IN THE COURT OF APPEAL OF NEW ZEALAND

CA320/2016
[2017] NZCA 88

BETWEEN		MATHEW NGATAI TE MOANANUI Appellant
AND		THE QUEEN Respondent

Hearing: 14 February 2017

Court: Wild, Simon France and Duffy JJ

Counsel: M F Laracy and J W Griffiths for Appellant
K S Grau for Respondent

Judgment: 28 March 2017 at 2.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Duffy J)

[1] Mr Te Moananui is a sentenced prisoner. Following a jury trial in the Wellington District Court he was convicted of assaulting a corrections officer while in possession of a metal shank, in circumstances that prima facie showed an intention to use the shank as a weapon.[1] He now appeals against that conviction. The sole issue in the appeal is whether the Judge misdirected the jury as to the requirements of the offence.

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1 Crimes Act 1961, s 202C(1)(b).

Facts

[2] As a sentenced prisoner Mr Te Moananui was required to undergo a rub down search before he went into an outside yard. He refused to undergo the search and so was ordered back to his cell. He returned towards his cell, but refused to go inside it unless the corrections officer followed him in. At this time the corrections officer placed his hand on Mr Te Moananui's shoulder to direct him into the cell. Mr Te Moananui pushed the correction officer's hand away and a struggle ensued. During the struggle Mr Te Moananui reached into the right side of his track pants and pulled out an improvised metal weapon, commonly referred to as a shank. It was 32 centimetres in length, made from a round metal bar. One end had been sharpened to a point. During the restraint of Mr Te Moananui and attempts to remove the shank from his possession, he attempted to strike the corrections officer with it. He was subdued when a second corrections officer arrived. Mr Te Moananui was subsequently charged with assault with a weapon under s 202C(1)(b) of the Crimes Act 1961.

Relevant law

[3] Section 202C(1) states:

> **202C Assault with weapon**
>
> (1) Every one is liable to imprisonment for a term not exceeding 5 years who,—
>
> (a) in assaulting any person, uses any thing as a weapon; or
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> (b) *while assaulting any person, has any thing with him or her in circumstances that prima facie show an intention to use it as a weapon*.

Grounds of appeal

[4] Mr Te Moananui contends the Judge erred in directing the jury to incorporate defence evidence regarding Mr Te Moananui's actual (subjective) intent into the overall objective inquiry mandated by s 202C(1)(b). He submits that, properly interpreted, an actual intention to use the weapon is a separate element of the offence to be proved to the criminal standard.

Directions to the jury

[5] In his summing up to the jury, Judge Mill directed the jury that they could take Mr Te Moananui's evidence into account when deciding if all the elements of the charge were made out:

> Now in this case [Mr Te Moananui] has explained his versions of events …
>
> Now if you accept what he says well obviously you'll take that into account in your assessment of whether a reasonable observer would conclude that on the face of it he intended to use it as a weapon. But just remember, going back to my question trail, the test under question 3 is not whether he in fact intended to use it. That's [not] what the Crown have to prove. The test is what a reasonable observer would at first sight conclude given what they saw and heard at the time.
>
> …
>
> Now if what the defence says leaves you unsure of whether you accept it or not and you think it's a reasonable possibility that what he says is true, well when you're assessing this element again you just use that reasonable possibility as part of your assessment of whether a reasonable observer would at first sight conclude from what they saw or heard at the time that he intended to use it as a weapon.

[6] The question trail given to the jury contained the following question:

> **Question 3**
>
> Has the Crown satisfied you beyond reasonable doubt that at first sight, the circumstances show that Mr Te Moananui intended to use the metal shank as a weapon?
>
> *You assess this question from the standpoint of a reasonable observer who saw and heard what was going on at the time of the confrontation. You must be sure that the reasonable observer would conclude that there was an intention to use the metal shank as a weapon.*

Mr Te Moananui's submissions

[7] Mr Te Moananui argues that the jury would have been confused by the Judge's direction (which conflated objective and subjective evidence), and so there is a real risk that the direction adversely affected the outcome of the trial.

[8] Mr Te Moananui contends that there are three distinct steps in the s 202C(1)(b) inquiry:

(a) The Crown must adduce evidence as to the prima facie circumstances objectively indicating that the defendant intended to use the object as a weapon.

(b) The defendant may adduce evidence as to his or her actual (subjective) intent. This is an evidential burden only.

(c) The onus then shifts back to the prosecution to disprove a lack of intent beyond reasonable doubt.

[9] In other words, although an objective test applies at first instance, it does not continue to apply if the defendant adduces evidence contradicting the established prima facie circumstances. Mr Te Moananui argues that intent is by its very nature subjective, and that it is "counterintuitive and artificial to assess a defendant's intention by reference to what a reasonable observer would have made of events at the time rather than by reference to the defendant's subjective view of events".

[10] Mr Te Moananui relies on comparable case law to support his interpretation of s 202C(1)(b). First, he relies on various drug cases in which the defendant's honestly held belief that he or she was not cultivating or dealing in controlled drugs was in issue. The courts have held that if there was evidence of such an honestly held belief, the defendant was entitled to be acquitted.[2]

[11] Secondly, he relies on Canadian case law dealing with a provision in the Land and Forests Act 1967, which states that the possession of firearms in a forest area shall be "prima facie evidence of the use of the same in violation of said clause (c)".[3] In *R v Pye*, the Court accepted the argument that "in the absence of evidence to the contrary, the undisplaced prima facie [evidence] can, but not must, support conviction".[4] The effect of the words "prima facie" was to create a permissive but not mandatory presumption.

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2 *The Queen v Strawbridge* [1970] NZLR 909 (CA); *R v Wood* [1982] 2 NZLR 233 (CA); and *R v Metuariki* [1986] 1 NZLR 488 (CA).

3 Land and Forests Act RSNS 1967 c 163, s 202(5).

4 *R v Pye* (1984) 7 DLR (4th) 275 (NSSC) at [14].

[12] Mr Te Moananui further contends that the Judge "fused two distinct steps in the inquiry", by directing the jury to incorporate the defendant's evidence regarding his actual intent into its objective inquiry. In his submission:

> The jury should have been directed to consider what it made of the defendant's subjective intention, on a standalone basis, once it was satisfied that the objective *prima facie* circumstances exist.
>
> (footnotes omitted)

[13] Mr Te Moananui further argues that s 202C(1)(b) should not be read as imposing an entirely objective test because doing so breaches the rights contained in ss 25(c) and 25(e) of the New Zealand Bill of Rights Act 1990 (NZBORA). Mr Te Moananui asserts that imposing an objective test under s 202C would render it an "extraordinary penal provision with liability based only on appearances".

[14] Instead, he contends that the words "prima facie" in s 202C(1)(b) can be read as transferring an evidential burden to the defendant to raise evidence of his or her subjective intent, and that is the interpretation to be preferred in light of ss 5 and 6 of the NZBORA.

[15] Referring to s 5 of the NZBORA, Mr Te Moananui submits that imposing an entirely objective test under s 202C(1)(b) is not a justified limitation on the rights to be presumed innocent and to present a defence (s 25(c) and (e) NZBORA). The limitation on the right is not proportionate to its apparent objective, namely deterrence of violent offending and the facilitation of prosecution. Mr Te Moananui cites several reasons for this, including that the deterrent effect of an objective test under s 202C(1)(b) is doubtful.

[16] Referring to s 6 of the NZBORA, Mr Te Moananui submits that his reading of s 202C(1)(b) is not a strained interpretation, although he accepts that it runs contrary to Parliament's expressed intent at the time s 202C was inserted into the Crimes Act. He cites *R v Hansen* and *Re AMM* to support his submission that Parliament's intent at the time legislation was passed, particularly as it was prior to the NZBORA, should not be taken as determinative of its meaning.[5] Rather, in light

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5 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1; and *Re AMM* [2010] NZFLR 629.

of the NZBORA, the courts should now prefer a rights-consistent meaning if it is available on the wording of the provision.

[17] As to the inconsistency of his preferred interpretation with the dominant interpretation of s 202A by the courts, Mr Te Moananui submits that the primary focus should be on the section under consideration (s 202C), not surrounding sections. While there may be some inconsistency in the interpretation of the two related provisions, Mr Te Moananui considers that an NZBORA interpretation exercise can accommodate a degree of awkwardness.

Respondent's submissions

[18] The Crown relies on the legislative history of s 202C(1)(b) in submitting that the test it imposes is entirely objective. That was Parliament's clear intention. While the defendant is not precluded from advancing evidence of his or her actual intent, such evidence is "only relevant to the extent that it informs the objective test". Generally, therefore, the defendant's intention would need to "be stated or apparent at the time of the alleged offending for it to have any effect".

[19] On the Crown's approach, therefore:

> It is possible that the jury could positively accept a defendant's evidence that he or she had no intention to use the weapon, but nevertheless find the defendant guilty on the basis that a reasonable observer would on first appearance think that the defendant intended to use the weapon.

[20] The Crown submits that the ordinary meaning of the wording in s 202C(1)(b) supports this interpretation.

[21] The Crown contends, therefore, that the Judge's direction did not therefore cause any miscarriage of justice. If anything, the direction was unduly favourable to Mr Te Moananui.

[22] The Crown objects to Mr Te Moananui's reliance on both *Hansen* and *Re AMM*. In *Hansen*, the Supreme Court declined to read s 6(6) of the Misuse of Drugs Act 1975 as placing an evidential onus on the defendant when the only tenable interpretation suggested otherwise. In *Re AMM*, the context was quite different: the

statutory definition was clearly discriminatory, and there was an available alternative meaning that was workable, consistent with the Act's purpose, and not a strained interpretation.

[23] In this case, Parliament deliberately rejected the interpretation sought by the appellant. Furthermore, an evidential onus cannot be read into s 202C(1)(b) when the courts have interpreted the same wording in s 202A as imposing an objective test. To do so would be inconsistent with the case law on s 202A.[6]

[24] Moreover, s 202C(1)(b) does not impair the right to be presumed innocent. The onus of proof remains on the Crown, as the Crown must prove:

(a) an assault;

(b) that the defendant was carrying a thing; and

(c) that the circumstances at first appearance show the defendant intended to use that thing as a weapon.

Discussion

[25] At issue is the meaning of the words: "in circumstances that prima facie show an intention to use it as a weapon".

[26] There are two other provisions in the Crimes Act that use identical language ("in circumstances that prima facie show an intention"): ss 198B (commission of crime with firearm) and 202A(4)(b) (possession of offensive weapon or disabling substance).

[27] Section 198B is in the following terms:

> **198B Commission of crime with firearm**
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> (1) Every one is liable to imprisonment for a term not exceeding 10 years who,—
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> (a) in committing any imprisonable offence, uses any firearm; or

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6 The Crown cites *R v Haqiqzai* CA158/02, 18 December 2002.

(b) while committing any imprisonable offence, has any firearm with him or her *in circumstances that prima facie show an intention to use it* in connection with that imprisonable offence.

(emphasis added)

[28] In the commentary to s 198B, *Adams on Criminal Law* discusses the phrase "in circumstances that prima facie show an intention to use it". The author notes that the same phrase is found in several provisions of the Crimes Act (including s 202C(1)(b)), and observes that "it seems that when this test is met it is no defence that the offender did not *in fact* have the specified intent".[7] This supports the Crown's view that an objective test is to be applied.

[29] Section 202A(4) is in the following terms:

202A Possession of offensive weapons or disabling substances

...

(4) Every one is liable to imprisonment for a term not exceeding 3 years—

(a) who, without lawful authority or reasonable excuse, has with him or her in any public place any knife or offensive weapon or disabling substance; or

(b) who has in his or her possession in any place any offensive weapon or disabling substance *in circumstances that prima facie show an intention to use it to commit an offence* involving bodily injury or the threat or fear of violence.

(emphasis added)

[30] In *R v Haqiqzai*, this Court referred to s 202A(4)(b) and held:[8]

> The term "prima facie" must carry its usual meaning "at first appearance". An intention engaged by s 202A(4)(b) is therefore one to be ascertained objectively, by reference to actual circumstances, and in conjunction with mere possession. By contrast, s 48 is concerned with subjective intention, namely an intention to defend, actual or threatened use of force not mere possession, and circumstances not as they actually were but as the user of force subjectively believed them to be.

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7 Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CA198B.03].

8 *R v Haqiqzai*, above n 6, at [26].

[31] In *Haqiqzai* this Court was clearly of the view subjective intention has no place in the application of the phrase "circumstances that prima facie show an intention". Again, this supports the Crown's argument in favour of an objective test.

[32] It is important to note, however, that s 202A(5) expressly creates a defence to a charge under s 202A(4)(b), if the defendant proves that his or her subjective intention was not to use the weapon to commit an offence. It is therefore not surprising the wording in s 202A(4)(b) does not refer to subjective intent — the objective and subjective inquiries are clearly delineated: s 202A(4)(b) sets out the initial objective inquiry, while s 202A(5) allows a defence based on the defendant's subjective intent.

[33] That is not the case in s 202C, which contains no express defence similar to that in s 202A(5). Mr Te Moananui argues that, in the absence of an express defence, the subjective inquiry can simply be incorporated into s 202C(1)(b): the defendant has an evidential burden (rather than the legal burden imposed by s 202A(5)) to raise evidence of subjective intent.

[34] We do not find this persuasive. In the absence of an express defence like that in s 202A(5), it would seem that the defendant's subjective intent has no real place in the s 202C(1)(b) inquiry (except to the extent that it informs the objective inquiry). This is what the plain meaning of the words and *Haqiqzai* suggest.

[35] This view is also supported by the legislative history of s 202C(1)(c). Perhaps the clearest statement comes from Rt Hon Geoffrey Palmer on the second reading of the Violent Offences Bill (which added s 202C to the Crimes Act):[9]

> … submissions expressed concern that the offences dealing with firearms and other weapons applied to those who had such a weapon in circumstances that prima facie showed an intention to use it irrespective of what the offender actually intended to do. Both the university and the Law Society expressed the view that it should be a defence to the new charge for the defendant to show that there was no actual intention to use the weapon. However, the Government cannot agree with that view.

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[9] (18 September 1986) 474 NZPD 4432. We acknowledge that this speech is not altogether consistent with the language of s 202C(1)(b) as it contains the assumption that to be complete, the offence requires the weapon to be used, when that is not a requirement of the legislation.

> I want to make it clear that the offence is committed if anyone uses a firearm or a weapon when it is reasonably believed by others that it will be used. The secret intention of the user will be relevant, if at all, only to the question of penalty.

[36] Finally, we note that the case law cited by Mr Te Moananui to support his proposed subjective test is not entirely on point:

(a) His submissions refer to various drug cases in which the defendant's honestly held belief that he or she was not cultivating or dealing in controlled drugs was in issue. The strict liability provisions under which those cases arose are not really comparable to s 202C(1)(b) of the Crimes Act.

(b) His references to Canadian case law on the Land and Forests Act are also not quite apt. The statutory provision in those cases states that certain circumstances amount to "prima facie evidence" that the person is in violation of the statute. On that wording, it is clearly open to the defendant to adduce evidence to the contrary. It is "prima facie evidence" only. By contrast, s 202C(1)(b) says that an *offence is committed* where a person has an object "in circumstances that prima facie show an intention to use it as a weapon". There is no question of "prima facie evidence" which is open to rebuttal by evidence of the defendant's subjective intent.

[37] Accordingly, we consider the proper interpretation of the section is that it imposes an objective inquiry. The burden of proof is on the Crown to prove beyond reasonable doubt the existence of circumstances that prima facie show an intention to use the object as a weapon. As the Crown acknowledges, it is open to the defendant to counter this by adducing evidence of his or her own subjective intent. Nevertheless, the inquiry remains an objective one, and the only relevance of any such evidence would be to inform the objective inquiry.

[38] As for Mr Te Moananui's alternative arguments, we do not see these as applicable here.[10] First, his interpretation involves too much manipulation of the language of s 202C(1)(b), and suggests that the section should be read outside its statutory context.[11] This would be plainly wrong. Second, the interpretation we consider correct does not displace the onus of proof, which remains at all times on the Crown when it comes to proof of the elements of the offence. Accordingly, neither ss 5 and 6 of the NZBORA nor the principles to be drawn from *Hansen* assist Mr Te Moananui's argument. Further, the circumstances here are quite different from those in *Re AMM*, and so they do not call for the approach taken in that case.

[39] It follows from the above analysis that Judge Mill did not err in the directions he gave. The Judge clearly referred to an objective test:

> The test is what a reasonable observer would at first sight conclude given what they saw and heard at the time.

[40] The Judge accepted that the defendant could raise evidence as to his subjective intent, which the jury could take into account, but emphasised that it remained an objective inquiry overall:

> Now if what the defence says leaves you unsure of whether you accept it or not and you think it's a reasonable possibility that what he says is true, well when you're assessing this element again you just use that reasonable possibility as part of your assessment of whether a reasonable observer would at first sight conclude from what they saw or heard at the time that he intended to use it as a weapon.

[41] Accordingly, there is no misdirection and so no miscarriage of justice.

Result

[42] The appeal is dismissed.

Solicitors:
Public Defence Service, Auckland for Appellant
Crown Law Office, Wellington for Respondent

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10 These arguments are set out at [13] to [17] herein.

11 The interpretation Mr Te Moananui advocates is inconsistent with the interpretation this Court in *R v Haquqzai*, above n 6, gave to the same language as it appears in s 202A(4)(b). We do not accept that much the same language in two statutory provisions that sit so closely together can be interpreted differently.