IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 10/2017
IND.0092/2016
SC#02992/2016

BETWEEN:

FABIAN OLIVER THOMPSON

Appellant

- and –

HER MAJESTY THE QUEEN

Respondent

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

Date of Hearing: **6 September 2018**

Appearances: **Dr. Steve McField for the Appellant**
Ms. Nicole Petite-Tyson for the Respondent

JUDGMENT

Transcript of oral judgment 6 September 2018
Approved and Released – 22 October 2018

GOLDRING, Pres:

Introduction

1. On 8 May 2017, the Applicant was convicted after a trial before the Honourable Justice Swift QC, sitting without a jury, of an offence alleging, as the Statement of Offence put it, "*Possession of an imitation firearm with intent to commit an offence*", the particulars being that on 20 January 2016, at an address 100 Kitty Lane, Bodden Town, Grand Cayman, he had with him an imitation firearm with intent to resist arrest. On 30 May

2018, he was sentenced to five years six months' imprisonment. He seeks leave to appeal against conviction.

2. At the time of his trial, the Applicant was a 34-year-old man of good character. He did not give evidence.

The Firearms Law (2008 Revision)

3. It is helpful at this stage to set out the relevant part of the Firearms Law (2008 Revision).

4. Section 18(6) states:

> "*Whoever has with him a firearm or imitation firearm with intent to commit an offence, to resist arrest or to prevent the arrest of another person, in either case while he has the firearm or imitation firearm with him, is guilty of an offence ....*"

5. "*Imitation firearm*" is defined in the following terms in s.2:

> "'*Imitation firearm' means anything which has the appearance of being a firearm, whether or not it is capable of discharging any shot, bullet or other missile.*"

The facts

6. The judge set out the facts in the following way:

> "*On the 20th of January 2016 Police Officers on information attended 100 Kitty Lane at 12:02 pm. This was the home of Abbott Thompson and the Defendant who is his son.*
>
> *The Defendant was seen coming from the direction of one of the bedrooms. He was wearing a basketball top and a large pair of shorts with a pair of jeans pants in his hands held at the front of his waist band. The jeans*

pants were taken from him. He walked quickly away from the door of the house and then, when one officer asked other officers to search him, walked backwards and forwards preventing those officers from searching him.

PC Grant shouted to the Defendant to stop but, instead, the Defendant veered off in the direction of a shed and jumped the adjacent fence at the same time pulling what appeared to be a black-coloured 9mm pistol out of his front right shorts ... pocket. PC Grant immediately saw the butt and magazine parts of a weapon and said it was being held in the right hand as a pistol would ordinarily be held. He had 16 years of firearms experience. He said 'He held it like a firearm and it looked like a firearm'.

PC Grant shouted 'gun' and fired his taser at the Defendant."

On the other side of the fence, on being hit with the taser, the Defendant was caused to stumble and fall with the effect also of detaching the taser wires from which the Defendant was able to free himself and make good his escape. He continued to run away from the officers with the item still in his hand.

Inhibited by the presence of what they believed was a firearm, the officers, on reaching the undergrowth, did not give immediate chase to the Defendant as they were frightened of being shot, and so had to go through pre-pursuit procedures. The Defendant was lost in the undergrowth.

The Defendant was only a short distance from the officers when observed — being only 3-4 feet from PC Grant and up to 10 feet from PC Millwood. PC Gibson also saw the item. PCs Gibson and Millwood have 19 years' and 16 years' firearms experience respectively. DC Reid viewed the taser video footage and said he recognised the Defendant to be holding what appeared to be a black 9mm pistol. The item in question was never recovered.

The pistol (if that was what it was) was never intentionally pointed at the officers or used towards them although, having failed to halt the Defendant with the taser, the officers were inhibited in their pursuit by its perceived presence.

The object does point in the direction of the officers as the Defendant was falling over, after being hit by the taser, but I am satisfied that this pointing was simply in the course of falling over and getting up again."

7. The judge described the Defendant turning himself in on 26 January and submitting a prepared statement in which he said that he did not have anything in his waist band. He otherwise made no comment. The judge observed that the police had not suggested to him that the item had ever been in his waist band. He referred to the Applicant's good character and gave himself the proper "*good character*" direction.

8. At the end of his summing up, under the heading '*Conclusions*', the judge said:

"*I conclude that there is clear evidence that the item was in the possession of the Defendant throughout the incident. I have heard the description of the officers and I myself saw the item in the right hand of the Defendant in the recording.*

To deal with the appearance of the item, the following matters must be taken into account.

(i) The evidence of the ... officers who say the item resembled a 9mm pistol and was handled as if it was a firearm. I have no reason to question their veracity or the correctness of their observations;

(ii) The taser recording which shows the item in the Defendant's hand;

(iii) My own observation and interpretation of the recording.

On those grounds I am completely satisfied that the item in the Defendant's right hand was an imitation firearm because it had the appearance of a firearm.

I infer and conclude that the Defendant had an intent to resist arrest from his behaviour:

(i) In avoiding being searched by walking to and fro at a time when the weapon was in his pocket;

(ii) In taking the weapon out of his pocket when he heard the call to stop him;

(iii) In keeping it in his hand while leaping the fence and fleeing (as opposed to throwing it aside); and

(iv) By causing the taser wires to become detached when the firing of the taser must have clearly indicated to the Defendant the desire on the part of the police to stop or arrest him.

These aspects of the evidence seem to me to provide a sound evidential basis for concluding that the Defendant believed he was going to be arrested and that he was not applying his mind at all to the question of whether that arrest might turn out to have been unlawful. His intent was to escape being arrested and he demonstrated his intent by his actions. By producing the weapon, he was resisting the efforts to arrest him.

I am therefore satisfied so as to be sure that:

(i) The Defendant had an imitation firearm in his possession on the 20th of January 2016;

(ii) the imitation firearm is proved to satisfy the definition in the Firearms Law; and

(iii) the Defendant [had] intended to resist arrest at the time he had the imitation firearm with him."

9. At the close of the prosecution case there was an unsuccessful submission of "*No Case to Answer*". It was submitted that there was no evidence of the essential ingredients of an offence contrary to s.18(6) of the Firearms Law.

The grounds of appeal

10. Dr. McField (who did not represent the Applicant below) relies on three grounds of appeal. They are:

    (1) The learned trial judge erred [in law] in finding that the thing held by the Appellant was an imitation firearm;

    (2) The Prosecution did not prove beyond a reasonable doubt the ingredients necessary to convict for the offence of possession of an imitation firearm with intent to resist arrest;

    (3) The charge on the indictment is wrong in law in that Section 18(6) of the Firearms Law (2008 Revision) creates three separate unlawful use of an imitation firearm (sic) whilst the charge on the indictment refers to two separate use (sic) in the same count.

11. We take Ground 3, first. As we have stated, the statement of offence is in terms of possessing an imitation firearm with intent to commit an offence. The particulars, however, allege an intent to resist arrest. The statement of offence should have alleged an intention to resist arrest. However, it is quite clear that counsel and the judge considered this case in terms of an intent to resist arrest. The drafting error cannot begin to render the conviction unsafe. However, it is a matter that should have been picked up and corrected by the judge and by both counsel.

12. We turn to Dr. McField's other submissions.

13. The first submission is that the judge could not, on the evidence, be sure that the Applicant had with him an imitation firearm. The judge's analysis, it is said, is

insufficient. The nature of the firearm could not be identified. It may have been a real, not an imitation one. It is insufficient, submits Dr. McField, to found a conviction for possessing an imitation firearm with intent to resist arrest if it turns out the firearm is a real one. In support of that rather startling submission, Dr. McField, at least in the papers provided to us, sought to rely upon a report in the Cayman Compass in which, according to that report, an acting judge apparently found a defendant not guilty because the firearm in question, although charged as an imitation, turned out to be real.

14. In our judgment, Dr. McField's argument cannot be sustained. The definition of an imitation firearm is clear: provided the thing has the appearance of a firearm, whether or not capable of discharging a shot, bullet or other missile, (and hence being a firearm), it falls within the definition of an imitation firearm. Moreover, it does not seem to us that however invariably accurate may be the reporting of the Cayman Compass, its reports have the force of law. That aspect of the appeal therefore fails.

15. Dr. McField's second submission is that there was insufficient evidence of an intention to resist arrest such as is required by s.18(6). What was required to sustain such a conviction was evidence of the Applicant making use of the firearm to resist arrest: for example, by pointing it at the officers or by brandishing it in such a way as to provide evidence of the necessary intent. Dr. McField points out that the judge, in terms, stated that it was never intentionally pointed at the chasing officers. The judge was wrong, he submits, in relying on the officers' belief that the Applicant was making use of the firearm to resist arrest when the evidence was quite to the contrary.

16. We cannot accept Dr. McField's submissions. As set out in his judgment, the judge inferred an intention to resist by, in particular, the Applicant taking it out of the pocket where it had been and keeping it in his hand when running away. He could, as the judge said, have thrown it away. In para. 40 of his judgment, the judge put it in this way: "*By producing the weapon he was resisting efforts to arrest him*". In our judgment, the judge was entitled to come that view.

17. Dr. McField's third broad submission is that for the offence to be made out the prosecution had to prove any arrest had to be lawful. If it may not have been, the charge

is bound to fail. The submission is that the Applicant should have been informed he was under arrest and why. He never was. In the circumstances, he was not under lawful arrest. He could not therefore be resisting arrest with the intentional use of the firearm. In effect, Dr. McField submitted, this was equivalent to a 'stop and search' demand by the police.

18. In our judgment, these submissions are misconceived. The Applicant was leaving a house which was being searched under a warrant. Before any officer could inform him of any possible arrest, the presence of the firearm became apparent. The Applicant ran away. It plainly was not reasonably practicable to inform the Applicant that he was under arrest and why.

19. Section 62 of the Police Law (2017 Revision) states:

> *"(1). Where a person is arrested, he is to be informed that he is under arrest and of the nature of the offence for which he is being arrested as soon as is practicable after his arrest.*
>
> *"(2). Where a person is arrested by a police officer, subsection (1) applies regardless of whether the fact of the arrest is obvious.*
>
> *"(3). Nothing in this section is to be taken to require a person to be informed —*
>
> *(a) that he is under arrest; or*
>
> *(b) of the ground for the arrest.*
>
> *"If it was not reasonably practicable for him to be so informed by reason of his having escaped from the arrest before the information could be given."*

20. That, as it seemed to us, was plainly the situation here.

21. There was a second, different, element of the submission in relation to the lawfulness of arrest in Dr. McField's written submissions. Although not advanced orally, we think it right briefly to refer to them.

22. At the close of the prosecution, a submission was made to the judge in the following terms. It is encapsulated in para. 24 of his ruling in respect of it (line 20):

> *"... it is submitted that, if the officers had no lawful grounds to arrest him, he cannot intend to resist an arrest which was incapable of being made lawfully."*

23. In his ruling, the judge rejected that submission. He held that the lawfulness of the arrest or possible arrest was irrelevant. He referred to *Archbold* at paras. 17-38 and to the case of *Bentham* [1973] QB 357, and to the Att-Gen.'s References (Nos 1 and 2 of 1979) [1980] QB 180.

24. In the case of *Bentham*, as it was summarised by the judge, it was held that:

> *"... the prosecution are not required to prove an immediate or unconditional intention to endanger life. The mischief at which the section was aimed must be that of a person possessing a firearm ready for use, if and when the occasion arises, in a manner which endangers life".*

25. As to the Attorney-General's References, they related to a charge, in the first case, of burglary with intent to steal and, in the second, of stealing or attempting to steal specific items. The submission was that the fact there was nothing to steal rendered a conviction for attempting to steal defective. As it was put in the short summary in Archbold:

> *"on a charge of burglary with intent to steal the accused is guilty if he intended to steal only if he found something in the building worth stealing;*
>
> *(b) on a charge of stealing or attempting to steal specific items the Crown must prove an intent to steal one or more of the items specified;*
>
> *(c) an intention to steal can exist even if unknown to the accused there is nothing to steal. The same principles apply whether the charge is burglary, attempted burglary, theft or attempted theft."*

26. The judge by analogy concluded that the same thought process should be applied to this provision under the Firearms Act. As we understand his ruling, it came to this: the authorities show that in some cases a conditional intention to do that which is criminal may be sufficient evidence of the specific intent needed to prove the case. There may be an intention to steal if there is nothing in fact to steal. There may be an intention to endanger life if the accused possessing a firearm intended only to use it should the need arise. The cases emphasise, the judge appeared to be saying, the importance of an accused's intention as to opposed to the possible objective situation or possible outcome. By analogy, as the judge found, it did not matter whether the arrest resisted was lawful or unlawful. What mattered was the intention of the accused to make use of the firearm to resist any arrest should such a situation arise whether in the end it transpired to be a lawful arrest or an unlawful arrest.

27. As the judge finally put it at para. 31, line 30:

> *"It is only necessary to prove that the Defendant intended to resist his arrest as perceived by him namely as an unwanted restraint on his freedom likely to result in the police recovering the weapon he was carrying."*

28. In our view, the judge was right in his analysis. The mischief at which the section is directed is that of a person possessing an imitation or, for that matter, real firearm intending to use it to resist arrest should the need arise. The law, in our judgment, does not permit an imitation or real firearm to be used to resist what later transpires to be an unlawful arrest, while penalising what subsequently might transpire to be a lawful arrest. All that need to be proved is the use of the imitation or real firearm with an intention, if necessary, to resist an arrest irrespective of whether it subsequently transpires it was lawful or unlawful.

29. It is not, however, on the facts here, necessary to go as far as that, for it is quite clear that the officers had the power to arrest this Applicant under s.60 of the ***Police Law (2017 Revision)***. Under s.60:

"A police officer may, without an order from a Justice of the Peace and without a warrant, arrest any person —

(a) whom he suspects on reasonable ground of having committed or to be about to commit an arrestable offence; [or]

(b) ... commits in his presence an arrestable offence."

30. The possession of a firearm or imitation firearm, as we understand it, falls within that definition.

Conclusion

31. In the circumstances, in spite of Dr. McField's helpful submissions, this appeal must fail. It is an appeal which raises both issues of fact and law and therefore leave is required to bring it. Given its lack of merit, in our view, leave should be refused.