# The Court of Appeal for Bermuda

**CRIMINAL APPEAL No. 1 of 2016**

Between:

**JOSEF SMITH**

**-v-** Appellant

**THE QUEEN**

Respondent

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

**Appearances:** Ms. Elizabeth Christopher, Christopher's, for the Appellant
Mr. Loxly Ricketts, Department of Public Prosecutions, for the Respondent

**Date of Hearing:** **15 June 2016**

**Date of Judgment:** **3 August 2016**

**JUDGMENT**

*Application to adduce fresh evidence – Section 36 of the Criminal Code – meaning of "accident"*

**PRESIDENT**

1. Josef Smith appeals against his conviction before Simmons J and a jury on 16 June 2015 for aggravated burglary, contrary to s340(1) of the Criminal Code Act 1907 and discharging a firearm, contrary to s4(1) of the Firearms Act 1973. On 17 December 2015 he was sentenced to 14 years' imprisonment for the aggravated burglary and 10 years concurrent for discharging a firearm. He also appeals against sentence.

**The Facts**

2. The relevant facts are as follows. The intended victim was a man called Minks-Cole who is said to have owed a co-defendant, Woolridge, money. Woolridge and a third defendant, Clarke, went to Minks-Cole's residence and met the appellant at the parking lot outside. Clarke and the appellant went into the property wearing helmets, gloves and hooded sweatshirts. Woolridge remained outside as he knew the residents. Inside were three men, Raynor, Parris, and Sherwin Smith. Minks-Cole was not at home. The appellant produced a gun. Clarke robbed Raynor and Parris of their cell phones. The gun was discharged, injuring Clarke on the forearm. Clarke left a trail of blood from the premises and discarded bloodstained clothing outside. It was recovered and contained gunshot residue. Woolridge took Clarke to King Edward VII Memorial Hospital.

3. The case against the appellant depended on the evidence of Clarke, who pleaded guilty and accordingly received a reduced sentence. Clarke's evidence was corroborated by his girlfriend, Tiffany Trott, to whom Smith admitted that he had shot Clarke. The appellant did not give evidence.

4. There were two issues on the appeal. The first related to the circumstances in which the gun was discharged, and the second to the true construction of s36 of the Criminal Code Act 1907 and the judge's direction on the accident.

**The Discharge of the Gun**

5. Ms. Christopher, who appeared for the appellant, sought to adduce fresh evidence in the form of an affidavit from Sherwin Smith. We considered this *de bene esse*, but for reasons we shall explain have decided not to admit it. Sherwin Smith did not attend to give evidence at the trial but his video recorded interviews with the police were put before the jury. The reason he did not attend was that he was a patient at Mid-Atlantic Wellness Institute, apparently suffering from a mental condition.

6. In his first video recorded interview, Sherwin Smith said:

> "And then when they was about to leave, a gun, the gun went off, it might of hit somebody or, or not but there was blood leaving from the house and they left, and they, when they shot it they ran and left."

Later he said:

> "He was, like, he was like, pointing it down, like, I don't know, I guess he was, probably was about to walk out, like, he had the gun down and 'bop'."

In his second video interview he said:

> "Well, well, the gun accidently went off and after that they bolted out the door."

At no time in either interview did he say that he was hit by the gun prior to it going off.

In his affidavit he said:

> "At no time did the gunman hit me with the gun itself or anything at all. He did not try to hit me with the gun either. At no time did I tell the police that the gunman hit me with a gun or tried to hit me with a gun.
>
> I gave an interview to the police. I stand by what I said to the police because I was trying to assist them in this matter."

7. It seems to us that the affidavit adds nothing of any significance to Sherwin Smith's evidence in the two interviews. True he was never asked whether the gunman hit him with the gun but the plain implication is that he did not. What Sherwin Smith says in his affidavit in reality takes the evidence no further and we declined to admit it.

8. No one except Clarke saw the appellant hit Sherwin Smith with the gun. The conflict of evidence between Clarke and Sherwin Smith was important, submitted Ms. Christopher for two reasons. First it was relevant to the credibility of Clarke, because he implicated the appellant in the offences. Without his evidence there

would have been no case against the appellant. Secondly, what caused the gun to discharge was arguably relevant to a defence under s30 of the Criminal Code.

9. The judge correctly warned the jury about the danger of Clarke's evidence in that he was an accomplice. There was, however, independent evidence supporting his evidence in a material respect. Tiffany Trott's evidence was that she went to see the appellant soon after the burglary. He started to cry and said: "I fucked up." Asked why he shot Taariq Clarke, he said he didn't mean to. He was very distraught. The jury was well aware of the challenge to the truth of Ms. Trott's evidence, that she was Clarke's girlfriend and that she was not telling the truth. The jury plainly resolved that issue, in the absence of any evidence of the contrary from the appellant, in her favour. They were entitled to do so. Ms. Trott's evidence took matters no further, one way or the other, as to whether the appellant struck Sherwin Smith with the gun. The jury may well have felt they were unable to be sure what caused the gun to discharge.

10. Ms. Christopher complains that the judge invited the jury to accept that Sherwin Smith was gun-butted and that the judge should have said there was no support for Clarke's evidence. She referred us to various passages in the summing up. The most relevant appears to us to be at p66:

> "Clarke's evidence was that he did not even know that Josef Smith had the gun until he turned in his direction, and that is when he saw the Defendant gun-butt Sherwin Smith and the gun fired.
>
> Now, Sherwin Smith did not mention the gun-butting in his recorded interview, but he was the only (one) of the victims to hazard a description of the handle of the gun. He said that it had wood on it. You may well think that Raynor and Parris were not in a position to see any attempt at gun-butting. That's a matter for you.
>
> And although Sherwin Smith did not describe any action toward him, he did get to see the handle of the gun, because he described it. But, again, that's a matter for you whether or not that indicates anything.

> The one person in the room on the evidence who was looking at the man with the gun, and the gun, you may well accept was Taariq Clarke. This you may well think can be reinforced by the fact that the very basis for his guilty plea to aggravated burglary, it's in the agreed facts, as opposed to what he though was supposed to take place, was that he turned -- he saw the gun when he turned to look at Josef Smith, and did nothing to separate himself from it, like leave the room immediately.
>
> In those circumstances you may well think that his is a reliable account of the circumstances on which the gun fired, followed by the victim's observation that the men looked startled.
>
> The evidence of Parris, of what he believed was a fumble, or some kind of noise in the background, if it is acceptable to you, could well support Clarke's evidence.
>
> It is undisputed that the gun discharged a bullet. All the witnesses heard it and Taariq Clarke was wounded by it, from what he said was a few steps away, and the GSR, the emissions from the gun when fired, on the brown jacket, supported that he was not very far away. You will have that with you too.
>
> But otherwise than speculation the evidence…but otherwise than speculation, the evidence is for you to evaluate, to accept or to reject."

11. In our judgment that passage put the matter fairly before the jury. It is true that one would expect Sherwin Smith, if he had been gun-butted to have been aware of it and said so. But something caused the gun to discharge and the conflict of evidence was plainly before the jury. In so far as the circumstances in which the gun was discharged reflected upon the credibility of Clarke, the issue was fairly and squarely before the jury and we do not think the judge can be criticised for the way in which she dealt with it in the summing up.

**Section 36 of the Criminal Code**

12. Section 36(1) of the Criminal Code provides:

> "Subject to the express provisions of this Act relating to negligent acts and omissions, a person is not criminally responsible for any act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident."

This section exempts an individual from criminal liability in two distinct circumstances: (1) an act or omission that occurs independently of the exercise of his will; (2) an event which occurs by accident.

13. The judge was only asked to give a ruling and direction in relation to the second – an event which occurs by accident. She ruled that if an event could reasonably have been foreseen by an ordinary person the event does not occur by accident. She followed Gibbs J in *Kaporonovski v The Queen* (1975) 133 C.L.R 209, 321:

> "It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person."

He was there referring to s23 of the Queensland Criminal Code which is in identical terms to s36.

14. She said the event was the discharge of the firearm when it was being unlawfully used in the circumstances of the aggravated burglary. Section 4(1) of the Firearms Act 1973 was properly in the indictment and it was a matter for the jury what they made of the evidence.

15. In summing up she said this at p41:

> "An event can only be regarded as an accident if the Defendant neither intended it to happen nor foresaw that it could happen and if an ordinary person in the Defendant's position at the time would not reasonably have foreseen that it could happen.

> It is settled law that if an offence occurs by accident within the meaning of this section, if it was a consequence which was not in fact intended, or foreseen by the defendant, or would not reasonably have been foreseen by an ordinary person.
>
> The prosecution must prove that the Defendant intended that the event in question should occur, or foresaw it as a possible outcome, or that an ordinary person in the position of the Defendant would reasonably have foreseen the event, that is the discharge of the weapon, firearm, as a possible outcome."

16. After advising the jury to exclude remote or speculative possibilities the judge went on to say that each of the witnesses in the room described the firing of the gun as by accident, or by saying the gun fired unexpectedly and the two men appeared startled. She went on:

> "That evidence raises for your consideration the possibility that neither the Defendant nor an ordinary person could have foreseen that the gun would fire a shot, let alone hit Mr. Clarke.
>
> If the Defendant did not intend, and there is no evidence that he did intend the gun to fire, or, more relevant to your consideration, if the Defendant did not foresee the firing of the gun as a possible outcome of his actions, and the prosecution say gun-butting Sherwin Smith, and if an ordinary person in the position of the Defendant would not have foreseen that as a possible outcome of those actions, then the Defendant will be excused by law, and you would have to find him not guilty of count three.
>
> It is not for the Defendant to prove anything. Unless the prosecution proves, beyond reasonable doubt, that an ordinary person in position of the Defendant would reasonably have foreseen that gun go off, as a possible outcome of his action, or the Defendant foresaw that, you must find him not guilty."

17. The judge did not specifically deal with whether the defence of accident might be available in the context other than that the gun discharged in the course of gun-butting Sherwin Smith. She could have added that the jury might think that an

ordinary person in the shoes of the appellant taking a loaded gun into that burglary might reasonably have foreseen that the gun would fire – particularly if the safety catch was off. In our judgment the judge's direction on accident cannot be criticised and was, if anything, unduly favourable to the appellant in that it was given solely on the basis of the prosecution's case that he gun-butted Sherwin Smith.

18. Despite the fact that the judge was only asked to direct the jury on the second limb of section 36 – accident - Ms. Christopher submits that this was in reality a first limb case and that the jury should have been directed accordingly. This she submits was an act or omission that occurred independently of the appellant's will.

19. She referred the Court to *The Queen v Taiters* [1996] QCA 232, another Queensland authority on s.23 in which the Court said at p5:

> "It should now be taken that in the construction of s.23 the reference to 'act' is to 'some physical action apart from its consequences' and the reference to 'event' in the context of occurring by accident is a reference to 'the consequences of the act'. Even if, as has been said, there can on occasion be some difficulty, in an exceptional case, in distinguishing the border line between act and event so viewed, this theoretical distinction is clear."

20. So, submits Ms. Christopher in the present case, the 'act' was the discharge of the firearm and the 'event' was the consequential injury to Clarke. Mr. Ricketts for the prosecution says, and we think this is more accurate, that the 'act' is what causes the discharge i.e. pressure on the trigger, rather than the discharge itself. It seems to us that the 'act' may also include release of the safety catch, without which pressure on the trigger would not fire the gun. She relied on *The Queen v Falconer* (1990) 171 C.L.R 30 and *Murray v The Queen* [2002] HCA 26, both cases from the High Court of Australia. *Falconer* concerned s23 of the Criminal Code of Western Australia, *Murray* s23 of the Criminal Code of Queensland; both are for practical principles identical to s36.

21. In *Falconer,* Mrs. Falconer had fired a shotgun at close range and killed her husband. The evidence was that she had separated from him. He had been violent toward her, had sexually assaulted two of their daughters, and in the week before the shooting she had demonstrated fear, depression, emotional disturbance, and a changed personality. Her defence was non-insane automatism and that she had a defence by reason of the first limb of s23 in that the shooting occurred independently of her will. The commissioner rejected admissibility of the psychiatric evidence sought to be adduced in support of the defence, but the Court of Criminal Appeal overturned the decision holding it was admissible to the issue of 'voluntariness' i.e whether the act causing death was a willed act.

22. In a joint leading judgment Mason CJ, Brennan and McHugh JJ said at para 8:

> "Mrs. Falconer is criminally responsible for discharging the gun only if that act were 'willed', that is, if she discharged the gun 'of (her) own free will and be decision' (per Kitto J in Vallance, at p64) or by 'the making of a choice to do' so (per Barwick CJ in Timbu Kolian, at p53). The notion of 'will' imports a consciousness in the actor of the nature of the act and a choice to do an act of that nature."

And a little later in the same paragraph:

> "The requirement of a willed act imports no intention or desire to effect a result by the doing of the act, but merely a choice, consciously made, to do an act of the kind done. In this case to discharge the gun."

23. Ms. Christopher submits the principle enunciated in *Falconer* applies to the present case. The discharge of the gun was not "willed" by the appellant. He did not discharge it by his own free will and decision. He was as surprised as everyone else when it went off.

24. This submission however overlooks an important passage at para 9 of the judgment:

> "In the absence of some contrary evidence, it is presumed – sub silentio, as Barwick CJ said – that an

> act done by a person who is apparently conscious is willed or done voluntarily. That presumption accords with, and gives expression to, common experience. Because we assume that a person who is apparently conscious has the capacity to control his actions, we draw an inference that the act is done by choice. Keeping steadily in mind that the concepts of will and voluntariness relate merely to what is done, not the consequences of what is done, it would be an exceptional case in which a person, apparently conscious, committed an act proscribed as an element in a criminal offence without choosing to do so – or, at the least, without running the risk of doing so. (We need not now consider criminal responsibility for the running of a risk of engaging in proscribed conduct.) The presumption that the acts of a person, apparently conscious, are willed or voluntary is an inference of fact and, as a matter of fact, there must be good grounds for refusing to draw the inference. Generally speaking, grounds for refusing to draw the inference appear only when there are grounds for believing that the actor is unable to control his actions."

25. The appellant did not give evidence in the present case. Indeed his case was that he was not present at all and did not participate in any burglary. There was therefore no basis for concluding that he was unable to control his actions in discharging the gun.

26. The common law in England and Wales is no different. Before the question of "automatism" can be left to the jury, a proper foundation for such a defence must have been laid. See *Hill v Baxter* [1958] 1 QB 277.

27. The second authority relied on was *Murray*. In that case the deceased became verbally abusive. The appellant took a loaded shotgun from under his bed and approached the deceased with the gun in his hand. As the deceased started to rise from a chair the appellant lifted the gun, the deceased's arm shot out and something hit the appellant on the head. The gun went off. He denied he had deliberately pulled the trigger. He had only intended to frighten the deceased. The evidence of the appellant left open two possibilities: (1) that the gun discharged without any pressure being applied to the trigger; and (2) that pressure was

applied to the trigger by reflex or automatic motor action when the deceased's arm shot out or when the appellant was struck on the head. The trial judge did not instruct the jury on unwilled act, in respect of the first limb of s23. The Court was divided in whether such a direction was necessary. The appeal succeeded by a majority on the basis that the judge's direction on the burden of proof was inadequate. The choice for the jury was not whether they preferred one version of events over another but whether the prosecution had proved the relevant elements of the offence beyond reasonable doubt. The meaning of the first limb of s23 was therefore irrelevant to the decision.

28. Kirby J in his minority judgment drew attention to the judge's duty in criminal cases to direct the jury concerning any defence (even one not raised by either party or indeed disclaimed by the parties) that fairly arises on the evidence and therefore needs to be considered by the jury. But he did not say anything to detract from what had been said in *Falconer*. In particular that an act done by a person who is apparently conscious is willed or done voluntarily. In short, the law is as stated in *Falconer* and the judgments in *Murray* do not advance Ms Christopher's argument in the present case.

29. The first limb of s36 was not raised before the judge and she was not asked to give a direction upon it. The judge was only asked to give a direction on accident. In our view this was for the good reason that there was no evidence that the gun was discharged independently of the appellant's will. It is true he told Trott he didn't mean to do it but this was in answer to the question why did he shoot Taariq Clarke, rather than why did he discharge the gun. The appellant took the gun with him into the burglary. At some point he took the safety catch off or, if in the unlikely event the weapon had no safety catch, he had it in his possession, loaded, and in a condition that pressure on the trigger would cause it to discharge. The judge was correct not to leave the first limb of s36 to the jury. The section 36 issue was accident or nothing. The second limb was properly left to the jury and they were fully entitled to reject the defence of accident. In our

judgment the conviction is safe and the appeal against conviction must be dismissed.

**Sentence**

30. As to sentence, a total of 14 years for aggravated burglary with a firearm was fully justified following a trial. There was no mitigation. The appellant was not of previous good character and deterrent sentences are required for offences with firearms. As the judge found, this was an appropriate case in which to invoke s70P of the Criminal Code Act 1907 and require the appellant to serve half the sentence before eligibility for parole. The only point that was seriously argued by Ms. Christopher was disparity with Clarke's sentence of 6 years' imprisonment. However, Clarke pleaded guilty, he was not the gunman, assisted the police and gave evidence against the appellant. Clarke's plea to aggravated burglary was tendered on the basis that, notwithstanding his initial lack of knowledge of the presence of a firearm, when the firearm was produced he failed to withdraw and continued to participate in the offence.

31. There is nothing in our view in the disparity argument and the appeal against sentence must also be dismissed.

*Signed*

Baker, P

*Signed*

Bell, JA

*Signed*

Bernard, JA