



**IN THE COURT OF APPEAL
AT NAIROBI**

**(CORAM: PLATT & GACHUHI, JJ.A AND MASIME, Ag. J.A.)
CRIMINAL APPEAL NO.50 OF 1986**

BETWEEN

RANJI MWAURA SMITH.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi

(Butler—Sloss, J.) dated 29th November 1985

in

Cr. Appeal No.865 of 1985)

JUDGMENT OF THE COURT

This is a second appeal.

The appellant with the unusual name of Ranji Mwaura Smith was convicted of robbery contrary to section 296(1) of the Penal Code, and sentenced to seven years' imprisonment, three strokes of corporal punishment and an order for police supervision.

The courts below held that the appellant, having been found in recent possession of the pistol on June 5, 1985, which had been stolen from the complainant's house on May 19, 1985, was also guilty of two further charges.

On count 2 he was found guilty of illegally possessing a firearm contrary to section 4(2)(a) of the **Firearms Act** (cap 114). On count 3 he was further convicted of being in unlawful possession of ammunition in contravention of the same provision of the **Firearms Act**. He was sentenced to three years' concurrent imprisonment on each of those counts, as well as with count 1.

The High Court reasoned that if the appellant had stolen the pistol on the first count assuming that he was found in possession of the pistol and ammunition, he could not have an answer to the second and third counts. Certainly, the defence of the appellant was that he was not in possession of this pistol and

ammunition at all. Consequently on that basis, the appellant could not have a license for either the pistol or ammunition. On the prosecution case, if the appellant stole the pistol, then of course he could not have had a license for it; and if the ammunition went with it, it would be a reasonable inference that the appellant had no license for the ammunition either.

The strange feature of this apparently obvious case is the absence of business-like care concerning the way it was prosecuted or perhaps tried. The complainant did identify the pistol but with no details. The appellant said that she ought to have produced her own certificate. Well that might have been the property of her late husband, but it would have helped perhaps to identify the pistol's number and description. A magistrate ought always to insist on the details of identification in case of accidental mistake. The complainant did not even look at the ammunition. Perhaps she could not identify it. Then let her say so. Corporal Davis was allowed to talk of the opinion of the ballistic expert and produce the latter's report. How could that be done without calling the expert? It is true that that report did not aid the prosecution in proving the charges, but it went to sentence. This court has held that if the gun is not working at all, a less severe sentence would normally be commensurate with the offence, than if it was a lethal weapon. It must surely have been possible to call the expert to give evidence.

Apart from these aspects of the case, there is the question of the inference to be drawn from the discrepancy in the evidence of the two police corporals. Corporal Davis, PW 2, testified that the pistol and the lamp stolen from the complainant's house were found with the appellant at room No 3, Laikipia Guest House, Eastleigh on June 5, 1985. But apart from the general statement, the details of the search of this room and room of the appellant's co-accused deal only with the pistol and ammunition found with the appellant. Corporal Njenga PW 3 however, in a more detailed statement, explained that the co-accused's house had been searched on June 3, 1985, nothing being seized; that then on June 5, 1985, the police party arrested the appellant when he was found to have the pistol in his trousers, and the ammunition; but that it was on June 6, 1985 that the lamp was found with the co-accused. This discrepancy caused the High Court to doubt that the co-accused really did possess the lamp and so acquitted him. Corporal Davis noted that on June 6, 1985 it was the co-accused who told the police that the pistol had certainly been stolen from the complainant's house. If it was a confession it was inadmissible (see section 29 of the **Evidence Act (cap 80)**); if it were not, it was not thought sufficient evidence upon which to base the prosecution case.

But the appellant complained that his co-accused knew all about the theft of the pistol. The police corporals were not reliable, he said, and there were no surrounding circumstances at all, either by way of identification by the complainant, nor fingerprints or the evidence of other persons in the Guest House, to show that the appellant had certainly been arrested with the pistol and ammunition. But the lower courts were satisfied that though the police corporals disputed the whereabouts of the lamp, there was no doubt about the gun. The latter had actually been tucked in the trousers of the appellant. There had been a magazine with the ammunition. The lower courts were clearly aware of the discrepancy and the lack of any supporting evidence. They still accepted the evidence of the corporals as against this appellant. This was evidence upon which they could come to that conclusion, and there is no point of law which overrides that result. Consequently it follows that the appellant was found in possession of the pistol and ammunition on June 5, 1985. That was recently after the robbery. The complainant's identification of the pistol was sufficient as the appellant did not challenge it. The result is that the appellant was properly held to have taken part in the robbery. From his possession of the gun and ammunition, it followed in this case, that he was properly convicted on counts 2 and 3.

The sentences were lawful and the appellant had several previous convictions. This court cannot interfere see section 361 of the **Criminal Procedure Code.**

Accordingly the appeal is dismissed.

Dated and delivered at Nairobi this 23rd day of October, 1987

H.G. PLATT

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

J.R.O. MASIME

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AG. JUDGE OF APPEAL

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