

**IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY**

CRI-2010-463-57

JEREMY MICHAEL GRAVES
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 14 December 2010

Appearances: Mr N J B Taylor for appellant
Ms N Tahana for respondent

Judgment: 14 December 2010

(ORAL) INTERIM JUDGMENT OF LANG J
[on appeal against conviction]

Solicitors/Counsel:
Crown Solicitor, Rotorua
Mr N J B Taylor, Auckland

[1] Mr Graves faced charges in the District Court of unlawfully and without sufficient purpose presenting an air gun at a police officer without lawful and sufficient purpose, and assaulting that police officer using an air pistol as a weapon. The charges were laid under s 52(1) of the Arms Act 1983 and s 202C of the Crimes Act 1961 respectively.

[2] After a defended hearing spanning two days, His Honour Judge McGuire found both charges to have been established to the required standard. He convicted Mr Graves and ordered him to come up for sentence if called upon to do so within the next six months. Mr Graves now appeals to this Court against his conviction.

Factual background

[3] Both charges have their genesis in an incident that occurred in the early hours of 12 March 2010. By and large there is little dispute regarding the facts, which were canvassed thoroughly at the hearing in the District Court.

[4] Mr Graves is the owner of a bar and restaurant in the central business district of Taupo. On the evening of 11 March 2010 he attended a function at his restaurant to mark a friend's departure from the Taupo district. Mr Graves consumed alcohol during the course of the evening, and for that reason he sensibly elected to get a ride home in a taxi rather than attempt to drive home himself.

[5] He estimated that he arrived at his address about 30 minutes after midnight. Usually he would obtain access to his house using a garage door opener that he kept in his vehicle. When he got out of the taxi, he realised that he did not have his garage door opener. It was still in his vehicle, which was parked in town.

[6] Mr Graves went round to the rear of the property where he believed that a key was hidden. Because the key had been hidden by his father, he was not aware of its exact location and his searches for it proved to be unsuccessful. He then tried all of the windows of the property but found they were locked. He climbed up on a balcony to try to obtain access that way but this, too, was unsuccessful.

[7] He then decided to resort to force to obtain entry to his house. He went to the rear of his property and smashed several terracotta plant pots against the back door. Unfortunately, the back door is constructed with double glazing and his efforts to smash the glass panes in the door were unsuccessful. He then went round to the front door. To the right of the front door is a large glass panel that is approximately 1.8 metres high. By this stage Mr Graves was desperate to gain access to his property, so he used a stone statute to smash his way through the glass panel so that he could reach inside and unlock the door. He entered the house, locked the door and went upstairs. He then turned the television set off and went to bed.

[8] Not surprisingly, the noise that Mr Graves had created in attempting to gain access to his property had attracted the attention of at least one of his neighbours, Mr Weston. Coincidentally, Mr Weston was a police officer who had just returned home after completing a shift. The noises that he heard were such that he went outside, where he ascertained that the noises were coming from Mr Graves' property. He then telephoned the police.

[9] The call to the police was answered by Constable Humphries and Constable Foden who were on duty in a marked patrol car. They arrived at the address and spoke to Mr Weston. Constable Foden then went round to the rear of the address, where she saw the smashed terracotta pots and the damage resulting from Mr Graves' unsuccessful attempts to open the back door using the pots. She knocked on the back door loudly and called out to the occupants of the address without obtaining any response.

[10] Constable Humphries observed the damage to the glass panel beside the front of the address and he, too, began knocking on the door loudly. He says that he knocked several times, and used words to the effect that it was the Taupo police and that the occupants should open the door. When this produced no result, he reached through the broken panel and opened the door using the key that Mr Graves had left in the interior lock.

[11] Mr Graves says that about this time he woke up. He does not recall hearing knocking or voices identifying the visitors to his property as being police officers. Rather, he associated the noise with that likely to be made by an intruder. He was conscious of the fact that he kept takings from his business at his house, and he also stored a valuable Harley Davidson motorcycle there. For that reason he decided that he needed to confront the intruders.

[12] In his bedroom he kept a .177 calibre air pistol fitted with a laser pointer. He got out of bed and walked to the top of the stairs. When he looked down the stairs, he could see a dark silhouette. He then activated the laser light and trained the red laser dot on the torso of the person below.

[13] There is a dispute at this point as to what the person at the foot of the stairs said. Mr Graves believed that the person said “put it down, put it down”. Constable Humphries is adamant that he said “police, put it down, put it down”.

[14] Mr Downes, a taxi driver who happened to be in the vicinity at this time, said that he heard the words “put it down, put it down” but did not hear the word “police”. Constable Foden, however, said that she heard the words “police, put it down, put it down”.

[15] The Judge did not make any express factual finding as to what was said at this point. He recorded only in his judgment that the person at the bottom of the stairs said “put it down, put it down”. He gave no reason for apparently preferring the evidence of Mr Graves and Mr Downes to that of the two police officers.

[16] Mr Graves then turned the laser dot away from the officer and turned to go into the living room. A short time later he went back to have another look and again trained the laser dot on the torso of the person downstairs. This person again said “put it down, put it down”. At this point Mr Graves realised that the person was speaking with the voice of authority, and for that reason he turned and walked back into the living room.

[17] Constable Humphries immediately ran up the stairs and tackled Mr Graves from behind. He also used his elbow to knock him to the ground. Constable Foden came up the stairs a short time later. Constable Humphries told Constable Foden that Mr Graves had a pistol, and that he had pointed the laser sight at him. She could not see the pistol at this point, and accordingly used pepper spray to disable Mr Graves. Mr Weston also arrived on the scene at this stage, and he and Constable Foden were able to apply handcuffs to Mr Graves to subdue him. At about this point Mr Graves said something to the effect of “It’s my house I’ll do what I want”.

[18] That narrative essentially sets out the factual matrix relevant to the two charges that Mr Graves faced.

The Judge’s decision

[19] The Judge summarised the evidence to which I have referred, and said that the case involved important principles relating to the rights of property owners and the rights of police officers who are investigating complaints of crimes. He gave Mr Graves the benefit of the doubt in relation to his belief that intruders were present when he first shone the laser light on Constable Humphries. He considered, however, that there was no justification for Mr Graves pointing the laser light at the police officer on the second occasion after the police officer had already told him to put the pistol down. He considered that any rational person at that point would have known that he was dealing with a person in authority and not an intruder.

[20] The Judge found that the defence of self-defence under s 48 of the Crimes Act 1961 and the defence under s 55 of the Crimes Act 1961 did not come into play because the force that Mr Graves used when he shone the laser light at the constable on the second occasion was not reasonable. For that reason he convicted Mr Graves.

Grounds of appeal

[21] On appeal, three points are taken. They are:

- i) Did the pointing of the laser light at Constable Humphries constitute an assault for the purposes of s 202C of the Crimes Act 1961?
- ii) Was Mr Graves entitled to rely on the defence of self-defence contained in s 48 of the Crimes Act 1961?
- iii) Was Mr Graves entitled to rely on the further defence provided by s 55 of the Crimes Act 1961?

[22] The relevance of the latter two issues is that, if Mr Graves was entitled to rely upon either of them, they would provide him with a complete defence to both charges. They would also provide him with a lawful or sufficient purpose for presenting the air pistol at Constable Humphries in relation to the charge laid under s 52(1) of the Arms Act 1983.

Did the pointing of the laser light at Constable Humphries constitute an assault for the purposes of s 202C of the Crimes Act 1961?

[23] For present purposes the definition of assault is the extended definition in s 2 of the Crimes Act 1961. It relevantly provides as follows:

Assault means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose; and **to assault** has a corresponding meaning:

[24] Constable Humphries said that, when he first saw the red dot coming towards him, he believed that it may have been from a laser light. When he looked closer, however, he saw that the object in Mr Graves' hand was larger than a laser light. He then believed that Mr Graves was holding a firearm. He said, in fact, that he believed at one point that he was about to be shot. He said that that feeling was particularly intense when Mr Graves concentrated the red dot on his chest area for ten to 15 seconds.

[25] In my view the act of training a red laser dot on the torso of another person amounts to a threat or gesture to apply force. That force takes the form of a bullet from a firearm. In the present case Mr Graves clearly caused the constable to believe that he had the ability to effect that purpose. That belief arose as a result of the movement of the red laser dot, coupled with the fact that the object that the constable could see that Mr Graves was holding appeared to be larger than a laser light. I consider that the constable was justified in concluding that Mr Graves was holding a firearm and that, when he applied the red dot to the constable's chest, the constable believed on reasonable grounds that Mr Graves had the ability to discharge a shot to his person.

[26] For that reason I find that the training of the laser dot on the constable's chest amounted to an assault within the extended definition contained in s 2 of the Crimes Act 1961.

Was Mr Graves entitled to rely upon the defence of self-defence contained in s 48 of the Crimes Act 1961?

[27] Section 48 of the Crimes Act 1961 provides as follows:

48 Self-defence and defence of another

Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

[28] When self defence is raised, the onus remains on the Crown to negative it beyond reasonable doubt. No onus shifts to the accused at all.

[29] Self defence contains several elements. Some of these are to be determined objectively and other must be determined subjectively. The first issue is whether it is reasonably possible that the accused is acting in self defence. Next, the tribunal of fact must ascertain the facts as the accused believes them to be. In this regard what is important is not what the accused ought to have believed, but what he actually believed, regardless of whether or not that belief was reasonable or rational. This is a subjective determination.

[30] The third issue is whether the force that the accused used was reasonable. This is an objective test. Whether or not the accused believed that the force that he or she used was reasonable is beside the point. The issue is whether the force was reasonable in the view of the tribunal of fact, having regard to the circumstances as the accused believed them to be.

[31] In the present case the Judge appears to have proceeded on the basis that Mr Graves was acting in defence of himself and/or his property when he armed himself and went to the top of the stairs. In determining the circumstances as Mr Graves believed them to be, the Judge gave Mr Graves the benefit of the doubt when he said that he believed that intruders were in the house. He gave him the benefit of that doubt on that point up until after Mr Graves had pointed the air pistol at the person at the foot of the stairs on the first occasion, and that person had said “put it down, put it down”.

[32] On the third element, the Judge said that any rational person hearing those remarks would conclude immediately that they were coming from a person in authority. For that reason he concluded that Mr Graves used more force than was reasonable when he pointed the laser dot at the person down the stairs on the second occasion.

[33] On this point I agree with the Judge. Even if Mr Graves is given the benefit of the doubt on the first occasion, the person who was at the bottom of the stairs did not react in a manner that a burglar would react. Even if the force that Mr Graves used on the first occasion can be described as reasonable, it was not reasonable on my view for him to train the red dot on the person at the bottom of the stairs on the second occasion. Once the person at the bottom of the stairs had said “put it down, put it down”, a reasonable response would have been for Mr Graves to turn the light on or to ascertain from the person at the bottom of the stairs exactly who that person was.

[34] I do not disregard the submission from Mr Graves that this incident happened within a very short space of time, and in circumstances where Mr Graves had just woken up and was obviously still affected to some extent by alcohol. Even allowing

for those factors, I do not consider that self-defence could apply in relation to the second occasion on which he pointed the laser dot at the police officer's chest.

[35] This means that the prosecution excluded the defence of self-defence beyond reasonable doubt.

Was Mr Graves entitled to rely on the further defence contained in s 55 of the Crimes Act 1961?

[36] Section 55 of the Crimes Act 1961 provides as follows:

55 Defence of dwellinghouse

Every one in peaceable possession of a dwellinghouse, and every one lawfully assisting him or acting by his authority, is justified in using such force as is necessary to prevent the forcible breaking and entering of the dwellinghouse by any person if he believes, on reasonable and probable grounds, that there is no lawful justification for the breaking and entering.

[37] In the present case, I accept, as did the Judge, that it is reasonably possible that Mr Graves was acting to prevent the continued entry into his property by an intruder. In this context it has been held that the defence under s 55 is not restricted to the use of force in order to prevent actual breaking and entry. It may be used even after an intruder has gained entry to a dwellinghouse: *R v Frew* (1992) 9 CRNZ 445 at 448.

[38] The real issue in relation to this defence is whether Mr Graves' belief that he was dealing with intruders was based on reasonable and probable grounds. A person will only be justified in using force under s 55 if his belief that there is no lawful justification for the breaking and entering is based on lawful and probable grounds. That issue must be assessed objectively.

[39] In this context the circumstances in which Mr Graves gained entry to his property become highly relevant. This involved the use of heavy objects that he smashed against the back door of his property in an unsuccessful attempt to gain entry by that means. That must have created a significant amount of noise by itself. He then used another heavy object to smash the large pane of glass on the right hand side of his front door. That, too, would obviously cause considerable noise. Any

reasonable person would conclude that sounds of this type at this time of night would attract the attention of neighbours and, as a consequence, the police. For that reason the most probable reason for any subsequent visitor to the property would be an investigation into the cause of the noises that his actions have caused. In my view any reasonable person would conclude that it would be highly improbable that the next person to visit the property would be an intruder.

[40] I accept that Mr Graves was obviously intoxicated on the night in question. For that reason his reasoning capabilities may have been significantly impaired. The question of whether or not the belief that there is no lawful justification for the breaking and entering must, however, be determined on objective grounds, and I conclude that he did not have reasonable and probable grounds for his belief. This was essentially the same reasoning that the Judge used when he rejected this defence at the hearing in the District Court.

[41] For this reason I do not consider that the defence under s 55 is made out either.

Result

[42] Given those findings I conclude that the appeals against conviction cannot succeed. I am concerned, however, that the consequences of the convictions may be out of all proportion to the gravity of the offending.

[43] The offending obviously contains some serious elements. It involved the use of a firearm and the fact that Mr Graves was in an intoxicated state when he pointed that firearm at the constable is of concern as well.

[44] Having said that, the Judge clearly accepted that, initially at least, Mr Graves believed that he was dealing with an intruder. It is also clear that Mr Graves knew that the firearm was unloaded and, as a consequence, no harm could ever have come to the intruders. Weight can therefore be given to his assertion that he merely wanted to scare the intruder away.

[45] The convictions are likely to have serious consequences for Mr Graves, because they may affect his ability to continue to run his business. This is possible notwithstanding the fact that the present offending occurred in a domestic context and not in a business context. I understand, in fact, that some form of process under the liquor licensing legislation has already been initiated to assess whether or not Mr Graves is a fit and proper person to hold a liquor licence.

[46] The Judge clearly considered that the offending fell at the lowest end of the scale, because he did not impose any penalty on Mr Graves. Rather, he ordered him to come up for sentence if called upon to do so within six months. Reading the Judge's decision, it would appear that he convicted Mr Graves and made that order immediately after finding that the charges had been proved. The record does not disclose any pause for submissions to be made as to the appropriate penalty.

[47] It would, of course, have been open to Mr Graves to ask the Judge to discharge him without conviction on the basis that the consequences of the convictions were disproportionate to the gravity of the offending. That possibility was never canvassed, because counsel for Mr Graves did not put it to the Judge. That may be because of the way in which the Judge appears to have proceeded to order Mr Graves to come up for sentence if called upon immediately at the end of his decision as to liability.

[48] I propose to grant Mr Graves leave to amend his appeal to include an appeal against sentence. Although I make no promises as to the outcome, he is to file and serve any affidavits that he wishes to advance in support of an application for discharge without conviction no later than 31 January 2011. Submissions directed to the appeal against sentence are to be filed at the same time. The respondent is then to have 14 days to file submissions in opposition to those filed on behalf of Mr Graves. Any submissions in reply should be filed and served seven days thereafter. I will then determine the appeal against sentence on the papers.