

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CRIMINAL DIVISION

Indictment No. 198/2020

BETWEEN:

THE QUEEN

Prosecution

v

TRE DECOURSEY LOWE

Accused

Before: The Honourable Carlisle Greaves, Judge of the High Court

Date of Judgement: 2021 June 2

Appearances:

Mr. Rudolph Burnett for the Prosecution

Ms. Shadia Simpson for the Accused

DECISION

Firearms Act, Cap. 179, section 9(1)(b)(a) and subsection (9), possession of firearm, whether a 6mm Ruger Airsoft pistol is a firearm within the meaning of the Act.

CARLISLE GREAVES J:

INTRODUCTION

[1] The accused man Tre Lowe appeared before this court by HMP zoom on the 23rd April 2021 on Indictment No. 198 of 2020, dated October 8th 2020, which

charged, that he on the 27th April 2019 had in his possession a firearm, namely a .177 Ruger Airsoft pistol without a valid licence to do so.

- [2] He was arraigned in the presence of his counsel Ms. Simpson and he pleaded guilty. The prosecution accepted that plea.
- [3] At his counsels request, a presentence report was waived. The matter was adjourned to the 17th May 2021 for his antecedent and custody record to be entered in the record and for him to be sentenced following written submissions which were to be filed by 11th May 2015.
- [4] On the 17th of May 2021, Ms. Simpson informed the court that new information had come to her suggesting that the subject firearm may not be a firearm within the meaning of the Act and that she wanted to call expert evidence and have a ruling on this preliminary issue before any further proceedings.
- [5] She brought to the court's attention a letter purported to be previously issued by now Deputy Commissioner of Police, Oral Williams, advising that an Airsoft pistol was not a firearm within the meaning of the Act.
- [6] The prosecutor indicated he was aware of the letter which had been issued during the office of the previous DPP but that the new and present DPP was of a different opinion, hence the present prosecution of this mater.

- [7] The matter was adjourned to 19th May 2021 for arguments and expert evidence to be called by both parties.
- [8] On 19th May 2021, no evidence was taken due to the very full schedule of the court and the matter was adjourned to the 26th May 2021.
- [9] On that day expert evidence was heard and arguments made and the matter was adjourned to 2nd of June 2021 for decision.

THE EVIDENCE

- [10] Sargeant Roger Bullard testified for the prosecution. He established his training and expertise as a firearms expert. He said, inter alia, as a firearms expert he has examined thousands of firearms.
- [11] He said submitted to him was one black airsoft bb pistol, a magazine and 7 metal balls for ballistic examination. *“I subsequently carried out examination and tests on the submitted items making notes at the time - the submitted handgun is a 6mm calibre Ruger CO2 powered BB pistol.*
- [12] *The pistol is of the type that does not discharge the projectile at a velocity exceeding 535 feet per second and a muzzle energy exceeding 5.98 jolts.*
- [13] *This pistol is made of an ABS material. The CO2 cartridge is empty, therefore the pistol cannot be test fired. The submitted magazine is a 6mm, 15 pellet magazine made to be used in the pistol. Based on my examination and test, I*

formed the following conclusion: the submitted 6mm calibre bb airsoft pistol is a firearm within the meaning of the Firearms Act of Barbados.”

[14] I shall note here, that no explanation was given as to the relevance of this BB pistol’s incapacity to fire at a velocity exceeding 535 feet per second or muzzle energy exceeding 5.98 joules.

[15] One would think it must be of some relevance as to whether a firearm is or is not and or what it is or is not capable of, since the evidence was thought to be important enough for the expert to mention it.

[16] I shall also note that the expert said the CO2 was not working and hence the pistol was not test fired, yet he concluded, according to him, based on his *examination and tests* that it was a firearm within the meaning of the Act.

[17] One may wonder, if that particular CO2 cartridge was not working, why not acquire and try another as firearms officers tend to do with other firearms which they test fire with substituted ammunition to see if they are discharging.

[18] Furthermore if the pistol was not test fired due to the state of the CO2 cartridge on what basis could the expert be saying he concluded it was a firearm based on his examination and *tests*. In short what tests.

[19] Pressed further by the prosecutor for an explanation as to why he said it was a firearm despite his inability to test fire it, he said, *“it had a barrel, it could fire a missile from the magazine through the barrel, it is an air pistol and*

those are the descriptions according to the Act for a firearm.” I do find some difficulty with this explanation.

- [20] Pressed under cross-examination that he on several occasions in his report referred to the pistol as a .177 calibre air pistol as it is also referred to in the indictment and at some point in his conclusions he referred to it as a 4.5 calibre air pistol, yet in his evidence he referred to it as a 6mm calibre, he answered his previous references were all typographical errors.
- [21] He disagreed with the suggestion that the pistol in this case could only discharge plastic pellets and he emphasized that all air guns, bb guns, and airsoft pistols can discharge, metal and ceramic pellets.
- [22] He disagreed with the suggestion that an Airsoft bb pistol is different to an air gun.
- [23] Accepting that a weapon is anything that can cause injury, he did not accept the Airsoft pistol was incapable of causing harm. He suggested they are used overseas for killing rodents so in his opinion they could cause harm depending on how they are used.
- [24] As to whether CO2 is air or not he opined it is part of air.
- [25] Suggested that these particular pistols are designed not to cause bodily harm, he answered that such was not to his knowledge.

- [26] In re-examination he confirmed that the Airsoft pistol in this case is a 6mm calibre as evidenced by the 6mm engraved into its frame.
- [27] Gregory Cozier was accepted as a firearms expert for the defence. He said he was an expert firearms man since school days, that he represented the island in several overseas tournaments, trades in firearms and was adviser to the Firearms task force which studied and implemented the Firearms Act, thus he is familiar with its workings.
- [28] He was of the opinion that the BB Airsoft pistol is not a firearm within the meaning of the Act and was never intended to be. His opinion is that it is a toy gun and is thus excluded.
- [29] He expressed the view that there are three calibres of what are known as air guns in the world of air guns. They are .177 or 4.5 mm, .2 or 5mm and .22 or 5.5 mm. They are designed to cause harm, can be lethal and are therefore unlawful under the Act.
- [30] The Air Soft pistol which was developed after the Act was specifically designed not to be a weapon. It was designed not to cause any bodily harm or injury, it can only fire small specially designed for plastic pellets and its propulsion system is too weak to fire any metal pellets. 6mm is specifically designed by the manufacturers of airsoft pistols to avoid mix up with the other lethal air guns. He said it is not a weapon and thus does not fall within any of

the provisions which refer to weapons as it is not capable or designed to cause bodily harm.

[31] Furthermore, he said, it carries the orange nozzle as an international recognition that it is a toy gun incapable of harm.

[32] He was also of the view that since it carries a CO2 cartridge as its source of propulsion, it is not an air gun within the meaning of the Act since carbon is not air.

[33] He said like the paint gun which was designed only to shoot paint balls and are designed to shoot at people and leave a mark but not cause harm so are airsoft pistols which are their cheaper cousins designed to shoot plastic pellets at people but not to cause harm.

[34] Furthermore, he demonstrated that the metal pellets submitted in this case, which were larger than 6mm were incapable of being fitted into the barrel of the submitted pistol in this case.

THE LAW

[35] **Section 2** of the *Firearms Act, Cap. 179* says “firearm” means:

- (a) A gun or other barreled weapon of any description from which any shot, bullet or other missile can be discharged, whether or not it is at any particular time capable of being fired;
- (b) Any accessory to a weapon referred to in paragraph (a) that is designed or adapted to diminish the noise or flash caused by firing the weapon;

- (c) Any weapon of whatever description designed or adapted for the discharge of any explosive noxious liquid, gas, energy or any description or other thing;
- (d) Any signal gun; or
- (e) Any air rifle, air gun, air weapon or air pistol, but does not include:
 - (i) an antique firearm that is incapable of discharging;
 - (ii) a starting pistol;
 - (iii) a toy gun; or
 - (iv) a flare gun used or carried as a necessary part of safety equipment.

[36] In the interest of brevity, the relevant section is **section 2 (e) (iii)**:

[37] **Section 2 (e)** on its face appears to be clear, when the literal rule is applied, that all air guns or air pistols, regardless of their brand names, whether such be airsoft , medium or hard fall within the prohibition under the *Firearms Act*. Such instruments are only excluded if they are shown to fall under one of the exceptions.

[38] This is a penal statute and a criminal case. It is the duty of the prosecution not only to satisfy this court that the pistol in this case is an air gun which falls within the meaning of the Act but that it is not a toy gun which is exempt from the Act.

[39] In the instant case, after hearing the prosecution's expert evidence, I am not left in any state of confidence or certainty that he has established this instrument to be a firearm as defined by the Act.

- [40] His failure to mention or explain the relevance of the instruments inability to achieve the velocity or force he mentioned leaves me unable to accept his conclusion.
- [41] Furthermore his failure to test fire the pistol or attempt to test fire it raises some discomfort but added to that his evidence that he concluded it was a firearm within the meaning of the Act coupled with his evidence that he did so based on his *examination and test*, without explaining that test, does not inspire in this court the degree of confidence necessary for it to accept his conclusion.
- [42] In addition, his repeated error displayed in his description of the calibre of the pistol when the true calibre was displayed on the firearm by the manufacturer does not inspire the confidence of this court that he bore sufficient knowledge of this type of instrument or that he sufficiently examined it to support his conclusion.
- [43] On the other hand insofar as his evidence was material, I find more confidence in the opinion of the defence expert who displayed full knowledge of this particular type of air pistol.
- [44] Firstly, I do not think I can disregard judicial notice of the international practice by manufacturers who attached the colour orange on apparent firearms to distinguish them from real firearms.

- [45] In addition given his evidence that this type of Aero pistol is only capable of firing the 6mm light plastic pellets, it seems that some support is added to his evidence by the prosecutions own expert who testified that the instrument did not meet the velocity and force to which he referred but failed to explain.
- [46] I reach this conclusion despite the prosecutions experts evidence that the pistol was capable of firing other objects, including metal objects.
- [47] He provided no proof.
- [48] On the other hand for the avoidance of doubt, I would reject the defence's splitting of hairs evidence of whether CO₂ is air or gas and would disqualify an Airpistol as a firearm.
- [49] The reality is firearms are often discharged by gasses and had the prosecution otherwise met its standard in this case, I would not have ruled against it on the basis of some distinction between gas and air.
- [50] In all the circumstances, I think I must rule in the instant case, that this Airsoft 6 mm calibre pistol does not meet the definition of a firearm under the Firearms Act. Alternatively, I hold that the prosecution has failed to establish to my satisfaction that it is not a toy gun.
- [51] I will take this opportunity to discuss a further matter of concern to this court.

- [52] The facts upon which the prosecution intended to rely are that on Saturday 27th April 2019, the police on duty and dressed in uniform saw the accused riding a bicycle along Spooners Hill towards Eagle Hall.
- [53] Upon seeing the police he suddenly turned onto an adjoining road and rode faster and as the police followed he looked back at intervals.
- [54] This action aroused the suspicion of the officers. When he stopped they were informing him of a traffic violation when they noticed a bulge under his right side waist. Upon their request to search him he said. *“I have a mock gun on me.”* They examined it and found it to be the pistol in question.
- [55] He also said he found it in Orange Hill.
- [56] Later he said *“To be honest it was just for me to collect my girlfriend and get some food. It was no special occasion. It was just for my protection.”*
- [57] Based on that evidence and a view of the pistol which imitates its true cousin, it seems the pistol in this case would satisfy the requirements of an imitation firearm as defined by **section 2** of the Act, which defines an imitation firearm as meaning, a toy gun or anything which has the appearance of being a firearm but which is not capable of discharging any shot, bullet or other missile.
- [58] The problem here, however is that given what he gave as the reason for its possession, no offense would be met under any of the provisions of the Act.

- [59] For example, **section 20** of the Act would require that he had the intention to commit an indictable offence and under **section 21**, though he had the instrument in a public place, the section does not refer to imitation firearms.
- [60] It seems it would be necessary to amend the *Firearms Act* to meet situations such as this.
- [61] In addition I think the **section 2** definition of imitation firearm may need to be amended as well to remove the words “and is not capable” and replace with the words, “whether or not it is capable of discharging ...”
- [62] Perhaps a good example may be seen in the *Bermuda Firearms Act 1973*, which defines an imitation firearm as meaning anything which has the appearance of a firearm whether or not it is capable of discharging any shot, bullet or other missile.
- [63] In addition **section 26A** of that Act may be found useful if included in the local legislation. That section makes it an offence to use a firearm or imitation firearm to commit an offence or attempt to commit an offence whether or not any harm occurs. It goes further than the offences sections of the local Act.

[64] In all the circumstances, I consider this a case for which the accused must be allowed to vacate his plea and the prosecution to consider the way forward.

Carlisle Greaves
Judge of the High Court