IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

Ind. No.: 0092/2016

THE QUEEN

V.

FABIAN OLIVER THOMPSON

Appearances:	**Ms. Nicole Petit for the Crown**
	Ms. Prathna Bodden of Samson Law for the Defendant
Before:	**Hon. Mr. Justice Malcolm Swift (Actg.)**
Heard:	**4th – 8th May 2017**
Decision handed down:	**8th May 2017**

HEADNOTE

Criminal Law – s.18(6) of the Firearms Law – Possession of an imitation firearm with intent to commit an offence – *No Case to Answer submission – Evidence of the essential ingredients of the offence argued.*

JUDGMENT

SUBMISSION OF NO CASE TO ANSWER

1. On a charge of possession of an imitation firearm with intent to commit an offence, the Defendant elected to be tried by Judge Alone and, at the close of the Crown's case the Defence made a submission of no case to answer.

2. The defence submits that there is no case to answer, invoking the well-known principles expressed in the leading case of ***Galbraith***[1] in which Lord Lane CJ stated:

> *"How then should the judge approach submission of no case? (1) if there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence that it is of a tenuous character, for example because of inherent weakness of vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that that its strength weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."*

3. It is argued that there is no evidence of the essential ingredients of the offence and alternatively that, if the case stopped here, I, as tribunal of fact, could not at this stage of the proceedings properly direct myself to properly convict the Defendant on this evidence.

GRAND COURT - CAYMAN ISLANDS

[1] 1981 1 WLR 1039

4. The Defendant is charged with possession of an imitation firearm with intent to commit an offence contrary to s.18(6) of the Firearms Law (2008 Revision) – the particulars being that he had with him an imitation firearm on the 20th January 2016 at 100, Kitty Lane, Bodden Town with intent to resist arrest and the facts are as follows.

5. On the 20th January 2016 Police Officers, on information received, attended 100, Kitty Lane at 12:02pm. This was the home of Abbott Thompson, and the Defendant, who is his son.

6. 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.

7. 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 front pocket. PC Grant immediately saw the butt and magazine parts of the 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*".

8. PC Grant shouted "*gun*" and fired his Taser at the Defendant.

GRAND COURT - CAYMAN ISLANDS

9. 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.

10. From being struck by the Taser, the events are shown on the Taser recording which I have viewed several times in real time and in slow motion.

11. 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 undergrowth.

12. 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 had 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.

13. The pistol (if that is 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.

GRAND COURT CAYMAN ISLANDS

14. At 08:56 on the 26th January 2016 the Defendant turned himself in. He was arrested and Interviewed at 15:35. He made a prepared statement stating that he did not have anything in his waistband (As far as I can discover, the Police had not suggested to him that the item had ever been in his waistband).

15. On the 27th January 2016 the DPP ruled that the Defendant should not be charged at that time. The Defendant was informed of the ruling and told he could be rearrested if new evidence was obtained and he was released. After reconsideration, on the 14th May 2016 the DPP recommended that the Defendant be charged. On the 18th May 2016 the Defendant was re-arrested and charged with this offence. No point is taken in respect of this series of events.

16. ***The Firearms Law (2008 Revision)*** provides as follows:-

> *"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 while he has the firearm or imitation firearm with him, is guilty of an offence and, subject to section 39, is liable on conviction to a fine of one hundred thousand dollars and to imprisonment for twenty years."*

17. 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."*

18. The test of whether the thing has the appearance of a firearm is "does the thing look like a firearm"[2] and that is a question of fact for the tribunal of fact to determine taking into account the evidence of the witnesses who saw it, the observation of the tribunal of the thing itself, the conclusion as to the intent of the Defendant at the time he had the thing in his possession and, I would add, the interpretation of the Taser video recording.[3].

19. The questions of fact are:

(i) Did the Defendant have the item with him/in his possession?

(ii) Did the item have the appearance of being a firearm?

(iii) Did the Defendant at the time of the possession, intend to resist arrest?

20. The Defendant must be proved to have been in possession of the item with that intent at the time of the possession, hence the words "*in either case*" in s.18(6). I conclude that there is clear evidence upon the basis of which a properly directed tribunal of fact could properly conclude 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.

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

[2] ***R v Debreli*** [1964] Crim.L.R. 53
[3] See ***R v Morris & King*** [1984] 79 Crim.App.R. 104 and ***R v John Williams*** [2006] EWCA Crim 1650)

(i) The evidence of the Police 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.

22. On those grounds, I am completely satisfied at this stage of the case that there is clear evidence from which a properly directed tribunal of fact could properly conclude that the item in the Defendant's right hand was an imitation firearm because it had the appearance of a firearm.

23. In relation to the issue of the intent of the Defendant to resist arrest, it must be established that, at the time he had the imitation firearm in his pocket and/or in his hand, he had it with him with the intention of resisting arrest.

24. It has been submitted to me that the intent to be proved must be an intent to resist a *lawful* arrest and that there were no reasonable grounds for arresting the Defendant for any offence at the time. Nothing was found at the house capable of justifying an arrest. It is submitted that mere possession of an imitation firearm is not *per se* an offence so that, even if the Defendant wrongly thought he might have been liable to be arrested for possession of it and took it from his pocket intending to resist arrest by intimidating the officers into letting him flee unimpeded, his mistaken belief negates his intent. Equally 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.

25. The police officers have not claimed that they had any grounds for arrest at any time before the Defendant fled the yard pulling out the weapon as he leapt the fence.

26. I am satisfied that there is evidence that the police officers, and PC Grant in particular, honestly and reasonably believed that they were dealing with a man armed with a real firearm. Hence PC Grant trying to Taser the Defendant and hence the reluctance of the officers to pursue into the undergrowth a man they believed to be armed with a deadly weapon. If the Taser had worked as intended, the Defendant would certainly have been arrested even if that arrest subsequently turned out to have been based on an incorrect belief that the weapon was real. PC Grant suspected on reasonable grounds that the Defendant was committing an arrestable offence namely possession of an unlicensed firearm and, I infer, was instinctively trying to stop and arrest him. That power of arrest arises under s.60 ***Police Law (2014 Revision)***.

27. I am also satisfied that there is evidence that the officers, who were present to search for drugs, clearly stated their intention to stop and search the Defendant for that reason and clearly stated their intention to stop him when his movements suggested a reluctance to cooperate. It was then that the Defendant pulled out the weapon and jumped the fence. No reason to flee can be properly inferred on this evidence apart from possession of the weapon.

28. What is the evidence from which such an intent to resist arrest (even a mistaken intent based on a belief that the police had proper grounds for arrest) could properly be inferred? There is evidence from which such an intent could properly be inferred namely his behaviour:

GRAND COURT - CAYMAN ISLANDS -

(i) In avoiding being searched by walking to and fro at a time when, it can properly be inferred, 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 a desire on the part of the police to stop or to arrest him.

29. These aspects of the evidence seem to me to provide a sound evidential basis for concluding that the Defendant believed that he was going to be arrested and that he was not applying his mind at all to the question 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 efforts to arrest him. It may have been otherwise if the Defendant had immediately thrown the weapon away after taking it from his pocket.

30. Is it sufficient to prove an intent to resist an arrest which was or which turns out later to have been unlawful?

(i) ***Archbold 17-38:***

GRAND COURT - CAYMAN ISLANDS

> *"In **R. v. Bentham [1973] Q.B. 357, 56 Cr.App.R. 618**, the Court of Appeal held that on a charge of possessing a firearm with intent to endanger life contrary to section 16 of the Firearms Act 1968 (post, § 24-51), 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*."

(ii) ***Archbold 17-39****:*

> "*In **Att.-Gen.'s References (Nos 1 and 2 of 1979) [1980] Q.B. 180, 69 Cr.App.R. 266, CA**, it was held, following **R. v. Walkington, 68 Cr.App.R. 427, CA,** and explaining **R. v. Hussein, 67 Cr.App.R. 131, CA**, that: (a) 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; and (d) the same principles apply whether the charge is burglary or attempted burglary, theft or attempted theft*." (emphasis added)

GRAND COURT CAYMAN ISLANDS

31. It makes sense therefore that, to prove an intent to resist arrest, it is only necessary to establish that the Defendant's intent was to resist being arrested regardless of whether an arrest was, in fact, likely, possible, unlikely or impossible and regardless of whether any such arrest was lawful or unlawful because the true intent of the Defendant is to take whatever steps he thought he needed to take in order to get away from the police. I have therefore concluded that the law does not require the arrest, which the Defendant is said to have intended to resist, to be a lawful arrest. 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.

32. This does not reverse the burden of proof, as the defence argues, because there is evidence (set out above) from which the intent can properly be inferred.

33. I am satisfied that there is evidence from which a properly directed tribunal of fact could properly conclude that the Defendant had the necessary intent based on the matters set out in paragraph 19 above.

34. It follows that a properly directed tribunal of fact is well able, properly to convict, based on the evidence I have heard establishing all elements of the offence charged.

Dated this the 8th day of May 2017

Honourable Mr. Justice Malcolm Swift (Actg.)
Judge of the Grand Court