IN THE HIGH COURT OF THE COOK ISLANDS **JPAPPEAL 1/14 (CR 7-8/2013)**
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CROWN

v

POARU TATIRA

Date: 21 July 2014

Counsel: Ms M Henry for the Crown
Mr N George for the Defendant

DECISION OF THE HONOURABLE MR JUSTICE COLIN DOHERTY J

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[1] The Respondent was tried before three Justices in March 2014.

[2] He had been charged pursuant to Section 331(b) of the Crimes Act 1969 with a threatening act by the discharge of a firearm. This is an incident that took place in Aitutaki on 3 November 2012.

[3] In the event the only real issue at trial was whether or not the defendant discharged a firearm. There were five elements to be proved by the Crown and the other four need not be mentioned in this Appeal, as they were in the event relatively uncontentious.

[4] The Crimes Act does not define what a firearm is. It was proposed by the Crown and accepted by the defence and ultimately accepted by the Justices that the appropriate definition was that contained within the Cook Islands Arms Ordinance 1954-55, that is that a firearm "includes any weapon from which a missile is discharged by force of any explosive substance or by compressed air."

[5] It was the Crown case that the Respondent had discharged a .22 rifle. The Respondent who ultimately gave evidence at trial contended that he had discharged a toy gun which was used for scaring birds. The .22 calibre rifle alleged to be used by the Crown was never found by the Police and thus did not form any part of the trial. The Crown were instead relying upon the evidence of a number of eye witnesses and ear witnesses. Ms Vaevaepare and Mr Vaevae were two witnesses who described the gun in some detail. They both said that they have handled the weapon and they discussed its length, what it was made of, what its colour was and a number of other issues about its weight and characteristics. They also described, as did two other witnesses, what the sounds were that emanated from the alleged firearm. Some of those witnesses did not actually see a firearm but described hearing of shots and one of them I think from six houses away.

[6] There were also issues in relation to the sounds of the shots; as to the sequence of them and the timing of them. This became important in cross examination as the defence alleged that if it was a .22 rifle, it would have been a single shot one and the rapidity of firing was not commensurate with such, but rather the toy gun did have a rapid fire mechanism. As an aside, the toy gun was not produced by the defence.

[7] And so the Crown says that there was eye witness evidence of significant weight, which might well have proved the case. There was also other circumstantial evidence which included a number of spent cartridges or shells being found in the position where the witnesses described the Respondent as having fired the firearm, which were of .22 calibre. The Respondent had an explanation for that saying that those had fallen from his pocket, being shells retrieved from an earlier pig hunting expedition.

[8] There was also observation evidence about whether or not the firearm that was discharged had shown sparks or lights of the explosion, and that too was relied upon by the Crown.

[9] The Justices gave a reasoned decision which was issued on 8 April 2014. It was a written decision. In it, they set out the background, set out the law, the elements which the Crown had to prove and then move to the facts of the case.

[10] Under a heading "Proven Facts from Evidence" the Justices went through a number of issues and those were split really into two categories. The first were non-contentious, non-disputed and in large part admitted facts relating to the incident itself, its surrounding circumstances and who was there and what happened. It then isolated the only real issue and that is whether the defendant discharged a firearm and moved into another category of listed evidence. It was the contentious evidence relating to the identification of the alleged firearm.

[11] The Justices then moved into a paragraph which is headed "Application of Proven Facts." It commences by saying "in applying the facts to the elements of the charge that prosecution is required to prove beyond reasonable doubt, we make the following findings" and thereafter there were findings on all of the elements including that relating to the matter in dispute. And in relation to that, the Justices said;

(i) "Crown presented photographic evidence of seven spent .22 shells recovered from about the point the defendant stood during "shooting stage" of the incident. The defendant does not deny that they are his, saying they were from an earlier pig hunting trip and must have fallen out of his pocket. It would be tempting to find it unlikely that used shells would appear at the scene of an alleged shooting, and have nothing to do with that incident. However the lack of any weapon to tie the shells to is a severe weakness. To compound this weakness, it was revealed in the course of the trial that the seven .22 shells have also gone missing from Police possession.

(ii) The defendants claim that a toy gun he fired could make sufficient noise to scare people, also stretches credibility; however it is for the Crown to prove what was used, not the defendant.

(iii)The Crown did provide several witnesses who testified they viewed and or they handled a rifle of some description in the defendant's possession in the early hours of the morning of the alleged incident.

(iv) The credibility and honesty with which they testified is not in question, however the lack of a weapon for them to identify in Court means their testimony lacked weight.

(v) We noted that there were discrepancies in their testimonies in terms of some of the descriptions of the alleged firearm used."

[12] The Justices then moved into their conclusion which was effectively their decision. The first of those really was an acceptance of the setting of the scene where entry had been refused to the Respondent and an argument ensued.

[13] The Justices went on:

(i) "There is even agreement that he was carrying some sort of firearm and that it was discharged. The key issue is whether it was a firearm as to finding the Arms Ordinance 1954-55 the defendant discharged or a plastic toy gun that he claimed it to be.

(ii) The Police failed to physically produce the alleged firearm "as crucial evidence to support the charge against the defendant".

(iii) The Court noted the time gap the Police took to interview the defendant which was seven days after the alleged incident. Similarly the witness statements were recorded some 15 months after the alleged incident.

(iv) In this respect the Crown has failed to prove this case beyond reasonable doubt. In addition, despite Mr Tatira's admission that it was his intention to scare the occupants of the house, Section 331(b) of the Crimes Act specifically refers to a firearm, this Court therefore finds the defendant not guilty as charged therefore the charge is dismissed."

[14] The Crown complains that there were several failings by the Justices and the appeal was lodged on grounds that firstly they had failed to make findings backed on the evidence and failed to properly assess the evidence and determine what evidence was either accepted or rejected. Second, that the Justices erred in law and finding the failure of the [Appellant] to produce the firearm meant that the Crown could not prove the charge, and third, that they took into account irrelevant matters mainly the delay in time in interviewing various persons.

[15] Similar concepts and principles were dealt with by this Court in the judgment of *Solicitor General v Boaza* a JP appeal 2/2011 27 May 2011, a judgment of Hugh Williams J.

[16] I agree with his Honour's observations that judicial officers are bound to provide reasons for their decisions, and that they are under an obligation to provide an indication of the reasons for which they took that view. In that case, his Honour adopted the reasoning in *Lewis v Wilson & Horten Ltd* [2000] 3NZR 546 which was a judgment of the New Zealand Court of Appeal. In that judgment, the Court set out three main reasons why the giving of reasons by a Judge is desirable and I quote here from the submissions of the Crown;

(i) The provision of reasons by a judge is an important part of openness in the administration of justice

(ii) Failure to give reasons means that the lawfulness what is done cannot be assessed by a Court exercising supervisory jurisdiction

(iii)The requirement to give reasons provides a discipline for the Judge exercising the discretion which is the best protection or wrong or arbitrary decisions and inconsistent delivery of Justice.

[17] The Crown also referred to the New Zealand Court of Appeal in its decision of *Queen v Awatere* [1982]1NZLR 644 and the observations made by the Court about the counsel of perfection in busy lower courts. The Court of Appeal thought it undesirable to give in some sort of inflexible rules which apply universally to the requirement to give reasons, for the very reason that some of the District Courts in New Zealand are very busy and a counsel of perfection might be going too far. But Court did say at page 649 "nonetheless Judges and Justices should always do their contentious as best to provide with their decisions reasons

which can sensibly be regarded as adequate to the occasion. Indeed, failure to follow that normal judicial practice might well jeopardise the decision on Appeal."

[18] Taking those observations into account and bearing in mind that this Court is dealing here not with a counsel of perfection and being conscious that the Justices do not necessarily have legal training but regardless, the observations of Hugh Williams J are in my view correct. Here there was a trial lasting three days where there was a wealth of Crown evidence about the "firearm" and other circumstantial evidence which needed to be assessed and analysed against the denial and explanation of the defendant.

[19] It is not my task in this Appeal to substitute my decision, at this stage at least, for that of the Justices, but in my view, having read the evidence, there is compelling evidence which if accepted, could easily have led to proving all of the elements of the charge including whether or not a firearm had been discharged. But, unfortunately, decision of the Justices does not deal with the evidence in any analytical way at all.

[20] My overall impression is that the Justices were distracted from doing that by the emphasis they put on the absence of the production by the Crown of a .22 calibre or any other rifle.

[21] Even if one looks at the observation that I referred to earlier where the Justices said that the lack of a weapon for the witnesses to identify in Court meant their testimony lacked weight, they needed to have said that they found the witnesses evidence unreliable for some reason. By accepting that the Crown witnesses were credible and honest which they did, there needed to be some distinguishing factors which meant their evidence was not sufficient so as to prove that the article was indeed a firearm within the definition that was accepted.

[22] It does not need as I have said to be a counsel of perfection but it does need to be an obvious pathway to the conclusion that they reached. They need as any Judge needs to assess all of the evidence in a case which lasted this amount time and where there was a diametric view between the Crown's witnesses and the only witness for the defence which was the Respondent, a good way of dealing with that evidence would have been for the Justices to take firstly the evidence of the Respondent, and assess what he said against the Crown witnesses. If the Justices had accepted his evidence or thought that it might reasonably be

true, then of course they would have found the Respondent not guilty because they could not have been sure that the article was a firearm within the definition.

[23] Here they could have assessed the reliability of the Crown witnesses, by assessing such things as: the lighting; this took place in the early hours of the morning; the witnesses were frightened; they had been shocked; and the fact that their statements were not taken some time between the incident itself and the giving of their evidence or the giving of a statement. That doubt could have been and ought to have been cast on the reliability of the evidence that they had given.

[24] The Justices did not do that. Whilst they accepted the honesty of the witnesses, their evidence and the assessment of it is left in a vacuum which bangs up against the view that the crucial evidence would have been the actual physical production of a firearm. That seemed to be the end of the case.

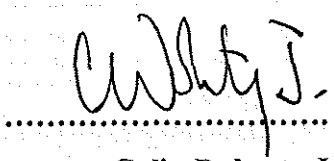
[25] Thus it is not sure whether the evidence of the Respondent was accepted and the evidence of the Crown witnesses rejected because of unreliability.

[26] I have no option but to grant the Appeal for the grounds I have just espoused.

[27] My ability to deal with the case thereafter is circumscribed by Section 80 of the Judicature Act. I can affirm, reverse or vary a judgment or may order a new trial or make such other orders as I think fit. There is thus a wide discretion.

[28] The Crown enjoins me to assess the evidence on the transcript and substitute my view for that of the Justices. I do not intend to do that. There is something to be said for the assessment of witnesses particularly in reliability; having seen and heard them. That is not the be all to end all because I have as I have just said there needs to be reasoned decisions and assessment of the evidence as it falls. But in a case where there was the need to assess the witnesses as they gave their evidence particularly when there was some time between the incident and trial, for me to substitute my own view of a case that took three days would not be an appropriate exercise of my wide and unfettered discretion.

[29] I therefore set aside the judgment of the Justices and Order a new trial.



Colin Doherty J