

BETWEEN

LESHAWN FORRESTER

Applicant

AND

Her Majesty the Queen

Respondent

Before: The Rt. Hon Sir John Golding, President
The Hon. John Martin QC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal

Appearances: Mr. Rupert Wheeler of Samson Law for the Applicant
Mr. Greg Walcolm of the DPP for the Respondent

Date of Hearing: 8 May 2020



JUDGMENT

Transcript of oral judgment dated 8th May 2020 and Approved for Release 3rd June 2020

GOLDRING, President.

Introduction

1. On 3 October 2018 the Applicant was convicted by Justice Carter, sitting alone, of one count of aiding and abetting the possession of an imitation firearm with intent to resist arrest, contrary to section 18(6) of the *Firearms Law (2008 Revision)*. He had pleaded guilty to dangerous driving. He was found not guilty on count 3, a count of harassment, a successful submission of abuse of process having been made. He was sentenced to 3 years imprisonment for the firearms offence, 8 months concurrent for the dangerous driving. He seeks leave to appeal his conviction on the firearms offence. We grant leave.

The facts

2. On the night of Saturday 3 June 2017, a team of police officers was on duty at a police check point in the vicinity of the roundabout near the Public Beach linking Esterley Tibbetts Highway and West Bay Road. Several marked police vehicles were clearly visible. There were several officers in full uniform visible in the area.
3. At approximately 11.20 pm the police officers saw a dark Honda motor vehicle approach the check point. There were three people in the vehicle. The Appellant was the driving. Police Constables Hunter and Phillips were standing at different areas within the roadway, whilst PC Myers was standing to the side. All three officers were armed. The vehicle approached the checkpoint. The police officers instructed the Appellant to stop. He briefly did so, but then sped away at high speed after the male passenger seated in the left rear passenger seat spoke to him. That person was described throughout the case as 'the unknown male.' PC Phillips had to jump out of the path of the vehicle to avoid being hit as it drove off.
4. PC Phillips, in his service vehicle, pursued the Honda as it travelled along Esterley Tibbetts Highway towards George Town, at speeds in excess of the speed limit. Other officers followed in another vehicle.
5. The Appellant's vehicle accelerated to speeds in excess of 85 mph as the officers followed. During the chase PC Phillips never lost sight of the Honda. At the roundabout by Cost-U-Less at Governors Square, the Honda turned right into Lime Tree Bay Avenue, where it entered the wrong carriageway into on-coming traffic. It did not give way to on-coming traffic. It made a dangerous manoeuvre as it turned right into West Bay Road and headed in the direction of the Public Beach. When it reached the area of the Public Beach, it turned sharply left into the entrance of the parking lot. It came to a stop near the construction site adjacent to the Kimpton Sea fire Resort.
6. PC Phillips immediately came to a stop behind. Aided by the lights of his vehicle, he saw two males hurriedly leave from the left side of the Honda. They ran in the direction of the Kimpton Sea Fire Resort. One of the males had an object which appeared to be a firearm in his right hand. This was the same person who had spoken to the Appellant whilst at the police check point shortly before the Honda sped off.

7. PC Phillips drew his service firearm. He shouted at the two males, telling them to stop, but they continued to make good their escape, on foot, towards the Resort. PC Phillips then approached the Honda. The Appellant was in the driver's seat. He was arrested. He made no reply when cautioned. Having been taken to the Cayman Islands Detention Centre, he was interviewed. He made no comment.

The relevant statutory provisions

8. The judge set out the relevant provisions of the *Firearms Law (2008 Revision)* at paras 16 and 17 of her judgment. As she said:

“s.18(6) 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 whilst he has the firearm or imitation firearm with him, is guilty of an offence and subject to section 39 is liable on summary conviction to a fine of one hundred thousand dollars and to imprisonment for twenty years.”

9. The definition section of the *Law* provides as follows:-

“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.”

10. Section 18(1)(c) of the *Penal Code*, under the heading “*Principle Offenders*” provides:

“S.18 (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to have committed the offence and may be charged with actually committing it, that is to say –

...

(c) every person who aids and abets another person in committing an offence...”

The issues at trial

11. In paragraphs 18 and 19 of her judgment, the judge set out the issues as she saw them. She said:

“18. In this case where the Defendant has been charged with aiding and abetting an unknown male, I remind myself of the burden that is on the prosecution in proof of its case and that the prosecution must prove each of the constituent

elements of the offence as it relates to this defendant to the requisite standard, beyond a reasonable doubt. The issues for me to determine are as follows:

- i. Has the Crown proved so that I am sure that the unknown male had the item alleged to have been an imitation firearm with him/in his possession?*
- ii. Has the Crown proved so that I am sure that the item alleged to have been an imitation firearm had the appearance of being a firearm?*
- iii. Has the Crown proved so that I am sure that the unknown male, at the time of having the item with him/in his possession, intended to resist arrest?*

19. If I conclude from my examination of the facts and application of the law that the unknown male was in possession of an imitation firearm with intent to resist arrest on the date and time in question, I must then go on to consider whether there is any evidence that the defendant aided and abetted him in that possession. In order to prove its case against the defendant the Crown must go on to prove that the defendant intended to assist the unknown male in the commission of the offence and that he did in fact assist the unknown male with the imitation firearm to resist arrest."

12. The judge carefully set out the evidence on the first issue. She set out, in clear and unimpeachable terms, why she was sure the unknown male had a firearm in his possession. We need not recount what she said. Mr Wheeler on behalf of the Appellant both accepts the judge was correct in defining the first issue and that she was entitled to conclude that the unknown man did have a firearm in his possession.
13. Having found that the unknown man had in his possession a firearm, the judge, again with clarity set out how, on the evidence, she came to be sure that the unknown man intended to resist arrest. Again, as Mr Wheeler accepts, her findings in respect of that are unimpeachable. Indeed, the evidence was quite overwhelming. However, submits, Mr Wheeler, it was not enough for the judge to be sure that the unknown man had a firearm in his possession, and that he intended to resist arrest. She also had to be sure that he intended to make use of that firearm to resist arrest. The ingredients of the offence in respect of the principal offender, the unknown man, were not therefore proved. That is Ground 1 of the Grounds of Appeal.
14. That, submits Mr Wheeler, inevitably means that the Appellant's conviction of aiding and abetting the unknown male must fall away. For the Appellant could only be guilty of aiding abetting the unknown male's intention to resist arrest, if, intending to aid and abet him, he both knew that the

unknown man had a firearm in his possession and knew that the unknown man intended to use it to resist arrest. That is part of Ground 2 of the Grounds of Appeal.

15. It follows that Mr Wheeler is critical of what the judge said in paragraph 19 of her judgment (see above).
16. Mr Wheeler's submissions on this aspect rest upon part of an unnecessary observation of this court in the case of *R v Fabian Thompson* [2018] CICA 10 of 2017. It is unnecessary to set out the facts. At paragraph 28, the President, giving the judgment of the Court said that:

“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.”

17. If the first and last sentences of paragraph 28 correctly set out the law, it inevitably follows that Mr Wheeler is right. He submits that at least for the Cayman Islands, it does. As will become apparent, we do not agree.
18. First, as a reading of the decision makes plain, the observations to the effect that to prove the offence required an intention to use the firearm to resist arrest were wholly unnecessary for the decision.
19. Second, perhaps not surprisingly given the issues in *Thompson*, there was not drawn to the court's attention two English authorities which are highly material to the interpretation of section 18(6) of the *Firearms Law*.
20. Section 18(1) of the Firearms Act 1968 of England and Wales is in similar, although not identical, terms to section 18(6) of the *Firearms Law*. It provides:

“(1) It is an offence for a person to have with him a firearm or imitation firearm with intent to commit an indictable offence, or to resist arrest or prevent the arrest of another, in either case while he has the firearm or imitation firearm with him.”

21. Its meaning was considered by the Court of Appeal in *R v Stoddart* [1998] 2 Cr. App. R. 25. In that case, the appellant admitted he had in his possession a firearm. He admitted he had it with him when he set out to commit a robbery. He contended that he did not intend to use the firearm to commit the robbery but had it with him in order to sell it. In rejecting the appellant's submission that the Crown had to prove he had the firearm with him to further the indictable offence, Ebsworth J, giving the judgment of court, said at paragraph 32:

"We consider that...the appellant, goes too far in the interpretation of the statute. If parliament had intended to say 'it is an offence to have with him a firearm/imitation firearm with intent to use such a firearm to further the commission of an indictable offence' it would have done so. It seems clear to us that the section is intended to be wide enough to embrace those who set out to commit an indictable offence while intentionally carrying a firearm, whether or not there is intent to use the weapon. There is always a risk that those who are carrying weapons will use them should the need arise..."

22. The position was succinctly summarised in the judgment of the Vice-President of the Court of Appeal, Lord Justice Rose in *Larkin* [2003] WL 222 57942, where at page 6 he said:

"It is the law in Stoddart [1998] 2 Cr. App. R. 25 that the prosecution do not have to prove the intention to carry the firearm was being carried in furtherance of an indictable offence. It is sufficient to prove that the defendant had a firearm, that he intended to have with him, and at the same time he had the intention to commit an indictable offence, or to resist or prevent arrest."

23. We cannot accept Mr. Wheeler's submissions to the effect that *Stoddart* was limited to the offence of possessing a firearm with intent to commit an indictable offence. Indeed, in terms, Lord Justice Rose referred to the both elements of the offence. *Stoddart* clearly sets out a principle which is equally applicable to possession with intent to commit an indictable offence and possession to resist arrest.

24. In our judgment, what was said by this court in paragraph 28 of *Thompson* does not set out the law. It was an observation wholly unnecessary for the decision. It was made without the relevant authorities having been drawn to the court's attention. To make out an offence under section 18(6) of the *Firearms Law*, it is only necessary for the Crown to prove that the principal offender knowingly had in his possession a firearm or imitation firearm and, in the present context, possessing that firearm, he intended to resist arrest. It is not necessary to prove that he intended to

use the firearm to resist arrest. That disposes Ground 1 of the Grounds of Appeal. It also disposes of part of Ground 2.

25. Mr Wheeler's further submission is that the judge could not have been, and did not express herself as having been, sure the appellant knew of the unknown man's possession of the firearm.
26. That submission cannot withstand scrutiny of the judgment. First the judge set out in paragraph 19 that in order to prove its case the Crown had to prove that the defendant intended to assist the unknown male in the commission of the offence, and that he did in fact assist the unknown male with the imitation firearm, to resist arrest. She plainly had in mind that she had to be satisfied that the Appellant knew of the possession by the unknown man of the firearm.
27. Second, in paragraph 47 of the judgment, the judge said:

“Did the Defendant aid and abet the unknown male in his possession of the imitation firearm?”

The remaining issue for this court's determination is whether there is evidence that this defendant aided and abetted the unknown male in his possession of the imitation firearm.

The Crown invited this court that the actions of the defendant in driving off from the vehicle check point, after he spoke to the unknown male in the rear of the passenger seat, the manner in which he drove as he sought to evade the police on that evening, and the driving to a point from which the unknown male was able to escape the police are all matters that go to the defendant's active participation in the unknown male's possession of the imitation firearm.”

28. In a further passage the judge wholly rejected the Appellant's account that he drove off because he believed the unknown man had drugs in his possession.
29. At paragraph 57, the judge said the defendant's account of events was “*extraordinary*”. She observed that he gave no explanation either to the police at the scene or when later interviewed. As she was entitled to, the judge found that his failure to mention the evidence he relied upon in the course of the trial, should be held against him. At paragraph 68, she roundly rejected the Appellant's account. At paragraph 70, she said:

“I have listened to and considered all of the evidence in this case. I am satisfied that the evidence presented of the defendant’s actions is evidence from which I can infer that the defendant intended to assist the unknown male in his possession of the imitation firearm with intent to resist arrest. I also find from the evidence of the defendant’s actions that he did in fact aid and abet the unknown male with possession of the imitation firearm to resist arrest.”

30. In so concluding, the judge was saying she was sure, first, that the unknown man had an imitation firearm, second, that the unknown man had it with intent to resist arrest, and, third, and crucially for present purposes, that the appellant *“intended to assist the unknown male in his possession of the imitation firearm with intent to resist arrest.”* In other words, as we read what she said, she was sure of all the elements of the offence in the terms we have defined it.
31. In the circumstances, we dismiss this appeal.

