

IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

GR 6/84

146

BETWEEN EWAN GRANT MIDGLEY

Appellant

A N D THE POLICE

Respondent

Hearing: 10 February 1984

Counsel: A.J. Shaw for Appellant
 G.D. Pearson for Respondent

Judgment: 17 February 1984

JUDGMENT OF ROPER J.

This is an appeal against conviction and sentence on a charge pursuant to s.16B(1) of the Arms Act 1958 of being in possession of an explosive in a public place except for some lawful purpose; and against sentence only on a charge of causing bodily injury by driving a motorcycle in a manner which was dangerous having regard to all the circumstances. The sentence was three months' imprisonment on each charge, the terms to be concurrent.

At about 12.30 a.m. on the 23rd October last the police were called to a disturbance at a party in a house at Rathmore Street, Timaru and were asked by the owner to clear the house. Members of a local motorcycle gang, who were among those present, left the house and the street, but a short time later two or three, including the Appellant, returned on their motorcycles and rode through the crowd of police and former party-goers who were gathered on the street. According to Constable Leech, a dog handler, the Appellant rode his motorcycle at him and the dog, but the Constable was able to avoid a collision by pulling his dog clear. The Appellant made a U-turn and again drove at the Constable. Again the Constable was able to pull the dog clear but he was himself struck on the leg. The

dog became entangled in the motorcycle with the result that both dog and constable were dragged a short distance as the Appellant accelerated away, until the motorcycle fell on the dog. It appears there were no serious injuries to either the Constable or the dog. When the Appellant was searched after his arrest it was found that he had in his possession two explosive devices referred to as tuna bombs. It seems that they are used by fishermen to drive seals away from their nets, or control the movement of tuna. I understand that they look like outsize fireworks and have a fuse which will continue to burn under water. Mr Morehouse, an Inspector of Explosives, referred to them thus:-

" From my tests those devices are designed to be put out from a fishing boat into the sea where the device will continue, the fuse will continue to burn and the device will explode under water. They are manufactured under very high standard and it is my experience that they are very reliable under operation. When the fuse ceases to burn the item explodes with a very very loud report and there is associated with that report a considerable detonation flash. It would be, I would say, a very powerful item in this class. On dry land, as I said the effect would be a loud report associated with a very bright detonation flash. There is considerable potential energy in the actual device itself and it has capacity to, under certain circumstances, to incur injury and damage to property."

Mr Morehouse then went on to explain the law relating to such devices in terms of the Explosives Act 1957. In terms of the Schedule to that Act the devices come within the Class 7 classification which deals basically with "fireworks". They can only be sold and purchased by holders of permits issued under the Explosives Act and its regulations, and apparently come within this provision of the Explosives Act:-

" 42. Explosives not to be carried by night -

Except with the prior consent in writing of an Inspector given subject to such conditions as he thinks fit, no person shall carry any explosive by land at any time during the period commencing at sunset and ending at sunrise."

The learned Judge dealt with the matter in this way:-

"Under Section 42 of the Explosives Act, it appears that except with the prior written consent of the Inspector of Explosives it is unlawful to have possession of things like these between sunset at night and sunrise in the morning. The events that we are concerned with occurred around 12.30 a.m., on Sunday 23rd October."

And further:-

" I have to wonder about this other charge against Mr Midgley. I feel rather that there are some sinister aspects of having this sort of explosive device in his possession. One can surmise the sort of things these things might be used for. He says he had got them from a fisherman friend, and that as far as he was concerned they were like crackers, and there was nothing sinister about them at all. It is unlawful really to be in possession of them at night without the consent of the Inspector and indeed without a permit. They are not issued to anybody, and must be used for the purpose for which they are issued. He could not have had them for a lawful purpose in these circumstances."

Mr Shaw made two basic submissions, the first being that the learned Judge erred in holding that s.42 of the Explosives Act applied to the carriage of explosives on the person. His second point was that even though the Appellant's possession was unlawful in that the tuna bombs had not been purchased pursuant to a permit as required by Reg. 71 of the Explosives Regulations 1959, it did not follow that the Appellant's purpose was unlawful in terms of s.16B of the Arms Act. I reserve my opinion on whether s.42 had any application to the particular circumstances, but accept Mr Shaw's submission that unlawful possession does not necessarily make for unlawful purpose. In my opinion this case fell to be decided under the Arms Act not the Explosives Act. He was not charged with any offence under the latter Act and it is to be noted that the definition of "explosive" in the two Acts is quite

different. In the Arms Act the definition is:-

"'Explosive' includes any article of which an explosive forms part and which is capable of destructive effect by way of explosion."

And in the Explosives Act, so far as is relevant:-

"'Explosive" means any substance or mixture or combination of substances which in its normal state is capable either of decomposition at such rapid rate as to result in an explosion or of producing a pyrotechnic effect."

Unlawful possession was not the key to the present problem. One in lawful possession could still have an unlawful purpose and vice versa.

The Appellant's explanation was that he had obtained the bombs from a Nelson fisherman who had brought a whole box to the motorcycle club's headquarters and distributed them. The Appellant claimed that he intended keeping them for Guy Fawkes night, and that if he had known his possession was unlawful he would certainly not have carried them about with him.

The question then is whether the Appellant established on balance that his purpose was lawful. Because of the approach he took to the matter the Trial Judge did not really consider the Appellant's explanation.

The evidence from Mr Morehouse established that the bombs came within the definition of an "explosive" in the Arms Act and in my opinion the Appellant's explanation does not establish lawful purpose. The bombs were certainly not conventional fireworks and I cannot accept Mr Shaw's argument that there is no prohibition on a person having "explosives", as defined in the Arms Act, in possession if his sole intention is to create a display on Guy Fawkes night. If Mr Shaw is right then there would be no bar to exploding sticks of gelnite to celebrate the event.

I am satisfied that the Appellant was properly convicted on the "explosives" charge but that in the circumstances a sentence of three months' imprisonment was manifestly excessive. On that charge the appeal against sentence is allowed and in lieu of the sentence of imprisonment he will be convicted and discharged.

I fear that that result is academic so far as the Appellant is concerned because the appeal against three months' imprisonment on the dangerous driving charge must fail. Although the Appellant has no serious list of previous offending this was, as the Trial Judge noted, as serious a case of dangerous driving as could be envisaged, and the circumstances in which it was committed made a term of imprisonment virtually inevitable.

The appeal against sentence on the dangerous driving charge is therefore dismissed.

A handwritten signature in dark ink, appearing to be 'J. H. J.', is located on the right side of the page.

Solicitors:

Petrie, Mayman, Timpany & More, Timaru, for Appellant
Crown Solicitor, Timaru, for Respondent