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**
No Case to Answer Decision:	**8th May 2017**
Verdict Decision:	**8th May 2017**

HEADNOTE

Criminal Law – s.18(6) of the Firearms Law – Possession of an imitation firearm with intent to commit an offence *– Matters to be taken into account in dealing with the appearance of the item – Determining the intent to resist arrest.*

JUDGMENT

INTRODUCTION

1. The Defendant stood trial on a Count of Possession of an Imitation Firearm with intent to commit an offence contrary to s.18(6) of the Firearms Law (2008 Revision).

2. The particulars of the Count are that he had with him an imitation firearm on the 20th January 2016 at 100, Kitty Lane, Bodden Town with intent to resist arrest.

THE LAW

3. I have considered the legal definitions of the Count. 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.*"

4. 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.*"

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5. The test of whether the thing has the appearance of a firearm is "does the thing look like a firearm"[1] 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.[2].

6. The questions of fact for me to determine are set out later in this Judgment.

7. This is a Judge alone trial and in conducting it and in composing this Judgment, I have gratefully followed the legal analysis of Quin J. in ***R v George Dexter Evans***[3].

8. I fully understand that I must advise myself on the applicable principles of law, give myself the appropriate warnings as necessary and state clearly my reasons for acting as I do so that my reasoning is clear and I have in mind the decision of Rowe J. in ***K. Richards v R***[4] where he said:-

> *"When a trial judge sitting alone has advised himself to the applicable principles of law, and given himself any necessary warning, he must indicate clearly in his judgment his reasons for acting as he did, in order to demonstrate that he has acted with the requisite degree of caution in mind and has therefore heeded his own warning. No specific form of words is necessary for this demonstration, what is necessary is that the Judge's mind upon the matter should be clearly revealed."*

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[1] ***R v Debreli*** [1964] Crim.L.R. 53
[2] See ***R v Morris & King*** [1984] 79 Crim.App.R. 104 and ***R v John Williams*** [2006] EWCA Crim 1650)
[3] Indictment No 18 of 2011 paragraphs 67 to 71
[4] 2001 CILR 496

9. I also keep in mind the guidelines of the Court of Appeal stated in ***R v Dave Kennedy Whittaker***[5] and in ***Randy Martin v R***[6]. In the ***Whittaker*** case the Court adopted the words of Lord Lowry LCJ in ***R v Thompson***[7] where he said at p83:

> *"While on the subject I might say a word on the duty of the judge when giving judgment in a trial under the 1973 Act. He has no jury to charge and therefore will not err if he does not state every legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant aspect of the law or to give a full and balanced picture of the facts for decision by others. His task is to reach conclusions and to give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an Appeal, it may be seen how his view of the law informed his approach to the facts."*

10. In the ***Martin*** case the Court adopted the reasoning of Lowry LCJ in ***R v Thain***[8] where he said:-

> *"From these cases the following guidance may be discerned. A judge sitting in a criminal case without a jury, in rendering his decision and giving his reasons for so concluding, is not required to review every fact and to detail each argument on which the prosecution and defence rely as if he were summing up to a jury. The judge must set out the conclusion reached and make clear the reasons for arriving at that conclusion. He is required to have regard to any difficult or unusual points of law and to show how those points of law have in anyway impacted the conclusion that he has reached."*

11. In essence my task is to reach conclusions and to give reasons in support of those findings. I am not required to review every fact in the case or to detail every argument as if I was summing up to a jury. I am required only to state my conclusions and to give clear reasons for those conclusions.

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[5] Cr. App. R. No 14 of 2006
[6] Cr. App. R. No 2 of 2010
[7] 1977 NI 74
[8] 1985 NI 457 at p478

APPLYING THE LAW TO THE CASE

12. I must begin by reminding myself of the steps in the process of proof in this case. The questions for me to answer are:-

    (i) Has the Crown proved so that I am sure that the Defendant 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 Defendant, at the time of having the item with him/in his possession, intended to resist arrest?

13. I have directed myself as follows. The issues in paragraphs 12 above are matters of fact for me to determine, according to the evidence, applying the normal burden and standard of proof.

14. In respect of the issue in Paragraph 12(iii) above I apply the law as follows:-

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i. 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 who, he believed, were either intent on arresting him, or, if they detained him, would surely find the weapon and as a result arrest him even if that arrest turned out to be unfounded. I have therefore decided 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 had been carrying.

15. In reaching that conclusion, I have considered and applied the case law set out in my Judgment on the submission of no case to answer at paragraph 30.

THE EVIDENCE

16. The facts are as follows. On the 20th January 2016 Police Officers on information received attended 100, Kitty Lane at 1202pm. This was the home of Abbott Thompson and the Defendant who is his son.

17. 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.

18. 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*".

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

20. 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.

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21. 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.

22. 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.

23. 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.

24. 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.

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25. At 08:56 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). Otherwise he made no comment to the questions he was asked.

26. On 27th January 2016 the DPP ruled that the Defendant should not be charged at that time. The Defendant was informed of 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.

27. I take into account the contents of the Admitted Facts.

GOOD CHARACTER

28. The Defendant is a man of previous good character in the sense of having no previous convictions. I deal with that in the following way. The Defendant is a man of 34 years of age with no previous convictions. Good character is not a defence to the charges but it is relevant to my consideration of the case in the following way: The fact that the Defendant has not offended in the past may make it less likely that he acted as is now alleged against him.

29. It is in effect submitted on behalf of the Defendant that his absence of convictions means that he is not the sort of man who would be likely to cast his good character aside in this way. That is a matter to which I pay particular attention.

30. What weight should be given to the defendant's lack of convictions and the extent to which it assists on the facts of this particular case are for me to make. In the circumstances, it has little if any effect on the decisions I have to make.

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ADVERSE INFERENCES FROM SILENCE

31. The Defendant has not given evidence. I asked the usual questions of his counsel and was assured that the Defendant was fully aware that I would be entitled, if I thought it proper to do so, to draw an inference adverse to his defence from his failure to go into the witness box and to have his account given in interview tested in cross-examination. The Defendant has in effect relied upon his prepared statement the evidential status of which is that of an untested assertion. I remind myself that the Defendant has a perfect right not to give evidence and to require the prosecution to prove its case. On the other hand, there is no evidence before me capable of contradicting, undermining or explaining the evidence for the prosecution. It is open to me to conclude that the reason why the Defendant has remained silent is that he has no answer to the prosecution case or none that would stand up to examination. In the witness box, if asked what he was holding in his hand and why he took it out of his pocket, he would not be able to make no comment.

32. I regard the prosecution case as sufficiently strong to require an answer from the Defendant, and conclude that the only sensible explanation for his silence is his awareness that he has no answer, or none that would bear examination.

33. The Defence, I would assume, invite me not to draw any conclusion from the defendant's silence, on the basis that he must have been acting on legal advice and because he should not be forced into providing explanations for things the prosecution has the duty to prove. I do not accept that argument. There is a strong case to answer irrespective of the advice he may have received.

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34. I draw the conclusion that the Defendant has deliberately avoided cross examination about his possession of the firearm. I draw that conclusion as an inference adverse to the case for the defence. However it is only one small element of the case and is not in itself determinative of guilt.

CONCLUSIONS

35. I answer the questions I posed earlier in this judgment as follows and first draw the following conclusions from the evidence I have heard.

36. 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.

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

(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.

38. 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.

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39. 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 a desire on the part of the police to stop or to arrest him.

40. 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.

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41. I am therefore satisfied so as to be sure that:-

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

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

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

42. Accordingly I conclude that the Defendant is GUILTY of the offence charged.

Dated this the 8th day of May 2017

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