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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI-2018-004-007098
[2020] NZHC 3006**

THE QUEEN

v

AHAMED AATHILL MOHAMED SAMSUDEEN

Hearing: 12 November 2020

Appearances: H Steele and A Mateni for Crown
B Sellars QC and S J Bird for Defendant

Judgment: 12 November 2020

**ORAL JUDGMENT OF VENNING J
Section 147 application**

Solicitors: Meredith Connell, Auckland
Counsel: B Sellars QC/S J Bird, Auckland

[1] Ahamed Samsudeen faces trial on a number of charges in this Court. He seeks a discharge under s 147 of the Criminal Procedure Act 2011 (CPA) in relation to three charges alleging possession of an offensive weapon.

[2] The three charges are:

- (a) Charge 1 – possession of an offensive weapon – s 202A(4)(b), Crimes Act 1961 – that on or about 19 May 2017 at Auckland, he had in his possession an offensive weapon, namely a hunting knife, in circumstances that prima facie showed an intention to use it to commit an offence involving bodily injury or the threat or fear of violence;
- (b) Charge 2 – possession of an offensive weapon – s 202A(4)(a), Crimes Act 1961 – that on or about 8 August 2018 at Auckland without lawful authority or reasonable excuse, had with him in a public place a knife;
- (c) Charge 3 – possession of an offensive weapon – s 202A(4)(b), Crimes Act 1961 – that on or about 9 August 2018 at Auckland had in his possession an offensive weapon, namely a throwing star, in circumstances that prima facie showed an intention to use it to commit an offence involving bodily injury or the threat of violence or the fear of violence.

Principles

[3] The principles to apply on such applications are well understood and settled. The Court may dismiss a charge under s 147(4)(c) of the CPA if satisfied as a matter of law a properly directed jury could not reasonably convict the defendant of that charge.

[4] The issue is whether the evidence is sufficient in law if accepted to prove the case. If it is then the issue should be left to the jury.¹

¹ *Parris v Attorney-General* [2004] 1 NZLR 519 (CA).

Background

[5] Mr Samsudeen is a Sri Lankan citizen who arrived in New Zealand in October 2011. He is ethnically Tamil and Muslim by faith. I understand his refugee status is under review.

[6] Between November 2015 and March 2016 the New Zealand Police were alerted to two Facebook accounts under the names 'Aathill Ahamed' and Aathill Al-Ceyloni Al-Moori' which were being used to post Islamic extremist themed material, including scenes of extreme violence and cruelty. The Police identified Mr Samsudeen as the operator of the Facebook accounts.

[7] Mr Samsudeen was spoken to by the Police during April and May 2016 and issued a warning for publishing objectionable material under the Films, Videos, and Publications Classifications Act 1993.

[8] Following the warning Mr Samsudeen deleted both Facebook accounts. However, he shortly thereafter opened four new Facebook accounts and again began posting material similar to that which he had previously been warned about. His activity was monitored by Police.

[9] Mr Samsudeen made a number of comments in respect of a news article published on 21 March 2017. His posted comments included:

Kiwi Terrorist low life scums killed innocent muslims kids and women

...

One day I will go back to my country and I will find kiwi scums in my country (its very easy to find) and I will show them...what will happen when you mess with Aathil while I'm in their country. If you're tough in your country.. we are tougher in our country scums #payback

[10] This was followed by a further comment shortly afterwards:

I WILL FILL THE ENEMIES WITH STABBING AND CUT OFF THEIR HEADS VIOLENTLY #EverytimeIBlinkMyEye.

[11] About the same time in 2017 a former contact of Mr Samsudeen approached New Zealand authorities and provided information that Mr Samsudeen was planning to travel to Syria in order to fight on behalf of IS (Islamic State).

[12] Police continued to monitor Mr Samsudeen's activities. On 19 May 2017 Mr Samsudeen booked a flight to depart New Zealand early the following morning, 20 May 2017, travelling to Singapore via Kuala Lumpur. The Police believe Mr Samsudeen then intended to travel from Singapore onward to Syria. Mr Samsudeen was located and arrested at Auckland Airport just after 11.00 pm on 19 May 2017.

[13] When spoken to by the Police on his arrest on 19 May 2017 Mr Samsudeen made a number of comments in relation to the knife, the subject of the first charge:

Did they find a knife in my house? There's a knife in my house under my bed.

And a brief conversation as follows when questioned:

Q. Where did you get the knife from?

A. The shop. A normal shop on K Rd, like a \$2 shop.

Q. When did you get that ?

A. Maybe last year. Some guys came last year and checked my passport and I was scared so a few months later I saw it and thought I'd buy it. I looked up the law and it said it was okay to have it as long as it's kept at home. Those guys come when I wasn't home and moved my passport. I thought someone could come in and kill me.

[14] The search warrant executed by the Police at Mr Samsudeen's address located a large hunting knife underneath his mattress.

[15] Mr Samsudeen was charged with a number of offences, including unlawful possession of the knife. On 29 June 2018 he pleaded guilty to representative charges of knowing distribution of restricted material under the Films, Videos, and Publications Classifications Act, two charges of dishonestly using a document and one charge of refusing to assist Police. The possession of the knife charge was withdrawn by consent. It has subsequently been refiled.

[16] Mr Samsudeen was released on bail to appear for sentence on a later date. It is alleged that he committed a series of further similar offences whilst on bail, including the two other charges before the Court today relating to the purchase of a substitute knife and the possession of the throwing star.

Charge 1

[17] The elements the Crown must prove under s 202A(4)(b) are that:

- (a) on or about 19 May 2017 Mr Samsudeen had possession of a knife; and
- (b) the possession was in circumstances that on the face of it showed he had an intention to use the knife to commit a crime involving bodily injury or threat of violence.

If both of those elements are made out it would be open for Mr Samsudeen to satisfy the jury, on the balance of probabilities, that he did not intend to use the knife in that way. For present purposes it is only necessary to consider the elements the Crown must prove.

[18] In *Simon v R* the Court of Appeal stated in relation to possession:²

Possession involves both physical and mental elements. They have been discussed by this Court in many decisions. The physical element is satisfied either by custody of the item in question or control of it. The mental element involves knowledge of the presence of the item, and an intention to exercise control over it.

[19] Ms Sellars submitted that by leaving his apartment to depart for Auckland Airport and then to Singapore on a one-way ticket flight Mr Samsudeen “lost” custody of the knife underneath his bed. There was no evidence he retained control over it. Further, she submitted there was no evidence to support that Mr Samsudeen intended to use the knife underneath his bed to commit an act of violence as the section required. She emphasised his one-way ticket to Singapore. Presumably for some time beforehand Mr Samsudeen intended to leave New Zealand as was confirmed by the

² *Simon v R* [2017] NZCA 277 at [14] (footnote omitted). Also see: *Bennett v R* [2016] NZCA 170 at [19]; and *Moon v R* [2017] NZCA 56 at [35].

statement of his associate. There is no evidence to suggest he intended to take the knife with him or that he intended to use it in the commission of a violent offence before his departure from New Zealand. Ms Sellars also noted the summary suggested Mr Samsudeen appeared to have liquidated the few assets he had prior to departure and had purchased only a one-way ticket.

[20] The Crown response is that it is evident from Mr Samsudeen's admissions to the Police that he knew of the knife's presence and the material on his internet posts disclose his intention to use it.

[21] Mr Samsudeen was at Auckland Airport when he was arrested at just after 11.00 pm on 19 May 2017. While he was physically some distance or separated from the knife there is evidence to support a finding that during that day and in the preceding days he was in possession of the knife. The charges are laid on or about that date. The knife was under his control. It was under his mattress in his apartment. He had the keys to the apartment with him when arrested. There was no suggestion he had made any attempt to dispose of the knife or of his apartment keys which enabled him to retain control over the knife.

[22] Mr Samsudeen clearly had knowledge of the presence of the knife as he had discussed it with the Police when he spoke to them. A jury could infer that Mr Samsudeen had an intention to exercise control over the knife by leaving it in the apartment and by retaining the keys to the apartment which enabled him to access the knife if for any reason he had decided not to travel, or on his return to New Zealand.

[23] The more difficult issue is whether the possession that he had in that way was in circumstances that prima facie showed an intention to use the knife to commit an offence involving bodily injury or the threat or fear of violence.

[24] The Crown submit that his intention as to the use of the knife can be informed by his expressed sympathies for IS and his Facebook postings. The Crown also submit that the absence of any other suggestion of legitimate use and the fact the knife was concealed are consistent with an intent to use the knife to commit an offence involving bodily injury or threat of violence or the fear of violence.

[25] Mr Samsudeen’s apparent explanation he had it for self-defence would be a matter for him to establish if the charge survived this application.

[26] The Supreme Court confirmed in *Te Moananui v R* that the wording “in circumstances that prima facie show an intention to use it [in the way described]” in various sections in the Crimes Act poses an objective inquiry. The burden of proof is on the Crown to show beyond reasonable doubt circumstances that prima facie showed an intention to use the knife as a weapon in the way the section prescribes.³

[27] Circumstances is defined in the Oxford English Dictionary online (as relevant) as:⁴

The logical surroundings or ‘adjuncts’ of an action; the time, place, manner, cause, occasion, etc., amid which it takes place;

[28] In *R v Haqiqzai* the Court of Appeal noted:⁵

[27] Care is needed in defining the relevant circumstances in any particular case. They are such circumstances as are apparent. ...

...

[29] When directing a jury in respect of s202A(4)(b) a Judge should tell them They must then examine the apparent circumstances, without reference to what the accused says was his or her state of mind, and decide whether such circumstances show, prima facie, an intention to use the offensive weapon or disabling substance to commit an offence involving bodily injury or the threat or fear of violence.

[29] I do not consider there is any relevant evidence to support the Crown submission that the surrounding circumstances of time, place or manner show that Mr Samsudeen was in possession of the knife with intention to use it in the way described by the section.

[30] Given the physical disconnect between Mr Samsudeen and the knife on 19 May 2017, while he may have been in possession of it in that he retained ultimate control of it, there is no evidence to support a finding that on the face of it he intended

³ *Te Moananui v R* [2017] NZSC 93.

⁴ Oxford English Dictionary (online 3rd ed, Oxford University Press, Oxford, 2000).

⁵ *R v Haqiqzai* CA 158/02, 18 December 2002.

to use the knife to commit an offence involving bodily injury or the threat or fear of violence. There must be a connection between the possession and the circumstances of time, place, or occasion, which is lacking in the present case.

[31] I turn to consider charge 3.

Charge 3

[32] On Thursday 9 August 2018 Mr Samsudeen was arrested at his then bailed address [redacted]. Following arrest the Police executed a search warrant at his address. They located a metal throwing star, also known as a Ninja star inside a room occupied by Mr Samsudeen.

[33] Again, the evidence supports a finding Mr Samsudeen was in possession of the Ninja star. It was found in his room at his address. The issue is again whether it can be said the surrounding circumstances show that on the face of it he intended to use it to commit a crime involving bodily injury or threat of violence.

[34] The Crown again submits that given the material on his Facebook posts it can be inferred that he was preparing to perpetrate an attack in which he was going to use the throwing star.

[35] I accept Ms Sellars' submission that the submission is effectively speculative and unsupported by the evidence, at least insofar as it relates to the issue of the throwing star. As she noted Mr Samsudeen has for a number of years accessed material of allegedly offensive nature. Nothing distinguishes the circumstances on 9 August 2018 from his earlier possession of the throwing star. The physical connection and access to the throwing star are closer and more proximate than in the case of the knife under charge 1, but the injury and torture depicted by the allegedly offensive videos are far more extensive and extreme than could be inflicted by the throwing star.

[36] I turn to charge 2.

Charge 2

[37] At approximately 2.30 pm on 8 August 2018 Mr Samsudeen and an associate went to the premises of the [redacted] shop at East Tamaki. While in the shop Mr Samsudeen spoke with a staff member in relation to purchasing a 10 inch knife. He stated he had viewed it online and advised he wanted a long knife. Mr Samsudeen picked up the knife from inside the cabinet, held it and checked the blade. He discussed the quality of the knife with a staff member prior to putting the knife in its sheath, handing it to them stating he would take it.

[38] The knife was the same model as the knife formerly located at Mr Samsudeen's address on 20 May 2017. It was effectively a replacement for the knife seized by Police that day. Mr Samsudeen paid the full cash price of \$39 and requested that the knife be couriered to his address, providing his name, address and mobile. In explanation to the shop attendant for having the knife couriered he said he did not want to take the knife at that time because as a dark man people might think he was a bad person.

[39] To prove this charge the Crown must prove beyond reasonable doubt that:

- (a) Mr Samsudeen was in a public place;
- (b) Mr Samsudeen knowingly had a knife "with him";
- (c) Mr Samsudeen had no lawful authority for having the knife; and
- (d) Mr Samsudeen had no reasonable excuse to have the knife.

[40] Ms Sellars accepts the shop was a public place. But she submitted that the prosecution could not establish that Mr Samsudeen had the knife "with him" or that he intended to possess it in a public place. For the knife to be with him "there must be a very close physical link and a degree of immediate control" over it.⁶ Possession was not enough. Ms Sellars accepted there was a degree of control but submitted that

⁶ *R v Manapouri* [1995] 2 NZLR 407 (CA) at 417, citing *R v Kelt* [1977] 1 WLR 1365 (CA).

Mr Samsudeen did not want the knife in a public place as evidenced by his request it be couriered to him.

[41] In *R v Manapouri* the Court of Appeal stated that whether a person “has with him” a weapon was a matter of fact and degree in the circumstances of each case.⁷ The Court referred with approval to the *R v Kelt* in which case Lord Scarman explained there must be a very close physical link and a degree of immediate control over the weapon for it to be with the defendant.⁸ Knowledge the weapon was present was required.

[42] In this instance Mr Samsudeen physically handled the knife and then purchased it. He had immediate control over it. He bought it, it was his and he directed the shop keeper to courier it to his address. There is sufficient evidence that he knowingly had the knife with him, at least for a time in a public place.

[43] On the face of the surrounding circumstances which include the alleged offensive material on the internet, some of which depicts the use of knives such as that purchased by Mr Samsudeen, a properly directed jury could infer, in the absence of evidence to the contrary, that Mr Samsudeen had no lawful authority or reasonable excuse for having the knife. The evidence of his internet posts are sufficient to negate that suggestion.

[44] It is relevant that over the preceding days his searches included a number of posts, such as:

- safety and security guidelines for lone wolf mujahedeen;
- islamic state dress;
- enemies of allah;
- isis allegiance;

⁷ *R v Manapouri*, above n 6.

⁸ *R v Manapouri*, citing *R v Kelt*, above n 6.

- heros of the Islamic state; and

there were also other videos providing instruction on the use of the knife and footage of attempted decapitation using a hunting knife.

[45] The evidence that is currently available could support a finding that Mr Samsudeen had the knife with him, at least for a short period of time, whilst in the shop which was a public place, and that there was no lawful authority or reasonable excuse for him having the knife. Of course, Mr Samsudeen could advance an innocence explanation for possessing it, but that would be for trial.

[46] I consider there is sufficient evidence for count 2 to go to the jury.

Summary/result

[47] The result is that Ms Samsudeen is discharged under s 147 of the CPA in relation to charges 1 and 3. The application in relation to charge 2 is dismissed.

Venning J