

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CIV-2012-004-002276**

BETWEEN

CLIVE OWEN JORDAN  
Appellant

AND

COMMISSIONER OF POLICE  
Respondent

Hearing: 9 and 10 April 2014  
Submissions received 5 May 2014

Appearances: N Taylor for the Appellant  
S L McColgan for the Commissioner

Judgment: 26 September 2014

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**RESERVED DECISION OF JUDGE P A CUNNINGHAM**

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**Introduction**

[1] On 1 September 2009 the New Zealand Police issued an import permit to allow Mr Clive Jordan to import into New Zealand three rifles that were described as Heckler and Koch military style semi automatic weapons. It was a condition of the permit that once the rifles arrived in New Zealand a sample must be inspected to ensure they were as described on the import permit. Following that inspection by a police armourer the police advised Mr Jordan that the firearms could be easily converted to fire in full automatic mode and therefore they did not meet the description of "semi automatic". The police subsequently cancelled the permit.

[2] Following that decision in late January 2011 Mr Jordan made further submissions to the police seeking to persuade them that the rifles did meet the description of being semi automatic weapons. That included obtaining material from overseas which was subsequently considered by the police. He was advised on 4 March 2012 that the police decision remained. Mr Jordan then filed this appeal.

### **Relevant Arms Act provisions**

[3] Pursuant to paragraph 4 of the schedule to the Arms (Restrictive Weapons and Especially Dangerous Airguns) Order 1984 firearms that are “capable of full automatic fire” are defined as restricted weapons. Restricted weapons are not able to be imported into New Zealand without a permit. Automatic firearms permits are generally restricted to the New Zealand Armed Forces and certain specialised units of the New Zealand Police.

[4] Semi automatic weapons which fire one cartridge with each pull of the trigger fall into at least two categories. Some are made in a sporting configuration and they are able to be owned by anyone who has an ordinary (usually referred to as Class A) firearms licence. Military style semi automatic weapons are able to be owned by people with a special endorsement on their firearms licence. This is commonly known as an “E” endorsement. It is the latter that Mr Jordan wished to import.

[5] These firearms can only be sold to someone who holds the “E” endorsement. The change of ownership must be registered with the police.

### **The appellant’s case**

[6] Mr Jordan is a firearms dealer and also a collector of guns. The three rifles that he imported are wanted by him for the purpose of resale to other persons. Such sale would follow the proper procedure of only being sold to someone with an “E” endorsement. There is no suggestion that Mr Jordan would do other than abide by the legal requirements demanded of him.

### **The appellant’s case**

[7] It is the appellant’s case that the three rifles that were imported into New Zealand by Mr Jordan were “born” or “made” as a semi automatic rifle. While based on a fully automatic Heckler and Koch rifle, modifications have been made

during the manufacturing process that means that when the trigger is pulled only one shot can be fired.

[8] Mr Jordan's evidence essentially fell into the following three categories:

- (a) Information provided by the entity from which he purchased the rifles in Germany;
- (b) Information that he gathered from other firearms dealers and agencies in Turkey and the United States which support that these are military style semi automatic rifles;
- (c) Expert testimony from Mr Martin Bath that an inspection and consideration of the componentry of the rifles satisfied him that they were born as military style semi automatic rifles.

[9] Mr Bath is a theatrical armourer and gunsmith. He has a background in precision engineering and is a toolmaker. He has worked with firearms for the last 30 years, making parts for and repairing firearms. He holds a general firearms licence and also holds a "C" endorsement for his work in the entertainment industry which involves being in control of firearms on a film set. I am satisfied he has the qualifications and experience to give expert testimony in this case.

### **The police case**

[10] The police position is that these rifles have been converted from an automatic rifle into a semi automatic rifle. The police witness Mr Robert Ngamoki did not rule out that this may have occurred in the factory when the weapons were manufactured.

[11] Mr Ngamoki is a Senior Police Armourer with an impressive background of 11 years training and working as an armourer for the New Zealand Army and over 30 years as an armourer in the New Zealand Police currently holding the position of Senior Police Armourer. I am satisfied that he has the qualifications and experience to give expert testimony in this case.

[12] Mr Ngamoki emphasised the ease with which the rifles could be converted back to an automatic one. Part of the police concern is that if such weapons fall into the wrong hands, in particular, the criminal element, they would present a risk to public safety. MSSAs are “status guns” within some criminal communities and had been found when warrants were executed on “clan labs” and criminal houses.

### **Court process**

[13] At the hearing before me evidence did not proceed in the usual way in relation to both experts. A number of rifles including the subject rifles were in the courtroom for the purposes of explaining and demonstrating to me what each expert had to say about how the rifles were made and the ease with which they could be converted back to automatic firing. During this part of the evidence Mr Bath for the appellant and Mr Ngamoki for the respondent were both giving evidence at the same time in a process known as “hot tubbing”. Following this each expert was cross-examined in the usual way.

### **The relevant law in relation to appeals**

[14] The way in which the Court approaches these appeals is set out in a decision of Her Honour Justice Goddard in *Fewtrell v New Zealand Police* 1 November 1996 AP 164/96 High Court at Wellington Registry. This was an appeal by way of a case dated from the District Court and concerned the onus of proof. In the District Court the position taken was that the onus fell on the appellant to establish that he was fit and proper person to hold a firearms licence.

[15] The Court held that the hearing of an such appeal is a hearing de novo giving due weight to the opinion of the police 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. Thus there is 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 (see paragraph [15]).

[16] Her Honour held that under s 62 of the Arms Act I am required to hear the matter de novo and reach my own decision and in doing so I can either confirm, vary or reverse the decision of the commissioned officer appealed from.

**Case law relevant to the issue in dispute**

[17] Both parties referred to the case of *Horn v The New Zealand Police* a decision of Judge Murfitt in the District Court New Plymouth 17 February 2006. Mr Horn appealed a decision of a police inspector who revoked a permit for the importation of 20 Czech CZ 58 firearms. Modifications had been undertaken in Czechoslovakia before the rifles were shipped to New Zealand. They were described as TE 58 semi automatic rifles.

[18] Following Mr Ngamoki expressing the view (on behalf of the police) that the firearms were restricted weapons because they were capable of full automatic fire, Mr Horn made a number of further modifications to ensure the firearm complied with the classification of category A firearm, namely a semi automatic weapon in a sporting configuration. The police maintained the view that it was a restricted weapon because it was capable of full automatic fire.

[19] Judge Murfitt came to the conclusion that the rifle in the *Horn* case was capable of full automatic fire by applying an extended definition that it was “readily capable by alterations undertaken with skills and tooling readily available to persons motivated to effect such modifications, of full automatic fire.” The Court upheld the revocation of the import licence based on that test.

[20] The police position is that the same can be said in this case, namely that these weapons could be readily reconverted back to full automatic fire. This is consistent with the police view that it was “born” as an automatic weapon.

[21] The appellant’s position is that *Horn* case is distinguishable because this weapon was born as a semi automatic weapon (and not a fully automatic one). Further the appellant says that converting it back to full automatic fire is not a simple task as the police suggest.

[22] As in this case, there was evidence that there are other rifles that have been allowed into New Zealand as category A weapons notwithstanding that they are capable of conversion back to full automatic fire. These have been imported legitimately.

### **Were these guns “born” as automatic weapons?**

#### The appellant’s view

[23] Mr Jordan ascertained that Mechanical and Chemical Industries Corporation (MKEK) in Turkey makes Heckler and Koch automatic firearms under licence in Turkey. Heckler & Koch is a reputable brand in firearms. He ascertained that MKEK had made semi automatic versions of the H & K 33 and the H & K MP5 automatic rifles. His application to import these firearms included specifications explaining that the rifles were manufactured as semi automatic under a civilian programme.

[24] Following the initial granting of a licence to import the firearms Mr Jordan experienced difficulties importing them directly from MKEK in Turkey due to difficulties relating to the end user certificate he acquired from the New Zealand Customs Department. This apparently was not acceptable to the Turkish Ministry of Defence who wanted documentation from New Zealand’s Ministry of Foreign Affairs and Trade (MFAT). Mr Jordan was not able to comply with the Turkish company’s requirements because MFAT would not give him the documentation requested so he turned to a wholesaler in Germany, which was also a distributor of MKEK civilian semi automatic rifles.

[25] In early 2011 Mr Jordan set about documenting some of what he had found out about the production of the rifles. Written information he obtained from the German wholesaler was in German and he experienced translation difficulties. Because of this, he then went back to MKEK in Turkey who provided documents certified by the General Directorate, Gulderen Baclacer, the technical expert and Akis Akgul, the Director of Marketing. That was an attachment to his affidavit. It referred to precautions that have been taken for preventing conversion of hunting

rifles to military rifles. These included design changes to prevent conversion of the semi automatic hunting rifles to automatic military rifles in the following parts of the weapon:

- (i) Trigger group. Changes to the release lever, hammer and trigger housing.
- (ii) Bolt body.
- (iii) Rifle housing, inside of the housing and the grip setting part.
- (iv) Grip frame, inner form and external form.

[26] Then followed twelve pages with photos and text which explained what the changes were.

- (i) Changes to the trigger group included:
  - (a) The release lever has been removed. A selector block and trigger block restrict automatic firing because the selector lever and trigger mechanism are restricted.
  - (b) The hammer has no second "jaw" which is required for automatic firing.
  - (c) The trigger housing for an automatic weapon cannot be mounted because of changes to the trigger housing.
- (ii) Bolt body, automatic firing is prevented because that part of the bolt body that operates the releaser level is not formed.
- (iii) A block has been welded into the upper receiver during manufacture that prevents an automatic bolt carrier being inserted.

- (iv) Full automatic firing is prevented:
  - (a) by an attachment and no pin hole which is required for automatic fire.
  - (b) internally a full automatic mechanism is not possible.
  - (c) the full automatic grip cannot be mounted onto the semi automatic version.

[27] The conclusion was:

T41, T43, T94 SD rifles are designed and manufactured for civilian purposes. According to the explanations above, the hunting rifles have been designed with different configurations from military guns. To prevent conversion between civilian version and military version, the precautions explained above, have to be overcome, each one separately. Overcoming these precautions will cause the deformation on the body of the gun to the trigger mechanism. This deformation will effect the operation of the rifle. It is not possible for civilian people to overcome these precautions, as it requires fabrication and manufacturing ability and the specifications and ability to manufacture the rifle from the beginning.

[28] Mr Jordan included a letter from John R Spencer, Chief of Firearms Technology Branch (FTB) of the Bureau of Alcohol Tobacco and Firearms in the United States which was sent to a Mr Di Chario of American Tactical Imports. This letter outlines that the civilian rifles made by MKEK with the configuration of the receivers and trigger housing assemblies are sufficient to preclude the ready conversion to fire automatically.

[29] Mr Bath's evidence supported Mr Jordan's own research and information he had obtained from overseas. That included that:

- (a) A hardened steel block has been welded into the main receiver which stops the fully automatic bolt from being placed in the housing.
- (b) The welding of the receiver where the trigger housing fits has the locating pin holes welded up at the time of manufacture making it impossible to ever take a full automatic trigger group. A locating lug



is also welded to block the fully automatic trigger group so that only a semi automatic one will fit in.

- (c) The trigger housings are different as are the bolt carriers and hammers.
- (d) The grip is different.

[30] Mr Ngamoki pointed to the following observations that led him to the view that these weapons have been converted from a fully automatic weapon:

- (i) A fully automatic version has an external change lever in three positions. They are nought or safe, semi automatic fire and automatic fire. The gun imported by Mr Jordan has two positions but it is apparent that at one time there was a third indentation;
- (ii) The fully automatic version of the bolt carrier has a ramp and the semi automatic one does not. Mr Ngamoki pointed to a shiny surface where he said the ramp had been ground off;
- (iii) In terms of the trigger mechanism, Mr Ngamoki noted that the auto sear and auto seal release lever and related spring had been removed and the profile at the bottom of the mechanism reshaped to fit over the blocks that had been welded into the trigger housing. This block is intended to stop the installation of a full automatic trigger mechanism;
- (iv) The hammer had had the full auto sear removed;
- (v) The trigger housing had been modified which included the removal of two lugs on the front with holes. It was Mr Ngamoki's view that marks were visible that showed where a file or similar had been used to clean the area following removal of the lugs;

- (vi) Inside the trigger housing are blocks intended to impede the insertion of a full auto trigger mechanism;
- (vii) The receiver is the main body of the firearm which contains the bolt and bolt carrier. This has had a block inserted into it to prevent a full auto bolt carrier.

[31] In relation to the hardened steel insert which blocks the operation of automatic firing, Mr Bath's view was that it was once a flat piece of metal that had been folded around during production. Mr Bath pointed to the fact that the parts were all the same colour which indicated it had been processed at the same time. Mr Ngamoki was of the view it had been put in after production. He did not agree it was hardened steel.

[32] The next difference was the ramp in the bolt carrier necessary for automatic fire. Mr Ngamoki's view was that the appearance of a shiny silver surface where the ramp once was supported the change being made after production. Mr Bath's view was it had been machined away at the time of production.

[33] There is the indentation where the third selection (for automatic fire) on the grip. Mr Ngamoki pointed to this as supporting the gun being "born" as an automatic weapon. Mr Bath explained that this is not surprising as the basic dies from the automatic version would have been modified in the production process.

[34] In terms of the removal of the lugs on the front Mr Bath's view was that the die had been altered to remove these.

[35] In my view both the experts gave plausible reasons as to whether the gun was born an automatic or not from the appearance of the gun. I was unable to decide as between the two of them.

[36] There were evidence about whether changes to make a semi automatic weapon had been carried out in the factory. Mr Ngamoki's view was that this could have happened but he had no way of knowing. Mr Bath's view was that it would not

make sense to individually change a production run of thousands of automatic guns rather the more sensible thing would be to change the die for the production run. These would be changes made to die used in the production of componentry for an automatic weapon. That opinion is persuasive.

[37] Mr McColgan raised issues about the admissibility of the documentary evidence produced by Mr Jordan. This included that the letter from FTB was not on letterhead and there was nothing from the actual supplier. Hearsay evidence is admissible if the circumstances relating to the statement provide reasonable assurance that the statement is reliable and either the maker of the statement is unavailable or it would cause undue expense or delay to cause the maker of the statement to be required as a witness (see s 18 of the Evidence Act 2006). Hearsay statements in business records can be admitted (s 19).

[38] I accept that Mr Jordan obtained these documents from MKEK in Turkey and the FTB in the United States. I therefore accept the authenticity of these documents. I found Mr Jordan to be a reliable and truthful witness.

[39] The documentary evidence supports the evidence of Mr Bath and Mr Jordan. I am therefore satisfied on the balance of probabilities these weapons were produced in the manner in which Mr Jordan contends that they were, namely they were “born” as semi automatic weapons, albeit based on H & K automatic rifles.

[40] On the balance of probabilities I am satisfied that MKEK did produce a run of civilian military style semi automatic rifles. I am further satisfied that the three rifles that Mr Jordan imported came from that run.

**How easily can these weapons be converted back to full automatic fire?**

[41] It is part of Mr Ngamoki’s day to day work that he sees weapons that have changes made to their operating mechanisms by criminals. Indeed he told me that much of what he knew about how to convert weapons he had learnt from inspecting weapons seized by police from criminals.

[42] My view of Mr Bath is that he practises a counsel of perfection in his work. That is no criticism, it is understandable given his training and background.

[43] Mr Ngamoki's evidence is that the T94 which was the gun we considered in the hot tubbing could be easily converted back to an automatic weapon. The reasons including the following:

- (i) The bolt carrier can either be replaced or if one was not available, the ramp could be rebuilt. Mr Ngamoki said that you would make a metal block copying the outline of the portion of the bolt carrier that has been removed and fix it in place by using solder or adhesive. His view was that this would take approximately an hour and would require basic hand tools and soldering equipment;
- (ii) The bottom of the trigger mechanism could be reshaped to allow the installation of a full auto mechanism in the trigger housing. Mr Ngamoki's view is that that could be performed with a hacksaw and a file and would take approximately 15 minutes. If a full trigger auto mechanism could not be sourced then the missing auto sear, auto sear release lever and spring could be inserted. Mr Ngamoki was of the view that this could be achieved by "trial and error". This would mean removing the internal block which Mr Ngamoki said could be carried out with a dremel which are available in hardware stores;
- (iii) The installation of a full auto trigger mechanism would overcome the problem of rebuilding the bent on the hammer. If one is not available then the bent could be restored in the same manner as the ramp on the bolt carrier;
- (iv) If the full auto trigger mechanism is modified or adapted then the trigger housing does not need modification;

- (v) The receiver on the semi automatic rifle contains an internal projection to impede the use of a full auto bolt carrier. Mr Ngamoki's view is that this could easily be removed.

[44] Where Mr Bath differed on these issues was as follows:

- (i) Mr Bath did not agree that solder or adhesive would be strong enough to secure a built up ramp.
- (ii) If you had to make an auto sear, getting it to the exact measurement could be time consuming and difficult.
- (iii) Changes to the hammer so it engaged with the auto sear would require TIG (Tungsten Inert Gas) welding. Mr Bath did not agree that resin or brazing as Mr Ngamoki suggested would be strong enough.
- (iv) The internal changes to insert an automatic trigger mechanism would be much more difficult to effect than Mr Ngamoki suggested, both in terms of removing impediments and making new parts strong enough.
- (v) Mr Bath also said that replacement parts could not be obtained. Overseas entities will not send them to anyone in New Zealand without a permit and a permit would not be issued.

[45] My view is that someone of Mr Ngamoki's experience and skill could reconvert these guns to automatic fire. It may take longer than he suggested but I am satisfied it would be less time than Mr Bath suggested and probably with a less perfect conversion than Mr Bath might effect.

## Legal issues

[46] There was a 1992 amendment to the Arms Act to further restrict the spread of automatic weapons in New Zealand. This was in response to a multiple homicide incident known as Aramoana Massacre. In *Horn v The New Zealand Police*, Judge Murfitt referred to *Wall v The New Zealand Police* unreported High Court Palmerston North AP57/95 14 October 1996 where Neazor J said:

The exclusion in respect of semi automatic firearms maintained in a sporting configuration in my view presents no illogicality in construction of the provision. That exclusion applies only so long as a weapon is the sporting configuration. If on a particular occasion it is not or if it can shown that on any occasion it has not been, the weapon will come within the definition of military style semi automatic firearm.

[47] Judge Murfitt said that this meant that a particular firearm may fluctuate from one classification to another depending on its configuration at the time. Judge Murfitt noted as I have that almost any number of firearms could be converted so that they are capable of full automatic fire. It therefore cannot be the purpose of the Arms Order to declare all of them as restricted weapons because on the strict interpretation of the phrase “capable of full automatic fire” that would be a possible outcome (see paragraph [57] of the *Horn* decision.

[48] Judge Murfitt decided that the purpose of the statute would be met if the weapon was “readily capable by alterations undertaken with skills and tooling readily available to persons motivated to affect such modifications of full automatic fire” (see para [63] *Horn*).

[49] Given that I have formed the view these guns were born as semi automatic weapons it seems wrong in principle to decline Mr Jordan’s application for a permit. In my view he is acting within the law. I accept that may not sit comfortably with the definition of capable of automatic fire in the *Horn* case.

[50] Judge Murfitt commented and I support his view that the Arms Act and the Arms Order are not easy to unwrap. Further that a review of the Act might result in more comprehensive laws based on clearly stated policies. I agree. It does not make sense to have a number of weapons that are capable of automatic fire yet able to be

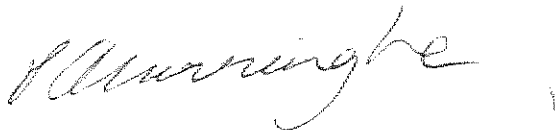
owned by people under an A category or ordinary firearms licence. Having said that, this case did not focus on how easily or otherwise that is able to be achieved. However it does make sense that if a weapon is "born" an automatic then conversion back to that state would be more easily achieved as compared to a weapon which was "born" a semi automatic one.

[51] The decision of the Inspector to revoke the permit is reversed. The appeal is allowed.

[52] This case has presented a number of difficulties in part because of apparent ambiguities in the legislation itself. In those circumstances Mr Jordan may wish to consider whether he wished to apply for cost. However if an application is made I will consider it. Such application is to be filed within 21 days. The police have 14 days in which to reply.

[53] I do apologise for the time it has taken me to get to this decision.

Dated at Auckland this 26<sup>th</sup> day of September 2014 at 3.20 pm.

A handwritten signature in cursive script, appearing to read 'P A Cunningham', written in black ink.

P A Cunningham  
District Court Judge