REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr.A. No. 44 of 2001

BETWEEN

EMMANUEL WILSON **APPELLANT**

AND

THE STATE **RESPONDENT**

CORAM:

L. JONES, J.A.
R. NELSON, J.A.
A. LUCKY, J.A.

APPEARANCES:

MS SEETAHAL APPEARED ON BEHALF OF THE APPELLANT

MS CHARLES APPEARED ON BEHALF OF THE RESPONDENT

DATE DELIVERED: May 15, 2003

JUDGMENT

Delivered by Lucky JA

The appellant was convicted on 28th June 2001 for being in possession of a dangerous drug for the purpose of trafficking; possession of ammunition, jointly with one Wilbert Sampson, and possession of ammunition. He was sentenced to 12 years imprisonment with hard labour for being in possession of a dangerous drug for the purpose of trafficking and 3 years imprisonment with hard labour for each of the offences of being in possession of ammunition, the sentences to run concurrently.

On 29th April 2003 we granted leave to appeal but dismissed the appeal with respect to possession of a dangerous drug for the purpose of trafficking and confirmed the conviction and sentence; allowed the appeal with respect to ammunition found in the exhibits, home made shot-guns; and, dismissed the appeal with respect to the ammunition found in the appellant's pocket and confirmed the conviction and sentence indicating we would give our reasons at a later date. We do so now.

The Case for the Prosecution

The Prosecution's case was that on Thursday the 3rd September 1998 PC Nazim Nisha No. 11955 and PC Kamuluddin Mohammed together with 5 other officers were on a routine duty at 26 ¼ mile mark Tabaquite, Rio Claro. At around 10:00 p.m. PC Nisha observed a Grey Datsun 120Y, registration number PAH 2152 proceeding North along the said road.

PC Mohammed signalled the driver of the vehicle to stop and he complied by stopping a short distance away. The appellant was in the front passenger seat of the said vehicle, another man was seated in the driver's seat. Using a flashlight which he shone into the front seat of the vehicle, PC Nisha observed two long objects resembling firearms protruding from the Appellant's lap with the muzzles angled towards the floor of the car.

PC Nisha opened the left front door of the vehicle and seized the objects. In the presence of the appellant and the other man he opened the chamber of each barrel in which he found a 12 gauge cartridge and a 16 gauge cartridge. He told the appellant and the other man that he was of the opinion that the two objects were shot-guns and that the two shot-gun cartridges which he found therein were ammunition. He then asked the appellant and the other man whether they were the holders of a Firearm User's Licence or alternatively if either of them was exempted to which each replied in the negative. PC Nisha then informed the appellant and the other man that they were under arrest and cautioned them. They remained silent.

PC Nisha then searched the appellant and found two shot-gun cartridges, one 12 gauge and one 16 gauge, in his right front pants pocket. He enquired of the appellant whether he had a Firearm User's Licence or whether he was exempted by law with respect to the said cartridges to which the appellant replied in the negative.

PC Nisha then carried out a search of the said vehicle in the presence of PC Mohammed, the appellant and the other man. He opened the left rear door whereupon he saw two large feed bags, one was cream coloured and the

other blue, on the rear seat of the said vehicle. He opened the cream coloured bag and noticed a home made shot-gun and plant material resembling that of marijuana. He also opened the blue bag in which he also found plant material resembling that of marijuana. On completion of the search, the appellant, the other man, the two feed bags, the three shot-guns, and the four shot-gun cartridges were taken in a marked police vehicle to the Rio Claro Police Station.

At the Rio Claro Police Station the two feed bags containing the plant material resembling that of marijuana were weighed, they weighed 28 pounds. He then placed similar markings on each feed bag 'NN vs EW WS 3/9/1998'. He also placed similar markings on the wooden butts and on the barrels of the three shotguns; he also placed similar markings on the two shot-gun cartridges which were found in the chambers of the two shot-guns and on the other two cartridges which were found in the appellant's right front pants' pocket.

PC Nisha took all the items he had seized to the Forensic Science Center where they were examined. The analyst reported that the exhibits were firearms and ammunition as defined under the *Firearms Act Chapter 16:01*. The appellant was then formally charged for the offences.

The appellant's defence was a denial of the charges. He stated that at the material time he was an innocent passenger in the said vehicle. He denied that any of the exhibits were found in the said vehicle or on his person on the date in question. In support of his defence the appellant called one witness, who testified that on the date in question he was a passenger in the back seat

of the vehicle and that there was nothing in the back seat while he was in the vehicle.

The following grounds of appeal were argued.

<u>Firstly</u>, a miscarriage of justice occurred when the learned trial judge sentenced the appellant for the offence of possession of dangerous drugs for the purpose of trafficking when there had been no verdict of guilty returned by the jury in respect of that offence.

<u>Secondly</u>, the learned trial judge erred in law when she told the jury that the appellant was in possession of firearms when in fact there was no admissible evidence that the items were in fact firearms and it is uncertain what effect this prejudicial statement had on the minds of the jury when they deliberated on their verdicts.

and;

<u>Thirdly</u>, the learned trial judge erred in law when in purporting to sentence the appellant for the offence of possession of dangerous drugs for the purpose of trafficking she said that possession of more than fifteen grams of marijuana is indicative of trafficking when in fact it is possession of one thousand grams that is so indicative. It is uncertain how this error affected the learned judge in determining the sentence of 12 years, which she pronounced on the appellant.

In respect of the first ground, counsel for the appellant submitted that it appeared from the record of proceedings that the appellant was convicted and sentenced on a count for possession of dangerous drugs for the purpose of trafficking when in fact the jury returned no such verdict. Reference was made to the record of the proceedings where it appears that the clerk of the court asked the jury: ***"what is your verdict in respect of the first count of <u>possession of a firearm</u>?*** The foreman replied ***"guilty"***. The first count for the jury's consideration was not a count for possession of firearms but was for possession of <u>a dangerous drug for the purpose of trafficking</u>. However, counsel for the respondent was allowed to adduce evidence viz. an affidavit

of the court's shorthand writer who confirmed that after listening to the audio tape and looking at her unedited copy of the transcript there was in fact an error in the transcript which was submitted to the Court. The correct version should read:

> ***"Clerk:*** ***Mr Foreman, on the first count of possession of a dangerous drug for the purpose of trafficking in respect of the first named accused Emmanuel Wilson what is your verdict"***
>
> ***Foreman:*** ***Guilty."***

Miss Seetahal accepted the evidence on affidavit. By consent therefore the court amended the official record of the proceedings in conformity with the affidavit evidence and counsel for the appellant withdrew this ground.

Ground 2

At the commencement of the summing-up the judge told the jury:

> ***"that during this criminal trial our Court of Appeal has handed down a new law which takes effect immediately; and as a result of the new law after consultation with attorneys on both sides, the count of the Firearms is now withdrawn from your consideration."***

The judge obviously had in mind the decision of the Court of Appeal in Leroy Clint vs The State *Cr. App. 44 of 1999*, in which ***de la Bastide C.J.*** having referred to section 2 (1) of the Firearms Act Chapter 16:01 (the Act) said:

> ***"It is incumbent on an expert who sets out to establish either by a written report or by viva voce evidence that an object is a firearm within the meaning of the***

> ***Firearms Act, to indicate by what 'door' the object enters the definition. By that we mean that he must identify to which of the various categories of object covered by the definition this particular object belongs, and demonstrate by such means as are appropriate, why this object does fall into that category. If one leaves aside components and accessories, there are two categories of object that fall within the definition of firearm. One is a lethal barrelled weapon from which ammunition can be discharged and the other is a prohibited weapon. The latter is further divided as we have seen into three sub-categories by a definition of its own. More often than not, a firearm will fall into the first category i.e. a lethal barrelled weapon from which ammunition can be discharged. In the case of a factory-made gun, it may well be sufficient for the expert to state that he has examined the gun, that it has a barrel and that it is so constructed as to be capable of discharging a bullet of a particular size and description at a speed sufficient to kill a person. In the case of a homemade weapon it is necessary for the expert to go somewhat further and to point to the individual components of the gun which match the features of a firearm as described in the definition, and explain the capabilities of the gun by reference to what the definition requires for classification as a firearm. If it is safe for the gun to be fired, then it would be helpful for the armourer to have fired it and to include in his report the effect which this produced, though this is a matter which is best left to the discretion of the armourer. He should confine himself, however, to describing the object which he has examined, though of course with an eye to the statutory definition. He should leave it to the judge to decide whether in the light of his description the object is capable of falling within the statutory definition of firearm, and to the jury to decide whether it in fact does. It is no part of the expert's function to express a view on these questions, one of which is a question of law for the Judge to decide, and the other which is a question of fact for the jury to decide. A statement by an expert that in his opinion a certain object is (or is not) a 'firearm' within the definition of 'firearm' in the Firearms Act, is inadmissible and of no probative value whatever, whether such opinion is given in a report or in oral evidence. What has been said in this connection about a 'firearm' applies equally to 'ammunition' and is supported on balance at least, by previous decisions of this Court.***

In Leroy Clint, Clint had been charged for having ***"a homemade gun"*** in his possession. The evidence of the expert did not set out whether he carried out any tests on the '***gun***' to determine whether in his opinion it was capable of discharging ammunition and therefore fell into the definition of a firearm as prescribed in the Act. It was in this context that the passage above must be read.

Nevertheless, having withdrawn the counts of possession of firearms from the jury the judge directed the jury as follows in respect of possession of ammunition.

> ***"So, the State is saying that these accused were in joint possession of the two cartridges which were found in the firearms on the lap of Accused No.1. So, the State is saying, even though it was on the lap of Accused No.1, Accused No.2 had a measure of control over those rounds in the gun, and therefore they were in joint possession of them. So, that in respect of Accused No.1, if you accept the evidence that these cartridges, were found in two guns which he was holding on to at the time, if you accept that evidence, the question is, did he know that he had those items there? And, secondly, "were they on his person?"***
>
> ***Well, I will express my opinion now, which you are completely free to reject if you don't agree with it. But it seems to me that if you have two <u>firearms</u> on your lap and pointing down to the ground - that the evidence of the police if you accept it - you certainly must know you had the <u>firearms</u>. And would you then know that there was ammunition inside of those <u>firearms</u>? So, it is a matter for you whether you accept, first of all, that he had them, and second of all, whether he knew that he had them, and I am speaking of the ammunition in the <u>firearm</u>. And secondly, you must consider in respect of Wilbert Sampson, remember Mr Sampson did not have them on him, he was the driver sitting next to the passenger. Did he know of the guns, and did he know that there was ammunition in each of them, and then did he have any control over it? Because remember, Sampson did not have it in his physical custody. According to the State's case the physical custody was in Emmanuel Wilson."***

By referring to the items on the lap of the appellant as firearms and furthermore implying that ammunition is usually found in such firearms the trial judge was inviting the jury to find that if the appellant had ***"firearms on his lap"*** then he ought to have known that ***"there was ammunition inside the firearms"***. The foregoing direction was prejudicial since the trial judge had already effectively indicated to the jury that they should disregard any reference to firearms. The issue of possession of firearms was not before the jury therefore the judge apparently lapsed when she referred to the exhibits as ***"firearms"***.

We find that there is merit in this ground.

In respect of the count of being in possession of two cartridges in the appellant's trouser pocket, the jury accepted the evidence led and we find no fault with the judge's direction on that issue.

Ground 3

Counsel suggested that before passing sentence the learned trial judge would have considered the law at the time which specified that a person is deemed to have cannabis in his possession for the purpose of trafficking if the quantity is in excess of 15 grams. The appellant was found guilty of being in possession of 6 kilograms (6000 grams). Counsel contends that the disparity between 15 grams and 6000 grams could have influenced the judge in arriving at the sentence she imposed. We do not think that a strict mathematical approach is relevant in these circumstances. The science of mathematics is precise whereas the behavioural sciences are based on logic. 6000 grams or 6 kilograms is a large amount. The appellant has two previous convictions for possession of marijuana for the purpose of trafficking and possession of ammunition. We do not think that the threshold at which the reverse burden is placed on the accused has any relevance for sentencing purposes, and the learned judge did not express the view that it had. The judge considered the accepted principles before passing sentence: the need for punishment; deterrence, previous convictions; the seriousness of the offence and the maximum penalty for such an offence. We find the sentences adequate.

For the reasons set out above we dismissed the appeals in respect of the conviction for possession of a dangerous drug for the purpose of trafficking and for being in possession of ammunition and confirm the conviction and sentences. We however quash the conviction and sentence in respect of the joint charge of possession of ammunition.

The sentences are to run from 28th June 2001, the date of conviction.

L. JONES
JUSTICE OF APPEAL

R. NELSON
JUSTICE OF APPEAL

A. LUCKY
JUSTICE OF APPEAL