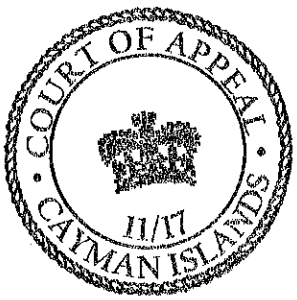
IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 030/2017
IND.073/2013
SC#06533/2013

BETWEEN:

Robert Aaron Crawford

Appellant



- and –

Her Majesty the Queen

Respondent

BEFORE: **The Rt. Hon Sir John Goldring, President**
The Hon Sir Richard Field, Justice of Appeal
The Hon C. Dennis Morrison, Justice of Appeal

Date of Hearing: Wednesday 17 April 2019

Appearances: Mr Laurence Aiolfi of Priestleys for the Appellant
Ms Candia James-Malcolm of DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 17 April 2019
Approved for Release 3 May 2019

FIELD, J.A.

1. Robert Crawford, applies for leave to appeal against his conviction on 10 October 2017 after a trial by the Honourable Justice Malcolm (Acting) and a jury on two counts of possession of an unlicensed firearm relating to a Lorcin semi-automatic pistol and six rounds of .38 ammunition.

2. We grant leave.

3. The Crown's case as to the circumstances relating to the offences with which the Appellant was charged was as follows.

4. On Sunday 29 September 2013, at about 12.10 am, Officers from the Uniform Support Group (USG) were on routine patrol in the West Bay Road area when they received a radio transmission from the Public Safety Communications Department of a report from an anonymous person that there was a male at a residence at #184 Shedden Road (also known as Nee Nee's Yard). Further information was provided to the officers that the male was a light skinned Caymanian male wearing a blue shirt and that he was sitting under a tree in the yard.

5. Three teams of officers responded to the location 184 Shedden Road –

   a) PC Hall, PC Mitchell and PS Maxwell
   b) PC Fullerton and PC Smith
   c) PS Harvey and PC Ward.

6. On arrival at the area, a foot approach strategy was coordinated with PC Smith and PC Fullerton to enter the yard from Shedden Road, PS Harvey and PC Ward to enter from Tigres Street, and PC Mitchell, PC Hall and PS Maxwell to enter from Martin Drive.

7. As the officers entered the yard, they observed that a party was in session. The residence is a large open yard with several tenement house/rooms. The yard was well lit from street lamps and outdoor lights.

8. As the officers entered the yard, PC Mitchell saw the Appellant whom he recognised, walking at a fast pace toward the main house. PC Mitchell saw the Appellant grab the right hand side of his waist pants where there was a bulge under his shirt. As PC Mitchell Approached him, the Appellant immediately began to run. PC Mitchell shouted "*stop armed police*" and gave chase. The Appellant did not stop but continued running to

the left of Nee Nee's residence in the direction of Shedden Road and across the street to a house next to Archie's Bar.

9. PS Maxwell, who had observed what had been happening and who had also recognised the Appellant, also gave chase. He saw the Appellant running on Shedden Road and then into the yard of an apartment complex/tenant building next to house number 209A Shedden Road.

10. PS Maxwell followed the Appellant into this yard. The Appellant was standing under a light that was above the door of one of the apartments about 35-45 feet away from him. He had a clear view of the Appellant and saw the Appellant with a silver or chrome coloured handgun in his right hand. He observed the Appellant pacing in front of the doorway with the gun in his hand. He observed the Appellant place his hand with the gun under the house he was next to then removed his hand with the gun. He then observed him putting his hand between the cushion of a brown and beige colour chair holding the gun. It appeared to DS Maxwell that the Appellant was trying to hide the gun.

11. The Appellant then climbed over a white table and squeezed between a fence and the left side of the building whereupon DS Maxwell lost sight of him.

12. About 30 minutes later, the officers arrived on the scene and surrounded the property. PC Ward and PC Hall went to the rear of the premises in the direction that the Appellant had last been seen and encountered him in the yard. He was holding his shirt in his hand at that point. The Appellant was ordered to stop. He complied and put his hands behind his head and lay flat on the ground and the other officers were alerted.

13. PC Robinson from the OSG (and not a firearm officer) donned gloves and searched the Appellant and seized certain items from his person. During the search, the Appellant requested that he be given his shirt which was on the ground and this was done by P C Robinson. No firearm was found on the Appellant's person

14. While conducting a search of the area in the view of Mr. Crawford, PS Harvey saw a space about 3-6 inches between the ground and the beige house they were next to. He knelt down using his flashlight and saw a silver or chrome semi-automatic handgun on the ground about 8 feet from where the Appellant had been held.

15. DS Harvey observed that the gun was a LORCIN with the serial number 518524. Wearing special gloves, he removed the magazine and saw that it contained 6 live rounds of ammunition.

16. The gun was submitted to the Cayman Islands Forensic Science Laboratory for DNA Analysis and comparison with a DNA sample taken from the Appellant. The grip area, trigger area and ridged/grooved area of slide of the handgun were swabbed for potential biological material for DNA analysis. A partial multiple source DNA profile was obtained from the swab of the handgun matching that of the Appellant. The Appellant could not be excluded as a possible contributor to the major component of this partial multi-source profile. The estimated probability of selecting an unrelated individual at random, with a matching DNA profile is 1 in 260,000.

17. Further DNA comparisons were done with samples taken from SOCO Williams, DS Harvey and PC Robinson for elimination purposes. They were all excluded as contributors to the DNA profile found on the gun.

18. The Appellant denied possession of the firearm. He claimed that the police had a grudge against him due to allegations he had made against a police unit in a previous trial in which there had been serious criticism by the Court of Appeal for the way a firearm had been mishandled by police at the scene. He further claimed that the same police unit arrested him in this case, mishandled the firearm in such a way as to lead to the possibility of contamination of the handgun with his DNA and colluded against him to cover their actions.

19. It is now necessary to refer to a number of occurrences during the course of the trial. The jury were selected on 2 October 2017 and immediately afterwards, but before being put in charge, they were directed by the judge not to conduct their own researches.

20. The following day, the jury having been put in charge, Justice Malcolm ("the Judge") further directed the jury not to go onto social media about the case or to conduct their own researches.

21. On 5 October 2017, it was brought to the attention of both prosecution and defence counsel by a court official that a juror had reported that the foreman had conducted a Google search on the Appellant and had discovered what was described as "*a conviction and a long list of charges a mile long*" and had reported this to a number of other jurors, possibly five.

22. Prosecution and defence counsel then attended the judge in Chambers to inform him of the situation. Thereafter, time was allowed by the Judge for instructions to be taken and for reflection upon the correct procedure to be followed.

23. The trial then resumed in open court in the absence of the jury and the information that had been related to counsel was repeated, with the Appellant's counsel, Mr Aiolfi, informing the Judge that the Appellant had been waiting to be tried for a very long time (in fact it was four years since the alleged offence) and was so concerned about any further delays he was willing to continue with the same jury notwithstanding the information that had come to light.

24. Prosecuting counsel, Ms James-Malcolm, then submitted to the Judge that the first thing to be done if the trial was to proceed was an enquiry to ascertain exactly what information was in the possession of the jury because that information was not part of the evidence in the matter and could not be commented on or dealt with until it was known what the jury knew and what it was they had been considering. Ms James-Malcolm also

asked rhetorically how the court was to have any confidence in the jury deliberating process when the Judge gave them directions. The Judge indicated to the Appellant that he (the Judge) would discharge the jury if the Appellant made such an application and that the Appellant could not subsequently make a complaint about this matter if he failed to apply for the jury to be discharged. The Appellant confirmed that he wanted the trial to proceed and Ms James-Malcolm told the Judge that if the Appellant felt able to continue she had no difficulty with that. The Judge then said that given the Appellant's specific request for the trial to continue he would give the jury a strong direction but since that the jury were to continue trying the case he would not make any further enquiries, particularly of the person who had gone on Google, because if he started cross-examining that person it may well affect the decision process.

25. The jury then returned to court and were given a further direction by the Judge not to conduct searches on the internet and were warned that if there was a further breach of his order, there would be an enquiry as to how the breach had occurred.

26. The following morning, counsel for the Crown in the absence of the jury, told the Judge of the Crown's concern about the jury issue. She said that in the ordinary way, the jury would have been discharged for what was a considerable irregularity and she invited the Judge to consider overriding the will of the accused in circumstances where significant prejudicial information had come to light before the jury. She then told the Judge that she herself had done a Google search that morning on the Appellant and the first report that came up listed the Appellant's pending matters, namely attempted murder and firearm offences. (In fact, the Appellant was facing two counts of attempted murder and possession of a firearm.)

27. The Judge sought confirmation that the Appellant's instructions had not changed. This was given and the trial continued. When the jury returned the Judge said this:

> *"Members of the jury I'm sorry for the delay but I want to deal with one particular matter. I told you at the beginning of the trial that you try the*

case on what you hear in this court and on nothing else and that you shouldn't speak to anybody else, or go on social media, or do any of your own searches. That is very important because you all took an oath to try the case on the evidence – and that's what you hear in this court and nowhere else – and that you should all discuss the case when all of you are together.

It may be the case that one or more of you have in fact gone on the internet and have in fact made your own researches. That will be in breach of the direction that I have given. In other jurisdictions it has been – and in particular the one that I spend most of my time in – it is thought so serious that jurors have gone to prison when they have ignored the directions of the judge.

So it is very important you try this case on what you hear in this court and on nothing else; not what anybody else has said, not on anything you may have read, not anything else you may have seen on social media.

I am not going to make any further inquiries about it but I want you to understand that that is the case. And that when you come to deliberate this case, you try the case on only what you've heard in this court and not on anything else.

It has been discussed amongst the attorneys, and the defendant and I have considered the matter and this case is going to continue, but if there are any other suggestions that there has been breaches of my order, it will result in the matter being discharged and then further inquiries will have to be made why the breach had taken place.

I'm sorry to speak too sternly about it but it is an essential feature of the judicial system that it is fair and you try the case on what you've sworn to try the case on; what you hear in this courtroom, do you understand?"

28. It is apparent that the judge had in mind that some of the material online would emerge in the course of the trial. This turned out to be correct to the extent that the Appellant introduced as part of his case his previous conviction for possession of a firearm and the circumstances of that conviction. It is plain to us that the pending charges or any other charges the Appellant had faced, including an acquittal for murder, would not have been relevant or admissible and were not introduced into evidence.

29. During the course of his summing up, the Judge did not repeat his specific direction not to rely or place any weight on material discovered from online searches, although he reminded the jury not to speculate about any material not covered by the evidence.

30. As already related, the Appellant was convicted on the two counts on which he was tried. On 27 October 2017, he was sentenced to a total of 13 years imprisonment.

31. The Appellant's substantive ground of appeal is that the Judge's failure to conduct an enquiry into what had been discovered on the internet by the jury foreman and the Judge's failure to override the Appellant's election to continue with the trial and discharge the jury constituted material irregularities resulting in an unfair trial and unsafe convictions.

32. In ***Thrakar v R*** [2008] EWCA Crim 2359, *Hooper LJ*, giving the judgment of the Court, said that the test in a case such as this was where the jury had had access to extraneous material was whether there was a real possibility that a member of the jury, or members of the jury, did not follow the direction to disregard the extraneous material or to give it no weight.

33. In that case, despite the jury having been directed to disregard the extraneous material, the Court of Appeal held that there was still a real possibility that the jury did not follow the Judge's direction and the conviction was set aside.

34. In ***R v Karakaya*** [2005] EWCA Crim 346, the jury had conducted online researchers whilst in retirement. The Court of Appeal of England and Wales said:

> *"If material is obtained or used by the jury privately, whether before or after retirement, two linked principles, bedrocks of the administration of criminal justice, and indeed the rule of law, are contravened. The first is open justice, that the defendant in particular, but the public too, is entitled*

to know of the evidential material considered by the decision-making body; so indeed should everyone with the responsibility for the outcome of the trial, including counsel and the judge and, in an appropriate case, the Court of Appeal Criminal Division. This leads to the second principle, the entitlement of both the prosecution and defence to a further opportunity to address all the material considered by the jury when reaching its verdict. Such an opportunity is essential to our concept of a fair trial. These principles are too basic to require elaboration. Occasionally, however, we need to remind ourselves of them."

35. In ***R v Thompson*** [2010)] EWCA Crim 1623, another case where a member of the jury had accessed extraneous material, the Lord Chief Justice said (at paragraph 11):

"Just as it would in any other instance where it was satisfied that extraneous material had been introduced, the approach of this quote is to make inquiries into the material. If, on examination, this material strikes at the fairness of the trial, because the jury has considered material adverse to the defendant with which it has no, or no proper opportunity to deal, the conviction is likely to be on safe ***(Karakaya)****. If that the material does not affect the safety of the conviction, the appeal will fail".*

36. Ms James-Malcolm for the Crown has submitted that the failure of the Judge to discharge the jury did not in the circumstances of this case amount to a material irregularity. On the contrary, the proceedings had been conducted fairly and the foreman's access to extraneous material and sharing it with a number of members of the jury did not result in a substantial miscarriage of justice. She also submitted that it was open to the Court to apply the proviso.

37. Rather surprisingly, she sought to down play the material obtained by the jury foreman on the ground that this related only to **pending** matters which could be no more

prejudicial than the fact that the Appellant had actually been convicted of possession of an unlicensed firearm.

38. She also sought to distinguish the case of ***Thakrar*** on the basis that in that case there had been no evidence adduced as to the defendant's bad character and the access to the extraneous material was reported some three weeks later and not immediately as in the instant case.

39. Ms James-Malcolm also pointed out that in ***R v McDonnell,*** where: (i) the Appellant was charged with drug offences; (ii) the extraneous material was general information on drugs and the penalties for drug offences; and (iii) the Judge instructed the jury to put the extraneous material out of their minds, the Court of Appeal dismissed the appeal on the basis that the convictions were nonetheless safe.

40. Ms James-Malcolm laid considerable store on the direction the Judge gave to the jury when telling them the case was to continue following the revelation that there had been access by one of their number to material on the internet.

41. In our judgment, Ms James-Malcolm's submissions fell a long way short of persuading us that this Appellant had had a fair trial. For our part, we are well satisfied that there is a real possibility that a member of the jury or members of the jury in this case might well have failed to follow the direction given by the learned Judge to disregard the highly prejudicial extraneous material about the Appellant discovered on the internet.

42. We agree with Mr Aiolfi's submission that the introduction by the Appellant into his trial of his previous conviction for a firearm to show that the police had a grudge against him does not detract from the prejudice of the other extraneous material. Knowledge by the jury of the matters pending against the Appellant would have substantially undermined the credibility of his assertions concerning the previous firearm offence.

43. We acknowledge that the Judge was faced with a difficult situation with the Appellant insisting that he wanted the trial to continue four years having elapsed between the occurrence of the alleged offences and the start of the trial. However, we are of the clear view that the Judge ought to have undertaken an investigation into the matters that the foreman of the jury had learned from his internet research for the reasons explained in ***R v Karakaya***. What precisely those matters were are a matter of some conjecture. They may or may not have been only the pending offences. They may or may not have included the fact that the Appellant had been acquitted of a charge of murder in relation to a homicide shooting in 2010. If so, this latter matter would, we are satisfied, have been likely to be strongly prejudicial to the Appellant's case notwithstanding that he was acquitted of the charge of murder.

44. The manner in which the foreman of the jury conducted his Internet researchers strongly reinforces the contention that there is a risk in this case that the Judge's subsequent direction to exclude all extraneous material from their deliberations may not have been complied with. In this connection, we have in mind that the researches were carried out in blatant disregard of two prior directions from the Judge that no such researches should be undertaken. In addition, the material obtained from the internet was shared with other jurors and it obviously impressed the juror who obtained it since he described the material as "*a list of charges a mile long*". Further, it was not that juror who reported the matter to the court, but another juror.

45. In addition, the fact that it was the foreman of the jury who made the internet search is of particular significance given the potentially influential role he or she would have played in the jury's deliberations.

46. The fact that the Appellant after a warning by the Judge confirmed his instructions that he wanted the case to continue is not a reason for disallowing his appeal. It was the Judge's responsibility to ensure that objectively speaking the Appellant had the benefit of a fair trial. In ***R v Azam [2006] EWCA Crim 161***, the President of the Queen's Bench Division said at paragraph 48:

> *"... as an integral part of his duty to ensure a fair trial, the judge retains, and where necessary should exercise, his discretionary power to discharge the jury ... We further emphasise that it is open to the judge to exercise this power whichever side invites him to do so, and also when neither side does, and even when both sides submit that he should not. Thus in the final analysis, although the judge should attend to all the considerations drawn to his attention, he must make his own judgment whether the interests of justice in the particular case over which he is presiding requires the discharge of the jury."*

47. In our judgment, the Judge should have overridden the Appellant's election for the trial to continue, involving as it did a real risk that despite a direction that extraneous matter must be ignored, the jury would still take it into account.

48. For these reasons, we conclude that the Appellant did not have a fair trial and that his convictions are for that reason unsafe. We accordingly allow this appeal and will set aside the convictions appealed against it.