HOUSE OF LORDS SESSION 2004–05
[2005] UKHL 18

on appeal from: [2003] EWCA Crim 3751

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina
v.
Bentham (Appellant) (On Appeal from the Court of Appeal (Criminal Division))

ON
THURSDAY 10 MARCH 2005

The Appellate Committee comprised:

Lord Bingham of Cornhill
Lord Steyn
Lord Phillips of Worth Matravers
Lord Rodger of Earlsferry
Lord Carswell

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Regina *v.* Bentham (Appellant) (On Appeal from the Court of Appeal (Criminal Division))

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LORD BINGHAM OF CORNHILL

My Lords,

1. Can a person who has his hand inside a zipped-up jacket, forcing the material out so as to give the impression that he has a gun, be held to have in his possession an imitation firearm within the meaning of section 17(2) of the Firearms Act 1968? That is the short question raised by this appeal. Her Honour Judge Badley, sitting in the Crown Court at Preston, ruled that he could and the Court of Appeal (Criminal Division) (Kennedy LJ, Curtis and Forbes JJ: [2003] EWCA Crim 3751, [2004] 2 All ER 549, [2004] 1 Cr App R 487) upheld that decision. The appellant, who pleaded guilty on the basis of the judge's ruling, challenges its correctness.

2. The relevant facts are very short. Early on the morning of 24 May 2002 the appellant broke into the house of his former employer A and went to the bedroom where A was sleeping. He had his hand inside his zipped-up jacket, forcing the material out so as to give the impression that he had a gun, pointing towards A. He demanded money and jewellery, threatening to shoot A if he did not comply. In fear, and believing that the appellant was in possession of a gun, A handed over some money and the appellant left. The appellant later confided to a third party G that he had put his fingers inside his jacket when he had committed the robbery, to give the appearance of having a gun. When G made a statement recording this, the appellant tried to persuade her to retract it.

3. An indictment containing 3 counts was preferred against the appellant, charging him (in count 1) with robbery contrary to section

8(1) of the Theft Act 1968 and (in count 3) with acts tending and intended to pervert the course of justice. To these counts he pleaded guilty. He was in due course sentenced to 5 years' imprisonment on count 1 and 6 months' imprisonment consecutive on count 3. He did not seek to appeal against these sentences.

4. This appeal concerns count 2, which charged the appellant with possessing an imitation firearm during the course of a robbery contrary to section 17(2) of the Firearms Act 1968. The particulars alleged that at the time of committing an offence specified in Schedule 1 to the 1968 Act, namely robbery, he "had in his possession an imitation firearm namely an unknown item concealed beneath his jacket designed to give the appearance that he was concealing a firearm." It is now accepted that the bulge in the jacket was caused by the appellant's hand and fingers.

5. It was argued before the judge that on these facts the appellant did not have in his possession an imitation firearm, but she rejected this. She said:

> "Of course, an unadorned finger cannot have the appearance of being a firearm. But any piece of cloth which was puckered or gathered in such a way that could, to the eye of a terrified person, look like being a firearm is another matter entirely … "

In the light of this ruling the appellant pleaded guilty on the basis of the facts he asserted, which are now agreed, and the judge sentenced him to 18 months' imprisonment to be served concurrently with the robbery sentence. In para 25 of its judgment, dismissing the appeal against conviction, the Court of Appeal shared the opinion of the judge:

> "25. Consequently, if that approach is adopted in relation to the statutory words with which we are confronted, one is left, as it seems to us, in this position. In our judgment, the wording of the English statute as explained in *R v Morris* shows that the ruling of the circuit judge in the present case was right. If the matter had gone to trial (and what is important is the view of the jury), the jury would have had to consider whether at the critical time when threatening [A] and his partner the appellant had in his

> possession an imitation firearm. That is to say, having regard to the statutory definition, anything which had the appearance of a firearm. We cannot see that it mattered whether or not that item was made of plastic, or wood, or simply anorak fabric stiffened by a finger, if in the opinion of the jury at the relevant time it had the appearance of a firearm then, in our judgment, they were entitled to find that the offence was made out."

6. While an imitation firearm lacks the capacity of a real, loaded firearm to kill or injure, it has much the same capacity to frighten and enforce compliance, not least because many imitations are almost indistinguishable from the real thing and those threatened have little opportunity or inclination to examine the nature of the weapon used: see *R v Avis and others* [1998] 1 Cr App R 420, 423. So it is not surprising that Parliament has, since the Firearms and Imitation Firearms (Criminal Use) Act 1933, legislated to criminalise the use and possession of imitation firearms. In the 1968 Act as amended, sections 16A, 17, 18, 19 and 20 relate to both firearms and imitation firearms. In some of these provisions the offence is committed where a person has the imitation firearm "with him" for a prescribed purpose (section 18(1) and (2)) or in a public place without lawful authority or reasonable excuse (section 19) or as a trespasser (section 20). In section 17(1) the offence is to use the imitation firearm in a prescribed way. In section 16A the offence is to have possession of an imitation firearm with a prescribed intent. Section 17(2), with which this appeal is concerned, also creates an offence of possession:

> "If a person, at the time of his committing or being arrested for an offence specified in Schedule 1 to this Act, has in his possession a firearm or imitation firearm, he shall be guilty of an offence under this subsection unless he shows that he had it in his possession for a lawful object."

Robbery is an offence specified in Schedule 1. It is provided in subsection (4) that:

> "For purposes of this section, the definition of 'firearm' in section 57(1) of this Act shall apply without paragraphs (b) and (c) of that subsection, and ' imitation firearm' shall be construed accordingly."

In section 57(1), "firearm" is defined to mean:

> "a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged and includes –
>
> (a) any prohibited weapon, whether it is such a lethal weapon as aforesaid or not . . ."

Section 57(4) defines "imitation firearm" to mean:

> "any thing which has the appearance of being a firearm … whether or not it is capable of discharging any shot, bullet or other missile."

7. Conviction on indictment of an offence against section 17(2) carries a maximum sentence of life imprisonment, and is a serious offence for purposes of the Powers of Criminal Courts (Sentencing) Act 2000.

8. In my respectful opinion, the conclusion reached by the lower courts is insupportable. One cannot possess something which is not separate and distinct from oneself. An unsevered hand or finger is part of oneself. Therefore, one cannot possess it. Resort to metaphor is impermissible because metaphor is a literary device which draftsmen of criminal statutes do not employ. What is possessed must under the definition be a thing. A person's hand or fingers are not a thing. If they were regarded as property for purposes of section 143 of the 2000 Act the court could, theoretically, make an order depriving the offender of his rights to them and they could be taken into the possession of the police. *R v Morris* (1984) 79 Cr App R 104, cited by the Court of Appeal, does not assist on this point, since the defendant in that case had with him, with intent to commit robbery, a separate object, namely two metal pipes bound together, which had the appearance of a double-barrelled shotgun. The criticisms of the Court of Appeal's decision made by Richardson (Criminal Law Week Issue 45, 15 December 2003, para 6 and Comment) and Professor Spencer ("Is that a gun in your pocket or are you purposively constructive?" [2004] CLJ 543 are in my opinion unanswerable.

9. Parliament might have created an offence of falsely pretending to have a firearm (although not an imitation firearm). But it has not done so. And the appellant was not accused of falsely pretending to have a firearm but of possessing an imitation firearm. The offence would have been complete (if at all) even if, assuming there to have been a robbery, the alleged existence of an imitation firearm had not been disclosed to A. But both the lower courts attached importance to the impression made on the victim, a matter irrelevant to possession. It was, of course, very highly reprehensible conduct by the appellant to pretend that he had a gun, understandably frightening the victim, but it was conduct which the judge could take fully into account when passing sentence for the robbery, and it appears from her sentencing remarks that she intended to do so.

10. Rules of statutory construction have a valuable role when the meaning of a statutory provision is doubtful, but none where, as here, the meaning is plain. Purposive construction cannot be relied on to create an offence which Parliament has not created. Nor should the House adopt an untenable construction of the subsection simply because courts in other jurisdictions are shown to have adopted such a construction of rather similar provisions.

11. Despite the argument for the Crown attractively presented by Mr Jafferjee, I would, for these reasons and those given by my noble and learned friend Lord Rodger of Earlsferry, allow this appeal and quash the appellant's conviction on count 2.

LORD STEYN

My Lords,

12. I have had the advantage of reading the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Rodger of Earlsferry. I agree with their views. I would also allow the appeal.

LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

13. I have had the advantage of reading the opinions of my noble and learned friends, Lord Bingham of Cornhill and Lord Rodger of Earlsferry. For the reasons that they give I also would allow this appeal.

LORD RODGER OF EARLSFERRY

My Lords,

14. *Dominus membrorum suorum nemo videtur*: no-one is to be regarded as the owner of his own limbs, says Ulpian in D.9.2.13. pr. Equally, we may be sure, no-one is to be regarded as being in possession of his own limbs. The Crown argument, however, depends on the contrary, untenable, proposition that, when carrying out the robbery, the appellant had his own fingers in his possession in terms of section 17(2) of the Firearms Act 1968. I agree with my noble and learned friend, Lord Bingham of Cornhill, that for this reason the appeal should be allowed.

LORD CARSWELL

My Lords,

15. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Rodger of Earlsferry. For the reasons which they have given I would allow the appeal.