

**IN THE DISTRICT COURT
AT DUNEDIN**

**CIV-2015-012-000458
[2017] NZDC 5263**

UNDER	THE ARMS ACT 1983
BETWEEN	ANDREW KEITH HORE Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 14 November 2016

Appearances: D P Robinson for the Appellant
T R Hambleton for the Respondent

Judgment: 16 March 2017 at 12:50 PM

**RESERVED JUDGMENT OF JUDGE M A CROSBIE
[on an appeal pursuant to s 62 against the revocation of a firearms licence]**

[1] The appellant, Andrew Keith Hore, was issued a firearms licence (No. R5025502) in 1995 when he was aged 17 years.

[2] On 16 October 2015 this licence was revoked on the basis that the appellant was no longer “a fit and proper person” under s 27 Arms Act 1983 (the Act). The revocation was based, in substance, on the following grounds:

- (a) On 1 May 2015, the appellant left insecure firearms in a maimai at the Hore family property known as “Stonehenge” on Patearoa Road, Ranfurly in breach of reg 19 Arms Regulations 1992 pertaining to the security of firearms.
- (b) On 2 May 2015, the appellant supplied a firearm to an unlicensed person, Mr Daniel Parker, at Stonehenge, in contravention of s 43 of the Act.

- (c) The unlicensed person had previously been revoked from holding or obtaining a firearms licence.
- (d) The unlicensed person was seriously injured in a shooting incident later in the afternoon on 2 May 2015 at Stonehenge while in the appellant's presence.
- (e) The appellant and five associates all had consumed alcohol throughout the day while in the possession and control of firearms. The attending ambulance officers described a number of persons present as highly intoxicated including the person who suffered the gunshot wound.
- (f) The appellant was charged with and convicted on 17 September 2015 under s 43 of the Act of supplying a firearm to an unlicensed person.
- (g) As a result of the police investigation into the incident at Stonehenge on 2 May 2015, three of the appellant's associates were charged with offences under the Act including possession of a firearm without a licence¹ and unlawful possession of a firearm after revocation of a firearms licence.²
- (h) Two of the appellant's associates were in breach of the Wild Animal Control Act 1953 in that they were hunting without an appropriate licence issued under that Act while duck shooting at Stonehenge.
- (i) On 12 June 2005 the appellant was involved in a seal shooting incident on the Otago Peninsula and was convicted under s 9(1) Marine Mammals Protection Act 1978.
- (j) As a result of the seal shooting incident in 2005 the appellant was charged under s 51 of the Act with possessing a firearm (shotgun)

¹ Section 20 Arms Act 1983

² Section 49A Arms Act 1983

except for some lawful purpose. Diversion was granted which included a two year surrender of his firearms licence.

[3] The appellant appeals against this revocation by way of originating application pursuant to s 62(1A) of the Act.

Background

[4] The appellant was on 17 September 2015 convicted and sentenced for a charge under s 43 of the Act for supplying a firearm to a non-licensed person. The charge carries a maximum penalty of three months' imprisonment.

[5] The appellant had earlier entered a guilty plea and on 17 September 2015 the Court considered an application for a discharge without conviction. That application was dismissed and the appellant was convicted and fined \$400 and Court costs of \$130.

[6] The appellant appealed that conviction to the High Court. On 23 September 2015 Dunningham J dismissed that appeal.

[7] In the District Court, His Honour Judge Flatley described the facts as follows:

[8] The summary of facts is limited. Mr Robinson has made submissions in relation to the facts here and I accept the majority of his submissions. The facts that are relevant to me are these. Mr Parker, the person who used the firearm, had had his firearms licence revoked in November 2012. You and he were out duck shooting. You provided him with the firearm. You did not make any enquiry as to whether he had a licence and he used that firearm, but not extensively, as Mr Robinson has submitted. You carried on duck shooting that day. Others were present. Some alcohol was consumed and you and he moved to different ponds.

[9] The relevant facts are, of course, that Mr Parker used the firearm that was yours and he did not have a licence.

[8] In my assessment, given the limited penalty and the place of the charge at the lower end of the hierarchy of charges in the Act, the offending is at the lower end of the scale for firearms related offending. This assessment is consistent with the level of penalty imposed by the learned Judge.

Approach on Appeal

[9] As noted above, the firearms licence was revoked under s 27(1)(a) of the Act. Section 27(1)(a) enables a commissioned officer of police to revoke a firearms licence when they consider that the licence holder is “not a fit and proper person to be in possession of a firearm or airgun.”

[10] The appellant has jurisdiction to appeal through s 62(1)(c)(iii) of the Act. Under s 62(2), a District Court Judge may confirm, vary or reverse the decision of the commissioned officer of police.

[11] The Act is silent as to the nature of the appeal and the procedure to be followed. However, in *Fewtrell v Police*,³ Goddard J set out the procedure to be followed:

The hearing on appeal should have been conducted de novo, giving due weight to the opinion of the inspector and to all other evidence adduced but without applying the legal onus of proof which attaches to one party or another in an adversarial situation, and with a full hearing of oral evidence if appropriate. There was no presumption in favour of the inspector’s decision and no onus on the appellant to satisfy the Judge that the inspector’s decision was wrong.

[12] *Fewtrell* is explicit that, where a revocation is taken on appeal, “it is for the District Court Judge to satisfy himself or herself of the matter [that the appellant is a fit and proper person to be in possession of a firearms licence] de novo and there is *no onus on either the appellant or respondent*.”⁴ This approach has been confirmed in a number of recent cases.⁵

[13] As Holland J observed in *Police v Cottle*,⁶ the Court is entitled to take into account evidence that would usually be considered inadmissible, so long as the principles of natural justice are observed. Furthermore, the Court may take into

³ *Fewtrell v Police* (1996) 14 CRNZ 372 at 381

⁴ *Ibid* at 381, line 26 (emphasis added)

⁵ *Johnstone v Police* DC Dunedin CIV-2013-012-000489, 23 January 2014; *Dodd v Police* DC Kaikohe CIV-2014-027-000140, 26 November 2014; *Seymour v Police* [2015] NZDC 20533; *Innes v Police* [2016] NZDC 4538

⁶ *Police v Cottle* [1986] 1 NZLR 268 at 272

account the general character and temperament of an appellant when determining whether they are “a fit and proper person” to hold a firearms licence.⁷

[14] In my assessment, the appeal regime under the Act, providing for a hearing de novo, provides an appellant with a “second bite of the cherry”. It follows that the police must be prepared to meet or challenge evidence provided by an appellant that they are a fit and proper person. For reasons that follow, that was a significant shortcoming in this appeal and the approach taken by the police on appeal appeared half-hearted.

Evidence on Appeal

[15] The evidence for the appellant was:

- (a) First affidavit of Mr Hore dated 14 November 2016.
- (b) Affidavit of Mathew Frances O’Connell dated 25 November 2016.
- (c) Affidavit of Richard Hugh McCaw dated 20 November 2015.
- (d) Affidavit of Brian Hugh Bridges dated 25 November 2015.
- (e) Affidavit of Gilbert Ernest Enoka dated 18 November 2015.
- (f) Affidavit of Stuart Leslie Duncan dated 24 November 2015.
- (g) Affidavit of Shane John Wilkinson dated 9 May 2016.
- (h) Affidavit of Douglas Mackenzie Maxwell dated 20 November 2015.

[16] Significantly, the police did not require any of the deponents of the above affidavits, including the appellant, to be available for cross-examination. This failure is odd, particularly given that the appellant and Messrs Bridges and O’Connell were

⁷ Ibid at 274

present on 16 October 2015. As a result the affidavits can be taken as read and their contents unchallenged.

[17] The affidavits included the following extracts:

(a) R H McCaw:

- (i) The appellant ensured “targets were identified and there was no danger to people or property and that firearms were rendered safe and appropriate for transport.”
- (ii) “From my experience in using firearms with him, and having observed his demeanour and cautious approach to firearms use, I have no concerns around his firearms licence being restored to him.”

(b) B H Bridges:

- (i) A “very competent firearms user”, and “very safety conscious.”
- (ii) “Very safe and competent.”

(c) M F O’Connell:

- (i) “I consider him to be a fit and proper person.”

(d) G Enoka:

- (i) “A person who is honest, loyal and reliable.”
- (ii) “A quiet responsible person ... [nothing] suggestive of a personality disorder or indulging in risk taking or any other tendency that would make him an inappropriate person to hold a firearms licence.”

(e) S L Duncan:

- (i) “For Andrew, safety is paramount. He has taken my children (ages 13 and 15) out hunting on many occasions.”
- (ii) “I would describe his attitude to safety as ‘impeccable’.”
- (iii) “He checks the weapon, makes sure he knows the location of everyone in the shooting party, only loads the weapon when a shot is contemplated, carefully checks his firing zone and only fires when he is absolute [sic] certain of the target.”
- (iv) “When supervising my children or others with firearms, he is very calm, and ensures they are being methodical in checking, loading, aiming, firing and storing firearms. He is very controlled in his approach and always displays a mature attitude.”

(f) D M Maxwell:

- (i) Has allowed the appellant to shoot wild animals from his helicopter as part of culling operations.
- (ii) “I have seen him abandon attempts to shoot animals when circumstances are not ideal.”
- (iii) “I have never had any concerns as to his handling or use of firearms, or the security of firearms.”
- (iv) “His competency experience with firearms and his calm demeanour means that he is a pleasure to work with.”

(g) S J Wilkinson:

- (i) “When I first met Andrew, I knew straight away that he had been brought up with firearms. It was apparent to me that safety was paramount for him, I would say without hesitation he is the safest person I have hunted with.”
- (ii) “He was always careful about ensuring the rifle was pointing in the right direction, only loading when preparing to take a shot, and unloading immediately a shot became inappropriate or if the target had moved on.”
- (iii) “Everything to do with his use of firearms in my presence has been very safe and entirely appropriate.”
- (iv) “I would go so far as to say that I would be more than happy for him to take my children out hunting.”

[18] In addition, material before the Court established that Senior Constable Burke of Ranfurly considered the appellant to be a fit and proper person who has always dealt very carefully with firearms. While there appears to be some internal issues for the police around this view, it is evidence that the Court is entitled to take into account from a longstanding serving member of the police.

Police Evidence

[19] Inspector Olaf Jansen gave evidence and was the only witness called. Notably, no one was called who could give evidence on the presentation and demeanour of the appellant and the shooting party. In particular, the St John ambulance officers, whose account Inspector Jensen relied on when coming to his decision to revoke the licence, were not called.

[20] Mr Robinson challenged Inspector Jensen about not calling those witnesses, and the Inspector’s acceptance that the sworn evidence on the use of alcohol on the

day was from the appellant and Messrs Bridges and O'Connell. This exchange occurred:

Q. And you're not able to point to any form of sworn evidence to contradict that are you?

A. No, other than to say they've all admitted use of alcohol. Their evidence, what they've stated, is not in line with an [sic] independent ambulance officers that were, attended and if we disregard the levels of intoxication, firearms and alcohol just don't mix.

Q. Well, let's just put that in perspective because there's no offence of consuming alcohol while in the possession of firearms is there?

A. No offence but I would expect the community would consider the use of firearms and alcohol is not a favourable mix.

Q. If you just curtailed all the duck shooting activities nationwide, Inspector. Now, -

...

CROSS-EXAMINATION CONTINUES: MR ROBINSON

Q. Now, there's nothing that you can point to that suggests that Mr Bridges or Mr O'Connell are unreliable people?

A. No.

Q. They don't have any records do they?

A. I can't make comment on that.

Q. Well, you haven't determined to revoke their firearm's licences have you?

A. No.

Q. So the Court's entitled to conclude that they remain fit and proper people?

A. Yes.

Q. And so the evidence from two fit and proper people is that no one was intoxicated to the extent that they were incapable of using firearms. Do you accept that?

A. That, again that's a version of events from people that were involved on the day.

Q. It's a version of events that's been given on oath isn't it?

A. Correct.

Q. And there's no contrary version of events on oath is there?

A. No.

[21] This evidence serves to confirm that two other licensed people present on 2 May retain their firearms licences. Further, despite concerns about intoxication, the police did not seek to challenge their evidence or call evidence to rebut that.

Submissions for the appellant

[22] I have taken into account all of the submissions made by Mr Robinson, together with the legal authorities submitted. Mr Robinson identified the "key themes" of the police decision to revoke the firearms licence as follows:

- (a) Insecure firearms.
- (b) The supply of firearms to an unlicensed person.
- (c) Consumption of alcohol.
- (d) Associates of the appellant being in breach of the Wild Animal Control Act 1977.
- (e) The prior incident – unlawfully shooting seals.

[23] I address the key points made by Mr Robinson on these matters.

Insecure Firearms

[24] Mr Robinson noted the appellant's acknowledgement that the decision to leave the firearms in the maimai overnight was wrong. However, he noted that the possibility of anyone taking the firearms was remote as the maimai was isolated, on a small island in a pond, not visible from the road and behind closed and locked gates.

[25] Mr Robinson cited *O'Loughlin v Police*⁸ as authority for the failure to secure firearms not of itself (or cumulatively in that case) being sufficient to result in a finding that a person is not a fit and proper person to hold a firearms licence.

[26] I do not share Mr Robinson's view of the remoteness of the maimai as being, essentially, a mitigating factor. It was duck shooting season and the maimai had been used, and would continue to be used, by the hunting party. Responsible shooters should take all reasonable steps to mitigate the risks inherently posed by firearms. On its own, this issue might not be the most serious of matters. However, the Court is entitled to look at the cumulative effect of all factors.

Supply of firearms to unlicensed person

[27] Mr Robinson referred to this factor being the high point of the police case and submitted that the offence is at the lower end of the criminal spectrum. For the reasons already given, I accept that.

[28] Mr Robinson submitted that the appellant incorrectly assumed that Mr Parker had a licence and that his culpability is limited to not asking about the licence. Mr Robinson further submitted that in the circumstances it was fair for him to conclude that Mr Parker was licensed and that the revocation of Mr Parker's licence is not an aggravating factor. I disagree with the submission that the appellant was entitled to assume Mr Parker was licensed. The appellant provided a firearm and should have made an inquiry prior to that. It is the essence of the offence he was convicted for. He also submitted that the appellant was in a position to supervise the use of the firearm at all times.

[29] Mr Robinson then submitted that Mr Parker's injury was not the fault of the appellant and nor did it involve his firearms. Nor was it the fault of Messrs Bridges or O'Connell. Mr Robinson submitted that the injury to Mr Parker, while providing the context for the appeal, is entirely irrelevant to the appellant's fitness to hold a licence. I disagree. This submission loses sight of the earlier submission that the

⁸ *O'Loughlin v Police* [2001] DCR 488

appellant was in a position to supervise at all times. It is a contextual matter and a cumulative factor.

[30] Mr Robinson submitted that the decision in *Carruthers v Police*⁹ puts the injury sustained by Mr Parker in the appropriate perspective. There the firearm supplied to the unlicensed person was later used in an incident that resulted in a person facing a murder charge (though later being acquitted by reason of self defence). Contrary to the stance taken by the police in that case, the fact of harm was not found to be of sufficient moment to warrant revocation of the licence. I accept that submission. The subsequent conduct in *Carruthers* (murder) was significantly more serious than the present case.

Consumption of alcohol

[31] It was accepted that alcohol was consumed. Mr Robinson submitted that this is “common” as a central aspect of socialising while duck shooting. At this point I accept that there was no evidence before this Court of gross intoxication. However, for reasons given below, I do not accept Mr Robinson’s general submissions on the use of alcohol.

[32] Mr Robinson correctly noted that Crown counsel in the High Court (on appeal against the refusal to grant a discharge without conviction) accepted that alcohol was not a factor.

Breach of Wild Animal Control Act 1977 (WACA)

[33] This issue can be briefly addressed by accepting the submission made on this point. Mr Parker and Mr Gallagher’s lack of a licence under the WACA does not go to the appellant’s culpability. It was their own responsibility.

⁹ *Carruthers v Police* DC Opotiki CRI-2011-047-000050, 12 April 2012, Judge Bidois

Prior incident – unlawfully shooting seals

[34] Mr Robinson submitted that the prior incident “needs to be kept in perspective”. Mr Robinson submitted that, 10 years ago, the police determined that it was appropriate that the appellant receive diversion. While that is correct, I do not accept the submission that the charge was “capable of defence”. It is clear that Dunningham J considered the prior incident significant. It is equally clear that diversion requires either a guilty plea or an assumption of responsibility.

[35] Mr Robinson submitted this Court is required to make a current assessment of the appellant’s suitability and is best guided by the statements of the referees submitted to the police and the unchallenged evidence before the Court. I do not entirely accept that submission. The appellant’s firearms history is relevant to an overall assessment as to whether he is a fit and proper person under the Act, just as it was relevant to both the District and High Court decisions referred to above. In addition, the Court is entitled to take into account the cumulative effect of all relevant factors and is backward looking. However, I do accept that current evidence of character will be accorded significant weight, particularly if unchallenged.

Police submissions

[36] Mr Hambleton noted the decisions in the District and High Courts. On the issue of consumption of alcohol, Mr Hambleton submitted that, while alcohol may traditionally be part of the opening day of duck shooting, the Arms Code is clear that alcohol should only be consumed when firearms are safely locked away. It says:

Alcohol and Firearms do not mix! Ever!

- Alcohol and drugs must **never** be taken before you go shooting or while you are shooting. Wait until your firearm has been safely locked away before you consume alcohol or drugs.
- Do not shoot with others who are, or have been, drinking alcohol or taking drugs.

[37] For reasons that follow, I accept that submission.

[38] Mr Hambleton submitted that the appellant knew his friends had been drinking and should have realised the risk they posed in their intoxicated state in possession of firearms. Further, as the land owner's representative he should have intervened and put a stop to the days shooting. Had he done so, the incident with the firearm discharging and injuring someone may well not have happened. While such a submission may have carried weight at the time of Inspector Jansen's decision, the evidence before this Court falls short of establishing the level of intoxication. The police could have pursued that on appeal but elected not to.

Prior incident – unlawfully shooting seals

[39] Mr Hambleton noted that the appellant now claims he had a defence to the police charge stating in his affidavit before the Court at para 31, "I simply didn't know that it was unlawful to shoot seals." Mr Hambleton submitted that commonsense would surely have told him this, but despite "not knowing" whether it was lawful to shoot seals, the appellant and his associates went on to shoot at a group of fur seals from a boat, killing one adult male. He submitted that this demonstrates an irresponsible attitude towards the use of firearms. I agree with that submission, insofar as it relates to the appellant's attitude 10 years ago.

Discussion

[40] I consider that there was sufficient information before Inspector Jansen for him to make the decision to revoke. The cumulative effect of the factors identified and discussed above raise legitimate issues of the appellant's fitness into question and the police were entitled to scrutinise those actions and be concerned about them. However, this Court is in a different position on a hearing de novo.

[41] From the evidence before this Court, I am concerned about the line maintained by the appellant with respect to alcohol. I am well aware that there are those who will advocate for the culture of a few drinks when shooting, although from his own evidence I query whether the appellant's habits are of a "few". Equally I am aware of those who maintain that firearms and alcohol never mix and that

firearms should be secured before alcohol is consumed. In that regard I must be guided by the Firearms Code as the preferred view.

[42] In the end, the seal incident was 10 years ago. The more recent incident saw the appellant penalised with a conviction entered for offending at the lower end of the scale. That offending was more reckless than intentional.

[43] The appellant is a farmer. I accept that the revocation of his licence will affect him more than the occasional duck shooter. Further, the revocation has been in effect for some 18 months and should have served as a salutary reminder of his obligations. The appellant's status as a sportsman has undoubtedly attracted more attention towards his transgressions than might otherwise be the case, a reminder of the magnifying glass that lies over the lives of many. Rightly or wrongly, such status often attracts behavioural expectations and scrutiny from the public. In that regard, the appellant's thinking around firearms and alcohol might require some calibration, lest it be thought that the Arms Code has no relevance or application. Whatever the arguments before this Court about proof of levels of intoxication on 2 May 2015, I venture to suggest that adherence to the Code would have prevented the matter coming before the Courts.

[44] The appeal turns to be decided on an overall assessment of the appellant's fitness. In that regard, the appellant's witnesses appear aware of his earlier transgression and the most recent offence. Notwithstanding that, they unanimously speak of him in high regard. While the cumulative effect of the various factors identified raises some issues, I have determined that those issues are outweighed by the positive and unchallenged character evidence presented to this Court. I allow the appeal and reverse the decision of Inspector Jansen to revoke the licence.

[45] Costs will lie where they fall.

M A Crosbie
District Court Judge

Signed on: _____ at _____ am/pm