No Special Consideration

HAMILTON REGISTRY

10/12

M 301/80 NZLR

823

BETWEEN WILLIAM DALE FALWASSER

Appellant

AND POLICE

Respondent

Hearing: 12 November 1980

Counsel: Mr R.L. Young for Appellant
Mr Q.C.M. Almao for Respondent

Judgment: 24 NOV 1980

JUDGMENT OF GREIG, J.

The appellant appeals against his conviction and possession of certain firearms in breach of the Arms Act 1958. In pursuance of s.23 of that Act the finding was that the appellant was in occupation of the land or building in which the firearms were found and was therefore deemed to be in possession of those firearms. There being no proof that they were not the appellant's property or that they were in the posession of some other person he was therefore convicted.

The facts were that the firearms were found in a tent in the grounds of a property in Hamilton. The appellant and two others were in the vicinity of the tent when the Police visited the property and found the firearms. Another person was in the house in which the tent and firearm were situated. All four were jointly charged. One who was merely standing near the tent with the appellant was dismissed from the case at the close of the prosecution case; another was dismissed from the case at the close of the defence case, he giving evidence to the satisfaction of the District Court Judge of the exception under

s.23 as it applied to him. The third member of the group admitted occupation of the tent and in effect, possession of the firearms and was convicted.

The evidence against the appellant was that he was standing with two others at about eight feet from the tent when the police visited. The tent, apart from the firearms, contained a number of blankets, mattresses, sleeping bags and other clothing. To whom that, or any of it belonged was not disclosed in the evidence. There was a fire burning in a make-shift fireplace outside the tent and there was a quantity of food, including bread and butter, near the fireplace. There were two pairs of jeans on a concrete block beside the fireplace, one of which was admitted to belonging to the appellant. In the pocket of those jeans was a cartridge.

The visit of the police took place at about nine o'clock in the morning on Thursday, 24th April 1980. The appellant admitted that he had assisted in the erection of the tent on the previous Thursday. He denied that he had been in any occupation of the tent since and said that he had arrived on the premises some ten minutes or so before the police arrived. He denied any knowledge of the existence of the firearms. These denials and statements of the appellant were given in evidence as statements made to the police officers, the appellant not giving any evidence himself. As I have noted, one of the group charged did give evidence and he confirmed that the appellant had assisted in erecting the tent, and that he had not been there since. He also said that the appellant's jeans had been left at the property at the time the tent was erected. The appellant had said to the police in admitting ownership of the jeans that he had not worn them for a fortnight.

The District Judge accepted the evidence of the member of the group who gave evidence saying that there was a ring of truth in it. At the same time he resolved the discrepancy about the jeans against the appellant concluding that the appellant had lied but it seems that the Learned District Judge was incorrect in this in as much as the explanation between the two parties related on the one hand to the wearing of the jeans and on the other the leaving of them at the property.

On the evidence as I have mentioned, the Learned District Judge concluded that the appellant was an occupier and was therefore deemed to be in possession of the firearms. The question is whether on the evidence this was a proper inference to make or in other words whether on the evidence the police had proved beyond a reasonable doubt that the appellant was an occupier.

I was referred to the decision of Speight, J. in Bright v. Police (1971) NZLR, 1016 in which he considered the meaning of occupier for the purposes of s.23 of the Arms Act. He concluded in that case that an occupier does not include a visitor present on sufferance, nor an absentee owner who has let out his right to be present to another. It was in his view a person who has the right to use the premises for such purposes as he wishes, principally in the case of a dwellinghouse for the purpose of habitation. In that case the premises were a dwellinghouse and there was an admission by the appellant that he had been living at the dwellinghouse for some time.

I observe that occupation includes purposes other than habitation. A person could in my view occupy a dwellinghouse or a tent which is used for the purpose of storing his goods and clothing. It is also to be noted that the provisions of s.23 are for the particular benefit

of the prosecution contrary to the ordinary facts or inferences which would otherwise have to be proved. This may not impose any additional burden of proof on the prosecution but there can be little doubt that the prosecution must prove as an element of the charge and beyond reasonable doubt that the person concerned is an occupier. That clearly can be proved by inference but that must be a strong inference.

On consideration of the evidence I am left in some doubt as to the strength of the inference that the appellant was the occupier of the tent on the occasion in question. In the end, the only matters which distinguish him from the member of the group whose case was dismissed at the end of the prosecution case is the presence of his jeans and the fact that he had assisted in the erection of the tent. On the other hand his absence from the tent since the erection of it was confirmed by a witness who was believed. The other evidence against the appellant can be described as being negative and in any event came from the police and the statements of the appellant to the police.

This is not in my view a case where the District Judge had the particular advantage of hearing and seeing the witnesses and resolving any conflict by a finding implied or expressed as to credibility. In my view therefore it is open to me to consider the matter at large and to substitute my opinion as to the proper inferences to be made. My conclusion therefore is that there remained a reasonable doubt as to the status of the appellant as occupier of the tent. I conclude therefore that he was wrongfully convicted and the appeal will be allowed and the conviction quashed.

[signature] J

Solicitors for Appellant: McCaw Smith & Arcus, Hamilton
Solicitor for Respondent: Crown Solicitor, Hamilton