IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Crim) 02/13
C05428/2011

The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Ian Forte, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
(Ind 93/11)

BETWEEN

HM THE QUEEN

Respondent

-and-

ROBERT AARON CRAWFORD

Appellant

Nick Hoffman of Priestleys appeared for the Appellant, Robert Aaron Crawford
Trevor Ward Deputy Director of Public Prosecutions appeared for the Crown

Hearing: 29 July 2013
Judgment: 31 July 2013

JUDGMENT

Revised from transcript and Approved

Released 21 January 2014

Sir John Chadwick, President:

1. On 31 October 2012, after a trial before Justice Quin sitting alone, the applicant, Robert Aaron Crawford, was convicted of the offence of possession of an unlicensed firearm, contrary to section 55 of the Firearms Law (2008 revision). On 22 January 2013 the judge sentenced him to a term of ten years' imprisonment; as he was bound to do following the conviction unless he was

persuaded that there were exceptional circumstances. By this application Mr Crawford seeks leave to appeal against his conviction,

2. The circumstances of the offence with which the applicant was charged can be stated briefly. On the evening of 17 November, 2011, Police Constable Gordon was on duty with a fellow officer in the car park at the Grand Pavilion complex. He was approached by two individuals who gave him information relating to a white Nissan motor vehicle which was parked at the end of the car park. As a result of that information, PC Gordon drove in marked police service vehicle to the end of the car park and partially blocked the white Nissan motor vehicle.

3. The driver of the Nissan motor vehicle was the applicant. He was asked to get out of the vehicle; but he did not do so. He remained behind the wheel. The two individuals came over to the vehicle. One of them said to PC Gordon, "Officer, that's the man that pulled a gun on me". There was then an altercation; in the course of which it seems one of the individuals threw a punch at the applicant. In, in the confusion, the applicant was able to drive off.

4. PC Gordon shouted to his partner: "get in the vehicle quick". Whilst they were doing that, a USG vehicle, in which two officers were present, pulled into the car park. PC Gordon shouted to the officers in the USG vehicle: ""catch that car, the driver has a gun". PC Gordon had not seen a gun: he was passing on the information which he had received from the two individuals.

5. There was then a pursuit. The white Nissan motor vehicle was pursued by the officers, Police Constable Bradley and Police Constable Rabess in the USG. The two vehicles drove down the Estherly Tibbetts highway and as they came to the Heritage roundabout, the white Nissan left the road and rolled on to its side. The driver of the vehicle – that is to say, the applicant - left the vehicle and started to run away. PC Bradley shouted at him to stop; but he did not do so.

6. PC Bradley's evidence was that he gave chase; and that in the course of the chase he saw the applicant take something from his waist band - which he thought was a

silver-coloured firearm - and throw that object into the bushes by the side of the road. Shortly after that, the applicant was apprehended and arrested and taken to the police station.

7. The officers began a search of the bushes, near to the side of the road, into which PC Bradley had seen the object thrown. The search commenced in the early hours of the morning. It was suspended for a short time while better lighting was obtained. In the course of the search the officers found a firearm in the bushes. That firearm was a luger pistol. One of the officers took a photograph of it. They remained in the vicinity until the scenes of crime officers arrived. More photographs were taken.

8. The photographs were in evidence before the judge. That taken before the arrival of the scenes of crime officers appears to show the firearm covered by some undergrowth: those taken by the scenes of crime officers after their arrival appears to show the firearm on top of that vegetation. A bullet, which did not appear in the earlier photograph, could be seen, in the later photographs, to be on top of the chamber of the weapon. It was submitted to the judge that the photographs demonstrated that the firearm had been disturbed in the 40-minute period between the time when the firearm was found and the arrival of the scenes of crime officers.

9. The evidence of the officers, including PC Bradley, was that they had been at the site throughout that period; and that nobody had tampered with the firearm. Once they had found the luger pistol, they did not continue the search. They were unable to provide any explanation for apparent change in the position of the firearm; or as to the presence of the bullet outside the chamber.

10. When the firearm was subjected to forensic analysis, the applicant's fingerprints and DNA were not found on it. There was no forensic scientific evidence to link the weapon to the applicant. But there was DNA on the weapon which was identified as the DNA of a third party who was known to the police. So it could be inferred from the DNA evidence that the weapon had been in the possession of

someone else known to the police; but it could not be inferred from that evidence that it had been in the possession of the applicant.

11. It was on those facts that the judge had to determine whether the applicant was, or was not, guilty of the offence with which he was charged. The judge posed the question that he had to decide at paragraph 311 of a very full judgment. He said this:

> "If the Court is satisfied beyond all reasonable doubt that PC Bradley saw the defendant with a gun in his hand, that PC Bradley saw the defendant stop and throw the gun into the bushes before he was apprehended and that PC Bradley is truthful and reliable with his evidence, then the defendant is guilty. If the Court has any doubt that PC Bradley saw the gun and that rather he mistakenly assumed that he saw the defendant with the gun, then the defendant must be found not guilty.

And he went on to observe that the Crown's case depended to a large extent, if not wholly, on the correctness of PC Bradley's identification of the stock German luger in the defendant's right hand; and therefore in his possession and under his control. The judge's reference to "the stock German luger" was, of course, a reference to the weapon that was found in the bushes and shown in the photographs.

12. The judge referred to the defence submission that PC Bradley was mistaken; and that his mistake was explicable in the circumstances that (i) the applicant was on a "long arm" authority and (ii) that PC Bradley had been told by PC Gordon, before the chase began, that the driver of the white Nissan - that is to say, the applicant - had a gun. He directed himself of the special need for caution before relying on the evidence of identification. But he went on to point out, correctly, that the relevant identification, in the present case, was not the identification of the applicant himself, but the identification of the object that PC Bradley had seen in the applicant's hand as a hand gun. He reminded himself, again correctly, that a witness - such as PC Bradley - who was convinced in his own mind that he had seen the applicant with a hand gun might, as a result, be a convincing witness; but might, nevertheless, be mistaken. The judge was alive to the point that this was not a case in which the identification of the individual was in issue. There was no

doubt that the individual that PC Bradley was chasing was the applicant; and there is no doubt that it was the applicant whom PC Bradley saw throw some object into the bushes. The relevant question was whether what the applicant had been seen to throw into the bushes was a hand gun to which the Firearms Law applied.

13. In addressing that question it may be said, we think, that the judge assumed that the relevant question was whether the object thrown into the bushes was the firearm that was subsequently found in the bushes. That was, perhaps, an understandable assumption in the circumstances; but, on a proper analysis, it was not well-founded. It overlooked the possibility that what the applicant was seen to throw into the bushes was not found by the officers in the course of their search. The evidence did not establish that there had been a sufficiently thorough search of the bushes to support the conclusion, beyond reasonable doubt, that the luger pistol that was found was the only object in the bushes which could have answered the description of what it was that PC Bradley had seen the applicant to throw into the bushes. As I have said, the evidence was that the officers did not carry on searching once they had found what they thought they were looking for.

14. The judge asked himself a number of pertinent questions. He asked himself how long had the object thrown by the applicant been seen by PC Bradley before it was thrown into the bushes: he found that it had been observed by PC Bradley for some 30 to 40 seconds. He asked himself from what distance did PC Bradley have the object in view: he found that it had been observed from a distance of between 18 to 30 metres. He asked himself whether there was adequate light for PC Bradley to make a reliable identification of the object which he saw in the applicant's hand: he found (having visited the scene himself) that the light at the roundabout could be properly described as "bright". PC Bradley had described the lighting on the highway as "good"; but it was accepted that the lighting deteriorated once the applicant ran into the bushes. The judge asked himself whether PC Bradley's observation was impeded in any and if so what way: he concluded that the applicant's own body – and, in particular, his arm and shoulders - while he was running away, would impede the observation of anything

in his hands. He asked himself if PC Bradley had ever seen the applicant before that evening; and found that he had done. The judge noted that the applicant had said to PC Bradley, shortly after he was apprehended and arrested, that "that guy had a gun".

15. PC Bradley's evidence was that he didn't see the spot where the object which had been thrown had landed; but he told the other officers the general area in the bushes where he saw the defendant throw the object. The distance that the object travelled in flight was said to be about 30 feet. His evidence was: "I knew exactly what I saw in his hand. I knew he had a silver-coloured firearm and I knew the area where it landed." And he said that, when the luger pistol had been found, ""it looked like the one I saw in his hand". But it seems clear from his next answer that he may well have been assuming that the object that he saw in the applicant's hand was the luger pistol because the luger pistol was the object actually found. He said this:

> "I saw it in his hand, I saw the area where Mr. Crawford threw it, it was located in the same area where I saw it being thrown and it was silver in colour identical to the gun that Mr. Crawford had in his hands".

16. The judge's conclusion was that the finding of the luger pistol was very strong corroborative evidence that PC Bradley had seen a firearm in the possession of the applicant as he was running away from the police. He concluded, at paragraph 343 of his judgment:

> "When I consider PC Bradley's evidence, the evidence which supports his identification of the gun in the defendant's possession, of PC Gordon regarding the information that the defendant had earlier pulled the gun on Mr. Rodney, of the defendant's unchallenged statement to PC Bradley when apprehended 'that guy has a gun' and the finding of the gun shortly afterwards, a handgun that matched PC Bradley's description and the area in which he reported that he saw the defendant throw the gun, I'm sure the defendant is guilty as charged".

17. In his grounds of appeal the applicant asserts that the judge's finding of guilty is unsafe. Two main points are taken. First, it is said that the judge failed to analyse the evidence correctly in reaching the conclusion that the luger pistol that was

found in the bushes had been in the possession of the applicant. Second, it is said that, if the judge had appreciated (as it is said he should have done) that that evidence was not strong in the context of identifying what was found as the object which PC Bradley said he thought he saw in the applicant's hand, he should have been particularly cautious in evaluating the visual identification of the object in the defendant's hand; given that PC Bradley was expecting to see a gun because he had been told by PC Gordon, in the car park, that the applicant had a gun. This, the judge ought to have appreciated, was a case where there was a real danger that what the officer saw, or thought he saw, was what he expected to see: a danger which is enhanced, when the officer [found] a weapon in the place where he would have expected it to be. In short, there was a real risk that the officer may be "putting two and two together and making five".

18. Addressing the first of those points. There was photographic evidence that the luger pistol, when first found and photographed, was not in the same position as it was some 40 minutes later when the scenes of crimes officers photographed it. There were two differences which appear from the photographs. First, as I have said, the pistol seems to have been placed on top of the undergrowth rather than remaining underneath it; and second, there was a round in the chamber. Those differences required an explanation. They suggested that the luger pistol had, in fact, been moved; notwithstanding that the evidence of the officers was that it had not been moved. That went to the reliability of the officers' testimony. There was a risk that the luger pistol had been moved, in the 40-minute period before the scenes of crime officers arrived, in order to "improve" the evidence: an object lying on the top of the undergrowth was more likely to be the object which the applicant had been seen to throw into the bushes than an object beneath the undergrowth. The judge needed to address that issue: he needed to ask himself whether there was an explanation which he could accept for the difference between the photographs; and whether that explanation put out of his mind the possibility that the officers might not be truthful about their account in relation to the 40-minute period when the gun was lying there. Because, if their evidence in that respect was not, or might not be, truthful, PC Bradley's evidence that he had

seen a firearm in the hand of the applicant had to be examined with particular caution.

19. The second issue in relation to the luger pistol that the judge needed to address was that, although there was DNA on the weapon, it was not DNA which linked it to the applicant. The judge directed himself that a person who handles a weapon necessarily leaves on it DNA which is available to analysis by expert examination. He directed himself that the absence of fingerprints or DNA is supportive of the view that the applicant had not handled the luger pistol and should be taken into account; but he went on to say that it had to be accepted that the presence or absence of DNA and fingerprints linking the weapon to a defendant was not determinative of the guilt or innocence of that defendant. But what he needed to address – and did not address - was whether it was safe to assume that the absence of the applicant's DNA on the luger pistol was, indeed, neutral in this case; given that (i) there was other DNA on the weapon and (ii) that the applicant's hand was likely to be hot (because he had been running) and who could have been expected to have had a sufficient grasp of whatever it was that he threw into the bushes to enable him to throw it some 30 feet across his body. There was no evidence of which could have assisted the judge in reaching a conclusion on that point. It is said that the judge fell into the trap - identified by the Court of Appeal of England and Wales in *R v Mitchell* (8 July 2004) of speculating as to the scientific basis on which it could be assumed that the absence of DNA was neutral. If the case had been tried before a jury, it would, as it seems to us, have been necessary for the judge to direct the jury that they must take account of the fact that the applicant's DNA was not found on the weapon; and that they must take account of the fact that there was no evidence which could assist them in deciding whether that could be treated as a neutral factor in this case. But as I have indicated, when the judge came to sum up the factors at paragraph 343, the factors which led him to conclude that the applicant was guilty of the offence with which he was charged, he made no mention of the fact that the applicant's DNA was not found on the luger pistol.

20. By contrast, he did mention the statement of PC Gordon regarding the information that the applicant had earlier pulled a gun on one of the two informants. But that statement was not, of course, probative of the fact that the defendant had had a gun at an earlier stage, when he was in the car. It was not probative because the informant never gave evidence to that effect; and PC Gordon never saw the gun. He was simply passing on the information that he had been given. But it is relevant, and of importance, because the fact that PC Gordon had told PC Bradley that the driver had a gun was likely to lead PC Bradley to think that what he saw in the applicant's hand was that gun.It was necessary that the judge should have warned himself of that danger when evaluating the evidence of PC Bradley, who was running at some distance behind the applicant, at night, that he could identify that what was in the applicant's hand was in fact a firearm within the meaning of the Firearms Law; and before he came to the conclusion that he could convict the applicant on the basis of that evidence in circumstances where there was, on a proper analysis, no satisfactory corroboration.

21. We are driven to the conclusion that the judge's failure to deal adequately with those points does render his verdict of guilty unsafe. Accordingly we give leave to appeal; and we allow the appeal. We quash the verdict, set aside the sentence and direct that a verdict of acquittal be entered. We do not think it appropriate to order a retrial.