3/7/81

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

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M. No. 696/81

BETWEEN DURWARD COLIN KING-ANSELL

APPELLANT

A N D POLICE

RESPONDENT

Hearing : 25th June 1981

Counsel : B.C. Nordgren for Appellant
R.T. Fenton for Respondent

Judgment : 25th June 1981

ORAL JUDGMENT OF CHILWELL J.

Durward Colin King-Ansell appeals against conviction for being in possession of a .22 calibre rifle except for some lawful proper and sufficient purpose. The section of the Arms Act under which the conviction was sustained states :-

> "No person shall carry or be in possession of any firearm, ammunition, explosive, or dangerous weapon except for some lawful proper and sufficient purpose and the burden of proving the existence of any such purpose shall lie upon the defendant."

When two constables called on the appellant at his home at about 10 p.m. on the night in question the rifle was leaning against the wall of the defendant's lounge by his left shoulder as he sat in a sofa in the lounge. Four bullets were found in the magazine.

Bailiff Keane, who had attended about half

an hour earlier in the evening with Bailiff Hunt, said that when he tendered to the appellant a warrant of committal issued under the Imprisonment for Debt Limitation Act 1908 that the appellant said :-

> "You don't expect me to have that sort of money on me do you?"

He then made reference to being on strike. Bailiff Keane went on to say :-

> "I told him he would have to accompany me to the Auckland Central Police Station and he became emotional stating "I am not going to Mt Eden, you know who I am, those Black Power bastards will kill me.' He then turned to a female companion and stated 'Give me those keys' and he took the keys from her and ran inside the house slamming the door behind him."

Bailiff Hunt confirmed the essential aspects of the previous witness' evidence and in particular the reference about not going to Mt Eden.

Constable Kerr described his short interview with the appellant in the lounge. I read from page 9 :-

> "I asked him what the gun was for, he replied no-one was going to take him to Mt Eden tonight. I then asked him whether he was going to use the gun, he replied he was going to if they, referring to the bailiffs, had come into the house, there would have been blood shed."

Constable Hadwin corroborated the evidence of the previous witness. With reference to that part of the interview in the lounge he said at page 7 :-

> "Constable Kerr then asked the defendant what the firearm was for, the defendant replied 'no-one is going to take me to Mt Eden'. Constable Kerr then asked the defendant if he would have used the firearm and the defendant replied ' if they had got into the house there would have been bloodshed."

It ought to be said that in response to further questioning concerning whether the appellant understood that he may have committed an offence or not he replied that he considered that he was entitled to protect his own property.

The appellant gave evidence. In cross-examination his attention was specifically drawn to the incident involving the two bailiffs. He said at page 18 :-

> "You heard him (that is Constable Kerr) give evidence that your reply to that question was 'no-one is going to take me to Mt Eden tonight'? ..... That's right.
>
> Then he said were you going to use the gun, correct? ..... That's right.
>
> To which you replied that if the bailiffs had come in there would have been bloodshed? ..... If they tried to break into the house, I think thats quite reasonable."

and further down the page :-

> "Do you consider it would have been proper for you to use a firearm if they had attempted to come into your house? ..... If they attempted to break into the house, yes.
>
> And you admit you said in your words that if they had come in there would have been bloodshed? ..... Quite likely, yes.
>
> You would have used that firearm against them? ..... As a weapon yes, I don't know if I would have fired it, it has not been fired for such a long time. The barrel is probably blocked up with mud. I might have used it to make them leave or something like that."

Earlier in cross-examination he was asked certain general questions. At page 17 for example :-

> "Why do you keep a loaded firearm so handy to you in the house? ..... As I said earlier there have been several attempts on my life, one attempt to run me down, I was in fact knocked off my motorcycle and the car backed up over the cycle.
>
> Are you saying you keep this rifle to protect

> yourself? ..... If necessary, anyone in politics lives in fear someone will do something to you. I think Bill Anderson is an example recently."

and later :-

> "From your evidence you said that you would be tempted to use a rifle against a person if a person broke into your house? ..... I would, after all if someone breaks your door down trying to get into your house if you don't know how many people are coming in you grab the nearest thing available.
>
> Do you consider using a rifle and possibly shooting a person would be a lawful, proper and sufficient purpose for that person? ..... Under certain circumstances, yes, if someone is breaking into your house. There have been numerous cases cited in the Courts."

The District Judge had to determine the question of purpose. He had virtually uncontested evidence from the constables as to the appellant's attitude towards the request by the bailiffs about paying a certain sum of money and his response that no-one was going to take him to Mt Eden, and the uncontested evidence that if these bailiffs had got into the house there may have been bloodshed. Indeed, on his own evidence the appellant virtually conceded everything that the constables had said in that regard. There was evidence that the bailiffs had arrived at the property; they had shown the appellant a warrant; they had mentioned an amount of money that was due. Then there was the discussion about Mt Eden whereupon the appellant took refuge in his house. Within a relatively short space of time thereafter two constables arrived and found the rifle in the lounge near to where the appellant was sitting with ammunition in the magazine.

One of Mr. Nordgren's main criticisms of the judgment of the District Court Judge is that he

placed too much emphasis upon the questions put to the appellant in cross-examination. With some justification he observed that some of the questioning was hypothetical in nature and the answers given to general questioning about what he might have done with the rifle are the sort of answers that any honest, respectable individual might give if asked that sort of hypothetical question and if he happened to own a rifle. It is the kernel of Mr. Nordgren's submissions that the appellant's state of mind ought not to have been determined in the fashion that it was by the Judge on the basis of hypothetical questions and that there were no overt acts upon which the Judge could draw. He submitted that really the only evidence against the appellant were his out of Court and in Court statements. I do not entirely agree with that submission because the District Judge did have the evidence as to what in fact happened when the bailiffs arrived and up until the time the two constables arrived. It was clearly a situation in which two court officers were endeavouring to enforce a committal warrant.

With that background and having regard to the statements made to the bailiffs the Judge had the advantage of hearing the witness give answers to questions relating to his attitudes towards the bailiffs and answers to his attitude generally towards self protection and protection of his home and the use of the firearm. In addition, the Judge had the benefit of seeing and hearing the appellant and of assessing for himself the weight to be given to his evidence in so far as it was a pointer to his state of mind.

On the basis of the evidence so far discussed in this judgment I have come to the conclusion that it supports the inference that the appellant's real purpose

in being in possession of that firearm was to protect himself and his house from those who bear him ill-will attempting to gain unlawful entry and specifically to protect himself and his house from the two bailiffs outside had they attempted to enter.

It was put to me by Mr. Nordgren that the Court should not approach the matter on the basis that the appellant knew that the bailiffs were in fact bailiffs attempting to execute a warrant in the ordinary course of their duties because there is a sufficient basis in the evidence for the assumption that the appellant was justifiably suspicious that they were pretenders not bailiffs. As to that the District Judge specifically found against the appellant. He indicated in his judgment that he preferred the evidence of the bailiffs to that of the appellant over the issue of identification. In particular he said :-

> "I have considered carefully the evidence relating to the defendant's statement to the policeman to the effect that no-one was going to take him to Mt Eden, that indicates quite clearly that he knew he was dealing with bailiffs."

The District Judge took the view that the appellant had a general reason or purpose for having possession of the rifle. That is to be found in that part of his judgment where he said :-

> "Overall in my view it is not a lawful, proper and sufficient purpose for a person to retain a loaded firearm in his house with a view to repelling invaders ....."

And then as to the specific incident he took the view that the appellant had a purpose so far as repelling

the bailiffs were concerned. He went on to say, following the passage just referred to :-

> "and as far as this specific action is concerned when the philosophy was actually illustrated with reference to a person who had a legitimate reason for speaking to the defendant andeven arrest him the purpose was even less lawful by being put into effect."

It is the submission of the respondent on this appeal that, taking the evidence as a whole, the appellant had a wrongful general overall purpose; also a wrongful purpose at the time when the bailiffs engaged him in conversation and a little later that evening at the time when the constables arrived. It is not necessary, of course, for the respondent to establish a purpose. It is for the appellant to establish on the balance of probabilities that he had a lawful, proper and sufficient purpose for possession. I take the view that the Judge was justified in coming to the conclusion that the appellant had not discharged the onus of proof with regard to his general possession nor with regard to his specific possession at the time when he was conversing with the bailiffs and later when conversing with the constables.

In so far as self defence was raised by the appellant on this appeal the appellant, in my judgment, failed to establish on balance of probabilities that he was in fact and in law acting in self defence in a specific self defence situation. For the foregoing reasons the appeal is dismissed.

Solicitors :

Appellant : Newberry Mead & Davidson, Auckland.
Respondent : Crown Solicitor, Auckland.