



APPEAL COURT, HIGH COURT OF JUSTICIARY

**[2020] HCJAC 25
HCA/2020-2/XM**

Lord Justice Clerk
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

LORD ADVOCATES REFERENCE No. 1 of 2020

**For the Lord Advocate: Edwards QC, AD; Crown Agent
For RC: Lenehan, Findlater instructed by Paterson Bell**

17 June 2020

[1] This reference raises a sharp point about the circumstances in which a firearm may be said to be disguised as another object for the purposes of section 5(1A)(a) of the Firearms Act 1968, which provides that:

“(1A) Subject to section 5A of this Act, a person commits an offence if, without authority, he has in his possession, or purchases or acquires

(a) Any firearm which is disguised as another object.”

[2] In the trial to which this reference relates the accused was charged with possession of a firearm without a firearms certificate, contrary to section 1(1)(a) of the 1968 Act. It was a matter of agreement that he was in possession of such a weapon, namely a stun gun, that he

did not have a firearms certificate and that he should be convicted of the section 1 offence.

The accused was also charged under section 5(1A)(a) as follows:

“you did have in your possession, without the authority of the Secretary of State or the Scottish Ministers, a firearm which was disguised as another object, namely a stun gun disguised as a torch”.

It was admitted that he did not have the requisite authority but it was maintained that the device, which operated as both a stun gun and a torch, was not disguised as the latter and that the accused should not be convicted of the section 5 offence, of which he was in due course acquitted. The sole issue at trial therefore was whether the stun gun in question was "disguised as another object".

[3] Julia Bilsland, a forensic scientist with the Scottish Police Authority working in the firearms section gave evidence in support of a report she had submitted. The item in question had the appearance of a black torch, within a pouch. The pouch was made of black fabric with an integrated belt loop containing the item. The words “police” and “flashlight” were written on opposite sides. No marking identified the item as a stun gun or indicated that any given switch would operate a stun function. The torch function was activated by switching a three position switch to the upper position. There was an on/off switch at the base of the item, which operated as a safety device for the stun function. If this was at “on”, and the three position switch was in the lowest position, depression of a button on the opposite side would operate the stun function, although there was no marking at either switch to indicate that it would operate this function or that there was such a function which could be operated in this way. The unit worked as a torch when set accordingly. The torch and stun functions could not operate at the same time.

The submissions at trial

[4] The Advocate Depute focused on the appearance of the item as a torch, and said to the jury: “So if it looked like a torch to you then I ask you to find that it is a disguised stun gun”. It is perhaps not entirely fair to suggest, as counsel for the accused suggested, that the crown position was simply that “if it looks like a torch is must be disguised”, because the sentence we have quoted was used in the context of reminding the jury that they had seen Miss Bilsland show how the functions of the item could be made to operate. However, there was little more to the submissions made by the Advocate Depute at trial; and there was no reliance placed either on the words “police” and “flashlight on the item or on the absence of any marking on the item indicating that it had a stun gun function.

[5] The defence speech focused on the fact that the item had two operational functions. It was suggested that the combination of a stun gun and a torch was a “sensible” combination of functions, at least in countries where a stun gun was legal, in the same way that the combination of a rape alarm and a torch might be. A Swiss army knife may contain multiple functions but was not disguised only as a knife – “it just happens to be more than one function grouped together in a sensible combination.” The purpose of referring to a “sensible” combination such as this was contrasted with a combination such as a bunch of flowers and a stun gun: “that’s not a sensible combination, it doesn’t make any sense, I’m there to deceive with having the bunch of flowers”. Counsel went on to say:

“If things are grouped together and have a sensible coherent point to be combined into one object that, I suggest, mitigates against it being a disguise because you can see why they’re together, you can see it.”

The transcript goes on:

“But I ask you to bring your care and your full faculties to bear on the question of what is a disguise and what is simply a dual-purpose item. Is it beyond a sensible argument that it’s not a disguise? It’s simply a dual-purpose weapon.”

(From his own typed notes of his speech counsel suggested the question he had asked was in fact ""is it beyond sensible argument that this is not a disguise, **but** a justifiable form of a dual function item? We suggest that nothing turns on this.)

[6] Counsel went on to say

"If it was a fake torch so it looked like a torch but wasn't a torch, that's a disguised weapon, no problem with that. If it had some daft second function, the plastic flowers or whatever, that's a disguised weapon", later adding "if it's a daft combination then it's a disguise".

The judge's charge

[7] The trial judge directed the jury that the key question relating to the item was whether (emphasis added):

"[it] was disguised as a torch or whether it was **instead** a dual purpose item or weapon. If it was, on your view of the facts, so disguised as a torch then you will require to convict. But in so doing you will need to give a common sense meaning to the word disguise and I'll come to this shortly. **If it was, on view of the facts, a dual-purpose item, you'll require to acquit on charge 2** and convict instead on charge 1".

[8] The trial judge then directed the jury that the word "disguise" should be given its ordinary meaning, involving an element of concealment, or covertness or pretending. In relation to the evidence of Ms Bilsland, he pointed out that she had accepted in cross-examination that the pairing of a stun gun and a torch was a "sensible pairing", like a torch and a panic alarm. He went on to say that the jury "will bear in mind her evidence supporting [the defence] position on the stun gun's extra or additional function. And if you find that part of her evidence persuasive you must also acquit on charge 2".

[9] He went on to say that counsel for the defence had "correctly in my view" invited the jury to take a common sense approach to the issue of disguise, "asking yourselves what is a

disguise and what is a dual purpose item or weapon”.

[10] The jury duly acquitted of charge 2. The directions referred to are challenged in this reference by the Lord Advocate in which the following questions are posed:

1. Did the trial judge err in directing the jury to acquit the accused of charge 2 - possessing a stun gun disguised as another object, namely a torch - if Crown Label 16 was, on their view of the facts, a dual purpose item or weapon?
2. Is it a defence to a charge of possessing a disguised firearm that the firearm is a "dual purpose item or weapon"?
3. Where a firearm has the appearance of another object, does the fact that it functions as that other object as well as a firearm deprive its appearance of any element of disguise?
4. How should a jury be directed on the meaning of "disguised", in the context of Section 5(1A)(a) of the Firearms Act 1968 as amended?
5. What is the relevance, if any, of dual purpose in determining whether a firearm is disguised?

Submissions for the Lord Advocate

[11] The trial judge erred in giving the directions which he did. The effect was to direct the jury that if the object had a dual function it could not be disguised, and that if they concluded that the item had a dual purpose, capable of functioning under either, they required to acquit. It was an error to direct the jury that if they concluded that the object was a dual purpose item, they should acquit. Indeed, juries may be directed that, in determining whether or not the firearm is disguised as another object, they may take into account its ability to function as another object as an element of disguise. The first question

in the reference fell to be answered in the affirmative, and questions two and three in the negative.

[12] As to question 4, juries should be directed that the question of whether the firearm is “disguised as another object” is a matter of fact for them to determine. They may usefully be invited to address the following questions: (i) does the object look like a firearm? (ii) does it look like another object? (iii) has it been made to look like another object to prevent, or to attempt to prevent, it from being recognised as a firearm? The approach taken by the sheriff and sifft judges in *Morag McQuillan v HMA HCA/2019/000564/XC* was to be commended.

[13] In relation to question 5, the fact that a firearm has a “dual purpose” does not mean that it cannot be regarded as “disguised as another object”. If the firearm appears to be “another object” then it may properly be regarded as “disguised as another object” even if it also functions as that other object. Indeed, the fact that it functions as that other object as well as being a firearm may enhance the element of disguise. The item in the present case gave no indication that it was also a firearm. It was marked only as a torch, with the word “police” lending a spurious air of authority. There was no marking to indicate that it was capable of giving off an electric discharge.

Submissions for the accused

[14] It was disputed that either the address by counsel for the defence or the charge by the trial judge had presented the jury with a stark choice of the kind characterised in the reference. The respondent’s position had been that the only question for the jury was whether the Crown had proved that the firearm was disguised as another object. It was not suggested that the mere existence of dual or multiple purpose had any impact on the question of disguise. The reference to other functions was qualified by the importance or

value that combining those other functions added to the stun gun. If the combined functions were sensible accumulations of powers that served the same end, (rape alarms and torchlight functions with the stun gun added for example), then while the resultant item might have a dominant physical characteristic (like being torch shaped) there might be no intention to deceive an onlooker about the nature of the device. A comparison was drawn with a Swiss Army knife where the presence of scissors or a saw blade did not mean that the knife was a saw or scissors disguised to look like a knife. Counsel had posed the question to the jury “is it beyond sensible argument that this is not a disguise, **but** a justifiable form of a dual function item?”

[15] The Crown submission was essentially that because the item looked more like a torch than anything else then it was disguised. Counsel for the accused also commended the approach in *McQuillan* where the sheriff described disguise as meaning that something had been done to the appearance to deceive the viewer about the item’s true identity or character.

Analysis and decision

[16] Question 1: Did the trial judge err in directing the jury to acquit the accused of charge 2 - possessing a stun gun disguised as another object, namely a torch - if Crown Label 16 was, on their view of the facts, a dual purpose item or weapon?

[17] Given that the question whether the case was presented by the defence as being “either disguised or multipurpose, but not both” was disputed, the court obtained transcripts of the speeches. It appears that it was the intention of counsel for the defence to suggest (i) that the situation in this case was different from the more blatant example of, for example, a firearm presented, but incapable of operating, as a mobile phone; and (ii) that the

existence of parallel working functions was relevant to whether an item should be categorised as “disguised”, whilst not being determinative of that question. Nevertheless, the passage in his speech:

“But I ask you to bring your care and your full faculties to bear on the question of what is a disguise and what is simply a dual-purpose item. Is it beyond a sensible argument that it’s not a disguise? It’s simply a dual-purpose weapon.”

does tend to suggest a binary choice, however that question was phrased.

[18] In any event, whatever the intentions of counsel, it is clear that the trial judge understood the case to have been presented on this basis, saying in his report:

“it was made plain at the outset of the trial before the jury was empanelled that the short and focused issue for trial was whether or not the item Crown label 16 was a disguised or dual purpose weapon”.

It is abundantly clear that trial judge presented the case as one where the jury either concluded that the weapon was disguised, in which case they could convict; or they concluded that it was an item where two functions were reasonably combined, in which case they would have to acquit of the second charge. The trial judge did therefore direct the jury in the way suggested in the first reference question. In so directing the jury he fell into error, for the reasons set out below.

[19] Question 2: Is it a defence to a charge of possessing a disguised firearm that the firearm is a "dual purpose item or weapon"?

[20] Question 3: Where a firearm has the appearance of another object, does the fact that it functions as that other object as well as a firearm deprive its appearance of any element of disguise?

[21] Question 4. How should a jury be directed on the meaning of "disguised", in the context of Section 5(1A)(a) of the Firearms Act 1968 as amended? and

Question 5: What is the relevance, if any, of dual purpose in determining whether a firearm

is disguised?

[22] It is not a defence to a charge of possessing a disguised firearm that the firearm is a "dual purpose item or weapon", nor does the fact that a firearm possessing the appearance of another item functions also as that other item necessarily deprive its appearance of any element of disguise.

[23] The offence is committed by being in possession of a firearm which "is disguised" as another object. This requires a straightforward objective assessment of whether the item is presented in such a way as to conceal that amongst its functions is that of a firearm.

Whether a firearm is "disguised" as another item is critically a question of fact for the jury to determine on all the facts of the case. Those facts may include the appearance of the item in question; whether it has an appearance of a firearm or of another item; whether it functions as another item as well as a firearm; whether its function as a firearm, and how to operate that function, is clearly indicated on the item; and so on. If the item is labelled in any way, how it is labelled – in this case for example, bearing only the words "police" and "torch", may be relevant. Whether there may be a reason to disguise the item as something else may also be relevant. Against the whole facts of the case the jury must determine whether the firearm may properly be categorised as "disguised".

[24] The normal meanings of the word "disguise" are to be adopted, and the matter must be determined from the perspective of the ordinary person in the street. Would the ordinary observer appreciate that the item was a weapon, whatever other function it may be capable of performing? Counsel for the accused was correct, in his speech, to say that disguise implies deception; that is in our view implicit in all the definitions of the word, which in the Shorter Oxford English Dictionary include:

"Concealment of reality under a false appearance; deliberately alter the appearance

of a thing so as to mislead or deceive; exhibit in a fake light; misrepresent; conceal the nature or existence of anything by a counterfeit show or appearance”.

[25] At one extreme will be the obvious disguise, such as a firearm presented in the form of a mobile phone but incapable of operating as such. At the other extreme may be an item which clearly looks like a firearm, has markings identifying it as such, and showing how it operates by a button or switch indicating its firearm function, but which is also capable of performing another function. Whether the combination of functions is “sensible” or otherwise is neither here nor there. In any event, if one of the functions is an illegal one, it is difficult to see how any combination which includes that function can be described as “sensible”. A firearm presented as a mobile phone and capable of operating as such may nevertheless be within the category of a firearm disguised as something else. The same applies where the dual function is torch and firearm, or anything else.

[26] In the unreported case of *McQuillan v HMA* the sheriff directed the jury that the issue was:

“whether the normal or anticipated appearance of something has been changed in order to try to conceal its true identity or character and to make it appear to be something different from what it really is ... You might think ... that the critical question is ... whether it has been given the appearance of a torch, which it would otherwise not be expected to have, for the purpose of concealing the fact that it is also a weapon”.

As the sheriff in that case indicated in his report, the question was not whether such an item was a “multi-function device” but

“whether it had been given the appearance of a device having one function (a torch) for the purpose of disguising the fact that it had another function (a firearm).”

[27] We consider the sheriff’s approach in that case was correct. The simple question is whether the item is presented in such a way as to disguise or conceal its function as a firearm. We agree with the sheriff in *McQuillan* that it might be suggested to the jury that

they could usefully ask themselves questions along these lines:

Does the item look to you like a firearm, specifically a [stun gun or other firearm as appropriate]?

Does the item look to you like something else, eg a torch or mobile phone?

Has it been made to look like another object to prevent, or to attempt to prevent, it from being recognised as a firearm?

[28] It follows that Questions (1), (2) and (3) should be answered respectively: Yes; No; No. As to Question (4), the jury should be directed in accordance with paragraphs [23]-[27] above. The answer to Question 5 is that the fact that a firearm is incorporated into a dual purpose item does not mean that it cannot be regarded as a firearm “disguised as another object”. The dual purpose of the item may, in an appropriate case, be among the many factors to be considered by the jury in reaching their decision on whether it is a firearm disguised as another object (see paragraph [23] above).