

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CIV-2017-004-002092
[2019] NZDC 7434**

UNDER SECTION 62 OF THE ARMS ACT 1983

BETWEEN PETER GRAHAM MACKENZIE
Appellant

AND THE COMMISSIONER OF POLICE
Respondent

Hearing: 17 April 2019

Appearances: Mr N Taylor for the Appellant
Mr R McCoubrey for the Respondent

Judgment: 24 April 2019

DECISION OF JUDGE G M HARRISON

[1] The appellant, Mr Mackenzie, appeals against a decision of an Inspector of Police of 28 March 2017 cancelling Mr Mackenzie's firearms licence.

[2] On 15 November 2016 Mr Mackenzie was at a friend's house at 2315 Kaiuma Bay Road, Havelock in the Marlborough District. He had consumed two cans of beer. It was night time. While there, Mr Mackenzie and his friend observed possums in front of the house on the lawn. He retrieved his rifle from his vehicle and fired three rounds at the possums, using a torch as a spotlight. After a brief pause two further rounds were fired. At the front edge of the property is Kaiuma Bay. It is approximately 600 metres wide.

[3] At the same time a Mr Peter Sykes was out with his son Cory Sykes doing pest control on land next to Tai Close on the opposite side of Kaiuma Bay.

[4] In statements to the Police both of the Messrs Sykes described hearing the initial three shots followed shortly after by two more. They both claimed that after each episode they heard what sounded like bullets thumping into the ground. They had changed their location after the first three shots and described hearing the thumping into the ground again after the later shots were fired.

[5] Mr Mackenzie was apprehended by the Police later that evening and charged with offences under the Arms Act 1983 (the Act). The first charge was laid pursuant to s 53(3) which, as relevant, provides that every person commits an offence and is liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding \$4,000 or to both who, without reasonable cause, discharges a firearm in a manner likely to injure or endanger the safety of any person or with reckless disregard for the safety of others.

[6] A second charge was laid pursuant to s 48 of the Act which again, as relevant, provides – every person commits an offence and is liable on conviction to imprisonment for a term not exceeding three months or to a fine not exceeding \$3,000 or to both who, without reasonable cause, discharges a firearm in or near a dwelling house ... so as to endanger property or to endanger, annoy, or frighten any person.

[7] Mr Mackenzie denied any attempt by him to fire shots at the Messrs Sykes. He was also sceptical that any of the bullets fired by him could ricochet across Kaiuma Bay.

[8] On 20 March Mr Mackenzie pleaded guilty to the lesser charge of discharging a firearm near a dwelling. He was represented by legal counsel. The charge of reckless discharge of a firearm was withdrawn. The effect of pleading guilty meant that neither of the Messrs Sykes were cross-examined on their statements that they had heard the alleged thumping of bullets into the ground.

[9] On 19 December 2016 Inspector Simon Feltham of Blenheim gave notice to Mr Mackenzie that he was considering revoking his firearms licence. Mr Mackenzie's legal counsel made extensive submissions to Inspector Feltham against the revocation of the firearms licence, but on 28 March 2017, shortly after the conclusion of the prosecution in respect of which Mr Mackenzie was fined \$800 and ordered to pay Court costs \$130, Inspector Feltham cancelled Mr Mackenzie's firearms licence by written advice of that date.

[10] He did so under s 27 of the Act which provides that where, in the opinion of a commissioned officer of Police, any person who has been issued with a firearms licence is not a fit and proper person to be in possession of a firearm, that officer may by notice in writing revoke the firearms licence.

[11] The grounds for that decision were stated to be:

- (1) that Mr Mackenzie had consumed a minimal amount of alcohol but nevertheless consumed alcohol before using a firearm;
- (2) at approximately 2215 hours he discharged a rifle three times in quick succession and after a brief pause discharged the rifle twice more;
- (3) the shots fired caused a certain amount of distress for a member of the public across the bay who believed bullets landed nearby;
- (4) he discharged a firearm in or near a dwelling house;
- (5) in the incident two of the seven basic rules of firearms safety were breached –
 - (a) rule 5: check your firing zone;
 - (b) rule 7: avoid alcohol or drugs when handling firearms.

The appeal

[12] The appeal is brought pursuant to s 62 of the Act. As relevant, it provides that a person who holds a firearms licence may, by way of originating application, appeal to a District Court Judge from the revocation of the licence.

[13] The section also provides that on the hearing of an appeal the District Court Judge may confirm, vary or reverse the decision appealed against.

[14] The decision of Inspector Feltham was made without a hearing, although, as described, before a final decision was made Mr Mackenzie was invited to make submissions as to why his licence should not be revoked. Consequently, there is no official record of evidence that would normally be given at a formal hearing leading to the revocation. In those circumstances, the correct approach to adopt on an appeal is to conduct a hearing de novo – “giving due weight to the opinion of the 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, and with a full hearing of oral evidence if appropriate. There was 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.” *Fewtrell v Police* 14 CRNZ 372, Goddard J (at 381).

[15] Being a completely fresh hearing, I may take into account all relevant matters up to the date of the hearing.

Assessment

[16] Mr Mackenzie is now farming dry stock on a 50-acre farm at Amodeo Bay, Coromandel.

[17] In the course of the proceedings in this Court, a joint memorandum was filed by counsel for the parties where it was agreed that the appeal would be adjourned to enable Mr Mackenzie to reapply for a firearms licence. The Police recorded that no indication was given that this further application for a licence would be successful or unsuccessful. It was agreed “the usual course for an application must be followed.”

The aim of this procedure was to avoid the hearing of the appeal if possible. Mr Mackenzie's case was that he is a fit and proper person to hold a firearms licence on the basis that up until the time of the offence he had held a firearms licence for approximately seven years without incident. He has been married for approximately 12 years, with no suggestion of marital discord or the possibility of domestic violence.

[18] He has filed several affidavits attesting to his good character, and stability. He has a legitimate use for a firearms licence which would be limited to bolt action, small bore rifles of .22 calibre for the control of rabbits and possums, and a firearm described as a "bolt action centre fire" being a slightly larger calibre for pigs and goats. These firearms are not affected in any way of by recent legislation in this country prohibiting or limiting the use of automatic fire weapons. Lastly, Mr Mackenzie maintains that he is not a threat to public safety.

[19] At the hearing, Inspector Feltham did not attend to give evidence. His affidavit of 23 November 2017 was submitted in support of the Police case, without objection.

[20] I would have benefited from the presence of Inspector Feltham. In his letter of 28 March 2017 cancelling Mr Mackenzie's licence, Inspector Feltham concluded by stating the following:

Please note this decision is not indefinite and can be reviewed in time **after** you have demonstrated what you have done to address the issues of concern to me.

There was no evidence from the Police as to whether or not these issues had been addressed.

[21] Unfortunately for Mr Mackenzie his further application was not submitted to Inspector Feltham. It was referred to Inspector J Kelly, the Area Commander of Waikato East. He wrote to Mr Mackenzie on 15 November 2018 indicating that he was considering refusing the firearms licence application on the grounds that Mr Mackenzie was not a fit and proper person to hold a licence on the following grounds:

1. That in November 2016 you discharged your firearm in a dangerous manner several times endangering the life of another person (that appears to relate to the charge that was withdrawn).

2. That as a result you were convicted of discharges firearm in/near place/dwelling in the Blenheim District Court on 20 March 2017 and your firearms licence was revoked.
3. –
4. That your application is not recommended by the District Arms Officer.
5. That owing to the above actions and events you may not be considered as a fit and proper person to be in possession of firearms.

[22] He was invited to make submissions as to why his licence should be granted. However, on 8 December 2018 Inspector Kelly refused the firearms licence application on the four grounds specified in his earlier advice of 15 November 2018. He did not consider whether Mr McKenzie had addressed the issues of concern to Inspector Feltham.

[23] Following that rejection, this appeal was set down for hearing.

[24] I refer back to the notice of cancellation of Inspector Feltham of 28 March 2017 and whether Mr McKenzie has addressed the issues of concern.

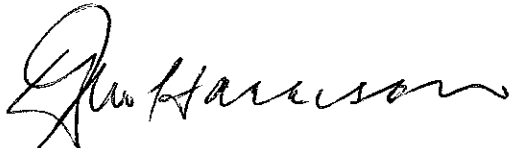
[25] In addition to the factors I have already mentioned, which Mr Mackenzie submits demonstrate him to be a fit and proper person, he has additionally reread and studied the Mountain Safety course as a refresher, along with the Arms Code Rules and is otherwise cognisant of good and safe firearms handling and safety practices.

[26] Furthermore, he has relocated to a farm in the Coromandel and it is unlikely there will be any future contact between him and the persons who were concerned at the incident in November 2016. Mr Mackenzie has no other disqualifying factors apart from the conviction I have described.

[27] The decision of Inspector Kelly in December 2018 does not assist in the consideration required because it merely repeats the grounds on which the original revocation was made, and, as stated, did not consider whether the issues of concern had been addressed

[28] I therefore determine that Mr Mackenzie is a fit and proper person to hold a firearms licence, and reverse the decision of 28 March 2017 revoking that licence, with the consequence that it is reinstated for the remainder of its tenure.

[29] As to costs, I do not regard it as appropriate to make an award of costs against the Police in this case. The conviction in March 2017 was clearly a sufficient ground on which the licence was cancelled. It is essentially the unremarkable conduct of Mr Mackenzie since that time, his efforts to re-educate himself in the use of firearms, his changed location and the acknowledgement of Inspector Feltham that revocation of the licence was not indefinite if Mr Mackenzie could demonstrate that he had addressed the issues of concern, that have led to the appeal being allowed. Leave to file memoranda in regard to costs, is nevertheless reserved.

A handwritten signature in cursive script, appearing to read 'G M Harrison'.

G M Harrison
District Court Judge