IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

GGHH set 3.

AP 270/89

[redacted]

BETWEEN ROBERT SANGSTER

Appellant

2246

AND THE POLICE

Respondent

Hearing & Judgment: 1 December 1989

Counsel: A.S. Vlatkovich for Appellant
Ms C. Evans for Respondent

ORAL JUDGMENT OF ANDERSON J.

The appellant appeals against conviction and sentence in respect of three offences under the Arms Act 1983. The convictions were entered after a defended hearing in the District Court at Auckland on 25 July 1989, sentences being imposed in the District Court at Auckland on 25 October 1989.

The first appeal against conviction relates to breach of s.45 of the Arms Act, the appellant having charged that on 18 March 1989 he was in possession firearm, namely a shotgun, except for some lawful, and sufficient purpose. S. 45(1) of the Arms Act as follows:

> "Every person commits an offence and conviction on indictment to imprisonm not exceeding two years or to a fir

> $4000 or to both who, except for some lawful proper and sufficient purpose
> (a) carries; or
> (b) is in possession of - any firearm, airgun, pistol, restricted weapon, or explosive."

Section 45(2) provides as follows:

> "In any prosecution of an offence against subsection (1) of this section in which it is proved that the defendant was carrying or in possession of any firearm, airgun, pistol, restricted weapon, or explosive, as the case may require, the burden of proving the existence of some lawful, proper, and sufficient purpose shall lie on the defendant."

The appellant was also convicted of an offence against s.53(2) of the Arms Act, which provides as follows:

> "Every person commits an offence and is liable on conviction or to a fine not exceeding $4000 or to both who, being a person who has in his charge or under his control a firearm, airgun, pistol, or restricted weapon loaded with a shot, bullet, cartridge, missile, or projectile, whether in its breech, barrel, chamber or magazine, leaves that firearm, airgun, pistol, or restricted weapon in any place in such circumstances as to endanger the life af any person without taking reasonable precautions to avoid such danger."

The appellant was also convicted of an offence pursuant to s.20(1) and (3) of the Arms Act in that not being the holder of a firearms licence was in possession of a firearm namely a shotgun.

In relation to the charge of possession except for some lawful, proper and sufficient purpose, the appellant was sentenced to 6 months imprisonment. In relation to the breach of s.53(2) of the Arms Act, the

appellant was also sentenced to 6 months imprisonment to be served concurrently. In relation to the breach of s.20, he was sentenced to 3 months imprisonment which is the maximum.

The brief facts were that a police party entered the appellant's small dwelling in a relatively remote part of Albany pursuant to a search warrant and discovered a shotgun in the appellant's bedroom. This weapon had been cut down. The extent to which the muzzle or stock had been abbreviated is not established in the evidence. There is no reference to size in the judgment. The weapon has not been produced as an exhibit on appeal so that it is entirely a matter of speculation as to the extent to which this weapon had been modified. However, the appellant was not charged with possession of a pistol so I take it that the modification was not too extreme. This weapon was found in the appellant's bed with a single cartridge in the breach. When the weapon was drawn to the appellant's attention and he was asked why the weapon was loaded, he explained to the police that at night he is out in the middle of nowhere, which I take to indicate that the weapon was kept in a loaded condition out of a sense of nocturnal insecurity of an unspecified nature. He then further explained that it got quite scary at night and that he heard a lot of strange noises. He said he had obtained the weapon from a former flatmate. He later and belatedly explained that he possessed the weapon for the purposes of shooting rabbits and oppossums. He did not have a firearm licence which he

conceded and there was no contest about that particular offence.

The learned District Court Judge correctly directed himself that the onus lay on the appellant to establish on the balance of probabilities that the weapon was in his possession for some lawful purpose. He found a finding of credibility in effect against the appellant in determining that the burden had not been discharged. In relation to the appellant's explanation, belated as aforesaid, that the weapon was possessed for the purpose of shooting vermin, he expressed the view that it would be inappropriate for such purposes because it would blow the specified fauna "to smithereens". There is no evidence relating to the fire power or firing characteristics of the weapon nor is this an area where a Court could reasonably take judicial notice of the fire power of the weapon in question.

This point was made by counsel on appeal along with the point that in any event, if the effect of firing the shotgun at rabbits and oppossums was as traumatic as the learned District Court Judge apprehended, then such a consequence was entirely consistent with the object of eradicating vermin. That may be so. It takes little imagination, however, to realise that a shotgun kept for the purpose of disposing of noxious animals is highly unlikely to be kept in a loaded condition between the sheets of one's

bed. The finding of credibility is supported by that objective aspect of the evidence and in the event the learned District Court Judge had the opportunity of assessing the appellant in a manner that this Court does not have the advantage of.

Whatever the original purpose of the appellant may have been in acquiring the weapon at the relevant time of possession, he was not on the evidence and on the lower Court findings then in possession for some lawful purpose.

I observe that in Gemmell v The Police, AP 27/86, Christchurch Registry, judgment 26 March 1986, Hardie Boys J. expressed the view that:

> "This country has not yet come to the pass where a citizen can claim self-defence in a broad, general way as a lawful, proper and sufficient purpose for keeping a loaded weapon on his bed."

In this case the retention of the weapon in a loaded state in the appellant's bed in order to defend himself from a threat perceived to exist in scary noises in the night could not be a lawful, proper and sufficient purpose and the appeal against conviction in relation to that particular charge is dismissed. I will return later to the appeal against sentence thereon.

In relation to the next matter, namely the breach of s.53(2) of the Arms Act the learned District Court

Judge found there to be in existence "such circumstances as to endanger the life of any person without taking reasonable precautions to avoid such danger" in the perceived possibility that any other person than the appellant "albeit not having authority could have entered the property and if for instance such persons had decided to use the bed and had found the firearm concerned, then in the case of an unsuspecting person the firearm loaded in the condition it was .....(could) present a danger to life." There is nothing in the evidence to suggest that actual or implied invitees had access to the appellant's residence let alone his bedroom so that the danger apprehended by the learned District Court Judge could only have related to the speculation of some unauthorised trespasser forcing entry through the door or window of the residence and in some improbable way deciding to use the appellant's bed and thereby being endangered by a loaded shotgun between the sheets. With all due respect to the learned District Court Judge, I do not regard that scenario as sufficiently cogent as to amount to circumstances such as to endanger life. The danger could not have applied in a relevant way to the life of the appellant himself as he could scarcely overlook the fact of the loaded shotgun between the sheets of the bed that he would customarily lie in. I therefore find the appeal against conviction on that charge succeeds. The conviction and sentence thereon are quashed accordingly.

The appeal against conviction on the charge of not having a licence for a firearm was probably included by an oversight rather than an excess of caution having regard to the guilty plea which was entered and the appeal against conviction on that charge is dismissed.

I turn now to the appeal against sentence on the principal charge remaining. In considering sentence the learned District Court Judge stated that the Courts have commented before that weapons such as the one in issue has no honest legitimate use, that it is a lethal weapon and the more so with a cartridge in its breach, that it has been known to be used both in the course of argument and for inducement. He found that the appellant had a long list of criminal offending although such list did not include previous firearm offences. He took into account that the appellant had not offended ecept in relation to certain traffic matters for the past 6 years. He stated, however, that the Court of Appeal in cases such as Wootton, CA. 442/89, had made it clear that those who have this sort of weapon about them must expect a prison sentence and sentences of a year or more have been handed down. He said that he was aware that in many of those cases firearms of the particular nature had been carried in a vehicle whereas this was a case involving private property. I would add that it was the private residence of the appellant himself rather than merely private property. He accordingly determined that there was no option really but a sentence of

imprisonment and that the real issue was the length of the term. In the event he came to the view that 6 months imprisonment would be appropriate.

The general observations made by the Court of Appeal in Wootton in a case involving the aggressive presentation of a sawn off shotgun to a publican whom Wootton had had a verbal altercation with, are these:

> "There can be no excuse whatever for the presentation of a firearm or indeed for the carriage of a firearm such as this. The Court must always take a serious view of every occasion on which the use of such a fiream is resorted to. "

The Court of Appeal considering that particular case involving as it did the presentation of a sawn off shotgun at close quarters with the muzzle pointing generally in the direction of a number of people visible through an open door of the hotel bar was a serious case of its kind, wherefor the sentence of 12 months imprisonment in the lower Court would not be interfered with. With due respect to the learned District Court Judge I do not find on my consideration of that case the endorsement by the Court of Appeal of a sentencing principle to the effect that those who have a weapon which is a shotgun with alterations to its length must expect a prison sentence. The general statement of principle in Wootton is that there is no excuse for the presentation of a firearm such as that in issue or for the carriage of it and that the Court must always take a serious view of every occasion on which the use of such a

firearm is resorted to. I accept, however, that there must be a general concern in the community at the existence and possession of modified shotguns. Although, as counsel for the appellant urged, there may be legitimate reasons for adjusting the barrel length of a sawn-off shotgun if one is a bona fide hunter accustomed to travelling on motor cycles or off-road vehicles, the more obvious use of such weapons in terms of the community's perception is their use for the purposes frequently associated with violence including armed robbery. In such cases the stock and/or barrel is reduced in order to facilitate concealment in pursuit of potentially violent and other criminal purposes. It is for such reasons that there is a general policy approach that the possession of such weapons except for a lawful and proper purpose will result in very firm sentences, but the facts of any particular case must be taken into account.

This is not such a case as, for example, Wootton. It is not such a case as, for example, Fenton, S.130/89, Auckland High Court Registry, 29 November 1989, where a man in a state of reduced sensibility by reason of drugs was found to have concealed in a sports bag which he carried into a shop where he effectuated a petty theft, a shotgun modified to bring it within the definition of pistol. Fenton had overall a significantly worse history of offending than the present appellant. The weapon in his case had a cartridge in the breach and one need hardly

say more to indicate the potential menace such a man represented. A sentence of effectively 12 months imprisonment was imposed.

This case is not of that degree. The unlawful purpose which has existed in this case was the purpose of a general and non specific preparedness to use this essentially fearsome weapon in the event of night marauders. Such circumstances are not consistent with the use of such weapon for actively perpetrating crimes of violence such as armed robbery, or, as in a case recently determined in the High Court, murder. This weapon was not in view of the public as in Wootton. It was not presented at anyone as in Wootton. It really remained a potentially lethal weapon in the event the appellant might be startled or feel himself attacked by persons with criminal intent in relation to him or his residence. Morever, I would not myself regard his criminal record as being quite as bad as seemed to the learned District Court Judge. When the appellant was 17 he got himself involved in some offences of dishonesty, including burglary on two occasions. When he was 18 he was convicted of theft and ordered to carry out 80 hours community service, but except in relation to three traffic matters he has not committed a criminal offence for almost 5 years before this incident. This is not the history of a criminal recidivist, this is the record of a man whose youth was irresponsible but whose more mature years were attended by greater responsibility until the

present matter.

Bearing all these considerations in mind I am brought to the view that the sentence of 6 months imprisonment is clearly excessive in this case but that for the policy reasons which I have previously adverted to a sentence of imprisonment nevertheless was appropriate.

The appellant has already spent 2 weeks in custody between sentencing and the grant of bail pending appeal. In this particular case, the circumstances of which are a little unusual, I would not have thought a sentence of more than 2 months imprisonment was warranted particularly given the reasonably successful attempts of the appellant for the past 5 years to conduct himself responsibly. Making allowance for the two weeks in custody, I allow the appeal against sentence by substituting for the sentence of 6 months imprisonment a sentence of 6 weeks imprisonemnt commencing today.

In relation to the sentence for being in possession of a firearm without a licence, that fact is itself one of the operative factors really in the more significant offence. Standing on its own it would be difficult indeed to ascertain how the maximum penalty on that charge could be imposed. It is an offence which I would apprehend is often dealt with by way of a fine or sometimes periodic detention. Neither is appropriate in

this case. A relative degree of seriousness therefore must be reflected in what is effectively a notional term of imprisonment in that it would be served concurrently with the term now substituted. The process is relatively academic. I allow the appeal against sentence of 3 months imprisonment thereon by reducing it to 2 weeks imprisonment to be served concurrently.