IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT CRIMINAL DIVISION

CRIMINAL APPEAL 8 of 2021
(IND 6/2020 & 8/2020
(SC#01513/2019)

BETWEEN:

KURT STEPHENSON CARTER

Applicant/Proposed 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 Sir Michael Birt, Justice of Appeal

Appearances: **Mr Jonathon Hughes, Samson Law for the Applicant/Appellant**
Ms Nicole **Tyson-Petit of the Office of the DPP for the Respondent**

Heard: **18 May 2022**

Draft judgment Circulated: **1 June 2022**

Judgment delivered: **3 August, 2022**

JUDGMENT

The Rt. Hon Sir John Goldring, President

The conviction

1. On 25 May 2021 the Applicant, having previously pleaded guilty, was sentenced to 5 years 7 months imprisonment by Acting Justice Chapple for an offence of possessing an imitation firearm with intent to commit an offence, contrary to section 18(6) of the Firearms Act (2008 Revision). A suspended sentence of 3 months imprisonment for an offence of assault occasioning actual bodily harm was ordered to be served consecutively. The Applicant now seeks leave to appeal against his conviction and sentence. We grant leave.

The Firearms Act

2. By section 18(6) of the Firearms Act:

> "*Whoever has with him a firearm or imitation firearm with intent to commit an offence…is guilty of an offence and…is liable on conviction to a fine of one hundred thousand dollars and to imprisonment for twenty years*"

The facts

3. At about 3.50 AM the Appellant was outside Bananas Nightclub in Georgetown, Grand Cayman with about six other people. He had what appeared to be a firearm in his waistband. On occasion he would take it out and show it to the others. There came a time when he moved to what has been described as the general area and discharged the firearm. He discharged it a second time when in an area at the side of the bar and in close proximity to a road. The firearm was never recovered. The Crown could not prove whether it was genuine or an imitation. The Appellant said it was an imitation and it was charged as such.

4. There is CCTV footage of the events which we have seen. The judge, in his sentencing remarks to which we shall shortly come, accurately described what is depicted.

The background

5. It is necessary to set out some of the background.

6. On 29 May 2020 the Appellant and his co-defendant, a man called Dilroy Linwood Watler, pleaded not guilty to an indictment containing 10 counts. Count 1 alleged possession of an imitation firearm "*with intent to commit offences*." The "*offences*" were not specified. Count 2 alleged that both defendants abducted a woman referred to as RR. The remaining counts alleged a series of serious sexual assaults by the Appellant on RR.

7. On 9 July 2020 the Appellant and his co-accused wrote to the court and his counsel stating that,

> "*the charge of imitation firearm with intent to commit an offence is weak or otherwise ill-founded give [sic] the fact that there is no credible witness to such a complaint. We request for the Crown to amend the charge to possession or simple possession of an imitation firearm and by such agreement to amend the charge, the defendants would be willing to conceded [sic] to an early guilty plea if such were the case.*"

8. On 14 January 2021, the Applicant pleaded guilty to count 1 on the indictment. At the time, he said, "*Guilty with an explanation.*" He submitted a basis of plea, which was signed by him and his then counsel. It stated:

> "*This basis of plea is given on the premise that Mr Carter accepts that he had with him an imitation firearm and that he used it in a manner that caused intentional alarm and distress by discharging it at Bananas in the presence and hearing of others. By pleading guilty, he accepts that the use and possession of the imitation firearm was unlawful, but denies that the imitation firearm was used at any time to intimidate the complainant or otherwise compel her into performing sexual acts with him and Dilroy Linwood-Watler.*"

9. The reference to intimidation and compulsion was in respect of the alleged abduction and sexual assaults of RR.

10. It is unnecessary to set out a subsequent amendment to the indictment. The trial took place. The Appellant was acquitted of all counts. He then fell to be sentenced on count 1.

11. On 8 April 2021, after his acquittal and before sentence, the Appellant submitted a letter to the court which we have read. Among other things, it stated that no witness had spoken of being harassed, alarmed or distressed, that the evidence of possessing a firearm with intent was weak, and that the weapon was nothing more than a noisy replica made in China. At the sentencing hearing, Mr Brady, then representing the Applicant, asked the judge to ignore the letter.

The judge's sentencing remarks

12. At paragraphs 9 and 10 of his sentencing remarks the judge said:

> "*9…It very much looks* [from the CCTV] *as though you wanted to impress [your audience] and that, sadly, they were impressed. To that extent I agree with Mr Brady's submission that your friends or associates were not alarmed or distressed by your possession or use of the imitation firearm. However, as you properly accept in your BOP* [basis of plea]*, you used that weapon in a manner that did in fact cause harassment, alarm or distress and that was your intention.*

10. The place where you discharged that weapon…is on Eastern Avenue, often a busy road, although this was in the early hours of the morning, when traffic was likely to have been light. That said, anyone witnessing what you did- discharging a very realistic-looking handgun twice, would be distressed, to say the very least of it."

13. Not surprisingly given the terms of the basis of plea submitted by the defence and accepted by the prosecution, the judge plainly believed that the Appellant had, by his plea, accepted an intention to cause harassment, alarm or distress. As will become apparent, he was wrong to do so.

14. Count 1, as we have said, did not specify the "*offences*" intended for the purpose of section 18(6) of the Firearms Act. Section 88A of the Penal Code (2019 Revision) makes it offence intentionally to cause alarm or distress. Section 88B of the Penal Code makes it an offence to cause alarm and distress without specifically intending to do so. It provides:

"*(1) A person who-*

(a) Uses threatening, abusive…behaviour or disorderly behaviour…within the hearing or sight of another person likely to be caused…alarm or distress commits an offence…

(2) An offence under this section may be committed in a public or private place, but a person commits an offence under this section only if he intends his…behaviour…to be threatening or abusive, or, is aware that it may be threatening [or] abusive or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly."

15. In short, therefore, section 88A is the offence of specific intent, section 88B the offence of basic intent. Ms Tyson-Petit, who represented the Crown below and the Respondent before us, has stated to the court that it was never the Crown's case that the Appellant intended to cause alarm and distress contrary to section 88A of the Penal Code. The Crown has throughout accepted the Appellant was using the firearm to show off to his friends. The basis of plea was not intended by prosecution or defence to be an acceptance by the Appellant that he intended to cause alarm and distress contrary to section 88A. It was an acceptance that by his deliberate firing of the imitation firearm the Appellant intentionally used behaviour which was likely to be alarming or distressing to anyone in sight, being aware that such behaviour may be disorderly; in other words, his intention for the purposes of section 18(6) of the Firearms Act was to commit an offence under section 88B of the Penal Code.

16. As to the likelihood of the behaviour being alarming or distressing, Ms Tyson-Petit drew the attention of the court to a woman who could be seen on the CCTV and who "scampers" from the scene.

The grounds of appeal

17. Not surprisingly, like the judge, Mr Hughes, on behalf of the Appellant, who did not appear below, understood the intention alleged under section 18(6) of the Firearms Act, was of an offence under count 88A of the Penal Code. His first submission on that basis was, in short, that the conviction was unsafe and unsatisfactory, in that it did not reflect the evidence.

18. Ms Tyson-Petit having explained the basis of the allegation and the plea to count 1, Mr Hughes understandably put his case on a different basis. He accepted, as he was bound to, that the Appellant's conduct amounted to an offence under section 88B of the Penal Code. As we understood his argument, it came to this. The offence under section 18(6) of the Firearms Act requires the specific intention to commit an offence. The Crown allege an offence of basic intent under section 88B of the Penal Code. It is not possible to have as the specific intent required for the purposes of section 18(6) an offence of basic intent.

19. He also submitted that in the light of the judge's misunderstanding of the basis of plea, there should be some reduction in the sentence he imposed.

Our conclusion

20. A number of things went wrong in this case. Firstly, the Crown should from the outset clearly have set out the "*offences*" alleged for the purposes of section 8(6). It was not good enough merely to allege "*offences*." Secondly, the basis of plea as set out does not reflect what the intention of the prosecution and the defence was. It suggests on its face a specific intent as provided for by section 88A of the Penal Code. That should not have been agreed in those terms by the prosecution (or advanced by the defence). Thirdly, the judge should have been clearly told what was intended by the basis of plea. Had he been, his perfectly understandable misunderstanding would not have occurred. All these are matters for which the prosecution was primarily responsible.

21. All that said, it does seem to us that it cannot be said the conviction following the plea of guilty is unsafe. There can be no doubt that the Appellant's behaviour in firing this realistic looking firearm on two occasions was likely to be alarming or distressing to anyone who saw it. That person would have no idea whether the firearm was real or an imitation or what might follow.

The Appellant must have known that. Nevertheless, he deliberately fired the shots. As he must have been aware, such behaviour was disorderly. It was not necessary for the Crown to adduce evidence of alarm or distress or to prove that the Appellant intended to cause alarm and distress. There was in the result the intention to commit what amounted to the offence of using disorderly behaviour. That was a sufficient intention for the purposes of section 18(6) of the Firearms Act.

22. We therefore dismiss the appeal against conviction.

Sentence

23. In passing sentence, the judge, as we have said, did so on the basis of a specific intention as set out in the basis of plea. His sentence no doubt reflected that. Albeit it is a serious offence to fire an imitation firearm in the circumstances which obtained here, it does seem to us that, in the circumstances, some reduction should be made to the sentence the judge passed. We reduce from 5 years 7 months to 5 years the sentence of imprisonment on count 1. The consecutive sentence of 3 months will be unaltered. To that extent this appeal is allowed.