

APPELLATE CRIMINAL.

Before Jack and M. C. Ghose J.J.

ARATOON MALCOLM

v.

EMPEROR.*

1932

Aug. 18.

Arms—Negotiation for sale, if an offence—Possession after expiry of license, if an offence—Temporary possession for negotiating sale, if an offence—“Extent,” meaning of—Indian Arms Act (XI of 1878), ss. 14, 19.

Negotiation for sale of a revolver to a person who has no license is not in itself an offence. An offence under section 19 (*f*) of the Indian Arms Act is only committed if the weapon is actually delivered to a person who has not got a license.

Rule 82 of the Bengal Government Arms Act Manual, to the effect that ordinarily applications received for renewal of license within 30 days after the date of expiry should be granted, does not affect section 19. Possession of arms of which license has not been renewed is an offence, though ordinarily prosecution would not result within 30 days.

The word “extent” in section 14 is not limited to the territorial extent only.

The temporary possession of arms for the purpose of negotiating a sale is not unlawful.

CRIMINAL APPEAL.

The material facts appear from the judgment.

J. Camel (with him *Prabodhchandra Chatterji*, *Beereshwar Chatterji* and *Phaneendranath Mukherji*) for the appellant Malcolm. The possession of the revolver was not unlawful possession at all. It was covered by a license. The time mentioned in the period of license had no doubt expired, but there was a period of grace for 30 days for the renewal of the license which had not expired. Rule 82 of the Bengal Government Arms Act Manual. So there could be no prosecution for unlawful possession against any of the appellants. The appellant

*Criminal Appeal, No. 176 of 1932, against the order of S. K. Sinha, Chief Presidency Magistrate, Calcutta, dated Feb. 29, 1932.

1932

Aratoon Malcolm
v
Emperor

Malcolm has been convicted really for negotiating a sale of a revolver for a friend. It is admitted by the prosecution that the sale was not complete. Mr. Burman, the bogus purchaser, said in his deposition that he had no money with him and the weapons were to be delivered at a subsequent date when the money would be paid. When taken to the *tháná*, the accused at once said that the revolver was covered by a license and it was subsequently discovered that the license had expired only 4 days earlier. In these circumstances, Malcolm is guilty of no offence. The wording of the various clauses of section 19 shows that this section deals with shop-keepers and arm-dealers and not to ordinary possessors. In any case, section 19 (a) is expressly made subject to section 5, which latter clearly permits sale of any arms which are lawfully possessed. When negotiation goes on, the intending vendor may not know if the purchaser has any license. What is prohibited is delivery after the sale is completed to any person without being satisfied that he possesses a license. Section 22. If negotiation for sale be no offence, then Malcolm's possessing the revolver temporarily for such purpose cannot be any offence. There are a very large number of cases to that effect. So, even assuming the whole of the prosecution case to be true, Malcolm has committed no offence.

Amiruddin Ahmad for the appellant Betteley. In addition to what has been said for Malcolm, there are one or two points in favour of Betteley. The conviction under section 19 (f) is bad, because it applies to cases where possession did not originate in a license or the manner of use or territorial extent mentioned in the license is violated. Form XVI of Schedule VIII of the Indian Arms Act Rules. The word "extent" in section 14 must, therefore, mean territorial extent in column 10 of the said form. The omission to renew the license comes under sections 16 and 19 (i) and the appellant would be punishable if he failed to deposit the

revolver within a reasonable time. Only four days elapsed and so there was no unnecessary delay. With regard to the attempt to sell, the prosecution does not say that Betteley took any part in it. So the conviction of Betteley is unsustainable.

1932
Aratoon Malcolm
v.
Emperor.

The Deputy Legal Remembrancer, Khundkar (with him *Anilchandra Ray Chaudhuri*) for the Crown. The most important question, on which the case turns, is whether Betteley's possession on the date in question was legal. If it were not so, then necessarily Malcolm's temporary possession would be illegal and section 5, which merely permits the sale of weapon which is legally possessed, would not help the accused in the least. Section 5 does not authorise any sale or negotiation for a sale of any weapon which is illegally possessed. Although the possession of Betteley originated in a license, the period thereof had expired and the subsequent possession was unlawful and rendered Betteley liable to prosecution. Rule 82 cannot in any way over-ride section 19 (f). It is purely executive instruction and has no statutory effect whatsoever. It is made by the Government of Bengal for the guidance of its officers, whereas section 17 vests the power to make rules in the Government of India alone. Moreover rules, even if made by the Government of India, for the extension of time for the renewal of a license is no answer to a prosecution under section 19 (f). The Government of India made this clear in their letter to the Government of the United Provinces. Prosecution may not be usually instituted, if the license be renewed during the 30 days mentioned in rule 82, but the liability is still there. The rule was intended to be for the benefit of innocent persons and certainly not for the protection of persons abusing the privilege by attempting to sell the weapon surreptitiously. In any case, the accused were guilty under section 19 (a) for attempting to sell a weapon, which, at that moment, they were fully aware, was not covered by any license. The conviction can be changed into one under sub-clause (a).

1932

Aratoor Malcolm
v.
Emperor.

JACK AND M. C. GHOSE JJ. The appellants have been convicted under section 19 (f) read with section 14 of the Arms Act and sentenced to periods of imprisonment and fines. The prosecution case is that an officer of the Customs Preventive Service received certain information on the 4th January. The information was conveyed to the Superintendent of the Preventive Service, who deputed an Indian officer, Mr. Burman, to act as a bogus purchaser of an automatic pistol. On the morning of the 5th January, they proceeded to Prinsep Memorial about 10-45 a.m., and after about an hour they saw the accused Malcolm come up to the memorial. The informer introduced Malcolm to Burman as the vendor and he said that he wished to sell the pistol which he produced. Negotiations then took place. The vendor wanted Rs. 440 for this revolver and another revolver which Malcolm said he had for sale. The bogus purchaser told him that he was willing to give him Rs. 300 for the pair. At this point, by an agreed signal, two other men from the Customs Department came up and arrested Malcolm. They found the pistol in his pocket. On his being seized, he shouted out for the other accused Betteley and they were both brought under arrest and later on produced at the *tháná*, where a license, which had expired on the 31st December, was found with Betteley. The suggestion of the prosecution is that the whole of the transaction was illegal inasmuch as the accused intended to make a surreptitious sale to a person who was not entitled to possess the weapon, and that the license had been obtained by Betteley merely for the purpose of enabling him to effect this transaction. Mr. Greenfield, Superintendent, Customs Preventive Service, says that Mr. Mann, another witness, had informed him of the intended sale of the pistol, as far back as October, 1931, and it was then that he instructed him (Mr. Mann) to get into touch with Mr. Burman, who posed as the intending purchaser. It appears that the license for this pistol was not renewed in January. It appears from the statement

1932

Aratoon Malcolm
v.
Emperor.

made by Mr. Burman in cross-examination that there was no intention of the immediate delivery of the pistol by the accused to him. He says "Malcolm told me that he would deliver both the weapons together and I would pay him then". As only one weapon was with him, it is clear that the delivery was intended to take place at a subsequent date. In any case, as the sale was not completed, no offence was committed, as negotiations for sale to a person who has no license is not in itself an offence. An offence under section 19(a) of the Act is only committed if the weapon is actually delivered to a person who has not got a license. But there has been an offence committed under section 19 (f), inasmuch as the accused Betteley had in his possession or under his control an automatic pistol in contravention of the provisions of section 14 of the Arms Act, inasmuch as his license had already expired on the 31st December. It is true that such delay in the renewal of the license is not ordinarily prosecuted. There is a rule (No. 82) in Bengal Government Arms Act Manual to the effect that ordinarily applications received for renewal of license within 30 days after the date of expiry should be granted. That does not affect the provisions of section 19, which states that a person who has in his possession arms in contravention of the provisions of section 14 commits an offence. It has been argued that the word "extent" in section 14 only refers to territorial extent, and in support of that reference has been made to Form 16 and the conditions thereunder (which are found in schedule 8 of the Indian Arms Act Rules) in which "extent" in column 10 refers to territorial extent only, and condition three there also refers to territorial extent only. But that does not limit the meaning of the word "extent" in section 14 of the Arms Act. It is true that any one who fails to deposit arms, of which the license has expired, or who is in unlawful possession, is also liable under clause (i) of section 19 of the Arms Act. But no authority has been shown to us limiting the meaning of the word "extent" in section 14 to

1932

Aratoon Malcolm
v.
Emperor.

territorial extent. So that we think that the possession of arms of which the license has not been renewed, is also punishable under section 19(f) of the Arms Act read with section 14.

As regards the possession of Malcolm, we think, where a weapon is made over merely for the purpose of negotiating a sale, such possession is not unlawful, inasmuch as it is not possession of the weapon with the intention of using it as a weapon. Such temporary possession is not possession as contemplated by the Act. We, therefore, think that Malcolm has not committed an offence under section 19 of the Arms Act. In any case, as I have said, negotiations for a sale, where no delivery took place, would not be an offence.

As regards the possession by Betteley, we think that he has committed an offence under section 19 of the Arms Act, inasmuch as he was admittedly in possession of this weapon after the expiry of the period of his license. Ordinarily, under executive instructions, no prosecution would result within 30 days. In the present case, we agree with the finding of the learned magistrate that both of the accused were trying to negotiate a sale surreptitiously. Such sales, at the present time, are highly reprehensible and we think that, in the circumstances, we would not be justified in not enforcing the provisions of the law as regards the illegal possession of this weapon beyond the period of license. In assessing the punishment for this offence we cannot take into account the intention of the accused to negotiate this illicit sale as part of the offence of retaining unlicensed arms in his possession, and we think for that offence a sentence of a fine of Rs. 50 will be sufficient punishment.

We, therefore, set aside the sentences which have been passed on both of the accused. We acquit Malcolm but convict Betteley under section 19(f) of the Arms Act and sentence him to pay a fine of

Rs. 50 in default to undergo rigorous imprisonment for three months. Malcolm is discharged from his bail bond and Betteley will be discharged from his bail bond on payment of the fine. The appeal is disposed of accordingly.

1932
Aratoon Malcolm
v.
Emperor.

Order modified.

A. C. R. C.