

38/81

SUPREME COURT OF VICTORIA

YEATES v HOARE

Kaye J

10 July 1981 — [1981] VicRp 91; [1981] VR 1034

CRIMINAL LAW – POSSESSION OF FIREARMS – POSSESSION OF FIREARM WITHOUT CERTIFICATE – CUSTODY, CONTROL, ACCESS – PROOF – STATUTORY PRESUMPTION IN SECTION 40 – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: FIREARMS ACT 1958, SS3, 40.

1. Where the defendant occupied part of the premises in which a prohibited weapon was found and by reason of the operation of s40(1) of the *Firearms Act* 1958, the defendant was deemed to have been in possession of the firearm. Evidence given by him and his wife did not rebut the presumption. It followed that the defendant was in possession of the firearm when it was so found and he was guilty of the offence as charged.

2. Apart from the statutory presumption and applying the principles of law, evidence of the several facts compelled the conclusions that the defendant's wife had left the gun in his care for safe-keeping, albeit for a short period, and that at the time the weapon was found it was in the defendant's physical custody and under his control. From his knowledge of the presence of the weapon under his bed, and from his knowledge that it had been left there some days previously by his wife, who had gone to live elsewhere, the inference ought to have been drawn that it was the defendant's intention to retain custody or control of it. Thus, the police informant proved both the *actus reus* and *mens rea* necessary to constitute the offences under the statute of which he was charged and the magistrate was in error in dismissing the information.

KAYE J: On 14th May 1980, in the Magistrates' Court at Prahran, orders were made dismissing an information preferred by the applicant that between 1st August 1979 and 16th August 1979, the respondent, not being the holder of a shooter's licence, had in his possession a firearm, namely a twelve gauge pump action single-barrel shotgun, and an information that between the same dates the respondent, having been convicted of an indictable offence and having been sentenced to a term of imprisonment, did within five years next after his release have in his possession a firearm. Both informations were heard and determined together.

This is the return of orders nisi to review calling on the respondent to show cause why the orders so made should not be set aside. The applications for the orders nisi were supported by affidavits sworn by the applicant, Eric Henry Yeates, a sergeant of police, who appeared to prosecute the informations. Several of the matters concerning the evidence given on the hearing of the informations and the Magistrate's findings and reasons for the orders made by him as verified by the applicant were disputed in affidavits sworn by the respondent and Kathleen Maud Hoare, his wife, who was called by him as a witness. The Magistrate did not file an affidavit deposing to what were his findings of fact and what reasons for dismissing the informations were announced by him. Because of contradictions in the material and the absence of either written depositions or notes taken by either the prosecuting officer or counsel for the respondent, I am for present purposes constrained to accept such versions of the evidence and of the proceedings which support the Magistrate's findings and orders: see *Buzatu v Vournazos* [1970] VicRp 63; (1970) VR 476. Accordingly, from the affidavits filed in support of the orders nisi and in reply thereto, I extract and accept that the following facts were either expressly or impliedly found by the Magistrate and the following reasons were given by him.

Between the months of April and August 1979 the respondent and his wife were living together in a flat known as Unit 9, 291 Church Street, Richmond, of which they were the tenants. On 1st August 1979, Mrs Hoare, who held a shooter's permit, purchased with the respondent's guidance a twelve gauge pump action single-barrel shotgun. She then placed the weapon out of reach of their three and a half year old child in a cupboard in the flat. Later she took the gun into the main bedroom. There the respondent explained to her its loading and unloading operations. In

his presence she loaded and unloaded the gun until she gained confidence. Then she placed the gun under the double bed in the main bedroom and she informed the respondent that she was doing so. Thereafter the gun remained where she had there placed it. At that time Mrs Hoare was in the course of moving her possessions from the flat in preparation for her planned separation from the respondent, although she continued for a short time to sleep in the flat. On 15th August 1979, Mrs Hoare, accompanied by her child, travelled by tram to her mother-in-law's home, leaving the remainder of her personal effects, save for the gun, stored in the second bedroom of the flat. She left the gun under the double bed in the main bedroom. Her other belongings were stored in the second bedroom of the flat. She did not take the gun and the other personal items with her because she was unable to carry them and an overnight bag containing toiletries and underwear while caring for her little girl. That night she and the child slept in her mother-in-law's home. Some days previous another female person, Danielle Freeman (also referred to as Sinclair), commenced occupying the second bedroom of the flat.

Early during the afternoon of the following day, namely 16th August, Detective Senior Constable Yvonne Robyn Eastaugh and other police searched the flat. In the main bedroom under the double bed on which the respondent was lying the police officer found the gun. In a wardrobe of the bedroom she found a box of Winchester Expert cartridges. The respondent did not hold a shooter's licence. On 29 August 1978, at the Magistrates' Court at Frankston, the respondent was convicted of three charges of theft and sentenced to a term of nine months' imprisonment on each charge, and it was directed that the sentences on the second and third charges be served concurrently with the sentence on the first charge.

At the conclusion of the evidence, after hearing a submission made by counsel for the respondent and reply from the prosecuting officer, the Stipendiary Magistrate stated that the charges would be dismissed because he felt that the respondent had not exercised access to the gun.

The Magistrate continued:

"I feel that the law needs clarification in regard to access, whether it is to be implied or in actual rights. Say if my son had guns in his room at home and while he was out I go into his room and look at the guns. I am not in possession of them because I haven't asked my son's permission to be in the room. In this case the Defendant is not in possession because he has not consulted the owner of the gun as to whether he could exercise any right or implied access to the shotgun."

The first information was laid under s22AA(1) and s23(2) of the *Firearms Act* 1958. Section 22AA(1), so far as relevant for present purposes, reads as follows:

"... no person shall have in possession a firearm of a type in any category referred to in subsection (4) unless he holds a shooter's licence granted under this part and in force at the time authorising him to have in possession a firearm of that category."

By sub-section (4)(a)(i) it is provided that every shooter's licence shall authorise the holder to possess a shotgun.

Section 23(2) is in these terms:

"Any person who not being the holder of a shooter's licence ... has in his possession ... a firearm (not being a pistol) shall be guilty of an offence and liable to a penalty of not more than \$200.00 or to be imprisoned for a term of not more than two months."

The second information was laid under s31(2)(a) of the *Firearms Act* which, insofar as relevant for present purposes, reads as follows:

"A person who has been convicted of an indictable offence and has been sentenced therefor to any term of imprisonment shall during the period of five years next after his release from imprisonment be prohibited from being granted a shooter's licence, and if during the operation of the said prohibition the said person has in his possession any firearm he shall be guilty of an offence and liable for a first offence to a penalty of not less than \$20.00 and not more than \$200.00 or to be imprisoned for a term of not more than one year and for any subsequent offence to be imprisoned for a term of not less than one year and not more than two years."

Central to the grounds of both orders nisi is the question of the meaning required to be given to the expressions "in possession" and "in his possession" where appearing in the sections under which the respondent was charged. 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 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 a whole: *DPP v Brooks* (1974) AC 862 at 865; (1974) 59 Cr App R 185 per Lord Diplock. In *Warner v Metropolitan Police Commissioner* (1969) 2 AC 256 at 304; [1968] 2 All ER 356; [1968] 2 WLR 1303; (1968) 52 Cr App R 373 Lord Pearce said:

"One must 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."

It is therefore necessary to discover the policy of the *Firearms Act* and to give to the expressions the interpretation which in turn give full effect to the legislature's intention and object as found from its provisions. From the wide ambit of the meaning of "possession" as defined by the Act, together with penal 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 firearm. Thus the Act regulates the manufacture, repair, testing, sale, purchase, possession, carriage and use of lethal firearms, and it does so by means of a licensing system, the issue of permits, and authorisation by the Chief Commissioner of Police. Age, character, and fitness to be entrusted with the handling, use and care of a firearm are qualifications necessary for the grant of a licence, the duration of which may be fixed for a term not exceeding three years. The Chief Commissioner of Police is empowered to cancel a shooter's licence before the expiration of its term if he is of the opinion that the licensee is no longer possessed of the required qualifications. The days and places when and where a firearm may be carried and discharged are subject to restriction.

Exemption from the operation of the Act is given to specified persons such as serving members of the armed forces of the Commonwealth, members of the police force, gaol officers, licensed guards and watchmen, starters and judges of aquatic events, national park officers, and members of recognised rifle clubs. Penalties by way of fines and terms of imprisonment are provided for breach of the provisions of the Act. Nevertheless, exemption from the penal consequences of contravention of s23(2) extends to the possession of a firearm by the widow or legal personal representative of the holder of shooter's licence or permit for six months after the death of the licensed or permitted holder.

The conduct of an unlicensed person which is prohibited by s23(2) is his purchase, his possession or carriage of a firearm. What is meant by "possession" for the purpose of the Act is defined by s3, which reads:

"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."

The condition of actual physical possession included in the definition corresponds with the words "actual possession" which appeared in the *Police Offences Act* 1915 in s40 (now *The Summary Offences Act* 1966, s26), and of which it was said in *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265 at 274; 25 ALR 213:

"Having actual possession means, in this enactment, 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 the property in his present manual custody, or by having it where he alone has the exclusive right of power to place his hands on it, and so have manual custody when he wishes."

Possession as defined by the Act, however, is not limited to possession according to doctrines of civil law, or to actual possession as interpreted in *Moors v Burke*. It embraces the factual situation of a person, unendowed with any propriety or exclusive possessory rights, having the physical custody or control of a firearm, and to the factual situation of a person who has

and exercises access to a weapon, whether alone or shared with others. 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 with the article in question by restraint or direction: cf. *Williams v Douglas* [1949] HCA 40; (1949) 78 CLR 521 at 528; [1950] ALR 223 per Rich J. There is no warrant for qualifying either the words "custody" or "control" or "access" with any legal doctrine of possessory rights, nor is there any justification for reading down the words by importing the need for some physical act in connection with the weapon consistent with ownership or dominion.

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 may be implied from his knowledge of its presence in such location: *DPP v Brooks* at pp866 and 867; *R v Woodman* [1974] EWCA Crim 1; [1974] 1 QB 754 at 757 and 758; [1974] 2 All ER 955; [1974] 2 WLR 821; 59 Cr App R 200; 138 JP 567, and the *R v Boyce* (1976) 15 SASR 40 at 43 per Bray CJ. Moreover, an informant is relieved from proving that the presence of an accused person in juxtaposition to a firearm constituted his possession of it if the matters set out in s40(1) are established. The sub-section reads:

"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."

Thus, in order to raise the statutory presumption of the *factum* of possession for an offence under s22AA or s23(2) or s31(2), it is sufficient for the informant to prove that the weapon was found on land or premises or part of premises which at the material time was occupied by the accused. The onus is then cast upon the accused to rebut the presumption by proving that his physical proximity to the weapon was not of the nature of possession as defined by the statute.

I now turn to consider the uncontroverted facts pertaining to the respondent's alleged possession of the firearm, having regard to the principles of law concerning "possession" with its extended statutory meaning. Those facts were as follows:

- (i) The respondent and his wife were the tenants of the flat in which the weapon was found;
- (ii) for two weeks preceding the day on which it was there found, the respondent's wife had been moving her belongings from the flat, and on the previous day she left the flat to live elsewhere;
- (iii) the respondent's wife left the weapon where she had placed it under the bed in the main bedroom because it was inconvenient for her to carry it and her immediate personal requirements while travelling with her child in a tram;
- (iv) the weapon was found in the main bedroom occupied by the respondent;
- (v) the respondent had knowledge that the weapon was under his bed in the main bedroom; and
- (vi) other belongings of his wife were stored in the second bedroom of the flat.

Thus the respondent occupied part of the premises in which the prohibited weapon was found. By reason of those facts and the operation of s40(1) the respondent must be deemed to have been in possession of the firearm. Evidence given by him and his wife did not rebut the presumption. It follows that the respondent was in possession of the firearm when it was so found.

Furthermore, apart from the statutory presumption and applying the principles of law which I have discussed, evidence of the several facts enumerated compel the conclusions that the respondent's wife had left the gun in his care for safe-keeping, albeit for a short period, and that at the time the weapon was found it was in the respondent's physical custody and under his control. From his knowledge of the presence of the weapon under his bed, and from his knowledge that it had been left there some days previously by his wife, who had gone to live elsewhere, the inference ought to have been drawn that it was the respondent's intention to retain custody or control of it.

Thus, the applicant proved both the *actus reus* and *mens rea* necessary to constitute the offences under the statute of which he was charged. In the result the grounds of the orders nisi were made out. It is ordered that the orders nisi be made absolute, and that the cases be remitted to the Magistrates' Court for conviction and sentence of the respondent.