21/95

SUPREME COURT OF VICTORIA

MILNE v O'NEILL

Ashley J

12, 13 September 1995

CRIMINAL LAW – GOING EQUIPPED FOR THEFT – POSSESSION OF KEYS ADAPTED FOR THEFT – WHETHER OPEN TO MAGISTRATE TO CONVICT: *CRIMES ACT* 1958, S91(1), (3).

Section 91(1) of the *Crimes Act* 1958 (Act) provides:

> "A person shall be guilty of an offence if, when not at his place of abode, he has with him any article for use in the course of or in connexion with any burglary, theft or cheat."

1. The gist of the offence created by s91(1) of the Act is that a person when not at his place of abode is guilty of an offence by having with him an article for the purpose or intent of committing at some future time a burglary, theft or cheat.

2. Where a person when not at his place of abode was found in possession of keys which had been altered or adapted and could be used for committing theft, it was open to a magistrate to be satisfied that the person was guilty of an offence against s91(1) of the Act.

ASHLEY J: [1] The appellant, Stephen John Milne, was charged:

> "That at Thornbury on the 6th day of February 1995 did, not being at his place of abode, had with him an articles, one pair of gloves, one screwdriver, two small torches and five keys, for use in the course of and in connection with theft".

The charge as thus detailed was not a tribute to the use of the English language, but it in substance alleged that the appellant was guilty of an offence against s91(1) of the *Crimes Act* 1958. The matter came on for hearing before a Magistrate in the Magistrates' Court at Preston on 1 June 1995. After a hearing in which evidence was given by Senior Constable Michael John O'Neill, the respondent (who was the informant below), by Senior Constable Peter Turnbull and by the appellant, the learned Magistrate found the charge proved. The appellant was sentenced to an imprisonment term of seven days, that sentence being wholly suspended under s27 of the *Sentencing Act* 1991, the operational period being 12 months. Additionally, a fine of $200 was imposed and an order was made that items seized be forfeited and destroyed.

The appellant now appeals on a question of law pursuant to s92(1) of the *Magistrates' Court Act* 1989. Today, I granted leave to the appellant to amend questions of law set out in an order made by Master Evans on 27 June 1995. The questions of law in their amended form are as follows:

> "(a) No reasonable Magistrate could have concluded on the evidence before the Court that the keys found in the possession of the appellant were made or adapted for use in the course of or in connection with theft;
>
> (b) The Magistrate erred in applying s91(3) of the *Crimes Act* 1958 so as to direct himself **[2]** that proof that the appellant had modified keys with him was sufficient evidence to establish that the appellant had the keys with him for use in a theft.
>
> (c) No reasonable Magistrate could have concluded on the evidence before the Court that the defendant had keys with him which were intended to be used in the course of a theft".

The facts out of which the charge arose are of short compass and are essentially not in debate. At about 2:30am on Monday, 6 February 1995, Senior Constables O'Neill and Turnbull were performing routine police duties in the Northcote area. They observed the appellant, dressed

predominantly in black, riding his pushbike in a northerly direction in Victoria Road, Thornbury. That was quite close to the appellant's residence. The police officers stopped the appellant and asked him for his name and address. Thereafter, presumably in response to enquiry, the appellant produced two small torches and a screwdriver from the right-hand pocket of his tracksuit pants. He was observed to have a pair of gloves protruding from the left-hand pocket of his tracksuit pants. Somewhat later, the appellant was searched and in some pocket was found a keyring containing five keys. The keys were consistent with their being car keys and Mr O'Neill gave evidence that in his opinion they had been filed down. The appellant told the police officers that at the time of his being stopped he had been going home. He told them that he had been to a 7-Eleven store to get a drink.

It was conceded in cross-examination by the respondent that only two of the five keys appeared to be filed or worn down. It was further conceded in **[3]** cross-examination by the respondent that he had no evidence that the appellant intended to use the items in his possession for any future theft; nor that he had so used them for any recent theft. Further as to the keys, evidence was given by the respondent that keys which have been filed down are commonly used for gaining unauthorised access to cars. It is common ground that the keys were inspected by the learned Magistrate. I should refer to one other aspect of the respondent's evidence. It appears that in consequence of some conversation that he had with the appellant (the details of which conversation were the subject of objection and did not get into evidence) the respondent attempted to unlock with the keys a car to which his attention had been directed by the appellant, but was unable to do so. The evidence of the respondent was in essence corroborated by the evidence of Senior Constable Turnbull.

The appellant, as I have said, gave evidence. He told the learned Magistrate that on the 6th of February 1995 – that must be an error; it must have been a reference to the preceding day – he had been repairing his bike, had been riding it around, and had his torch and screwdriver in case anything went wrong with it. As to the keys, he said that they belonged to one of his friends, and that they were for that friend's motor vehicle which was at his premises. He said that he had received the keys that day - again, he must have been referring to the previous day – after he and his friend had been working on the car and changing the locks. He gave evidence that the keys did not appear to him **[4]** to be filed, and that in his opinion the keys were worn down because they were old keys. He denied filing down the keys. Having, as the parties agreed I should, inspected the keys myself, as did the Magistrate, it is not at all difficult to believe that the Magistrate would have been unimpressed by the appellant's evidence that the keys did not appear to him to be filed.

The learned Magistrate made a finding beyond reasonable doubt that the keys had been altered or adapted. It was not contended for the appellant before me that this finding had not been open. In so finding, of course, the learned Magistrate must have rejected the evidence of the appellant to which I referred a moment ago. The learned Magistrate further found that the alteration or adaptation was such that the keys could be used for committing a theft. That was doubtless a reference to s91(3) of the *Crimes Act,* which reads:

> "Where a person is charged with an offence under this section proof that he had with him any article made or adapted for use in committing a burglary theft or cheat shall be evidence that he had it with him for such use".

The gist of the offence created by s91(1) is that a person when not at his place of abode is guilty of an offence by having with him an article for use, by which is meant for the purpose or the intention, of the commission of a burglary theft or cheat. The purpose or intention must relate to the future. It need not be an intention or purpose to act in such a way in the immediate future. In the present case, the fact that the appellant was apparently close to his home and heading in that direction **[5]** did not oblige the Magistrate to determine, if there was otherwise evidence to support the commission of the offence, that the offence had not been committed.

Subs(3) of s91 is an evidentiary provision. Where certain facts are proved, they constitute evidence of the purpose or intention required by subs(1). Subs(3) does not require proof that the article made or adapted for use in committing a burglary theft or cheat was intended in the given case to be used in such a way. What is required to be proved is that the article, in this case adapted for use, was such as might objectively be employed in committing a burglary theft or cheat.

It was submitted by Mr Lavery of counsel, in relation to the first question of law, that the Magistrate could not have been satisfied that the keys had been adapted for use in committing a burglary. That was so, he said, because there was no evidence that the keys were to be used for such a purpose in this case. That was, for reasons to which I have adverted, a submission not based upon a correct reading of subs(3) of s91. It follows that question of law (a) must be resolved in favour of the respondent.

The gist of the matter raised by question of law (b) is that the learned Magistrate erred by treating proof that the keys were "an article adapted for use in committing a burglary" within s91(3) as being proof necessarily that the offence created by s91(1) had been made out. Counsel for the appellant particularly relied upon portions of para 10 of the affidavit of Chester Metcalfe sworn 23 June 1995 in support of the appeal. The portions to which he referred were these. I have referred to them **[6]** briefly already.

> "His Worship determined that pursuant to s91(3) proof that the appellant had the modified keys with him was sufficient evidence to establish that the appellant had the keys with him for use in a theft. His Worship accepted that the other items were on the appellant for a legitimate purpose. He was not, however, prepared to make such a finding in relation to the car keys and found that the keys were in Mr Milne's possession and, as such, subs(3) of s91 made him liable for the offence of going equipped to steal".

If the Magistrate had determined that proof that the appellant had with him an article adapted for use in committing a burglary for the purposes of subs(3) necessarily meant that the plaintiff must be found guilty of the substantive offence under subs(1), he would doubtless have misdirected himself. The question to be resolved is whether, on the quite scanty material before me, what his Worship is reported as saying should be regarded as demonstrating that he erred in such a way. The matter is not free from doubt; but, overall, I am of opinion that his Worship did not misdirect himself in the manner suggested. It seems clear that the learned Magistrate did consider the conflict in evidence that existed with respect to the keys, as well as with respect to the other items. Concerning some items, he apparently concluded that either they did not fall within s91(3), or that if they did, a balancing out of evidence led to a conclusion that the informant had not made out the charge in respect of them.

Concerning the keys, the learned Magistrate made a finding that brought them within s91(3). He said that he was not prepared to conclude that the appellant had the keys with him for legitimate purposes. That seems to me **[7]** to imply that, having found that possession of the keys brought subs(3) into play, he balanced the evidentiary effect of that subsection against the evidence that the appellant had given as to the circumstances in which he had come into possession of the keys. Such a balancing exercise would simply not have been undertaken had the Magistrate regarded the proof that the keys fell within subs(3) as being conclusive of guilt of the substantive offence. It follows that, in my opinion, question of law (b) must be resolved in favour of the respondent. No separate argument was advanced in respect of question of law (c). There is no basis upon which it can be upheld.

It remains to make observations upon two matters. First, the questions of law as originally framed doubtfully raised the misdirection point. If they did not, then they were an invitation to this court to say that there was no evidence that would support the critical findings of the learned Magistrate. The purpose of the s92 procedure is to agitate in this court questions of law; not to turn this court into a venue for what is, in effect, a retrial of the general issues. In a criminal case such as this an unsuccessful defendant has a general right of appeal. It is to the County Court. Where the gravamen of an unsuccessful defendant's complaint is as to findings of fact, the proper place for that complaint to be agitated and the way in which it ought to be agitated is in the County Court by way of appeal.

There are few cases in which it can be said that there was simply no evidence to support a particular **[8]** finding. It is undoubtedly true that a finding totally unsupported by evidence constitutes an error of law and, as such, may be the subject of appeal upon a question of law. But too often, in my experience, matters are being brought before this court via s92 where, despite them being framed as questions of law, they are, as I said a few moments ago, simply an invitation to retry the facts.

I should make it clear that what I have said about this undesirable practice does not extend to the misdirection point that was clearly framed by Mr Lavery today. When I read the papers before coming into court it was that point which seemed to me to shine out of the material; not to say that it would be successful, but rather, that it was a point worthy of being agitated. It would have behoved those who framed the questions of law submitted to the Master to have clearly identified the one question that appeared truly to arise and to require consideration by this court.

The second matter to which I should refer is this. The matter was fixed for hearing yesterday. It ought to have been heard yesterday, and should have been completed yesterday afternoon. It did not come on for hearing yesterday because there had been what is best described as chaos in the police station to which the appeal papers were delivered. That meant that yesterday afternoon the respondent was not represented and did not appear. Had it not been for concerns that I had about the way in which service had been effected, the matter might well have been disposed of yesterday in the respondent's absence. I do not attach blame to the respondent personally for what occurred; but certainly, the effect of the chaos to which **[9]** I have referred has meant that the appellant's side has been brought here for a second day and the court's time has been occupied for a second day. It is the fact that the court has more business than it can keep up with. Circumstances such as have occurred in this matter make more difficult the already difficult task of dealing with the work that must be dealt with. The respondent's side is deserving of some criticism in this matter, and I do make that criticism of it. Returning to the subject matter of the appeal, it appears to me that the proper resolution of the matter is that the appeal be dismissed.

ORDER: Appeal dismissed.

APPEARANCES: For the Appellant: Mr J. Lavery, counsel. Solicitors for the Appellant: Toop, Harris & Metcalfe. For the Respondent: Mr D. Just, counsel. Solicitors for the Respondent: Office of Director of Public Prosecutions.
