

District Court  
New South Wales

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Case Name: Fahma v Director of Public Prosecutions (NSW)

Medium Neutral Citation: [2021] NSWDC 329

Hearing Date(s): 18 February 2021

Decision Date: 21 July 2021

Jurisdiction: Criminal

Before: Colefax SC DCJ

Decision: Conviction appeal is dismissed

Catchwords: Possessing ammunition without holding a licence, permit or authority - firearms prohibition order - whether recipient of Fire Prohibition Order entitled to a reasonable opportunity of complying with the order - whether evidence obtained upon search admissible.

Legislation Cited: Firearms Act 1996 (NSW), s65(3), 73, 74, 74A; Evidence Act 1995 (NSW), s138

Cases Cited: DK v Director of Public Prosecutions [2021] NSWCA 134; Director of Public Prosecutions (NSW) v Shaba [2018] NSWSC 811; R v Shaitly [2019] NSWDC 762

Category: Principal judgment

Parties: Abraham Fahma (Appellant)  
Director of Public Prosecutions (NSW)

Representation: Mr Saddik (Solicitor for the applicant)  
Mr Auld (Solicitor for the respondent)

File Number(s): 2019/00253596

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal:	Local Court
Jurisdiction:	Criminal
Date of Decision:	16 December 2020
Before:	McAnulty LCM
File Number(s):	2019/00253596

- 1 On 13 November 2020, following a contested hearing, Abraham Elias Fahma was convicted in the Local Court of the offence of possessing ammunition without holding a licence, permit or authority.
- 2 That offence involved a contravention of s65(3) of the Firearms Act 1996 (NSW) – the maximum penalty for which is a fine of \$5,500.00.
- 3 The Local Court imposed its penalty for that offence on 16 December 2020.
- 4 On the same day, Mr Fahma filed an all-grounds appeal in this Court.
- 5 In conducting such appeals in this Court, it is appropriate for the Court to first determine the conviction aspect before considering (if necessary) the penalty aspect.
- 6 This judgment is only concerned with the conviction.
- 7 The only issues in the appeal are whether the search of the appellant's premises immediately upon the service of the firearms prohibition order (to which I shall refer) was lawful – and, whether or not it was lawful, was the evidence obtained by the police in that search admissible in the contested hearing.
- 8 This Court is regularly called upon to determine three types of appeal from the Local Court: a defendant's sentence appeal; a defendant's conviction appeal; and a prosecution sentence appeal.
- 9 In *DK v Director of Public Prosecutions* [2021] NSWCA 134, the Court of Appeal (per McCallum JA, Brereton JA and Simpson AJA agreeing) reminded this Court that a defendant's sentence appeal is different in nature from both a

defendant's conviction appeal and a prosecution sentence appeal. All three appeals are to be by way of a re-hearing based on the evidence given in the Local Court. However, only in a defendant's sentence appeal is an appellant entitled, as of right, to adduce fresh evidence; in the other two types of appeal, the appellant requires leave.

- 10 For completeness, I also note that that decision reminded this Court that, in a prosecution sentence appeal, the prosecution must establish error in order to enliven this Court's jurisdiction to vary a sentence imposed in the Local Court (and even then, this Court has a residual discretion to dismiss a sentence appeal, notwithstanding the establishment of material error in the sentence under appeal).
- 11 During the hearing of this conviction appeal, an application was made by the appellant to adduce fresh evidence. However: as that evidence was reasonably available to the appellant at the time of the Local Court hearing; no prior notice of the application had been given to the Crown; and the nature and scope of the evidence was (at best) vague, leave was refused.
- 12 There was no factual dispute in the Local Court and there is not one in this appeal. The undisputed facts are as follows.
- 13 On 12 November 2007, the appellant was convicted and sentenced for the offence of resisting an officer in the execution of duty.
- 14 On 3 September 2018, a COPS entry was made concerning the appellant for the offence of "not notify firearms safekeeping at new address".
- 15 As at 19 October 2018, the appellant:
  - (a) held "an active category A and B NSW Firearms Licence";
  - (b) possessed five registered firearms, being various types of rifles; and
  - (c) was "linked" to the Comanchero Outlaw Motor Cycle Gang.
- 16 On 19 October 2018, police attended the appellant's residential premises and discovered that:
  - (a) the five firearms were not stored in the appellant's rifle safe;
  - (b) the rifle safe itself was not secure; and

- (c) the rifles were at a location which the appellant refused to reveal.

17 On 28 December 2018, the appellant's firearms licence was suspended.

18 On the same day (incorrectly said to be "28 December 2019" in paragraph 6 of Exhibit 7), that notice was served on the appellant at his residential premises and the five rifles (by then stored in a secured safe) were seized – but no other firearms or ammunition were seen by police.

19 On 31 January 2019, the appellant was issued with a consorting warning.

20 Section 73 of the Firearms Act is, relevantly, in the following terms:

"73(1) the Commissioner may make a firearms prohibition order against a person if, in the opinion of the Commissioner, the person is not fit, in the public interest, to have possession of a firearm.

(2) a firearms prohibition order takes effect when a police officer serves a copy of the order personally on the person against whom it is made.

..."

21 On 18 May 2019, a delegate of the Commissioner of Police made a firearms prohibition order against the appellant.

22 In making the firearms prohibition order, the delegate of the Commissioner noted:

- (a) the conviction on 12 November 2007 of the offence of resisting an officer in the execution of duty;
- (b) the infringement notice concerning the COPS event entry on 3 September 2018 for the offence of "not notify firearm safekeeping arrangement at new address";
- (c) the consorting warning the subject of the COPS event entry on 31 January 2019;
- (d) the appellant's association with the Comanchero Outlaw Motor Cycle Gang; and
- (e) the fact that that motorcycle gang is an organised criminal group.

23 By having regard to those facts, the delegate of the Commissioner made the following finding:

"It is considered that you are not fit in the public interest to at any time have access to firearms, firearms parts or ammunition. It is critical to ensuring the public's safety that a firearms prohibition order is issued against you."

24 On 24 May 2019, the appellant's firearms licence was revoked.



- 25 On 26 June 2019, the firearms prohibition order was personally served by a police officer on the appellant who was sitting in his motor vehicle near his residential premises.
- 26 As s73(2) makes clear, a firearms prohibition order takes effect upon service.
- 27 Once such an order takes effect, s74 is engaged. Amongst other things, s74(3) provides that it is an offence for a person who is subject to such an order to be in possession of ammunition for any firearm.
- 28 Furthermore, once a firearms prohibition order takes effect, s74A is also engaged. The section gives powers to the police to search premises occupied by a person who is subject to such an order.
- 29 In this context, it is appropriate to note specifically s74A(1):
- “(1) The powers of a police officer under this section may be exercised as reasonably required for the purposes of determining whether a person who is subject to a firearms prohibition order has committed an offence under s74(1), (2) or (3).”
- 30 At the time the firearms prohibition order was served, it was the intention of that police officer to immediately thereafter search the appellant, his motor vehicle, and his residential premises – and that is what occurred.
- 31 During the conversation between the appellant and the police officer at the time that order was served, the appellant “... raised concerns... about having ammunition casings at his house”.
- 32 The police searched the appellant’s motor vehicle but nothing adverse to him was found by the police.
- 33 The police and the appellant then drove their respective vehicles to the appellant’s residential premises which the police then searched.
- 34 In a small chest of drawers in a bedroom in those premises the police found sixteen .38 calibre rounds of ammunition in a small cardboard box.
- 35 The appellant admitted that the ammunition was his – and that he had purchased it whilst he had the firearms licence.

- 36 The police then seized these items which were subsequently determined by an appropriately qualified expert to be firearm parts within the meaning of s4(1) of the Firearms Act.
- 37 It was submitted on behalf of the appellant that, upon its proper construction, s74(1) required the police, before undertaking those searches, to give the appellant a reasonable opportunity of complying with the firearms prohibition order. It was further submitted that what was reasonable would depend upon the particular subjective characteristics of the person who was the subject of the order.
- 38 In my opinion, the section does not impose any requirement upon a police officer to give a person who has been served with a firearms prohibition order a reasonable opportunity to remove, for example, ammunition from his residential premises. Any other construction would diminish the clear words and purpose of s73(2).
- 39 In my view, “reasonably required” directs attention to the actions taken by the police in the manner in which the powers under s74A(2) are carried out. Any alternative construction does not give effect to the clear purpose of a firearms prohibition order. My conclusion in this respect is consistent with *Director of Public Prosecutions (NSW) v Shaba* [2018] NSWSC 811 per Fagan J at [15] to [34], especially [25] to [27].
- 40 If, however, I am wrong in this regard, and it is necessary for a reasonable opportunity to be given to a person to comply with a firearms prohibition order, then, as I have noted, the appellant submits it is appropriate to focus on the subjective circumstances of the person under consideration.
- 41 In this regard, the appellant’s personal / subjective characteristics were outlined above in the notations made by the delegate of the Commissioner in making the firearms prohibition order. Significantly, they included the fact that the appellant had an association with an Outlaw motorcycle gang.
- 42 In my view, it is not unreasonable, because of the problems that are well known with such organisations, to immediately, upon service of a firearms prohibition order, search premises associated with such a person.

- 43 In my view, the search of the appellant's premises was lawful.
- 44 I shall now turn to the second issue on the appeal: in the events which have occurred, was the evidence obtained in that search admissible in the contested hearing?
- 45 A Court Attendance Notice (H71995107) was issued on 14 August 2019 (and returnable before the Local Court on 30 September 2019) alleging a contravention of s65(3) of the Firearms Act. It was that charge that was the subject of the conviction on 13 November 2020.
- 46 Critical to the prosecution's case was what was found by police in executing the search of the appellant's premises using the powers given to them by s74A.
- 47 The appellant points to the fact that he was not charged with any offence under s74(1), (2) or (3) (which are contained in Part 7 of the Firearms Act). Rather, as I have indicated, he was charged with an alleged offence under s65(3) of that Act (which is contained in Part 6).
- 48 The appellant submits (further, and in the alternative, to his submission concerning whether he ought to have been given a reasonable opportunity of complying with the firearms prohibition order) that in these circumstances the evidence was not lawfully obtained and should have been excluded under s138 of the Evidence Act.
- 49 The possession of ammunition is prohibited in both s65(3) and s74(3) of the Firearms Act. Why the police chose to prosecute the appellant under the former section (the maximum penalty for which is a fine) and not the latter section (the maximum penalty for which is imprisonment for 5 years) was not the subject of any evidence.
- 50 But the fact that the police subsequently took that beneficial (to the appellant) approach does not mean (as the appellant submitted) that the search of the appellant's premises was not lawful at the time it was conducted; or the evidence thereby obtained was obtained improperly or in contravention of an Australian law, or in consequence of an impropriety or of a contravention of an Australian law (cf s138 of the Evidence Act). The facts of this present case are,

therefore, significantly distinguishable from those in *R v Shaitly* [2019] NSWDC 762.

- 51 Even if I were wrong in that respect, in the circumstances of this case, the desirability of admitting the evidence clearly outweighs any undesirability of admitting it (see s138(3)(a), (b), (c) and (d)).
- 52 For these reasons, the evidence of the search was properly admitted in the Local Court.
- 53 The appeal against conviction is dismissed.
- 54 I shall now hear submissions on the severity appeal.