IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

GR 85/83

BETWEEN S CARTER

Appellant

A N D THE POLICE

Respondent

Hearing: 9 February 1984

Counsel: S.R. Crush for Appellant
I.H. Main for Respondent

ORAL JUDGMENT OF ROPER J.

This is an appeal against conviction and sentence on a charge pursuant to s.16 of the Arms Act of discharging a firearm, namely a gas operated pistol, in a manner likely to injure or endanger the safety of any person. The Appellant also pleaded guilty to a separate charge of presenting a firearm.

There is some doubt from the words used by the learned Trial Judge at the time of sentencing as to whether the Appellant was fined $80 on each charge, together with Court costs and witnesses expenses, or whether the fine was intended to be $80 overall. I have had the criminal record examined and it is now clear that the Appellant was fined $80 on each charge. In addition an order was made for forfeiture of the pistol.

The circumstances were that on the afternoon of Saturday, the 30th April, the Appellant and some teenage friends were target shooting with the pistol at the Appellant's home. Two young lads, M 11 and F 10, came past the Appellant's house and called out to the Appellant and his friends to stop calling them wankers, referring to an incident that had apparently occurred some time earlier. It seems that Michael and Brendon were simply engaging in cheeky conduct against older boys, which is a common state of affairs. The Appellant pointed the pistol at them and the two boys ran off, and I assume that is the basis for the presenting charge to which the Appellant pleaded guilty. Michael went to the corner of the street and peeped round, while it appears

E remained somewhere on the opposite side of the road to the Appellant's house. According to M the Appellant fired three shots in his general direction, although not at him, and he said he heard slugs hit the tin roof of a shed in the cemetery across the road. It appears that the shed was some distance from where M was hiding. E confirmed that the pistol was fired on that occasion and it appears it will make quite a loud bang whether loaded with slugs or not, but he did not hear any slugs hit the tin roof.

One of the Appellant's friends, Loe, was called as a prosecution witness, and he was adamant when the pistol was fired it was unloaded. When interviewed by the police the Appellant said the pistol was unloaded and he gave evidence to the same effect. There was some evidence of the precautions that had been taken to ensure that it was unloaded.

The learned Trial Judge dealt with the issue in this way:-

> "The boy McKay says three shots were fired, he said he heard the bang of the pistol operated by the defendant and then heard the slugs hitting the shed roof at the cemetery three times. The question is is that evidence of the boy M reliable, has he imagined or invented that. The contention of the defendant is that he had been firing this pistol at a target at an address in Greta Street. He was pretty sure it was empty. Fired a couple of times at the target to make sure it was empty of any slugs, and at the time when he pointed it down the road into the ground and pulled the trigger two or three times to make sure no slugs in the gun as he knew he was going to give the lad Mckay a fright. There is the question of which of these two accounts I believe. I do not believe that the boy McKay invented hearing the slugs hitting the roof of the shed in the cemetery a short distance away. That is as I view the case."

I am of the opinion that this was a case where the learned Trial Judge should have been left in reasonable doubt as to guilt. It was not, as he stated, a matter of deciding which of the two accounts, that of the Appellant or that of M , was to be believed, but whether on the whole of the evidence a reasonable doubt remained, and in that regard consideration should have been given to the evidence of the other young boy F who heard no slugs hit the roof and the Appellant's friend Loe. It is also relevant that the prosecution case in the result depended entirely on the evidence of a very young boy, M . There

was certainly no corroboration of M 's evidence, and indeed all of the other evidence was to the contrary, namely that when the pistol was fired there were no slugs in it.

It has been suggested by Mr Main that the Appellant could perhaps have been convicted on the basis of recklessness in that, although he may have taken precautions to ensure that the pistol was unloaded, those precautions were inadequate. That was not the way the case was presented in the lower Court as I read the evidence, and indeed was not what the Appellant was charged with. He was charged with firing the pistol without reasonable cause in a manner likely to injure or endanger the safety of others. He could, in terms of the Act, have been charged with firing with reckless disregard for the safety of others. It follows that I am not prepared to amend the matter for the purpose of bringing about a conviction.

The appeal against conviction is therefore allowed. The fine, Court costs and witnesses' expenses on that charge are quashed. The order for forfeiture is to remain as part of the sentence on the charge to which the Appellant pleaded guilty, namely presenting a firearm.

Solicitors:

Fitch, Mackay, Walker & Crush, Oamaru, for Appellant
Crown Solicitor, Oamaru, for Respondent