts of the particular case, could fairly be said to be 'in occupation' of the premises in question, so as to have the requisite degree of control over those premises to exclude from them those who might intend to carry on those forbidden activities."

In determining the nature of the legal right to use the premises enjoyed by the appellant, His Lordship considered that it was an exclusive contractual licence. His Lordship concluded:

"It was, in our view, clearly a licence which gave him not merely a right to use but a sufficient exclusivity of possession, so that he could fairly be said to be 'the occupier' of that room."

In *Fox v Warde*, the applicant had been convicted and fined on a charge that she, being the occupier of a room at a massage parlour, did use such premises for the purposes of habitual prostitution contrary to s12(1) (a) of the *Vagrancy Act* 1966. In considering the meaning of the word "occupier" McInerney J said that he did not intend to formulate [9] a judicial definition of the word, however, at pp367-368 of the report he indicated factors which would be relevant in his view when considering whether a person was an occupier of the premises. His Honour said that the extent of the user is a relevant matter, that it is not necessary that the occupation be permanent or lawful, but that a mere transitory use of the premises is not sufficient to constitute occupation. His Honour continued:

"Again, it is not essential that the occupation be exclusive of others. It is clear that there may be cases ... where the occupation has been an occupation along with other people."

His Honour then referred to *R v Robert Sayers* [1867] 4 WW & a'B (1) 146 and *Silvester v Hodder* [1956] VicLawRp 106; [1956] VR 733. His Honour added:

"The lodger in *Silvester's case* clearly had occupation of a defined space with the power to exclude others, including the landlord, and he was held to be the occupier thereof. The same conclusion was also reached in *R v Tao*."

In my opinion, these passages indicate that although occupation need not be exclusive of others, there must be some right in the applicant to prevent unauthorised entry by persons who are not co-occupiers. His Honour, in deciding the case before him, considered that the applicant did not have "the kind of control of the premises requisite to establish that she was an occupier within the meaning of s12(1)(a)" of the *Vagrancy Act* 1966. Although the provision His Honour was considering was different from that with which I am presently concerned, [10] in my opinion, the same considerations are relevant.

The final authority in this respect is the decision of Kaye J in *Yeates v Hoare* (*supra*) where, at p1039, His Honour said:

"To constitute an offence under either s22AA or s23(2) the *actus reus* may be satisfied by proof that the unlicensed person was in control of that part of the premises in which the weapon was located and the necessary accompanying intent must be implied from his knowledge of its presence in such a location."

In my opinion, these three cases indicate that to be an occupier of premises or part of premises within the meaning of s40(1), a person must have sufficient degree of control over those premises or part of them either alone or in combination with other co-occupiers so as to have the right or power to exclude others from entering or bringing unauthorised articles into the premises or part thereof. In the present case there is no evidence that the applicant had such rights. In my view, the Magistrate gave the word "occupier" too wide a meaning ...

APPEARANCES: For the applicant Hall: Mr D Grace, counsel. Campbell Grace & Co, solicitors. For the respondent Foster: Mr D Maguire, counsel. State Crown Solicitor.
