

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : McGEE -v- CHITTY [2011] WASCA 125

CORAM : PULLIN JA
NEWNES JA
MAZZA J

HEARD : 15 DECEMBER 2010

DELIVERED : 3 JUNE 2011

FILE NO/S : CACR 54 of 2010

BETWEEN : PETER McGEE
Appellant

AND

SIMON CHITTY
Respondent

ON APPEAL FROM:

Jurisdiction : SUPREME COURT OF WESTERN AUSTRALIA

Coram : SIMMONDS J

Citation : McGEE -v- CHITTY [2010] WASC 67

File No : SJA 1072 of 2009

Catchwords:

Appeal against acquittal - Failing to provide and use adequate storage facilities for firearms - Whether it was open to the magistrate to conclude that the firearms were in transit

Legislation:

Criminal Appeals Act 2004 (WA), s 14(1), s 14(2), s 18, s 30(4)
Firearms Act 1973 (WA), s 5, s 5A, s 8, s 11(1)(b), s 11(1)(c), s 11(3)(b),
s 11(7)(b), s 11A(1), s 11A(2), s 11A(3), s 11C, s 16, s 17(1)(c), s 18(4b),
s 20(1)(aa), s 23(9), s 23(9)(a), s 23(9)(d), s 23(9)(d)(i), s 23(9)(d)(ii), s 34(2)
Firearms Amendment Act 1996 (WA)
Firearms Regulations 1974 (WA), reg 11A, sch 4

Result:

Appeal allowed
Verdicts of acquittal be set aside
Verdict of guilty be recorded on each of RO 5721 to 5724 of 2008
The appellant's sentencing remitted to Magistrate Gluestein

Category: B

Representation:

Counsel:

Appellant : Ms C J Thatcher
Respondent : Mr S B Watters

Solicitors:

Appellant : State Solicitor for Western Australia
Respondent : David Walls & Co

Case(s) referred to in judgment(s):

Martino v Green [2001] WASCA 181; (2001) 123 A Crim R 301
McGee v Chitty [2010] WASC 67
Turner v Keegan [2001] WASCA 9

PULLIN JA
NEWNES JA
MAZZA J

1 **PULLIN JA:** I agree with Mazza J.

2 **NEWNES JA:** I agree with Mazza J.

3 **MAZZA J:** The respondent was charged in the Magistrates Court at Rockingham with seven counts of failing to provide and use adequate storage facilities for firearms or ammunition, contrary to s 23(9)(d)(i) of the *Firearms Act 1973* (WA) (the Act). Four of the charges, RO 5721 to 5724 of 2008, related to firearms, particularly a Boito single barrel 12-gauge shotgun, a CBC single shot .22 Hornet rifle, a CBC single shot .410 shotgun and a Chuckster .22 magnum rifle. The other three charges related to ammunition.

4 The respondent pleaded not guilty to all of the charges and was tried before Magistrate Gluestein. The learned magistrate upheld an application of no case to answer made in respect of the three ammunition offences and he dismissed those charges. The respondent gave evidence in his defence of the four firearms charges. After hearing closing submissions and having reserved his decision, on 5 June 2009 the magistrate acquitted the respondent of each of the four firearms charges.

5 The appellant appealed against the magistrate's decision to acquit the respondent of the firearms charges. That appeal was heard by Simmonds J. On 31 March 2010, Simmonds J dismissed the appeal: *McGee v Chitty* [2010] WASC 67. The appellant now appeals to this court against Simmonds J's decision.

Background

6 The facts are not disputed and can be shortly stated.

7 The respondent had, at the relevant time, been the holder of a firearms licence for approximately 14 years.

8 In March 2008, the respondent was in the process of moving house from an address in Parmelia Avenue, Parmelia, to an address in McKanna Gardens in the same suburb. On 19 March 2008, the respondent transported, from his old house to his new house, four firearms licensed to him, together with a firearms cabinet in which he had stored them and which had been bolted in at his previous house. He arrived at the new house with the firearms and cabinet at approximately 5.30 pm.

9 The respondent left the cabinet in the shed and took out the firearms. He then placed them in the master bedroom in the new house, up against a wall.

10 The respondent intended to bolt the cabinet to his bedroom wall in the new house on that same day, but a power failure at around 7.30 pm prevented him from using his electric drill to fix dynabolts into the wall to bolt the firearms cabinet in place. The power was restored some time later. However, at that point the respondent had gone to bed.

11 The respondent slept that night in his bedroom with the firearms approximately 1.5 metres away from him. The house was fitted with security screens, and the doors, screens and roller shutters at the front of the house were all locked. It was not disputed by the respondent that while the firearms were in his room he possessed them.

12 The following morning, the police searched the respondent's house in regard to an unrelated matter and discovered the firearms in the bedroom.

13 In cross-examination, the respondent said that he did not put the cabinet into his room because it was heavy. He said that the firearms were put into his bedroom where they were 'under my possession as safe keeping': blue AB 67.

The magistrate's reasons

14 The magistrate's reasons for decision are brief.

15 After correctly describing the onus and standard of proof, his Honour set out the respective cases. He said:

It very clearly was the prosecution case that [the respondent], following what I found to be a lawful search by police officers, had firearms and associated items located in an unstored fashion, or should I say not adequately stored as is required by the *Firearms Act*. They were located in his bedroom. That, prima facie, founds the proper charges that were levied against [the respondent].

Following the giving of evidence in his defence [the respondent] puts to the court that he had not really - it is my own language, it is not necessarily a language that is befitting of the particular legislation but he had a reason for the firearms and associated items not at that particular time to be adequately stored as is required by the [A]ct (blue AB 69).

16 The magistrate then set out the uncontested circumstances of how the firearms came to be in the respondent's bedroom. He concluded that description by saying:

By an interesting twist of fate the police arrive on the scene the next day or the next morning in connection with other matters and of course as we know locate the firearms in an unstored or inadequately stored manner (blue AB 69).

17 The magistrate continued:

The proposition put to the court is that there must be necessarily times when a person with a firearms licence has those items and in a situation where they are not stored in the appropriate facility. For example, in transit when the person holding the licence might be heading off to a farm for shooting purposes or to a club, for sporting pursuits in relation to those firearms.

Thirdly [sic], defence counsel would put it to me that this is a situation as per the evidence of the [respondent] where necessarily for a period of time the guns and associated items in transit from one house to the other would not be properly stored and of course logic says that that is quite correct.

It is significant that the [respondent] was not cross-examined to any great extent on these points about the transfer from one house to the other, the power failure, so that on his evidence I can accept that there may have been a reasonable excuse for him to have those firearms in the manner that he had them when police arrived to do their search of the premises.

When I read into the provisions of subparagraph (a) of section 23(9) of the *Firearms Act* quite clearly the proposition put to me by defence counsel would seem to be inferred in the legislation. What I am left with is that there is the possibility on the defence case that there was a reason for the firearms to not be appropriately stored. That leaves a doubt in the prosecution case and I must therefore acquit ... [the respondent] (blue AB 69 - 70).

18 It emerges from the magistrate's reasons that he found that the firearms which the police discovered in the respondent's bedroom were 'in an unstored or inadequately stored' condition and that they were 'in transit from one house to the other'. Further, it appears that the magistrate concluded that there may have been a reasonable excuse for the respondent's failure to properly store the firearms, namely the power failure.

19 The concluding paragraph of the magistrate's reasons is not altogether clear. On one view, he implied into s 23(9)(d)(i) of the Act an element, which the appellant had failed to negative, that the offender must

not have a reasonable excuse for failing to comply with the provision. On another view, the magistrate's reference to s 23(9)(a) of the Act could mean that the magistrate's opinion was that the firearms were, at the time the police discovered them, in the respondent's physical possession otherwise than by way of storage, because they were in transit. It may be that the magistrate reasoned that s 23(9)(d)(i) of the Act had no application because it operates only where the obligation to store had arisen.

The appeal to Simmonds J

20 There were two grounds of appeal argued before Simmonds J. Each was designed to deal with the two possible interpretations of the magistrate's reasons. They were:

1. The learned Magistrate erred in law by applying the wrong test under section 23(9)(d)(i) of [the Act] in finding that the [respondent] had a reasonable excuse for failing to store the firearms in accordance with the Act; and
2. The learned Magistrate erred in law by finding that the firearms were 'in transit' and therefore erroneously applying section 23(9)(a) of the Act.

21 Simmonds J upheld ground 1: *McGee v Chitty* [18] - [54]. The respondent in the appeal to this court did not challenge Simmonds J's conclusion or reasoning with respect to this ground. Nothing more needs to be said about it.

22 Simmonds J dismissed the second ground of appeal. His reasoning for doing so was encapsulated in his reasons as follows:

In my view possession of a firearm in transit is capable, at least in some circumstances, as being seen as 'possession otherwise than by way of storage'. Further, in this case the evidence, principally the respondent's evidence, in my view sufficiently raised the matter of such possession to justify the learned magistrate's conclusion that the prosecution to secure a conviction had to negative, but had not, that the respondent's possession was otherwise than by way of storage: *McGee v Chitty* [80].

As I understand his Honour's reasoning, he upheld the magistrate's decision to acquit the respondent because, as the firearms were in transit, there was insufficient evidence to prove beyond reasonable doubt that the respondent's responsibility to use adequate storage facilities had arisen. The consequence of Simmond J's dismissal of ground 2 was that the appeal was dismissed and the acquittals stood.

The appeal to this court

23 There is one ground of appeal which is as follows:

The learned Judge erred in fact and law in failing to find that at the relevant time the Respondent, being responsible for the storage of firearms, failed to provide and use adequate storage facilities to ensure their safety.

Particulars

- (a) The learned Judge erred in fact and law by finding that, at the relevant time, the Respondent's firearms were in transit;
- (b) The learned Judge erred in fact and law by finding that, at the relevant time, the Respondent had custody or control of his firearms otherwise than by way of storage; and
- (c) The learned Judge erred in law in misconstruing the responsibility of a responsible person to ensure storage of a firearm.

24 The ground of appeal is erroneous in that Simmonds J did not make any findings of fact. During oral submissions, it became apparent that the substantive ground of appeal is that Simmonds J erred by deciding that it was open to the magistrate to conclude, on the undisputed evidence, that the prosecution had failed to prove beyond reasonable doubt that the respondent's obligation to store the firearms had arisen.

The relevant statutory provisions

25 Section 23(9) is contained within the general offence provisions of the Act. It relevantly provides:

A person who, -

- (a) whilst carrying, or in actual physical possession of, or having the custody or control otherwise than by way of storage of, any firearm ... fails or omits to take all reasonable precautions to ensure its safe keeping;

...

- (d) being responsible for the storage of any firearm ... fails -
 - (i) to provide and use adequate storage facilities to ensure its safety;
 - (ii) where prescribed requirements as to security are specified in relation to a firearm ... of a prescribed kind, to ensure that those requirements are observed; or

(iii) otherwise, to safeguard it from loss or improper use;

...

commits an offence.

26 The 'prescribed requirements' referred to in s 23(9)(d)(ii) of the Act are to be found in reg 11A of the *Firearms Regulations 1974* (WA) (the Regulations). Regulation 11A(1) provides that a person entitled to possess a firearm of any kind is to ensure that the firearm is stored in accordance with the regulation. The regulation goes on to require that firearms be stored in a locked cabinet or container that at least meets the specifications set out in Sch 4 of the regulations. It is not necessary to set out here those specifications, save that they do require the locked cabinet or container to be anchored by masonry fixing bolts or coach screws, as is appropriate.

The parties' submissions

27 Ms Thatcher, for the appellant, submitted that ss 23(9)(a) and 23(9)(d), when read together, cover all of the circumstances in which a firearm can be used, possessed or stored. She submitted that s 23(9)(d) deals specifically with storage, while s 23(9)(a) deals with all states that a firearm can be in 'otherwise than by way of storage'. On the undisputed facts, Ms Thatcher submitted that when the police discovered the firearms against the wall of the respondent's bedroom, the only conclusion reasonably open was that they were being stored and the respondent, as the person responsible for the storage because he was the licensee, had failed to use adequate storage facilities. Ms Thatcher contended that both Simmonds J and the magistrate erred by failing to draw that conclusion.

28 Mr Watters, on behalf of the respondent, submitted that neither the magistrate nor Simmonds J erred. Mr Watters submitted that the firearms were, having regard to all of the circumstances of the case, still in the process of being conveyed from their storage in the firearms cabinet at one location to their placement back in the firearms cabinet at the new location. Accordingly, when they were discovered by the police they were still in transit and were possessed by the respondent otherwise than by way of storage. The prosecution had not established that the respondent had an obligation to store the firearms at that point. Therefore, it was not open for him to be convicted of an offence under s 23(9)(d)(i) of the Act.

29 Mr Watters submitted that if the ground of appeal was upheld, the appeal should nevertheless be dismissed, pursuant to s 14(2) of the

Criminal Appeals Act 2004 (WA) (incorrectly referred to in the respondent's written submissions as s 30(4)), on the basis that no substantial miscarriage of justice has occurred.

The interpretation of s 23(9)(a) and s 23(9)(d)(i) of the Act

30 It scarcely needs to be said that, in the wrong hands, firearms are potentially dangerous and lethal things which can be misused in many different ways with potentially catastrophic consequences. However, there are those in the community who have a legitimate reason for owning or using a firearm. Accordingly, firearms are not totally banned. Rather, their ownership and use is highly controlled and regulated in the Act and the Regulations.

31 The Act primarily controls the ownership and use of firearms by a system of licences, permits and approvals. For the purposes of this case, it is only necessary to refer to licences.

32 Unless exempted by s 8 of the Act, a person or organisation must have a licence under s 16 to possess, carry, use, deal, repair, manufacture or collect a firearm. The power to issue a licence is in the discretion of the Commissioner of Police (the Commissioner) or his delegate: s 5 and s 5A.

33 The Commissioner cannot issue a licence if he or she is of the opinion that it is undesirable in the interests of public safety or the person is not a fit and proper person to hold a licence: s 11(1)(b) and s 11(1)(c). Nor can a licence be issued to a person who is not shown to have a genuine reason for acquiring or possessing the particular firearm for which the licence is sought: s 11A(1), s 11A(2) and s 11A(3). A genuine reason for having a firearm includes membership of an approved shooting club, hunting or shooting of a recreational nature on land when the owner has given written consent, and when a firearm is required in the course of a person's occupation.

34 Before a firearm licence is issued, the appellant must be mentally and physically fit: s 11(3)(b) and s 18(4b).

35 The Commissioner may refuse an application for a firearms licence if an applicant fails to provide, when requested, a statement as to what the applicant has done or intends to do to ensure that any firearms in the applicant's possession are stored in accordance with the Act: s 11(7)(b).

36 The Commissioner is empowered to revoke a firearms licence in certain circumstances, including when he or she is satisfied that harm may be suffered by any person as a result of a person retaining possession of a firearm: s 20(1)(aa).

37 The Act contains a number of regulation-making powers. Amongst them is s 11C which provides that regulations may restrict the issue or renewal of a licence. Section 34(2) includes the power to make regulations for the safe custody and control of firearms. It is under this power that reg 11A was created.

38 The Act was extensively amended and strengthened by the *Firearms Amendment Act 1996* (WA) (the Amendment Act). The Amendment Act was passed in the wake of the tragic events which occurred at Port Arthur in Tasmania on 28 April 1996. Following those events, the Australasian Police Ministers' Council convened a special meeting on 10 May 1996 and passed various resolutions, with the aim of achieving more stringent and uniform firearms laws in the Australian States and Territories. Amongst the resolutions which were passed, was a resolution that all firearms be stored in secure conditions. The ministers agreed that legislation should be effected in each jurisdiction requiring firearms to be stored in a locked receptacle or safe. Further, when the firearms were temporarily away from their usual place of storage, it was agreed that the legislation should provide that reasonable precautions be taken for their safekeeping: Australasian Police Ministers' Council, Special Firearms Meeting, Canberra, 10 May 1996, resolution 8. Subsequent meetings of the council amended some aspects of the resolutions passed on 10 May 1996, but no amendment was made to the resolution concerning the storage of firearms.

39 Following the Australasian Police Ministers' Council meeting, a Bill to amend the Act was introduced into the Western Australia Parliament which, in due course, became the Amendment Act. The then Minister for Police, Mr R Wiese, said, in his second reading speech on 26 September 1996 in the Legislative Assembly, that the Bill was designed to rectify 'numerous existing anomalies and inadequacies' in the Act, and to incorporate the resolutions made by the Australasian Police Ministers' Council: Western Australia, *Hansard*, Legislative Assembly, 26 September 1996, 6301.

40 Section 23(9) was amended by the Amendment Act. A comparison of s 23(9) prior to and after this amendment reveals a marked difference.

Unlike the old s 23(9), the new s 23(9) imposed duties with respect to the storage and safeguard of a firearm.

41 Having regard to the Act as a whole and its recent history, it is clear that its purpose is to protect the public by, amongst other things, imposing the most stringent requirements for the security and storage of firearms: *Turner v Keegan* [2001] WASCA 9 [17].

42 Sections 23(9)(a) and 23(9)(d) contemplate that a firearm may be in a state of storage or in a state otherwise than by way of storage, and provide for different offences according to the state the firearm is in.

43 The word 'storage' means 'the state or fact of being stored'. The word 'store' means 'to deposit in a storehouse, warehouse or other place for keeping': *McGee v Chitty* [91]. The phrase 'otherwise than by way of storage' means 'otherwise than as a method or means of storage': *McGee v Chitty* [87].

44 The phrase 'otherwise than by way of storage' is plainly wide in its ambit. It captures all of the many states that a firearm can lawfully be in, other than when it is stored. Some of those states include when the firearm is in use or is in transit between places.

45 The different states in which a firearm can be, give rise to different duties, albeit that the duties are directed, in a general sense, to ensure that at all times a firearm is kept safe.

46 The duty imposed upon a person whilst carrying, or in actual physical possession of, or having the custody or control of a firearm, otherwise than by way of storage, is to take all reasonable precautions to ensure its safekeeping.

47 A person who is responsible for the storage of a firearm has several separate duties. Section 23(9)(d)(i) requires the responsible person to both provide (in the sense of furnishing or supplying) and use adequate storage facilities. The duties to 'provide' and 'use' adequate storage facilities are distinct duties. Section 23(9)(d)(ii) additionally provides that where prescribed requirements exist as to the security of a firearm, those requirements must be observed. Otherwise, the responsible person must safeguard a firearm from loss or improper use: s 23(9)(d)(iii).

48 Relevantly to this case, two questions arise in relation to the construction of s 23(9)(d)(i). The first, who is responsible for the storage

of a firearm? Second, assuming that adequate storage facilities have been provided, when does the duty to use those facilities arise?

49 As to the first question, the person responsible for the storage of a firearm is not specified in the Act. However, in light of the importance which the Act places on the person or entity to whom a firearm is licensed, it is clear that the person responsible for the storage of a firearm includes the holder of the licence for the firearm: *Martino v Green* [2001] WASCA 181; (2001) 123 A Crim R 301 [33].

50 As to the second question, having regard to the protective purpose of the Act, a firearm must be stored unless it is in a person's possession otherwise than by way of storage: *Martino v Green* [42].

51 Logically, a firearm cannot be stored if it is in any of the states which come within the wide ambit of the words 'otherwise than by way of storage'. It follows that if the firearm is in one of those states, the licensee is not required to use the storage facilities that the licensee has the duty to provide and cannot be found guilty of an offence contrary to s 23(9)(d)(i).

Resolution of the appeal

52 The respondent had, at the new house, an adequate storage facility in the form of the firearms cabinet. That facility was not being used when the police discovered the firearms. It has never been suggested, nor could it sensibly be suggested, that the respondent's actions in placing the firearms against his bedroom wall amounted to the use of adequate storage facilities.

53 The resolution of this appeal boils down to whether, on the uncontested evidence, it was reasonably open for the magistrate to conclude that when the police discovered the firearms they were in transit. If that conclusion was correct, the respondent was rightly acquitted because his possession was otherwise than by way of storage, and the responsibility to use the adequate storage facilities he had did not arise. If the conclusion was wrong and the firearms were being stored, the respondent should have been convicted.

54 Both parties proceeded on the basis that, at least while the firearms were in the process of being transported by the respondent from the old house to the new house, they were in transit, and the duty under s 23(9)(d)(i) had not arisen.

55 However, the parties differ about whether the firearms were in transit once they had been placed in the respondent's bedroom. The appellant's case is that at that point, on any reckoning, they were no longer in transit. The respondent's case is that they could reasonably be considered to still be in transit because the firearms safe could not be used as it had not been bolted into place - the process having been unavoidably delayed by the power cut.

56 The word 'transit' is not found in the Act except in s 17(1)(c), which empowers the Commissioner to permit temporary possession of a firearm 'for the purposes of transit'. The word itself is not defined in the Act.

57 The ordinary meaning of the word 'transit' is the 'conveyance from one place to another, as of persons or goods': *Macquarie Dictionary* (4th ed, 2005) 1495.

58 The question of whether something is in transit is a matter to be decided on the particular facts of a given case, bearing in mind the very stringent requirements of the Act. It may not always be easy to identify when something is in transit and when it is not. Accordingly, it is unnecessary and undesirable to make definitive statements about when a firearm is in transit.

59 The respondent's intention was to transport the firearms from his old house to his new house, and particularly, to his bedroom in the new house. The undisputed evidence was that, having taken the firearms to the new house in the firearms cabinet, he put the cabinet in the shed, removed the firearms and took them to his bedroom where he leant them up against the wall. At this point, on any reasonable view of the circumstances, the firearms were no longer in transit. They had reached their intended destination.

60 Having reached their intended destination, the respondent, as licensee, was under the duty to use adequate storage facilities. He had adequate storage facilities in the form of the firearms cabinet, but chose not to use it. Although the firearms cabinet was apparently heavy, there is nothing to suggest that it was impossible for the respondent to take it from the shed to his bedroom so that the firearms could be placed in it. The fact that the firearms cabinet could not be bolted into the wall, because of the power cut, did not prevent its use as an adequate storage facility.

61 It must be remembered that the respondent was not charged with any breach of s 23(9)(d)(ii) of the Act on the basis he had not bolted the firearms cabinet into his bedroom wall. Plainly, in light of the power cut,

it would have been unfair to do so. However, the power cut did not relieve the respondent of the responsibility imposed under the Act to store his firearms in the adequate storage facility he had.

62 With great respect to Simmonds J, he erred in deciding that it was open to the magistrate to conclude that the firearms were in transit when they were discovered by the police and that the obligation to store had not arisen. On the undisputed evidence, it was not open to the magistrate to conclude that the firearms were in transit. The firearms were clearly being stored and the respondent, as the licensee of the firearms, failed to use the adequate storage facilities he had provided.

63 For these reasons, the ground of appeal must be upheld.

Has a substantial miscarriage of justice occurred?

64 Section 18 of the *Criminal Appeals Act* provides that div 2 of that Act, with some modification, applies to an appeal from a single judge of the General Division of the Supreme Court to the Court of Appeal. Section 14 of the *Criminal Appeals Act*, which appears in div 2, sets out this court's powers with respect to the present appeal. Those powers include the power to allow an appeal: s 14(1)(b); set aside or vary the decision of a court of summary jurisdiction: s 14(1)(c); substitute a decision that should have been made by the court of summary jurisdiction: s 14(1)(d); or return the case to the court of summary jurisdiction: s 14(1)(e).

65 Section 14(2) of the *Criminal Appeals Act* provides:

Despite subsection (1)(b), even if a ground of appeal might be decided in favour of the appellant, the Supreme Court may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

66 The respondent's written submissions on this point were that because the respondent had, at all material times, intended to comply with his obligations pursuant to s 23(9) of the Act, but had been prevented from doing so by the power failure, this court should dismiss the appeal.

67 This submission cannot be accepted. Both the magistrate and Simmonds J have erred, with the effect that the respondent, instead of being found guilty of the offences, was acquitted of them.

68 The matters raised by the respondent's counsel are matters which are relevant to sentence. It would not be appropriate in this case to invoke the proviso.

Orders

69 In my opinion, the appropriate orders are:

- (1) the appeal is allowed;
- (2) the verdicts of acquittal be set aside;
- (3) a verdict of guilty be recorded on each of RO 5721 to 5724 of 2008;
- (4) the question of sentence is remitted to Magistrate Gluestein.