51/80

SUPREME COURT OF VICTORIA

TAPAI v KELLY

Gray J

15 July 1980

CRIMINAL LAW – OFFENSIVE WEAPON IN PUBLIC – KNIFE – NO CASE SUBMISSION UPHELD – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *VAGRANCY ACT* 1966, S6(1)(e).

K. attended a cinema armed with a knife which he said was his work knife and he used it for scraping plastic. The knife had a short sharp blade and was about 20cms in length. When K. was initially approached by the police officer, he denied that he had a knife in his possession. Later when interviewed, K. said he carried the knife for protection in case he got into a fight. The Magistrate upheld a no case submission and dismissed the charge. Upon appeal—

HELD: Dismissal set aside. Remitted to the Magistrates' Court for further hearing.
1. It was not suggested that the knife in question was a weapon which was offensive *per se*. Accordingly, the prosecution had to show that the circumstances were such as to demonstrate that an otherwise innocent knife fell into the category of an offensive weapon.

2. It was sufficient for the prosecution to lead evidence that K. intended to use the knife to inflict injury upon another person in the event that K. became engaged in combat with that other person. In this context, it is necessary for the prosecution to lead evidence that K. anticipated such a combat as a reasonable possibility and that the combat could have been avoided by K. had he wished.
***Wilson v Kuhl* [1979] VicRp 34; (1979) VR 315; and**
***Washington v Rangis* (unrep, VSC, Little J, 12 September 1973), followed.**
***Rowe v Conti; Threlfall v Panzera* [1958] VicRp 87; (1958) VR 547; [1958] ALR 1038, distinguished.**

3. At the time the 'no case' submission was made, the Magistrate was not called upon to make a personal evaluation of the evidence or to ask himself what inferences he would draw from the evidence. The question was whether there was evidence which, if accepted, could satisfy a reasonable tribunal of the guilt of the accused. It is a question of law. The Magistrate to whom a submission of no case is made, may have formed the view that the evidence supporting the prosecution case is quite unacceptable to him. But if the evidence, if accepted, provides a reasonable basis for a finding of guilt, he must reject a submission of no case to answer. The situation is quite different if the defendant then elects to call no evidence. The Magistrate can then give full effect to his personal views of the weight (or lack of weight) of the evidence. However, in such a case, it would be open to the Magistrate to consider the significance of the defendant's failure to give evidence.
***May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671, applied.**

4. It was not open to the Magistrate to rule that there was no case to answer. The circumstances in which K. was found armed and the admissions made by him were such as to justify a reasonable tribunal in concluding that the knife was an offensive weapon. To be more particular, it was open to the tribunal to infer that K. went to the theatre in anticipation of voluntarily engaging in combat with some person or persons. It was open to infer that K. armed himself and his companion with a knife to be used in the anticipated combat. It was further open to conclude that the anticipated combat was one that could have been avoided by K. had he wished. Furthermore, K's false denial that he had a knife could be legitimately used by the tribunal to infer a consciousness of guilt on the defendant's part.

GRAY J: This is the return of an order nisi to review the dismissal of an information by the Magistrates' Court at Melbourne on 13 June 1978. The information of George Tapai ("the informant) charges Glen Michael Kelly ("the defendant") that on 1st June 1979 he was found armed with an offensive weapon, to wit a knife, in a public place.

At the close of the case for the prosecution, counsel for the defendant submitted that there was no case to answer. The learned magistrate upheld the submission and dismissed the information. The informant obtained an order nisi to review the Magistrate's decision. It is only

necessary to refer to Ground 3, which reads:

> "3. On the evidence, the Stipendiary Magistrate ought to have held that there was a case for the defendant to answer.''

The only evidence before the Magistrate was that of the informant. He swore that at about 8.15 pm on 1st June 1979, he went to the Forum Cinema in Flinders Street. A film called "Warriors" was being shown for the first time. It was a film portraying wars between rival gangs. The informant saw the defendant buy tickets and then enter the cinema with another man. The informant approached the defendant and asked the defendant if he had a knife in his possession. The defendant denied that he had. Upon being asked to turn out his pockets, the defendant produced a knife from his rear pocket. He explained that it was his work knife and that he used it for scraping plastic. The following conversation then ensued:

"Q. Why have you got the knife here with you tonight?
A. For protection.
Q. What do you mean for protection?
A. In case I got into a fight.
Q. Do you mean to tell me that if you got into a fight tonight, you would use the knife to inflict injury to another person.
A. Yes, if necessary.
Q. When did you purchase the knife?
A. I only just got it today. I had another one which I gave to my mate in case we get into a fight tonight."

It is necessary to set out part of the record of interview: (taken later at Police Station) —

"Q. Where were you at 8.20 pm. tonight?
A. At the picture theatre showing Warriors.
Q. What were you going to do at the theatre?
A. Watch the movie.
Q. What was the movie about?
A. Bikies and other gangs.
Q. Do you agree that at the theatre you had in your possession this knife? (indicating to the knife)
A. Yep, yes.
Q. What were you going to do with the knife at the theatre?
A. Nothing.
Q. Why did you take the knife to the theatre?
A. To protect myself.
Q. What do you mean to protect yourself?
A. Against any anything that might have you know.
Q. What do you mean by that have you know?
A. Tried to bash us.
Q. I put it to you that if you had been in a fight any time throughout the night, you would have used the knife to protect yourself, what have you to say to that?
A. Yes.
Q. Did you go to the theatre tonight prepared to have a fight?
A. We were expecting it, yes.
Q. Have you ever used this or any other knife for self-protection?
A. No.
Q. Would you have used this knife to inflict an injury on any person if you had to?
A. If it was necessary."

The knife was tendered in evidence at the hearing. It has a short sharp blade and a long handle. Its over-all length is about 20 centimetres. It was not disputed that it was a knife that could be used for a number of innocent purposes. At the close of the informant's case, counsel for the defendant submitted that there was no case to answer. He founded his submission on the judgment of Gavan Duffy J in *Rowe v Conti; Threlfall v Panzera* [1958] VicRp 87; (1958) VR 547; [1958] ALR 1038. The substance of the defendant's submission was that the knife was not an "offensive" weapon but was a " defensive" weapon.

The prosecutor drew the learned Magistrate's attention to the unreported judgment of Little

J in *Washington v Rengis* (12/9/1973) and of McGarvie J in *Wilson v Kuhl* [1979] VicRp 34; [1979] VR 315 (MC75/1978). He submitted that the defendant had been found armed with a weapon which he intended to use in an anticipated combat with other youths and that, accordingly, the knife was an offensive weapon. The learned Magistrate accepted the submission of counsel for the defendant and dismissed the information. He said that the weapon was a defensive, not an offensive weapon in that he found that it was not offensive *per se*, nor was there any evidence before him of an intention to use it for the purpose of attack. It was not suggested that the knife in question was a weapon which is offensive *per se*. Accordingly, the prosecution had to show that the circumstances were such as to demonstrate that an otherwise innocent knife fell into the category of an offensive weapon.

In this connection, it is important to note that *Threlfall's case* was decided under s69(i)(f) of the *Police Offences Act* 1957. This charge is laid under s6(i)(e) of the *Vagrancy Act* 1966. In *Washington's case*, Little J drew attention to the differences in language between the two sections and pointed out the way such differences affected the reasoning of Gavan Duffy J in the earlier case. In *Washington's case*, Little, J stated the test to be applied under s6(i)(e) in the following terms:

> "The expression 'offensive weapons' as used in s6(1)(e) of the *Vagrancy Act* is not, in my opinion, confined to weapons the ordinary or common use of which is for the purposes of aggression or causing injuries. Such objects may be described as offensive weapons *per se* e.g. a knuckle duster, as in *Miller v Hrvojevic* [1972] VicRp 31; [1972] VR 305; and *Evans v Wright* (1967) Criminal Law Review 466, or the loaded rubber cosh in the Scottish case of *Grieve v MacLeod* (1967) SC (J) 32. Quite apart from that class, however, a weapon or instrument capable of inflicting injury in combat may be an offensive weapon or instrument within s6(1)(e) of the *Vagrancy Act*, even though its normal or ordinary use is for quite innocent purposes. Such a weapon or instrument is an offensive weapon if the person found armed with it had then any intention to use it for the purposes of combat or attack. See also *Pelvay v Brebner* (1963) SASR 36; *Considine v Kirkpatrick* (1971) SASR 73; and *Evans v Hughes* (1972) 3 All ER 412; [1972] 1 WLR 1452."

In *Wilson v Kuhl* [1979] VicRp 34; (1979) VR 315, McGarvie J stated the test (at page 320) in similar terms:

> "A person has an intention to use an article for an offensive or aggressive purpose if he has an intention to use it to inflict injury on another person in an attack on or in combat with another person."

The language used by McGarvie J shows that His Honour was not using the expressions "attack on" and "combat with " as synonymous expressions. I take it that a person "attacks" another when he initiates the violence. To engage in ''combat" includes the case of voluntary participation in avoidable violence whether the participant initiates the violent episode or not. The facts of the case in *Washington's case* strongly suggest that Little J was using the word "combat" in the sense I have indicated. I accept the observations of Little J and McGarvie J as correct statements of law as amplified in the way that I have endeavoured to express. In my opinion it was sufficient for the prosecution to lead evidence that the defendant intended to use the knife to inflict injury upon another person in the event that the defendant became engaged in combat with that other person. In this context, it is necessary for the prosecution to lead evidence that the defendant anticipated such a combat as a reasonable possibility and that the combat could have been avoided by the defendant had he wished.

In the well-known passage from *May v O'Sullivan* [1955] HCA 38; (1954) 92 CLR 654 at 658; [1955] ALR 671, the High Court said:

> "When at the close of the case for the prosecution a submission is made that there is 'no case to answer' the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law."

See also *Downward v Babington* [1975] VicRp 85; (1975) VR 872; (1975) 31 LGRA 314 per Gowans J at VR p875. In this case, the learned Magistrate expressed himself in a manner which suggests the possibility of some misunderstanding on his part. At the time the submission was made, the learned Magistrate was not called upon to make a personal evaluation of the evidence or to ask himself what inferences he would draw from the evidence. The question was whether there

was evidence which, if accepted, could satisfy a reasonable tribunal of the guilt of the accused. It is a question of law. When a similar submission is made to a Judge in a trial by jury, the Judge is not concerned with his own opinion. As to the weight of the evidence. He is only concerned to decide whether there is evidence which, if accepted by the jury, would justify a verdict of guilty. Nevertheless, the Magistrate to whom a submission of no case is made, has an identical question to decide. He may have formed the view that the evidence supporting the prosecution case is quite unacceptable to him. But if the evidence, if accepted, provides a reasonable basis for a finding of guilt, he must reject a submission of no case to answer.

The situation is quite different if the defendant then elects to call no evidence. The Magistrate can then give full effect to his personal views of the weight (or lack of weight) of the evidence. However, in such a case, it would be open to the Magistrate to consider the significance of the defendant's failure to give evidence. See *May v O'Sullivan* at p658. It was not, in my opinion, open to the learned Magistrate to rule that there was no case to answer. The circumstances in which the defendant was found armed and the admissions made by him were such as to justify a reasonable tribunal in concluding that the knife was an offensive weapon. To be more particular, it was open to the tribunal to infer that the defendant went to the theatre in anticipation of voluntarily engaging in combat with some person or persons. It was open to infer that the defendant armed himself and his companion with a knife to be used in the anticipated combat. It was further open to conclude that the anticipated combat was one that could have been avoided by the defendant had he wished. Furthermore, the defendant's false denial that he had a knife could be legitimately used by the tribunal to infer a consciousness of guilt on the defendant's part.

The Magistrate, when he had the final issue before him, would not be bound to come to any of the above conclusions; but those conclusions were, in my opinion, open to a reasonable tribunal. I suspect that upon this submission the Magistrate did give effect to personal opinions as to the weight of the evidence. This, as I have indicated, he was not entitled to do. Basing himself upon what was said by McGarvie J at p326-327 of *Wilson v Kuhl*, Mr Slim, of counsel for the defendant, submitted that the learned Magistrate may have dismissed this information in the exercise of his discretion to dismiss an information where the evidence is so unsatisfactory as not to warrant a conviction. The Magistrate doubtless had such a discretion, but I am quite satisfied that he did not exercise it here. The language he used in dismissing the information is entirely inconsistent with the exercise of such a discretion, nor was there, in my opinion, any proper basis for its exercise. I am satisfied that, as a matter of law, the learned Magistrate should have ruled that there was a case to answer. The order dismissing the information must be set aside and the information remitted to the Magistrates' Court at Melbourne for further hearing in accordance with this judgment.
