

35/04; [2004] VSC 378

SUPREME COURT OF VICTORIA

TICKNELL v FOSTER

Osborn J

23 September, 1 October 2004

FIREARMS – DEFENDANT FOUND GUILTY OF OFFENCES AND RELEASED ON COMMUNITY BASED ORDER – NOTICE GIVEN TO DEFENDANT BY POLICE OFFICER TO IMMEDIATELY SURRENDER ANY FIREARMS AND AMMUNITION IN HIS POSSESSION – FIREARMS AND AMMUNITION NOT SURRENDERED – DEFENDANT CHARGED WITH FAILING TO PRODUCE FIREARMS FOR INSPECTION WHEN SO REQUESTED – CHARGES FOUND PROVED – WHETHER MAGISTRATE IN ERROR: FIREARMS ACT 1996, SS53(1)(a), 120.

Section 120 of the *Firearms Act* 1996 ('Act') provides:

A person in whose name a firearm is registered must produce the firearm for inspection at any reasonable time and at any reasonably convenient place when so requested by a member of the police force.

T. was the registered owner of two firearms. As a result of being found guilty of offences and released on a community based order, a notice pursuant to s53(1)(a) of the Act was given to T. to immediately surrender any firearms and ammunition in his possession. T. failed to produce the firearms despite the notice and subsequent oral requests and was charged with two offences under s120 of the Act. The charges were found proved. Upon appeal—

HELD: Appeal allowed. Orders set aside.

The question to be decided by the magistrate was whether the notice given pursuant to s53 of the Act and the oral requests were regarded as a request to produce the firearms for inspection in accordance with s120. The written notice made a request to immediately surrender to the police member who served the notice “any firearms, ammunition or firearms licences in your possession.” Such a request was not a request in accordance with s120 as (a) it was expressly directed to firearms within the possession of the appellant, and (b) it was not a request to produce firearms for inspection “at any reasonable time and at any reasonably convenient place.” There was no evidence that the police officer requested T. to produce the firearms for inspection at any reasonable time and at any reasonably convenient place. Proof of a request in the terms required by s120 is an essential element of the offence. Accordingly, the essential elements of offence pursuant to s120 were not made out and it was not open to the Magistrate to conclude that the offences charged were proved on the evidence.

OSBORN J:

1. This is an appeal on a question of law pursuant to s92 of the *Magistrates' Court Act* 1989.

2. The appellant was convicted in the Magistrates' Court at Dandenong on 20 February 2004 of two offences under s120 of the *Firearms Act* 1996. Section 120 provides as follows:

“Offence not to produce firearm for inspection

A person in whose name a firearm is registered must produce the firearm for inspection at any reasonable time and at any reasonably convenient place when so requested by a member of the police force.”

3. The appellant contends that it is an essential element of the offence that a member of the police has made a request to produce the firearm for inspection. He further contends that there was no evidence from a member of the police force that the appellant had been asked to produce his firearm for inspection in accordance with s120.

4. The question of law raised by the appeal is:

Was there any evidence to support the finding that the appellant was requested to produce for inspection his firearms so as to support a conviction under s120 *Firearms Act* 1996?

5. The circumstances leading to the charges in issue were somewhat unusual. The

appellant was the registered owner of two firearms. On 27 March 2002 he was found guilty of offences at the Frankston Magistrates' Court and sentenced to a community based order with no supervisory component pursuant to s38(1)(b) of the *Sentencing Act* 1991.

6. In mistaken reliance upon these orders the view was taken by an officer of the Victoria Police that pursuant to s3(1) of the *Firearms Act* the applicant had become a prohibited person.

7. Further, by s46 of the *Firearms Act* the Chief Commissioner is required to cancel a firearms licence held by a prohibited person. The appellant was given notice in writing dated April 18, 2002 in the following terms:

"Victoria Police records indicate that on 27/03/2002 you were found guilty of offences against the *Crimes Act* 1958 including Refuse Or Fail To State Name/Address at the Frankston Magistrates' Court. Subsequently, pursuant to Section 3(1) of the *Firearms Act* 1996 you are now and will remain a prohibited person for the purposes of the *Firearms Act* 1996 until 28/03/2003. Pursuant to Section 5(1) of the *Firearms Act* 1996 if during a period of prohibition you possess, carry or use a firearm, you are liable for a maximum penalty of 600 penalty units (\$60,000) or 7 years imprisonment. In accordance with section 46(1)(a) of the *Firearms Act* 1996 your Category A & B Longarms Licence No: 452-578-80B is hereby cancelled. Pursuant to Section 53(1)(a) of the *Firearms Act* 1996, any firearm(s), ammunition or firearms licences in your possession must be immediately surrendered to the police member who served this notice on you. Penalty for non-compliance: 240 penalty units (\$24,000) or 4 years imprisonment. Please note a prohibited person is precluded from applying to the Firearms Appeals Committee for a review of cancellation. Pursuant to Section 189(A) of the *Firearms Act* 1996 a prohibited person may make application to the Court to be deemed not to be a prohibited person."

8. It can be seen that this notice purported to give notice pursuant to s53(1)(a) of the *Firearms Act* that the appellant was required to immediately surrender to the police member who served the notice any firearms in his possession. Section 53(1)(a) provides:

"53. Surrender of firearms and licence document

(1) If a licence under this Part is suspended or cancelled, the holder must - (a) if served personally with notice of the suspension or cancellation, immediately surrender any firearm or cartridge ammunition in that person's possession and the licence document to the person serving the notice; ..."

9. On 24 April 2002 the appellant made a statutory declaration to the following effect:

"On 24/04/02 I was served with a notice from the Firearm Licensing Services deeming [me] to be a prohibited person under the *Firearms Act*. This notice was served on me by Cranbourne Police. At the time of serving this notice, I was informed that there were 2 firearms registered to my name, being Baikal .22 Ser No AAN 2143 and a Boito shotgun Ser No 60271B. I do not own or possess these firearms."

10. This statutory declaration was amplified by the addition of the further following statement on 5 May 2002:

"Guns were put in my name as registered 10-12 years ago whilst original owner obtained a licence. I have not seen nor heard from this person for 10 years. I have no contact address or ph no and do wish not to give his name at this stage." [sic]

11. The circumstances of the supplemental statutory declaration were described in the evidence of the informant Senior Constable Foster to the Magistrates' Court:

"PROS: As a result of delegating that file to the Cranbourne police station, what result was provided to you? Foster: I subsequently got a report back from senior constable Patterson who had spoken with and dealt with the defendant. I received a statutory declaration made by the defendant. I read the statutory declaration and I noticed there was no mention of where the guns were or who owned the guns or where they were. I made a subsequent phone call to the defendant on the first of May that year, 2002, and invited him again to make some comment as to who owned the guns or where they were. He flatly refused to make any comment as to who had them or where they were. He said again his solicitor was going to have the matter overturned. He said he would get back to me. He didn't get back to me so on the 5th of May I went to his home at 135 Monahan's Road, Cranbourne. I interviewed him in relation to the matter of failing to produce the guns. PROS: What time did you attend Mr Ticknell's address on that day? Foster: I believe it was around 1:00 PM, Your Worship. PROS: And upon arrival at the address on that day, what did you tell him was your purpose for being

there? Foster: I made clear to him who I was and my identity and the office I represented and the reasons why I was there in relation to the cancellation of his gun licence and the whereabouts of the guns that were registered to him as the registered owner. I did produce the statutory declaration that he had made to senior constable Patterson. I asked him if he would like to make a fresh statutory declaration in relation to who had the guns and where they were. He refused. He said he wasn't going to do in his mate. He said he didn't own the guns, all that he was doing was keeping them for a person he refused to give me the name of because that person didn't have a gun licence. I asked if he wished to amend the statutory declaration, which he did do so. I produced a computerized record of the guns that were registered to him. He said yeah, they were registered to my name, but I don't own them. He did make an amendment to the statutory declaration. He did underline the fact that he had told the police of the fact that he didn't own them. But he still would not tell me who had the guns or where they were. I did warn him again of the penalties of perjury when he made the statutory declaration and I endorsed that on the back of the statutory declaration ... PROS: Do you have the original of the statutory declaration? Foster: I do. PROS: If I may have that for one moment to show Mr Hardy. I tender that statutory declaration Your Worship. Senior, after Mr Ticknell made those amendments to the statutory declaration, what further conversation did you have with him regarding the firearms? Foster: I made the point of the fact that he failed to tell me who had the guns or the whereabouts they were Your Worship. I asked him to cooperate with me for the second or third time. He said he wasn't prepared to do in the person who had the guns. I then cautioned him and said I was going to apprehend him for hindering police. I asked him if he had any reason for hindering police in the execution of their duty as to the whereabouts of the guns. He said you're a smart arse copper aren't ya."

12. Section 53(2) of the *Firearms Act* provides:

"(2) If a member of the police force has reasonable grounds for believing that a person has not complied with sub-section (1), the member—

(a) must seize any firearm or cartridge ammunition which the member is aware is in the possession of the person; and

(b) may, at any reasonable time, without warrant, enter and search any premises where the person resides or has resided for the purpose of seizing any such firearm or cartridge ammunition."

13. In answer to cross-examination Mr Foster confirmed that at the time he spoke with the appellant Mr Foster believed that the appellant had been required to surrender his firearms pursuant to s53(1)(a) of the Act. When he went to the house Mr Foster confirmed with the appellant that the appellant had been served with the notice of cancellation and that he had made the initial statutory declaration to which I have referred. Mr Foster asked the appellant whether the appellant was the registered owner of the firearms. The appellant said he was and the appellant wouldn't tell Mr Foster who had them. Mr Foster agreed that his own police statement was correct in stating:

"I said you stated in your declaration that you do not own or possess the firearms registered to you. Is that correct? And he said, yeah, I never owned them. I gave them back to the original owner ten years ago. I just did it until he got a licence."

14. In my opinion this evidence does not materially amplify the evidence given in chief.

15. It is the evidence of Mr Foster that was relied on before me as establishing the elements of the offence.

16. It is apparent that the inquiries which Mr Foster made and which are deposed to in the above evidence were directed to facilitating a seizure of possession of the firearms. Further, they were undertaken in reliance upon the s53 notice.

17. Subsequent to the confrontation described above, however, it was accepted by Mr Foster that the appellant was not a prohibited person and accordingly the notice procedure which had been implemented had no application to his circumstances.

18. Thereafter the appellant was charged pursuant to s120 of the *Firearms Act*. The short point which arises is whether the notice given pursuant to s53 and/or the oral requests made by Mr Foster might be regarded as a request to produce the firearms for inspection in accordance with s120.

19. In my view the written notice made a request to immediately surrender to the police member who served the notice “any firearms, ammunition or firearms licences in your possession.” Such a request was not a request in accordance with s120,

- (a) it was expressly directed to firearms within the possession of the appellant, and
- (b) it was not a request to produce firearms for inspection, “at any reasonable time and at any reasonably convenient place.”

20. Likewise, the request made by Mr Foster was in essence one to state who had the guns and where they were. The appellant’s failure to co-operate on the basis that “he wasn’t prepared to do in the person who had the guns” led to Mr Foster cautioning him and stating that Mr Foster was going to “apprehend him for hindering police.”

21. There was no evidence given by Mr Foster that at any point he requested the appellant, to produce the firearms for inspection at any reasonable time and at any reasonably convenient place.

22. Proof of a request in the terms required by s120 is an essential element of the offence.^[1] Accordingly, the essential elements of offence pursuant to s120 were not made out.

23. In my view it was not open to the Magistrate to conclude that the offences charged were proved on the evidence.

24. Accordingly, the appeal will be allowed and the orders of the Magistrates’ Court set aside. I will hear counsel as to the consequential orders that I should make.

[1] Cf *DPP v Foster & Anor* [1999] VSCA 73; [1999] 2 VR 643 [29] at 652; (1999) 104 A Crim R 426; (1999) 29 MVR 365 per Winneke P.

APPEARANCES: For the appellant Ticknell: Mr S Hardy, counsel. Walter Timms Pty Ltd, solicitors. For the respondent Foster: Mr G Silbert, counsel. Victorian Government Solicitor.
