IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

INDICTMENT NO: 0061/12

THE QUEEN

V

MARCUS STEVE MANDERSON

Appearances:	**Ms. Nicole Petit for the Crown**
	Ms. Lucy Organ of Samson and McGrath for the Defendant
Before:	**The Hon. Mr. Justice Charles Quin**
Trial:	**29th January 2013 – 8th February 2013**
Submissions heard:	**8th and 11th February 2013**

RULING ON NO CASE TO ANSWER SUBMISSION

1. The Defendant is charged with possession of an unlicenced firearm contrary to s.15 of the Firearms Law (2008 Revision) and the particulars of the offence are that the Defendant on the 5th day of February 2012 at Windsor Park, George Town, Grand Cayman, had in his possession a firearm that was not under and in accordance with the terms of the Firearm User's (Restricted) Licence, namely a modified Orion Flare Gun.

2. The trial in this case began on the 29th January 2013 and, at the close of the Defence case on the 8th February 2013, counsel on behalf of the Defendant made a no case to answer submission.

SUBMISSIONS FROM THE DEFENCE

3. Defence counsel made this no case to answer submission pursuant to the classic principles of Lord Lane in ***R v. Galbraith*** 73 Cr. App R. 124.

4. Lord Lane in ***R v. Galbraith*** 73 Cr. App. R. 124 stated:

> *"1. If there is no evidence that the crime alleged has been committed by the Defendant there is no difficulty – the Judge will stop the case.*
>
> *2. The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.*
>
> *a. Where the Judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.*
>
> *b. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are, generally speaking within the province of the jury, and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the Defendant is guilty, then the Judge should allow the matter to be tried by the jury."*

5. The Defence submits that in order to prove the case against the Defendant the Crown must establish the following three elements of the offence, namely:

(a) That the Defendant was in possession of the modified Orion Flare Gun.

(b) That the modified Orion Flare Gun is a firearm under the Firearms Law (2008 Revision);

(c) That the Defendant did not have the firearm in his possession under the terms of Firearms User's Restricted Licence.

6. For the purpose of this no-case submission the Defence accepts that there is prima facie evidence of possession and that the Defendant is not a holder of a firearm licence.

7. The sole submission is that the modified Orion Flare Gun is not a firearm as defined by the Firearms Law (2008 Revision). The Defence relies on both limbs of the Galbraith doctrine.The Defence submits that, because the weapon recovered is not a firearm under the Law, there is no evidence that the crime has been committed and I should stop the case. Alternatively, the Defence also submits that the evidence presented by the Crown is inherently so weak that, when I consider the Crown's evidence, taken at its highest, it is such that the jury, properly directed, could not properly convict on it and, therefore, it is my duty to stop the case.

8. A firearm is defined in Section 2(1) of the Firearms Law (2008 Revision) which reads:

> *"Firearm means artillery, machine gun, sub-machine gun, rifle, shotgun, pistol, air gun, air pistol or any lethal barrelled weapon from which any shot, bullet or other missile can be discharged or noxious fumes can be emitted except any air rifle, air gun or air pistol of a type prescribed the Governor and of a calibre so prescribed, and includes any component part of any such weapon and such accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon, and includes any ammunition capable of being used in any firearm and reloader which is capable of or designed for the reloading of shotgun cartridges or any other type of ammunition."*

9. As counsel for the Defendant, Ms. Organ, points out, this definition has not been amended through the 1995, 2006 and 2008 revisions of the Firearms Law.

10. Counsel for the Defendant submits that the definition of a "firearm" has two essential parts:

    i. The item must be one "*from which any shot, bullet or other missile can be discharged.*";

    ii. The item must be "*a lethal barrelled weapon.*"

11. For the sake of completeness, counsel for the Defendant also provided the Court with the equivalent United Kingdom legislation which is almost identical to the Cayman Islands legislation regarding the definition of a firearm. Section 57(1) of the Firearms Act 1968 of the United Kingdom reads as follows:

"57(1) In this Act the expression "firearm" means a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged and includes –

(a) Any prohibited weapon, whether it is such a lethal weapon as aforesaid or not; and

(b) Any component part of such lethal or prohibited weapon; and

(c) *Any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon."*

12. Counsel submits that there is no statutory definition of a "lethal barrelled weapon".

EVIDENCE

13. In order to properly consider the Defendant's application it is necessary for the Court to review some selective evidence regarding the modified Orion Flare Gun.

PC ANTHONY STEWART

14. PC Stewart is a firearms instructor with the Royal Cayman Islands Police Service (RCIPS). As part of his duties he is charged with the initial test firing of firearms and or ammunition that come within police custody. He has been performing this function for approximately three years. Before working in the Cayman Islands PC Stewart had twelve years experience with the Jamaica Constabulary Force (JCF) where he was also a firearms instructor.

15. PC Stewart initially received the modified flare gun in question on the 8th February 2012 and attempted to fire from it a .38 bullet. PC Stewart tried placing a few normal rubber bands on the weapon to see if the weapon would fire, but he was unsuccessful. PC Stewart found that the modified flare gun was inoperable. PC Stewart explained that it would not fire because the firing pin was not hitting the base of the bullet with sufficient force. Further, he found that the bullet was somewhat loose.

16. PC Stewart then went to the Scenes of Crime officer, Tommy Taylor, ("PC Taylor") who showed him the photographs of the weapon with the attached rubber, that is, photos 9, 10, 11, 12, 13 and 14 of Exhibit 1. PC Taylor also gave PC Stewart the black rubber tubing which is Exhibit 4.

17. Accordingly, PC Stewart next re-fitted the black rubber tubing, which was found along with and around the flare gun, but again, the firing pin did not strike the bullet with sufficient force. PC Stewart said that he realised that the breach area of the gun was slightly too deepened, which made the bullet loose and not fit securely in the chamber. Therefore PC Stewart wrapped a small amount of tape around the lower portion of the bullet. PC Stewart said he did not trust the weapon – fearing it would explode – so he actually placed the flare gun into a vice grip. PC Stewart said the vice grip held the bottom portion of the pistol grip. He then affixed the vice grip to a piece of wood – a simple 2" by 4" piece – and he then rotated the weapon that was fixed to the vice grip on the piece of wood. PC Stewart then raised the weapon over a barrel – three quarters of which was filled with water – and he then thumbed the hammer back and pulled the trigger. PC Stewart said the backlash from the water came up and hit him in the face and he had to remove his glasses. PC Stewart said there was the usual bang and recoil.

18. PC Stewart explained that the barrel of the flare gun was a pipe, which was copper tubing, was not of a diametre into which standard ammunition would fit. Accordingly, ammunition had to be modified to secure it in the chamber.

19. PC Stewart was asked whether he could measure the velocity with which the projectile left the firearm and he confirmed that he had no means by which to measure the velocity. PC Stewart's evidence was: As long as the bullet was discharged by whatever means, the bullet is going to maintain the same muzzle power/energy as any other firearm. It has to be noted that the Crown made no application to have Officer Stewart accepted as a firearms expert

and the Crown agreed with the Defence that his evidence was that of a normal serving officer of the RCIPS.

MR. ALLEN GREENSPAN

20. Mr. Greenspan has been a firearms and tool mark examiner for the past 20 years. He passed certifying exams in three different areas including firearms and firearms-related evidence, tool marks and tool mark-related evidence, muzzled target distance and determination, as well as gunshot residue analysis. The Crown presented Mr. Greenspan as a firearms expert and this was accepted by the Defence.

21. On the 24th February 2012 the modified Orion Flare Gun was sent to Mr. Greenspan. Mr. Greenspan said he examined the 12-gauge flare gun which had been modified. He carried out certain tests but he found that the Orion Flare Gun was not operable.

22. On the 9th March 2012 Mr. Greenspan was sent a second item, Exhibit 4, which was the piece of bicycle inner tube, and asked to re-examine the Orion Flare Gun. Mr. Greenspan said he placed the rubber tubing around the Flare Gun and attached it to the hammer of the gun. Mr. Greenspan said, initially, when the trigger pulled you could see that the hammer moved slowly and not with enough force to cause the flare gun to discharge. The second time Mr. Greenspan examined the gun he took a .38 calibre round and he removed the bullet and dumped the gunpowder for safety purposes. The diametre of the metal tube affixed to the flare gun was approximately .425 inches. This meant that a .38 special round would slide back and forth and would not be a good fit into the weapon. Mr. Greenspan then took the cartridge and placed


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27. However, from his examination and experience, Mr. Greenspan said that, in his view, the gun was capable of expelling a projectile at a force capable of causing death or serious injury, and was a firearm.

MR. PHILIP JOHN BOYCE

28. Mr. Boyce is a forensic scientist specializing in firearms, gunshot residue (GSR) and tool marks and he has been specialisng for over 28 years. The Defence presented Mr. Boyce as a firearms expert and this was accepted by the Crown.

29. Mr. Boyce, due to time and financial constraints did not examine the firearm but he did read and review Exhibit 1 – which is the photo album and includes photographs of the item. He also reviewed the statements of Mr. Greenspan and PC Stewart.

30. Mr. Boyce's view was that the item was originally a plastic signal service pistol, to which an attempt had been crudely made to convert it into a firearm. Mr. Boyce explained that a copper pipe has been placed into the item to make a barrel. Mr. Boyce said one would need some knowledge of firearms to undertake the conversion that he had seen.

31. It was Mr. Boyce's view that the Orion Flare Gun cannot discharge unmodified conventional ammunition.

32. Mr. Boyce told the Court that he was aware of the definition in law of a firearm in the Cayman Islands, which is substantially the same as the definition in law in the United Kingdom – namely, that it is any lethal

barrelled weapon from which any shot, bullet or other missile can be discharged.

33. It is Mr. Boyce's opinion that this item in its current condition is not a firearm. Mr. Boyce's view is that it is not a firearm because it cannot accommodate conventional ammunition and, even with modifying ammunition, it was not able to fire the ammunition. Mr. Boyce said, in its current condition, the item cannot discharge a projectile without modifying the ammunition to make it discharge the projectile. Mr. Boyce said the item effectively has a homemade barrel, in that, it will not accept any conventional ammunition, and, the barrel itself, that is, the copper tube, is not a lethal barrel.

34. Mr. Boyce said when one is considering whether an item is lethal or not:

i. One, in order to assess the velocity of the projectile, one would need to chronograph the velocity to get the specific energy.

ii. One can also test the item in a ballistic medium to see how deep it penetrates. The ballistic medium is representative of the human body.

35. Mr. Boyce said there is no specific guideline in the United Kingdom for what is termed lethal, but in most cases, any projectile which is less than 4FT/LB of energy could potentially be lethal if it hits a sensitive part of the body, such an eye.

36. Mr. Boyce said if the velocity of the projectile is not tested, one cannot, with any certainty, call the item a lethally barrelled weapon.

37. Directed to Mr. Greenspan's evidence on a velocity of 332 feet per second: Mr. Boyce says the actual mass of the projectile is also critical. For example, if there is a projectile which is the width of an air weapon pellet that would produce an energy of 2.94 FT/LB. So, in order to examine the velocity one would need the speed of the projectile and the weight of the projectile.

38. Mr. Boyce explained that in a situation where the ammunition is loose in the barrel, when it is discharged, the gases of combustion would actually go around the bullet and so the actual velocity would be considerably lowered. Owing to the fact that the projectile is not a tight fit, the projectile will not achieve the full energy of the cartridge.

39. Furthermore, Mr. Boyce said he would not consider gunpowder to be a projectile. In relation to the testing Mr. Greenspan undertook, Mr. Boyce said if he had used blank cartridges in the firearm it will actually discharge a propellant and gunpowder.

40. From his review of both Mr. Greenspan's and Mr. Stewart's statements, Mr. Boyce accepted that the flare gun has the potential ability to discharge a projectile, however, without modified ammunition the item has not discharged a projectile.

41. Under cross examination Mr. Boyce acknowledged that, with modified ammunition, there is a possibility that the flare gun is capable of causing more than just a trifling injury. However, because it has not been measured, it is not a lethally barrelled weapon in its original condition.

42. In response to the Court's question that Mr. Greenspan's view was that the modified weapon with modified ammunition is capable of discharging a projectile which could cause death or serious injury, Mr. Boyce agreed. Mr. Boyce said that, in conjunction with modified ammunition, it is potentially capable of causing lethal injury. Mr. Boyce said that in its original condition, without modified ammunition, it would not. However, Mr. Boyce agreed with Mr. Greenspan that, with the modified ammunition it could cause death or serious injury.

NO CASE SUBMISSION BY THE DEFENCE

43. The Defence made a number of submissions on the evidence and I have selected the following for consideration:

i. Neither Mr. Greenspan nor PC Stewart nor Mr. Boyce received the item in the same condition it was found, and therefore did not examine the Orion Flare Gun in the same condition and cannot comment on the operability of the item in the condition in which it was found.

ii. No modified ammunition was found with the item and there is no evidence that, prior to its recovery by the police, the item had ever discharged a projectile.

iii. Without the addition of the rubber tubing the Flare Gun in inoperable and cannot be considered a firearm because the firing pin would not hit the base of the bullet with sufficient force.

iv. Even with the use of the rubber tubing the flare gun is inoperable unless the ammunition is modified.

v. Mr. Greenspan did not wrap the rubber in the same way as the way the rubber was wrapped around the gun when it was first found.

vi. Mr. Greenspan and Mr. Boyce agreed with each other that when the projectile is loose in the barrell, the pressure exerted upon it is affected, and one would expect the velocity of the projectile discharged to be lower.

vii. Mr. Greenspan and Mr. Boyce agreed that the barrel of this item is of a dimension that cannot accept conventional ammunition and it would require ammunition to be modified for the ammunition to fit securely.

viii. The weapon could only discharge a projectile if it were modified to fit the barrel, because it was a homemade barrel which was not of a conventional diametre.

ix. The weapon was not lethally barrelled because there is no evidence of the velocity or energy the projectile obtained, and there was no attempt to test fire the projectile into a ballistic medium.

x. Mr. Boyce provided evidence that he had seen a number of modified or homemade firearms in the UK which, when they discharged a projectile, the velocity obtained was so low that they could not be considered capable of causing any injury at all.

xi. There is no evidence that the weapon in question was operable at the time it was said to be in the possession of the Defendant, and therefore cannot be said to be a firearm at that time.

xii. The weapon was not a firearm because the rubber band, Exhibit 4, had to be manipulated into position, a vice grip had to be used and also modified ammunition had to be used in order to get this item to discharge a projectile.

44. The Defence therefore submits that the Crown has failed to make out that the item recovered was as firearm as defined by the firearms law.

SUBMISSIONS FROM THE CROWN

45. In response to the Defence the Crown submits that everything required to make the firearm operate was recovered with the weapon namely, the Flare Gun with the rubber band attached to it.

46. The vice grip that was used when the weapon was test fired by PC Stewart was used as a safety mechanism and cannot be viewed as some external component used to make the weapon discharge.

47. The Crown relies upon the evidence of PC Stewart and Mr. Greenspan. They both successfully test fired the weapon and they did not do any modifications to the item itself.

48. The Defence relies on the case of ***R v. Bewley*** [2013] 1 W.L.R. 137. The Crown submits that in ***Bewley*** the weapon was designed to fire blank cartridges and was constructed with a solidly blocked dummy barrel. Part of the barrel had been removed by drilling, resulting in an off-centre hole, and the top part of the hammer had been broken off. By mounting the weapon in a vice or clamp, using a mallet, and punch to hammer a pallet through the muzzle, loading a blank cartridge, and using a mallet and punch to strike the firing pin, a police officer had made the weapon discharge a missile with sufficient force to penetrate simulated skin and flesh.

49. Bewley's appeal was upheld. The 1982 Firearms Act in England was enacted to widen the description of "firearms" in cases where conversion of an imitation firearm could be achieved without any special skill and without the use of equipment or tools other than those in common use.

50. In ***Bewley*** the firearm could only discharge a missile with the aid of other implements external to the weapon itself. The use of the vice to clamp the pistol and the mallet and punch to ram the ammunition home constituted a conversion of the starting pistol.

51. Crown counsel, Ms. Petit, submits that the facts of ***Bewley*** are easily distinguishable from the facts in this case. PC Stewart only used the vice grip to protect himself and the vice grip was not an implement external to the weapon in order to make the weapon work.

52. Accordingly, the Crown submits that no conversion was required, and that the use of the rubber band which was wrapped around the item when it was found cannot be viewed as an alteration or conversion.

53. The Crown highlights the fact that DC Campbell only removed the rubber band from the weapon at the scene in order to make the weapon safe. Mr. Greenspan and PC Stewart wrapped the rubber band, Exhibit 4, around the weapon, and then they were able to successfully test fire it. The Crown submits that PC Stewart's evidence is that he re-fitted the rubber band by wrapping it round the item in the same or similar fashion as shown in photographs 9 through to 15 of Exhibit 1.

54. The Crown submits that the item in question is lethally barrelled and submits that both Mr. Greenspan and PC Stewart successfully test fired the weapon. The Crown relies on Mr. Greenspan's expert opinion that the weapon was capable of discharging a projectile, which could cause death or serious injury.

55. Furthermore, the Crown submits that even the Defence expert, Mr. Boyce, conceded that with "modified ammunition" there is a possibility that the weapon could cause more than a trifling injury. The Crown also relies upon the fact that when PC Stewart test fired the weapon into a barrel of water it caused a splash that left the water and hit him in the eye.

56. Consequently, the Crown submits that the ultimate decision on matters about which both experts have expressed conflicting views is one for the jury and not for the experts.

57. Accordingly, the Crown submits that these matters should be left to the jury because it is possible that, on one view of the evidence before the Court, the weapon in question is a lethally barrelled weapon and a firearm under the Firearms Law.

THE LAW

58. As set out above, s.2(1) of the Firearms Law (2008 Revision) is so similar to s.57(1) of the UK Firearms Act 1968, that the minor difference is of no significance. It is worth repeating for the purpose of this analysis that the relevant portion of s.2(1) of the Firearms Law defines a firearm as a:

> *"...pistol... or any lethal barrelled weapon from which any shot, bullet or other missile can be discharged."*

Section 57(1) of the Firearms Act 1968 in the United Kingdom reads:

> *"Firearm means lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged."*

59. In ***Grace v. DPP*** [1989] Crim. L.R. 365, the Queen's Bench Divisional Court of Mann L.J. and Auld J, in determining what constitutes a firearm within s.57(1) of the Firearms Act stated that the prosecution must prove:

> *"1. Whether the weapon was one from which any shot, bullet or other missile could be discharged or whether it could be adapted to be made capable of discharging such a missile and*
> *2. If so satisfied, whether it was a lethal barrelled weapon."*

60. The Court commends both counsel for their extensive research and reasoned arguments in this application. Defence counsel helpfully reviewed the history of the relevant case law – much of which I find it necessary to review and record.

61. In ***Cafferata v. Wilson*** [1936] 3 All E R 149 the issue was whether a starting pistol was a firearm. The then Lord Chief Justice, Lord Hewart said at page 150:

> *"Everything turns on the definition of "firearm" in the Act of 1920. At the material time the article was incapable of being fired, but a part of it needed alteration to make it suitable for firing. The Magistrate has held that the article as a whole is part of a firearm within the definition. This is quite a tenable proposition. If something had had to be added to the dummy to make it into a complete revolver, the dummy might be said to be part of the revolver. It seems to make no difference that the decisive part was not to be an addition, but an adaptation of what was already there. It is easier to support the decision from another point of view. The dummy contains everything else necessary for making a revolver except the barrel, and therefore all the other parts of it except those which required to be bored are "parts thereof" within the meaning of the section."*

62. The English Court of Appeal in its decision in ***R v. Freeman*** [1970] W.L.R. 788 followed ***Cafferata v. Wilson***. The case of ***R v. Freeman*** involved a 380 starting pistol with a revolving chamber. It had constrictions in the front ends and the barrel was solid. These features were intended to prevent the discharge of missiles but could be removed by drilling. In following Lord Hewart in ***Cafferata v. Wilson*** the Court of Appeal in ***R v. Freeman*** held that the definition of "firearm" in s.57(1) of the 1968 Firearms Act embraced a weapon which, although incapable of being fired, could be adapted to discharge a missile.

63. Ms. Organ relied upon the decision of the Scottish High Court of Judiciary in ***Kelly v MacKinnon*** [1983] SLT 94 in which the Court decided not to follow the decisions of ***Cafferata v. Wilson*** and ***R v. Freeman***. The Lord Justice-General in ***Kelly v. MacKinnon*** found:

> *"If an article is not a lethal barrelled weapon from which any shot, bullet or other missile can be discharged or a component part of such weapon, it is not a firearm for the purposes of the Act. Whether it would be easy or difficult to convert such an article into such a lethal weapon is quite irrelevant, and where one is dealing with, let us say, an object which is not a component part of such lethal weapon, but which could be used in the construction of such a lethal weapon, it cannot be seriously suggested that it is, for that reason, a "firearm" in its own right."*

64. However, despite what has been described as the "*trenchant criticism*" by the Scottish High Court of the decisions in ***Cafferata v. Wilson*** and ***R v. Freeman,*** both the learned editors of the 2013 editions of ***Blackstone – Criminal Practice*** – and ***Archbold – Criminal Pleading Evidence and Practice*** suggest that the later English Court of Appeal decision in ***R v. Freeman*** which followed ***Cafferata v. Wilson*** is still the correct statement of the law of what is a "firearm."

65. The learned editors of ***Blackstone*** at B12.8 go on to quote from ***Grace v. DPP*** and address the first question as to whether the weapon was one from which any shot, bullet or other missile could be discharged, or whether it could be adapted so as to be made capable of discharging such a missile.

> *"As to the first question, see Freeman [1970] 1 WLR 788, where a starting pistol was capable of discharging bullets since the barrel had been partially drilled (but see **Kelly v. MacKinnon** 1983 SLT 9), and **Anderson** [2006] EWCA Crim 738, where it is confirmed that an unloaded or ineffectively loaded gun could be a firearm."*

66. In addition, the learned editors of ***Archbold*** state at paragraph 24-91:

*"In **R v. Freeman**, 54 Cr. App. R. 251, CA it was held that the definition of "firearm" is section 57(1) of the 1968 Act (ante, §24-85) embraced a weapon which, although incapable of being fired, could be adapted to discharge a missile. In **R. v. Bewley** [2012] 2 Cr. App. R. 27, CA, however, the court qualified the authority ... It held that such a weapon would only be a firearm within the 1968 Act if it could be converted into a weapon from which a missile could be discharged without any special skill or the necessity for specialist equipment."*

It is noteworthy that in their examination of the definition and meaning of "firearm" under s.57(1) of the UK Firearms Act 1968 the learned editors of Archbold do not cite the Scottish case of ***Kelly v. MacKinnon***.

67. At paragraph 24-86 the editors of ***Archbold*** state:

"Whether a weapon is a firearm, is a question of fact. Accordingly, the reported cases do not establish as a matter of law that a particular type of weapon is a firearm."

68. The editors of ***Blackstone's Criminal Practice 2013*** state at paragraph B12.8 that:

*"There is no statutory definition of a "lethal barrelled weapon. In **Grace v. DPP** [1989] 153 JP 491 the Divisional Court held that the prosecution must prove the following in order to satisfy the definition:*

(a) Whether the weapon was one from which any shot, bullet or other missile could be discharged or whether it could be adapted so as to be made capable of discharging such a missile and
(b) If so satisfied, whether it was a lethal barrelled weapon."

69. The learned editors of ***Archbold***, like the editors of ***Blackstone*** appear to accept the decision of the Divisional Court in ***Grace v. DPP*** and the Judgment of the Court of Mann L.J. and Auld J as the correct statement of what the Crown must prove and state at paragraph 24-86 that "*whether a weapon is a firearm is a question of fact.*"

70. I come now to the second question, that is, whether the weapon, Exhibit 2, is a lethal barrelled weapon.

71. In ***Read v. Donovan*** [1947] K.B. 326 the then learned Lord Chief Justice Lord Goddard, considered the question of what is a firearm and what is a "lethal barrelled weapon" as set out in s.32(1) of the Firearms Act 1937, which was the predecessor to s.57(1) of the Firearms Act 1968. In this case the Defendant had a double barrelled signal pistol of German make, firing a cartridge with explosive ballistic and containing a phosphorous magnesium flare. Lord Goddard in his Judgment stated:

> *"The question in this case is whether the article which the Defendant had in his possession is a firearm. The definition of "firearm" in s.32(1) of the Act is "any lethally barrelled weapon of any description from which any shot, bullet or other missile can be discharged."*

Lord Goddard went on state:

> *"If a weapon is a lethal weapon, which means a weapon capable of causing injury, and if such a weapon is barrelled and a sharpened bullet or other missile can be discharged from it, it is a firearm. In the present case the article is clearly such a weapon. The intention of the manufacturer or designer of the weapon is immaterial; the question simply is whether the weapon is capable of inflicting harm. In my opinion therefore the case should go back to the magistrate with an intimation that the offence is proved."*

72. It is noteworthy that the editors of ***Archbold*** describe Lord Goddard's test in ***Read v. Donovan*** of what is a firearm as "*an enduring test.*"

73. In ***Moore v. Gooderham*** [1960] 1 W.L.R 1308 the then Lord Chief Justice, Lord Parker, stated:

> *"If a gun was capable of causing more than trifling injury when misused, then it is a weapon capable of causing injury from which death might result and was in consequence, lethal and a firearm within the meaning of the section."*

74. Returning to ***Grace v. DPP*** [1989] Crim L.R. 365 there follows on from the case report some helpful commentary from Professor J.C. Smith who, with Professor Hogan, was the author of the classic textbook ***Smith and Hogan on Criminal Law,*** Professor Smith states in the ***Criminal Law Review*** 1989 at pages 366-367:

> *"Surely it is legitimate to assume, even in a criminal case, that an instrument is capable of performing its normal functions unless there is some evidence that it is not so capable. Moreover, an air rifle is a very common and uncomplicated article frequently owned by boys and young men or by their friends and might have been expected that ordinary bench would have been familiar with its nature and capable of satisfying themselves from an examination of it that it was in working order and capable of discharging a missile. From there it is not a great leap to deciding that it was "lethal". It was a lethal weapon within the broad meaning attributed to that term. Unless the missile does little more than trickle out of the end of the barrel, the weapon is almost bound to be capable of killing if it is discharged at point blank into some particularly vulnerable part of the body such as the eye."*

75. Finally, I return to the 13th edition of ***Blackstone*** in which the learned editors state at paragraph B12.9:

> *"Whether a device is a "lethal barrelled weapon" is a question of fact (see **Grace v. DPP** and consider **Street v. DPP** [2004] EWHC 86 (Admin). The correct approach is for a judge to determine whether a device is capable of amounting to a firearm and then to leave to the jury the question of whether it actually is a lethal weapon. (**R v. Singh** [1989 Crim. L.R. 724; see also **Paul** [1998] EWCA Crim 2283). In **R v. Singh**, an army signaling kit consisting of flares and hand-held device was held to be capable of amounting to a 'firearm' and the flares, being explosives, were held to be capable of amounting to ammunition."*

In ***R v. Singh*** 1989 Crim L.R. 725 the English Court of Appeal held that:

> *"There was evidence on which the Judge (at first instance) could find that the weapon could be a firearm: and the jury were properly left to decide which expert evidence they accepted and whether the possession of a firearm and ammunition had been proved."*

CONCLUSION

76. In this case the Crown alleged that the Defendant was in possession of the Orion Flare Gun. The Orion Flare Gun was found with a rubber band tied round the hammer. During recovery of the weapon the rubber band was removed in order to make the weapon safe and to have it swabbed for forensic analysis.

77. PC Stewart, on seeing the photographs of how the rubber band fitted round the Orion Flare Gun proceeded to simulate that by putting the same rubber band, Exhibit 4, round the Orion Flare Gun, Exhibit 2.

78. PC Stewart was able to successfully test fire the gun with a .38 bullet. He wrapped a small bit of tape around the bullet so it fitted into the barrel of the flare gun. He then successfully fired the Flare Gun. The bullet or the warhead was discharged from the Flare Gun. It hit the water in the barrel with such force that the water came up and hit officer Stewart in the face.

79. Mr. Greenspan also test fired the Orion Flare Gun, although without a projectile. The gun successfully fired.

80. In ***Grace v. DPP*** the Court stated:

> *"Expert evidence might not have been necessary. It could have been established by evidence of a witness to the firing of the gun or if someone familiar with such a weapon who could indicate to the court not only that it did work but what its observed effect was when it was fired."*

81. Although the Defence expert Mr. Boyce does not accept that it is a firearm, he does accept that with the tape attached to the .38 bullet the item could cause death or serious injury.

82. Although Mr. Greenspan did not complete his test by firing a bullet or projectile out of the weapon he also stated that, in his view, the item could cause death or serious injury.

83. There is, in my view, sufficient evidence from the two experts and PC Stewart to find that, on one possible view of the facts, a jury could properly come to the conclusion that the Defendant is guilty.

84. In addition, although the Crown expert, Mr. Greenspan, and the Defence expert, Mr. Boyce, disagree as to whether the Flare Gun is a "firearm", there is clearly evidence on which I could find that the weapon could be a "firearm". Accordingly, I think it is a matter for the jury to decide which expert evidence they accept and whether the charge of possession of a firearm has been proved against the Defendant beyond all reasonable doubt.

85. For all the above reasons I dismiss the Defendant's application to withdraw the case from the jury and I order that the trial against the Defendant is to continue.

Dated this the 14th February 2013

Honourable Mr. Justice Charles Quin
Judge of the Grand Court

GRAND COURT – CAYMAN ISLANDS