The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 9 of 2018

B E T W E E N:

THE QUEEN

Appellant

- v -

EHBONY ALLEN

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Alan Richards, Office of the Director of Public Prosecutions, for the Appellant;
Charles Richardson, The Legal Aid Office, for the Respondent

Date of Hearing: **20 November 2018**
Date of Judgment: **22 November 2018**

J U D G M E N T

Throwing a destructive substance with intent to burn another contrary to section 305 of the Criminal Code – Elements of offence – Order for retrial after acquittal by direction of judge following legal errors for which the Crown was not responsible.

KAY, JA

Introduction

1. In July 2018, Ehbony Allen ("the Respondent") stood trial in the Supreme Court before The Honourable Mr Justice Greaves and a jury. At the outset of the trial, the indictment contained a single count in the following terms:

"Count 1:

STATEMENT OF OFFENCE

***THROWING A SUBSTANCE WITH INTENT**, contrary to section 305(g) of the Criminal Code Act 1907.*

PARTICULARS OF OFFENCE

***EHBONY ALLEN**, on the 24th December 2017, in the Islands of Bermuda, with intent to burn Natasha Morris, unlawfully threw a substance, namely gasoline, upon Natasha Morris…"*

Background

2. On 9 July, 2018 – two minutes into the defence attorney's closing address to the jury – the judge intervened to express concern about the wording of the indictment. Following brief legal submissions in the absence of the jury, he ruled that an amendment to the indictment "would have to be granted", but that the Respondent had no case to answer on the amended indictment, so he would direct the jury to return a verdict of not guilty. He proceeded to do so and the Respondent was discharged. There is now before us an appeal by the Crown pursuant to section 17 of the Court of Appeal Act 1964, whereby it is contended that the judge was wrong to find there was no case to answer, and to direct the acquittal of the Respondent and that we should order a retrial.

The Facts

3. As this appeal is concerned only with legal and procedural matters, the barest outline of the factual matrix will suffice. In the early morning of 24 December 2017, at the Southampton Rangers Sports Club, the Respondent threw some liquid over Natasha Morris and called for a lighter. The evidence of Ms Morris

was that she thought she heard a lighter clicking. The liquid was or included gasoline. In the event, the liquid was not ignited.

4. The case for the Crown was that the incident, which followed an altercation between the two women two hours earlier, was a deliberate attempt by the Respondent to burn Natasha Morris.

The Offence charged

5. The relevant part of section 305 of the Code is in the following terms:

> *"305 Any person who, with intent to burn…any person –*
>
> *(f) puts any corrosive fluid or any destructive or explosive substance in any place; or*
>
> *(g) unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person…*
>
> *is guilty of a felony, and is liable to imprisonment for life."*

The Course of the Proceedings

6. On the first day of trial, counsel went to see the judge in chambers to explain that two other counts in the original indictment were not to be pursued because of witness unavailability. At that stage, the remaining count, which related to the incident with which we are concerned, was charged as "wounding with intent, contrary to section 305(g) of the Criminal Code 1907." The judge correctly observed that there was no evidence of a wound.

7. Following further discussion in chambers, an application was made in open court to amend the indictment so that the Statement of Offence read "throwing a substance with intent, contrary to section 305(g) of the Criminal Code 1907".

The judge took the view that the substance should not be described as "destructive" because, in section 305(g) there is no reference to "destructive". Hence the trial proceeded on the basis of the amended indictment which I set out earlier.

8. At the end of the case for the Crown, a submission of no case to answer was made on behalf of the Respondent. It was put solely on the basis that the evidence of the requisite intention was weak and/or tenuous. It was rightly rejected by the judge. The Respondent gave evidence and called another witness. The evidence concluded on a Friday and the jury was excused until Monday. There was some brief dialogue between counsel and the judge about the law on matters which are not currently relevant, after which, the trial was adjourned until Monday morning.

9. On the Monday morning, Counsel for the Crown, Ms Larissa Burgess, addressed the jury. Mr Richardson was two minutes into his address when the judge intervened and asked the jury to withdraw. He then explained that he had had second thoughts about the indictment. He now thought that, contrary to his earlier view, the word "destructive" in the statute does qualify "substance" and has to be averred and proved. He concluded that the appropriate course was for the indictment to be amended again, this time by the addition of the word "destructive" to both the statement of offence and the particulars of offence. In a brief ruling, he said

> *"I think the amendment would have to be granted, but then, once it is granted, then the ruling would have to be that the element is missing, and that is my ruling. I'm going to direct the Jury, in the circumstances, to return a formal verdict of 'Not guilty'."*

10. The jury returned and the judged explained to them what had taken place in their absence, and the reasons why he was about to direct them to return a

verdict of not guilty. Shortly afterwards, the jury returned that verdict on the judge's direction.

11. We can learn a little more of the judge's thinking from his explanation to the jury. At one point he said:

> *"…So the prosecution would have had to prove that the gasoline was a destructive substance, and the way the prosecution would have had to do that, in my view, would be to call evidence of somebody, perhaps the expert, who would have said, Yes, having examined this substance, which I say is gasoline, in my view, that is a destructive substance; all right? That is a substance capable of doing some destructive damage."*

12. He also explained to the jury the need for the intent to burn to be present at the moment of the throwing, and described different ways in which he thought the case for the Crown might have been put.

The Law

13. So far as the requirement that the substance be "destructive", there is no doubt that the judge's second thoughts were correct. The offence is "throwing a destructive substance with intent to burn". It seems that the judge had earlier misled himself by attaching significance to the fact that the word "destructive" appears in section 305(f) but not in section 305(g). However, as he later came to appreciate, the wording of section 305(g) is "any <u>such</u> fluid or substance" and the word "such" brings in the word "destructive" (along with the alternatives "corrosive" and "explosive") from section 305(f). Counsel for the Crown had endeavoured to explain this in the earlier discussion in chambers, but the judge had disagreed at that stage.

14. If the indictment had been in the form of "throwing a destructive substance" when the trial commenced, a further legal issue might have arisen, namely

whether gasoline amounted to a "destructive substance", in view of the fact that it could only result in burning if ignited. Mr Richardson made much of this in the course of his second submission of no case to answer. This issue has been considered obiter in relation to identical wording by the New South Wales Court of Appeal in *Regina v Dinh [2010] NSWCCA 74,* where it was said that gasoline is a dangerous substance when it is thrown on someone with an intention to burn them. I will return to this issue.

15. Of course, it is open to a defendant to put in issue whether the intent accompanied the throwing or was only formed later. The judge here contemplated that the defendant might only have intended to scare at the time of the throwing and before calling for the lighter (although as we understand it, that was not the defence). However, all that would have been a matter of inference for the jury.

16. In our judgment, if the word "destructive" had been in the indictment at the commencement of the trial, the Respondent would have had a case to answer, even without expert evidence about the flammability of gasoline. It follows that the judge's earlier insistence that the word "destructive" be excluded was wrong and brought about the very unsatisfactory concluding stages of the trial.

Discussion

17. At one stage in the dialogue between the judge and counsel on the Friday of the trial, the judge suggested that it would be open to the jury to convict on the basis that gasoline is in itself a destructive substance, capable of causing a burning injury without ignition. Whether or not that is correct, and we doubt that it is, in the present case the Crown had contended throughout before the jury, that they were seeking to establish the intention to burn by the evidence about the lighter, and that their case on "destructive substance" depended on the jury accepting that the Respondent, at the moment when she threw the gasoline,

intended to ignite it. When the judge came to consider the second submission of no case to answer, that is the case he should have identified.

18. As we have said, to the extent that the judge considered that the case failed because of a lack of expert evidence about the flammability of gasoline, we consider that he was wrong.

19. In his post-ruling explanation to the jury, the judge likened the circumstances to those in a case involving controlled drugs, where the Crown relies on expert evidence as a matter of course. But that, it seems to us, is different. It arises of necessity so that the Crown can prove that the substance is what it is alleged to be: cannabis, cocaine or whatever. The substance in the present case was proved to be gasoline by the formal admission. It does not need an expert to enable a conclusion that ignited gasoline is a destructive substance.

20. How, then, could or should the Crown's case have been left to the jury on the re-amended indictment? In our judgment, the essence of it was that the throwing of the gasoline, coupled with a contemporaneous intention to ignite it so as to burn Natasha Morris, would prove all the elements of the offence. It would not matter that no said ignition eventuated. Moreover, it seems to us that it is entirely permissible to rely on the intention so as to inform consideration of whether the substance is "destructive". It is analogous to the circumstances in which a mundane article can nevertheless become an "offensive weapon" on the basis of its intended use by its possessor for causing injury to another person. See section 315(4) of the Criminal Code. Although counsel have been unable to find an authority that is directly to this effect, it seems to accord with the approach explained in *Dihn.*

Conclusion

21. The first duty of a trial judge is to ensure that there is a fair trial, and that means one that is fair to both sides. As things stand, the Respondent is the beneficiary

of errors on the part of the judge. She has obtained an unmerited windfall in a serious matter in which there is a *prima facie* case against her. In our judgment, whilst it would be regrettable for her to have to face another trial, it would not be unjust. Indeed, the opposite is true. There would be an injustice if the Crown were not to be permitted to proceed to a second trial in circumstances where the original trial was derailed by the errors of the judge for which the Crown was not responsible. Accordingly, we allow the Crown's appeal and direct under section 23(2)(b) of the Court of Appeal Act 1964 that there be a retrial in the Supreme Court.

Maurice Kay

Kay JA

Scott Baker

Baker P

Geoffrey R. Bell

Bell JA