Neutral Citation No. [2005] NICA 7 | *Ref:* **NICF5181**

Judgment: approved by the Court for handing down | *Delivered:* **11/02/2005**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

GEORGE ANGUS McKENZIE

Before Nicholson LJ, Campbell LJ and Morgan J

NICHOLSON LJ

Introduction

[1] This is an appeal by George Angus McKenzie against conviction of the offence of possessing a weapon designed to discharge a noxious liquid gas or thing, contrary to Section 6(1)(b) of the Firearms (Northern Ireland) Order 1981 (the Order as amended) and against sentence of six months' imprisonment suspended for one year. The offence was a scheduled offence, the trial judge was His Honour Judge McFarland, sitting without a jury, and the date of conviction and sentence was 16 March 2004. The indictment should have referred to Article 6(1)(b) of the Order as amended but nothing turns on this mistake.

Summary of evidence

[2] On the evening of Wednesday 9 July 2003 a large crowd gathered at Evelyn Avenue which is a cul-de-sac between the Upper Newtownards Road and Bloomfield Walkway off the Beersbridge Road. They attacked 16 Evelyn Avenue in which the appellant was temporarily living. They severely damaged a Ford Escort car outside the house, smashed the front windows of the house and attempted to gain entry through the front door and an inner hall door, damaging both doors and breaking panes of glass in the inner door. One of them put his hand in through one of the panes of glass, holding what appeared to be a black handgun. A man called Ewing who was with the

appellant managed to close the inner door by kicking it, locking it, and putting a grill on it. In the course of doing so, the man outside dropped the handgun which landed on the floor inside the house. Ewing picked it up and threw it upstairs onto the first floor landing.

[3] When the appellant first saw the handgun on the floor he thought that it was a "real gun". He picked it up on the first floor landing and at some stage opened it to see if there were rounds in it. There was a magazine and the gun was cocked but the magazine was empty. He dismantled the gun and realised that it was a replica. He re-assembled it and hid it in a cupboard built into the roof-space in a second-floor attic which had been converted into a bedroom. There was a water tank in the cupboard with a plastic lid covered by an insulating jacket. On top of the jacket was a brown leather bag. He removed the bag and jacket and hid the handgun on top of the lid and replaced the insulating jacket and leather bag on top of the handgun, so as to conceal the handgun.

[4] Constable Green found the handgun in the course of a search of the cupboard at about 10.35 pm on 9 July 2003 and an ATO, Captain Blake, later on the same evening examined it. It had the appearance of a blank semi-automatic pistol; the magazine was fitted and the hammer was in a rearward position. The working parts were forward and the safety catch was off. He found that there were no rounds in the magazine or chamber. Mr Leo Rossi, a Senior Scientific Officer in the Forensic Science Agency examined the handgun and magazine on 17 July 2003. The handgun consisted of an unmodified Italian made model 85 replica pistol designed to discharge 9 mm (non-bulleted) cartridges. The pistol was constructed with a partially blocked barrel designed to prevent the discharge of projectiles. The blockage allowed the passage of discharge gases from the muzzle and hence allowed 9 mm blank cartridges with a gas (C.S.) lachrimatory component to be discharged. Under these circumstances, he stated, the pistol is classed as a weapon subject to general prohibition in that, under Article 6(1)(b) of the Order as amended, it is "a weapon of any description designed or adapted for the discharge of any noxious liquid, gas or other thing". The pistol was successfully test fired using blank 9 mm cartridges.

[5] At some time between 9.30 pm and 10.35 pm on 9 July 2003 Sergeant Lutton of the PSNI entered No. 16 Evelyn Gardens with Inspector McFarland. He saw five persons in the house and noted their names and addresses. They included the appellant. Inspector Little of the PSNI entered the house at 10.10 pm and asked all the occupants including the appellant whether there were any firearms located in the house before the police searched the house. The appellant was adamant, according to the Inspector, that no weapons of any kind would be found in the house. The appellant was informed of the finding of the gun shortly after 10.30 pm and told Detective Constable Stoneman that he had handled the gun which had been seized from someone

on the outside trying to get into the house. He was arrested and cautioned shortly after 1.20 am on Thursday morning and taken to Antrim Road Custody Suite. He was interviewed at approximately 4.50 am by two detectives in the presence of his solicitor. He was duly cautioned. He explained the circumstances in which the gun was seen by him on the floor inside the house, how he took it from the first floor to the attic and hid it, after examining it and finding that it was a replica gun. He said that he had had his "fair share" of replica guns and had looked at them in fishing tackle shops.

The charges

[6] Ewing and the appellant were charged with possession of a weapon designed to discharge a noxious liquid gas or thing, contrary to Article 6(1)(b) of the Order as amended.

Findings of fact made by the trial judge

[7] The trial judge set out in his written judgment the finding of the handgun by Constable Green, the examination of it by Captain Blake and the findings of Mr Rossi on examination of it. He then described the earlier events of the evening of Wednesday, 9 July 2003, the entry of the police into 16 Evelyn Gardens and the questions put to the persons present in the house, including the appellant. These included: (1) Have you anything or anybody in the house which you cannot properly account for? Have you any legally or illegally held munitions in your possession or in this dwelling house? All replied 'No'. He referred to McKenzie's interview with the detectives when he told them that Ewing brought the gun up the stairs to the top landing and gave it to him and he took it up to the attic and placed it there. He also referred to his evidence in which he stated that Ewing had thrown the gun up the stairs, that he had picked it up at the first landing and had taken it up to the top of the house. He explained his actions by saying that he had panicked and that he didn't know what made him do it. He said, inter alia, that on examination he knew right away that it was a replica.

[8] The trial judge accepted the appellant's evidence that the handgun had not been in the house prior to the evening in question, had been brought in by an unknown third party and had been forcibly removed from him (or her) by Ewing, disposed of reasonably quickly by Ewing and then picked up by the appellant and hidden.

The trial judge's decision

[9] He acquitted Ewing on the ground that he could not be satisfied that Ewing was not acting under duress of circumstances, having regard to the fact that a large crowd had chased Ewing into the house, had broken windows and tried to force their way into the house, that a person holding a

handgun had confronted him and Ewing dislodged the handgun from his grasp, picked the weapon up and almost immediately threw it further into the house. There was insufficient evidence to suggest that he possessed the handgun after throwing it away. He stated that McKenzie was in a different position. He picked up the gun, examined it and made a decision to hide it. The trial judge was satisfied that the Crown had not proved beyond reasonable doubt that McKenzie was not acting under duress of circumstances when he picked up the gun and carried it upstairs to the attic.

However he was not satisfied with McKenzie's explanation as to what happened next: "He quickly ascertained that the handgun was a replica and incapable of causing him or his fellow occupants any harm". The trial judge did not accept that it was hidden to prevent the crowd from retrieving it. He also rejected the explanation that he wanted to hide it from his partner and the children. "In any event at 9.35 pm the police presence was substantial, and McKenzie would not have been in any fear for his safety, or the safety of others. At that time he was in possession of the handgun, and the circumstances justifying his possession of it no longer existed … having been alerted to the fact that police were addressing the issue of a weapon in the house, he would have been under no illusions about the situation." Accordingly he convicted McKenzie on the basis that from a period shortly after the police entered the house, McKenzie was in possession of the handgun and was not under any duress of circumstances.

The issues of law

[10] We do not have the submissions of Mr O'Donoghue QC at the close of the Crown case nor the authorities which he cited to the court and most of his submissions at the close of the case related to the issue of "duress of circumstances" which was rejected by the trial judge. This argument was renewed before us but we reject it for the reasons given by the trial judge.

But there is a passage in the judgment which indicates what the nature of the submissions at the close of the Crown case were, that these submissions were repeated at the close of the case and that they were rejected by the trial judge.

At page 4 of his judgment the trial judge states:-

> "At the end of the Crown case Mr O'Donoghue QC on behalf of McKenzie applied for a direction that his client had no case to answer, on the ground that the Crown had not proved specific knowledge on the part of the defendants that the weapon was a prohibited weapon. Mr Orr QC, who appeared for Ewing, associated his client with the application, without

making any further submission. I did not consider it necessary to ask Mr Russell to respond on behalf of the Crown. These applications were refused by me following the authority of the line of cases *Warner v Metropolitan Police Commission* [1969] 2 AC 256 (a drugs case), *R v Hussain* 72 Cr App R 143, and *R v Vann and Davis* [1996] Crim LR 52. I held that it was sufficient for the Crown to prove that a Defendant had knowledge that he possessed an article, without the need to prove that the article was a firearm, never mind a specific type of prohibited firearm. There was sufficient evidence at that stage to prove such knowledge on the part of both defendants, as well as the other constituent elements of the offence. Mr O'Donoghue renewed this point at the conclusion of the case, stressing the difference between Article 3 offences and Article 6 offences and a consequential need to prove knowledge that the possessed item was a prohibited firearm, as opposed to a firearm. I again reject that argument."

[11] The grounds of appeal against conviction were:-

"(a) That the learned trial Judge misdirected himself in law on the issue of 'knowledge' required on the part of the appellant to satisfy the requirement of Article 6(1) of the Order as amended.

(b) The learned trial Judge was wrong in law to find that the appellant remained in possession of the prohibited weapon once he had hidden it within the curtilege of 16 Evelyn Avenue.

(c) The learned trial Judge was wrong to conclude that he was satisfied beyond reasonable doubt that from a period shortly after the police entered the house that the appellant was in possession of the handgun and that there was no duress of circumstance.

2. The sentence imposed upon the appellant was, on the facts as found by the learned trial Judge,

"manifestly excessive."

[12] In his skeleton argument and in oral argument before this court Mr O'Donoghue QC referred to various Articles of the Order as amended. He pointed out that Article 2 provides definitions of words used and defines "firearm" as meaning "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 ….."

It defines "imitation firearm" as meaning "anything which has the appearance of being a firearm whether or not it is capable of discharging any shot, bullet or other missile."

It defines "prohibited weapon" by reference to Article 6(1) and 6(1)(A). Article 3(1) provides that, subject to any exemption under the Order, a person who –

(a) has in his possession … a firearm without holding a firearm certificate in force at the time … shall be guilty of an offence.

Article 6(1) provides that a person who, without the authority of the Secretary of State, has in his possession … (b) any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing … shall be guilty of an offence.

Schedule 2 (as amended) provides a maximum punishment of five years' imprisonment or a fine or both for an offence under Article 3(1). For an offence under Article 6(1) the maximum punishment is ten years' imprisonment or a fine or both. The Criminal Justice Act 2003 amends the sentencing provisions as from 20 January 2004 so as to provide a minimum term of imprisonment of five years for an offence under Article 3(1)(a) – possession of a handgun without holding a firearms certificate in force at the time – unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so.

Articles 17A, 18, 19 and 21 create offences in respect of persons who have with them a firearm or imitation firearm with intent to commit an indictable offence or to resist arrest or prevent the arrest of another or who, while they have a firearm or imitation firearm with them enters or is in any building or any land without reasonable excuse. Offences connected with imitation firearms relate to their use. He pointed out that there was no definition of "possession" in the Order as amended. He submitted that in order to prove possession the prosecution must establish that the accused has actual or potential physical control of the item with knowledge of the nature of what is kept or controlled. He relied on the decision of the Court of

Appeal in Northern Ireland in R v Murphy, Lillis and Burns to which, he told us from the Bar, he had referred the trial judge: see [1971] NI 193.

[13] Lord MacDermott CJ, giving the judgment of the majority of the court, referred to the charges on the indictment which contained counts under the Explosive Substances Act 1883 and the Firearms Act (NI) 1969. Counts 4 and 5 alleged possession of firearms and ammunition respectively without a firearms certificate under section 1(1)(a) of the Firearms Act (NI) 1969. He stated at p. 199:-

> "'Possession' is an ambiguous word and one which, as Lord Parker of Waddington observed in *Towers & Co Ltd v Gray* [1961] 2 QB 351, at 361, is always giving rise to trouble. Its precise meaning must depend on the context and policy of the statute using it, and no comprehensive definition is therefore, possible or desirable. But in section 1(1)(a) it connotes, in our opinion, voluntary possession by actual or potential physical control, with knowledge of the nature of what is kept or controlled. Other contexts may demand less, as in *Reg v Warner* [1969] 2 AC 256. Some may demand more, as where the possession is attached to a specific purpose or some special intent. But to bring a case within section 1(1)(a) there is no need to look for any such attachment; see *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458, 469-470. The learned trial judge explained possession at some length. At one point in the summing-up he appears to have said that he did not agree that there had to be an element of willingness to take the article into possession. But his following observations correct this, and the summing up, as a whole, conveys a direction on the relevant meaning of 'possession' which is sufficiently clear not to justify interfering with the conviction under discussion.
>
> Two other matters fall to be considered in regard to section 1(1) of the Act of 1969 and its bearing in relation to the circumstances of this case. The first is that the duration of a possession otherwise within this enactment is not in itself material. While a momentary possession may at times verge on the kind of offence which is little more than a bare technicality, the mischief aimed at by this section cannot be measured in time, as possession for a very brief period may be just as dangerous as for a much

longer period. The second matter concerns the voluntary element in an assumption of possession or control. The material background here is the existence of an opportunity to take into possession a firearm for which there is no appropriate certificate. This may lead to a variety of situations. For example, A finds a pistol by the side of the road, takes it up, examines it and puts it in his pocket with a view to throwing it into a river he is just about to cross. Before he gets there he is stopped by the police and the pistol is discovered. He is guilty of an offence under section 1(1)(a): he has assumed control of what he knows is a firearm and has neither duty nor excuse to justify throwing it into the river or carrying it thereto. But suppose A finds the pistol lying in an hotel bedroom as he is retiring for the night, in circumstances which absolve him from responsibility for its presence. He determines to have nothing to do with the pistol and leaves it severely alone. Is he nonetheless in possession of the firearm? We think the answer must be in the negative. A has the relevant knowledge and the opportunity and ability to assume possession or control, but the necessary mental element is lacking: he does not wish or intend to take possession or assume control. Again, A on leaving the bedroom next morning takes the pistol with him with the sole object of handing it over to the police for safe custody. Has he committed an offence under section 1? This court considers he has not: like a fireman who carries a bomb from a burning house to a place of safety, he is acting as a good citizen should, and in a manner which we cannot believe Parliament intended to penalise.

Turning to the present case, we are of opinion – (i) that, in convicting under section 1(1)(a), the jury were certainly not acting inconsistently with their finding in relation to the charge under count 1, for that finding was based on a lack of reasonable suspicion which was irrelevant under section 1(1)(a); and (ii) that there was evidence enough on which to found the conviction now under consideration. It was open to the jury to find that the accused had gone up to the bedrooms much earlier than they admitted and had had plenty of time to discover the weapons and ammunition which were there to be found. But

> whether the jury were satisfied of this or not, they could well have inferred from the admitted handling of the rifles by Murphy and Lillis, in the presence of Burns, that the accused had assumed possession of the firearms within the meaning of section 1. The attempts to hide the rifles manifested a voluntary assumption of possession and control for a purpose which, however futile, had no justification in law; and for a time which, however limited, amounted to possession for long enough to come within section 1.
>
> For these reasons we hold that the conviction on count 4 of an offence against section 1(1)(a) must stand."

[14] Mr O'Donoghue submitted that the crucial words were: "with knowledge of the nature of what is kept or controlled". He argued that the appellant knew that the item was a replica handgun in the sense that it was an imitation firearm but that there was no evidence to justify the inference that he knew it was a prohibited weapon within the meaning of Article 6(1)(b). He also relied on R v Downey [1971] NI 224 in which the trial judge had directed the jury that "you can have possession of a thing though you don't know. It is a difficult idea but you must have a certain knowledge about the thing or the means of knowledge about the thing but you don't have to actually have this specific knowledge that you possess" and went on to refer to "imputed knowledge" and "means of knowledge". Lord MacDermott LCJ said: "… this was a misdirection, for possession under section 1(1) of the Act of 1969 means, in the opinion of this court, possession with knowledge as it does under the provisions of the Act of 1883: see Sambasivam v Public Prosecutor, Federation of Malaya [1950] AC 458, 469."

[15] This court adds that in Sambasivam the material words of Regulation 4(1) of the Emergency Regulations were: "Any person who carries …. any firearm, not being a firearm which he is duly licensed to carry …. shall be guilty of an offence". Lord MacDermott giving the reasons for allowing the appeal in that case on behalf of the Privy Council stated: "It was conceded on behalf of the Crown – and rightly, in their Lordships' opinion – that "carries" here means "carries to his knowledge" and that the carrying of a firearm by a person who did not know what he carried would not constitute an offence under this provision."

[16] Mr Russell on behalf of the respondent argued in the course of written and oral submissions that the prosecution must prove that the accused knowingly had in his possession an article which was in fact a prohibited weapon. The offence is absolute save for the requirement that the accused must know that he is in possession of the article which is in fact a prohibited

weapon under Article 6 of the Order as amended. The prosecution need not prove that he knew the article was a firearm or a prohibited weapon.

[17] He relied on R v Hussain [1972] Crim. App. R. 143 in which it was held by the Court of Appeal in England and Wales that the offence of possessing a firearm without a firearm certificate contrary to section 1(1) of the Firearms Act 1968 was an absolute offence. Accordingly the prosecution did not have to establish mens rea on the part of the accused.

The trial judge had directed the jury that the appellant would be guilty of the offence even if he did not know that the object was a firearm, provided that he knew that he had it in his possession.

Eveleigh LJ giving the judgment of the court stated that the sub-section makes no reference to the state of knowledge of the accused, that it is drafted in absolute terms and can be contrasted with other sections of the Act where the accused's state of mind is specifically referred to. The court applied what they described as the reasoning of their Lordships in Warner v Metropolitan Police Commissioner [1969] 2 AC 256, citing a passage from Lord Morris of Borth-y-Gest's speech in which he stated:

> "Was it, however for the prosecution to prove that the appellant knew the nature and quality of that which he had? In my view it was not …"

And a passage from Lord Guest's speech in which he said:

> "Absolute offences are by no means unknown to our law and have been created, inter alia, in relation to firearms (Firearms Act 1937) and shotguns (Criminal Justice Act 1967 s. 85) which Acts create serious offences. A common feature of these Acts and the Drugs Act is that they all deal with dangerous substances where the object is to prevent unauthorised possession and illegal trafficking in these articles."

We note that the court was not referred to Sambasivam or to Murphy, Lillis and Burns.

[18] Mr Russell also referred to R v Vann & Davis (1996) Crim. L.R. 52 and to R v Bradish [1990] 1 QB 981, the head note of which reads in part:-

> "*Held*, dismissing the appeal, that, since the clear purpose of the firearms legislation was to impose a tight and effective control on the use of highly

> dangerous weapons, and since the comparable words of section n1 of the Firearms Act 1968 had been held to import strict liability, section 5 of that Act, which concerned more serious offences than those created by section 1, on its true construction, made it an offence knowingly to possess, without the authority of the Secretary of State, an article which was in fact a prohibited weapon, and it was not necessary for the prosecution to prove that the defendant had known that it was such a weapon; that it would be no defence for the defendant to prove that he had not known, or could not reasonably have been expected to have known, that the article was a prohibited weapon, even where the weapon was concealed in a container which was not itself a prohibited weapon; that the canister was, in any event, a prohibited weapon under section 5(1)(*b*) and was not merely the container of such a weapon; and that accordingly the assistant recorder's ruling had been correct."

[19] He also reminded us of the decision in The Queen v Gerald Majella O'Neill. In that case MacDermott LJ giving the judgment of the court, stated at pp. 21-23:-

> "… The Crown case was that the appellant accepted from three men, one of whom he knew and knew to be a member of a terrorist organisation, the INLA or IPLO, a closed bag described on one occasion [by the appellant] as containing 'uniforms and things' and on another occasion as 'stuff'. He did not enquire what exactly was in the bag nor did he look. He was prepared to and did accept whatever was in the bag. In those circumstances the clear inference is in our judgment that he was willing to accept whatever the terrorists had put in the bag and he must have contemplated that that could have included a weapon or weapons of some sort – indeed he frankly accepted that even if he had known there was a rifle in the bag he would still have kept it.
>
> This inference is greatly strengthened by the appearance and weight of the bag and its contents. It is clear that this was a very significant matter in the eyes of the judge who saw and handled the bag …."

He said:

> "'… Given the weight of the holdall, its appearance and that it had been brought to his flat by a man he believed to be in either the INLA or the IPLO, both of which the defendant knew to be terrorist groups, I am satisfied beyond reasonable doubt that the proper inference to draw from all of the circumstances is that the defendant contemplated, by which I mean he either knew or believed that the heavy object which the bag contained was either a firearm or some sort of explosive materials of some sort. I am therefore satisfied beyond reasonable doubt that the defendant had possession of the firearm and given all of the circumstances to which I have referred, I am further satisfied beyond reasonable doubt that he had possession of the firearm to enable it to be retrieved in due course by this man for the purposes of either the INLA or the IPLO and that in such circumstances the proper inference to draw is that the defendant had possession of the weapon with intent by means thereof to enable others to endanger life or cause serious injury to property.'
>
> We have no doubt that the evidence fully supported such a conclusion – indeed it is one which we would have ourselves reached on the cold transcript."

Mr Russell sought to argue that R v Clinton [2001] N.I. effectively altered the law as expressed in Murphy, Lillis and Burns.

[20] Mr Russell relied on the relevant passages in Archbold 2005 § 24-6, 24-24, and Blackstone 2005, B 12.20 and 12.21 and the authorities cited therein.

[21] Mr Russell argued that in any event the evidence proved that the accused had knowledge of the nature of what was kept and controlled. The accused knew he had a replica handgun and such knowledge was sufficient whether the weapon subsequently transpired to be a firearm or prohibited weapon. The accused claimed that he did not know it was a prohibited weapon within the meaning of the Order. This was a mistake of law which is no defence.

Our Conclusions

[22] The law relating to the possession of firearms differs in Northern Ireland from the law in England and Wales.

Clinton did not deal with what has to be proved to establish possession and did not alter the law in this area. In the present case, as in Murphy, Lillis and Burns, the prosecution has to prove that the appellant had in his actual or potential physical control the prohibited weapon, voluntarily assented to such control and had knowledge of its nature.

[23] On an examination of the facts we are satisfied that the appellant had such knowledge. He was aware that it was a handgun: he examined it and took it to pieces, re-assembled it and hid it. He was accustomed to dealing with handguns and had previously acquired replica handguns. Replica handguns can be designed to discharge blanks and this handgun had a magazine, barrel and trigger which could be cocked and pulled. It was unmodified and whilst it could not discharge bullets, it could discharge noxious liquids, gases or other things. The fact that he hid it supports the conclusion that he knew its nature. Whether or not he was aware that it was a "prohibited weapon" under Article 6(1) of the Order as amended is irrelevant. The lawfulness or unlawfulness of his possession cannot depend upon whether he knew the provisions of the Order as amended. Ignorantia juris non excusat. Accordingly we are satisfied that the conviction is not unsafe. A passage in the final paragraph of the judgment of the trial judge leads us to believe that he would have reached the same conclusion if he had applied the legal test binding upon him.

[24] In many cases the accused will be charged with possession of an article which is concealed and the prosecution may not be able to prove that he knew what he was keeping or had under his control. The tribunal of fact may be able to infer that he assented to keeping or controlling it, knowing or being wilfully blind as to its nature. This inference may, for example, be drawn where there is evidence that the accused has an opportunity of finding out what it is but refrains from doing so: see Gerald Majella O'Neill cited in argument.

[25] This inference may also be drawn where there is evidence that he did not ask the person who gave him the article what it was or refused to disclose who gave it to him or why he was keeping it or who was to collect it or to whom he was to deliver it or knew that it was impossible for him to ascertain what the article was.

Such inference may be drawn under Article 4 of the Criminal Evidence (Northern Ireland) Order 1988 as commonsense requires: see The Queen v John Gerard McLaughlin (1991) 8 NIJB 20.

[26] Accordingly the conviction is not unsafe and the appeal is dismissed.

The sentence

[27] The appeal is also against sentence. It was contended that we should adopt the approach in Clinton and substitute a fine for the suspended sentence of imprisonment imposed by the trial judge.

In the course of his sentencing remarks the trial judge referred to R v Avis and Others [1998] 1 Cr.App.R. 420 Lord Bingham CJ stated at p423:-

> "(1) In several cases this Court has criticised the sentences imposed or upheld in previous cases as inadequately reflecting the gravity of such offences: see, for example, *Ecclestone* (1995) 16 Cr.App.R.(S.) 9 at 11; *Francis* (1995) 16 Cr.App.R.(S.) 95 at 98; and *Clarke* [1997] 1 Cr.App.R.(S.) 323, 324.
> (2) Parliament has recently increased the maximum term of imprisonment which may be imposed for certain of these offences in the Criminal Justice and Public Order Act 1994.
> (3) The Criminal Statistics for England and Wales published by the Home Office for 1996 show that, while the number of those convicted of some firearms offences has not increased between 1991 and 1996, the number convicted of other firearms offences has very sharply increased. Those convicted on indictment of possessing firearms with intent to endanger life have risen from 33 in 1991 to 207 in 1996. Those convicted of possessing or distributing prohibited weapons or ammunition have risen from 212 in 1991 to 1,002 in 1996. This accords with the subjective impression formed by a number of judges that cases involving the use of firearms come before them much more frequently than was once the case, particularly in some parts of the country."

The position in Northern Ireland is equally alarming. He further stated:-

> "Where imitation firearms are involved, the risk to life and limb is absent, but such weapons can be and often are used to frighten and intimidate victims in order to reinforce unlawful demands. Such imitation weapons are often very hard to distinguish from the real thing – for practical purposes, impossible in the circumstances in which they are used – and the victim is usually as much frightened and intimidated as if a

> genuine firearm had been used. Such victims are often isolated and vulnerable. "

This weapon was, of course, not merely an imitation firearm but capable of discharging a gas which could disable the victim.

At page 424 he said:-

> "The appropriate level of sentence for a firearms offence, as for any other offence, will depend on all the facts and circumstances relevant to the offence and the offender, and it would be wrong for this Court to seek to prescribe unduly restrictive sentencing guidelines. It will, however, usually be appropriate for the sentencing court to ask itself a series of questions:
>
> (1) What sort of weapon is involved? Genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded firearms. Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such as a sawn-off shotgun) will be viewed even more seriously than possession of a firearm which is capable of lawful use.
> (2) What (if any) use has been made of the firearm? It is necessary for the court, as with any other offence, to take account of all circumstances surrounding any use made of the firearm: the more prolonged and premeditated and violent the use, the more serious the offence is likely to be.
> (3) With what intention (if any) did the defendant possess or use the firearm? Generally speaking, the most serious offences under the Act are those which require proof of a specified criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence.
> (4) What is the defendant's record? The seriousness of any firearm offence is inevitably increased if the offender has an established record of committing firearms offences or crimes of violence.

The trial judge applied the correct principles. The facts in the case of Clinton differed from the facts in this case as can be seen from p210 of the

judgment [2001] N.I. 207 at 210. We can find no fault with the trial judge's approach to sentencing on the facts of this case or with the sentence. Accordingly the appeal against sentence is also dismissed.