27/06; [2006] VSC 299

SUPREME COURT OF VICTORIA

DPP v WOODWARD

Cavanough J

26 May, 14 August 2006 — (2006) 164 A Crim R 22

CRIMINAL LAW – CHARGE OF AGGRAVATED BURGLARY – AGGRAVATION ALLEGED TO BE CONSTITUTED BY ACCUSED HAVING AN OFFENSIVE WEAPON IN HIS SHORTS NAMELY, A POCKET KNIFE – POCKET KNIFE NOT AN OFFENSIVE WEAPON *PER SE* – CHARGE DISMISSED – WHETHER PROSECUTION REQUIRED TO PROVE THAT THE CARRYING OF THE KNIFE WAS FOR THE PURPOSE OF BURGLARY – WHETHER MAGISTRATE CORRECT IN FINDING THAT THE POCKET KNIFE WAS NOT AN OFFENSIVE WEAPON IN THE CIRCUMSTANCES: *CRIMES ACT* 1958, S77.

Section 77(1A) of the *Crimes Act* 1958 ('Act') provides: For the purposes of sub-section (1)—

> 'offensive weapon' means any article made or adapted for use for causing injury to or incapacitating a person, or which the person having it with him or her intends or threatens to use for such a purpose.

W. entered a house by kicking in a window. He had with him in his shorts a pocket knife and a screwdriver. W. stole property from the house which he later sold. W. was arrested some time later and was charged with a series of offences including aggravated burglary contrary to s77(1) of the Act. The circumstance of aggravation was that W. had a weapon with him namely, the pocket knife. At the subsequent hearing, the magistrate dismissed this charge. Upon appeal—

HELD: Appeal dismissed.

1. *Wilson v Kuhl* [1979] VicRp 34; [1979] VR 315 establishes that a pocket knife of the kind in question in this case is not to be regarded as an "offensive weapon" for the purposes of s77 of the Act unless the person who has it intends to use it for the purposes of attack or combat, as distinct from self-defence.

2. In a case like the present involving a pocket knife or other household knife, there is substantial room for overlap between facts which would bear on the question of intention in relation to the definition of "offensive weapon" and facts which would bear on the question of purpose in relation to the suggested implied element of s77(1)(a). Indeed, the relevant time in both respects seems to be the time of the burglary. The magistrate was not in error in finding that he was not satisfied that W.'s general intention in carrying the knife went beyond self-defence or that W. had a specific intention to use the knife in the event that W. encountered someone in the course of the burglary.

CAVANOUGH J:

Introduction

1. Shortly before 9.00 am on 7 April 2005 the respondent, Mr Woodward, drove to Barrington Street, Kew in a car he had stolen about a week earlier. Intent on further theft, he entered a house in that street by kicking in a window. He had with him a pocket knife and a screwdriver. Both were contained within his shorts. He did not encounter anyone in the house. He found and took away a laptop computer and within the hour he had sold it for money. He was arrested by police that same morning and interviewed at some length. He told the police that he always carried the pocket knife with him, not only when he was committing a burglary. He said that he carried it "just in case something happens … someone attacked me or assaulted me or something like that". He denied emphatically that he would produce the knife if confronted by a person in a house he was burgling.

2. Mr Woodward was charged with a series of offences. The charges were later amended and supplemented. Ultimately, on 25 August 2005, Mr Woodward faced eight charges at the Melbourne Magistrates' Court. They included burglary, theft and possessing a controlled weapon (the pocket knife) and going equipped to steal. In addition he was charged with aggravated burglary, contrary to s77(1) of the *Crimes Act* 1958 ("*Crimes Act*"). The circumstance of aggravation was alleged to be that he had a weapon with him, namely the pocket knife. He pleaded guilty to the other seven charges but not guilty to aggravated burglary.

3. The learned Magistrate was not satisfied beyond reasonable doubt that the answers given by Mr Woodward to the police about the pocket knife were not truthful. Taking that into account, the Magistrate was not satisfied that the charge of aggravated burglary had been made out and dismissed it. He sentenced the respondent on the other charges. The informant is dissatisfied with the dismissal of the aggravated burglary charge.

4. Under s92 of the *Magistrates' Court Act* 1989 an appeal "on a question of law" may be brought to this Court from a decision of the Magistrates' Court in a criminal matter. Where the party dissatisfied with the decision is a member of the police force (as informant), any appeal can only be brought by the Director of Public Prosecutions on behalf of the informant: s92(2). In Mr Woodward's case Detective Senior Constable Callegaro was the informant, and the Director of Public Prosecutions brings this appeal on his behalf against the decision of the Magistrate to dismiss the charge of aggravated burglary.

The notice of appeal

5. An appeal under s 92 lies only on a question of law. The procedure for such appeals is governed by Part 3 of Order 58 of the *Supreme Court Rules*: r58.06. An appeal is instituted by filing a notice of appeal in the Trial Division: r58.07. The notice ought to set out or state, among other things, the question or questions of law upon which the appeal is brought and, concisely, the grounds of appeal: r58.08(1)(b)(iii) and (iv). The question(s) of law should be stated with precision; and the grounds of appeal should be the grounds on which the appellant contends that the Court should answer the question(s) of law in the appellant's favour: see Williams, Supreme Court Practice, para I 58.06.100 and cases there cited.

6. The notice of appeal in the present case does not meet these requirements. As the (one and only) question of law, it asks:

> "Did the learned Magistrate err in dismissing the charge of Aggravated Burglary, pursuant to section 77 *Crimes Act* 1958."

This does not identify a question of law with precision, or at all[1]. The (one and only) stated ground of appeal is also unsatisfactory. It reads:

> "The learned Magistrate erred in dismissing the charge of Aggravated Burglary, pursuant to section 77 *Crimes Act* 1958 despite the undisputed evidence that at the time of the commission of the burglary the Respondent was in possession of an offensive weapon."

Apart from the difficulty that there is no properly stated question of law to which this "ground" could relate, it is misleading in that, as the appellant ultimately acknowledged at the hearing before me, it is not true that there was "undisputed evidence" before the Magistrate that at the relevant time the respondent was in possession of an "offensive weapon". Further, the stated ground does not disclose the point which, at the hearing, turned out to be the appellant's real point, to which I will come.

7. However, the respondent did not take issue with the form of the notice of appeal, and its inadequacies were not the subject of any discussion at the hearing. Both parties filed written outlines of submissions in advance of the hearing, and they spoke to them at the hearing without complaining of any lack of notice of the arguments to be met. No doubt the notice of appeal could have been amended by leave.[2] However, for reasons I will explain, I think that this appeal must be dismissed in any event, and so I will not stay to consider what precise form of amendment of the notice of appeal might have been appropriate.

Relevant provisions of the *Crimes Act* 1958

8. Section 77 of the *Crimes Act* provides:

> "**77. Aggravated burglary**
> (1) A person is guilty of aggravated burglary if he or she commits a burglary and—
> (a) at the time has with him or her any firearm or imitation firearm, any offensive weapon or any explosive or imitation explosive; or
> (b) at the time of entering the building or the part of the building a person was then present in the building or part of the building and he or she knew that a person was then so present or was reckless as to whether or not a person was then so present.

(1A) For the purposes of sub-section (1)—
'explosive' means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him or her for that purpose;
'firearm' has the same meaning as in the *Firearms Act* 1996;
'imitation explosive' means any article which might reasonably be taken to be or to contain an explosive;
'imitation firearm' means anything which has the appearance of being a firearm, whether capable of being discharged or not;
'offensive weapon' *means any article made or adapted for use for causing injury to or incapacitating a person, or which the person having it with him or her intends or threatens to use for such a purpose.*
(2) A person guilty of aggravated burglary is guilty of an indictable offence and liable to level 2 imprisonment (25 years maximum)."
(Emphasis added)

9. The penalty applicable to aggravated burglary, namely level 2 imprisonment (25 years maximum), exceeds substantially that applicable to simple burglary, which is level 5 imprisonment (10 years maximum): see s76(3) of the *Crimes Act*.

10. The provisions of the Act that relate to burglary and aggravated burglary occur in the same Division and under the same heading ("Theft, robbery, burglary &c.") as those that relate to robbery (s 75) and armed robbery (s75A). Section 75A provides:

"**75A. Armed robbery**
(1) A person is guilty of armed robbery if he commits any robbery and at the time has with him a firearm, imitation firearm, offensive weapon, explosive or imitation explosive within the meaning assigned to those terms for the purposes of section 77(1).

(2) A person guilty of armed robbery is guilty of an indictable offence and liable to level 2 imprisonment (25 years maximum)."

It will be noted that s75A is similar in expression to s77 and that it contains an express cross-reference to s77(1). Further, the penalty for armed robbery (level 5 imprisonment) is the same as the penalty for aggravated burglary, and it exceeds that applicable to simple robbery (level 2 imprisonment) to the same extent as the penalty for aggravated burglary exceeds that for simple burglary.

The appellant's contentions
11. The appellant submits that the learned Magistrate proceeded on the basis that it is an element of the offence under s77(1)(a) of the *Crimes Act* that the burglar not only have with him or her a firearm, imitation firearm, offensive weapon, explosive or imitation explosive at the time of the burglary, but also that he or she have it with him or her for the purpose of the burglary. According to the appellant, the latter is neither expressly nor impliedly included as an element of the offence under s77(1)(a).

12. The appellant further submits that in the present case the Magistrate dismissed the charge because he was not satisfied that this putative element had been made out on the evidence. In this regard he relies on certain observations made by the Magistrate in the course of his Honour's oral reasons for decision (which were transcribed) and to which I will come.

13. The appellant does not submit that, but for this alleged error, the Magistrate would necessarily have convicted the respondent. Rather, he says, the matter should go back to the Magistrate for him to make a finding on another issue which the appellant (now) admits did arise, namely whether the pocket knife was an "offensive weapon" within the meaning of that expression as defined in s77(1A).[3] The appellant says that the Magistrate went straight to the suggested "purpose" element without stopping to determine whether or not the pocket knife was an offensive weapon as defined. On the authority of *Wilson v Kuhl*[4] the appellant concedes that the pocket knife was not an "offensive weapon" in itself. In other words, he concedes that it was not an "article made or adapted for use for causing injury to or incapacitating a person" within the first limb of the definition. However he says that on the evidence it would have been (and would still be) open to the Magistrate to find, beyond reasonable doubt, that the pocket knife fell within the second limb, ie that it was an article "which the person having it with him or her intends or threatens to use for such a purpose". On the other hand, the appellant does not go so far as to

submit that the evidence was (or would be) such as to compel a finding (beyond reasonable doubt) that the pocket knife was an offensive weapon. (These submissions may be contrasted with the assertion in the notice of appeal that there was "undisputed evidence" that the respondent was in possession of an "offensive weapon".)

The respondent's contentions

14. The respondent denies that the Magistrate's reasoning should be characterised in the way complained of by the appellant. The respondent says that the Magistrate did, at least in effect, make a finding on the issue whether the pocket knife was to be regarded as an "offensive weapon", to wit, that he was not so satisfied (beyond reasonable doubt). It was on this basis, according to the respondent, that the Magistrate dismissed the charge. Accordingly, he says, there is no need in this appeal to determine the question whether it is an additional element of the offence under s77(1)(a) that the accused have the relevant article with him or her for the purpose of the burglary, or the question whether the Magistrate proceeded on the basis that it was. The respondent says that the appellant is really seeking to attack the Magistrate's finding of fact on the "offensive weapon" issue, which is not permissible in an appeal confined to a question of law. [5] The respondent did not argue, in the alternative or otherwise, that there is indeed in law an additional "purpose" element.

The appellant's contentions in reply

15. The appellant concedes that if the Magistrate did in truth make a finding that he was not satisfied that the pocket knife was to be regarded as an offensive weapon, then the appeal must fail. Otherwise he joins issue with the respondent's contentions.

Consideration

16. In my opinion, the respondent's contentions are in substance correct and the appeal should be dismissed accordingly.

17. The parties are divided as to the proper interpretation or understanding of the Magistrate's reasons. However the appellant has not sought to overturn the Magistrate's decision simply on the ground that his reasons are inadequate or ambiguous, and so the appellant must actually demonstrate error (of law) on the part of the Magistrate.[6]

18. Further, the appellant must show that the alleged error of law had a vitiating effect on the decision.[7] In other words, the appellant must at least show "that the decision may have been different if the error had not occurred".[8]

19. In seeking to ascertain the true basis or the true reasons for a decision of a court, it may be proper to look beyond particular statements contained in the reasons. In *Intertransport International Private Ltd & Anor v Donaldson & Anor*[9], Chernov JA (with whom Eames JA agreed) said[10]:

> "It may be that the basis for the decision can be inferred from the whole of the reasons for judgment, having regard to the circumstances of the case. As Gray J explained in [*Sun Alliance Insurance v Massoud* [1989] VicRp 2; [1989] VR 8 at 19],
>
> > 'The simplicity of the context of the case or the state of the evidence may be such that a mere statement of the judge's conclusion will sufficiently indicate the basis of a decision. ... In such cases, the foundation for the judge's conclusion will be indicated as a matter of necessary inference'.
>
> Whether a judgment sufficiently indicates the basis of the decision depends, as I have said, on the circumstances of the case, including how the case was conducted by the parties and, relevantly for present purposes, what were the principal issues in dispute between them."

20. In the present case, the true import of what the Magistrate said and did not say in his oral reasons can best be understood by reference to the way in which the case was conducted before him and the main issues that were fought out. This in turn requires some understanding of the main authorities to which the parties referred.

21. It was common ground that *Wilson v Kuhl*[11], although itself a case on the construction of the *Vagrancy Act* 1966, establishes that a pocket knife of the kind in question here is not to

be regarded as an "offensive weapon" for the purposes of s77 of the *Crimes Act* unless the person who has it intends to use it for the purposes of attack or combat, as distinct from self-defence.[12] This approach is supported by a passage in *R v Pope*[13] to which I will refer below.

22. In *R v Kolb & Adams*, the Victorian Court of Criminal Appeal referred to ss75A and s77(1) of the *Crimes Act* and proceeded[14]:

> "It has been decided by the Court of Criminal Appeal in England in relation to a statute *in pari materia* that the words 'has with him' mean 'knowingly has with him': *R v Cugullere* [1961] 1 WLR 858. But this is not all that the words in their context connote. The essence of the crime of robbery is stealing with the use of force or the putting of any person in fear of being subjected to force. 'Armed robbery' has the additional element of 'having with him' one of the weapons described in s75A. The use of force or the putting of a person in fear is still a necessary element. It would seem to follow therefore that the possession of a weapon would at least have to be for the purpose of the robbery. If a person committed a robbery and had at the time an imitation pistol concealed in a sealed package in an inside pocket of his clothing and no use was made of it during the robbery it is not to be supposed that the legislature intended that he should be guilty of armed robbery. The use of the word 'armed' must colour the words 'has with him' and they show in our opinion that the possession of the weapon must be for the purpose of the robbery."

(Emphasis added.)

23. In *R v Tommy Reid*[15], the Victorian Court of Appeal said[16]:

> "It is established that armed robbery is committed even if the weapon is not visible, provided it is available to be used by the offender; *R v Kolb & Adams*, unreported, Full Court of the Supreme Court of Victoria, 14 December 1979; per Young CJ, McInerney and Gobbo JJ; pp12-13. It might have been otherwise if the applicant had been for some reason unable to make any use of the weapon at the time of the offence, or if his possession of the weapon had been for some other purpose."

(Emphasis added.)

24. In *R v Nguyen*[17] the accused, in the course of stealing drugs from a pharmacy, threatened and tried to hit staff with a half-full plastic soft drink bottle. He was convicted of armed robbery and appealed, raising the question whether the plastic bottle was capable of being an offensive weapon. His appeal failed. The Court held that the offence is committed if a person commits a robbery and has with him at the time an article which that person then intends or threatens to use for the purpose of causing injury to or threatening another person.

25. In *R v Pope*[18], Callaway JA (with whom Phillips CJ and Batt JA agreed) said[19] that there was an "obvious affinity" between, on the one hand, the provisions of s77(1)(a) and the definition of "offensive weapon" in s77(1A) and, on the other hand, the provisions of s75A relating to armed robbery that were discussed in *R v Nguyen*, supra. His Honour proceeded (referring to a knife relevantly indistinguishable from the pocket knife involved in the present case):

> "It was common ground that a knife of that kind is not an offensive weapon in itself (compare *Wilson v Kuhl* [1979] VicRp 34; [1979] VR 315 at 320-322), so that there had to be an intention of the kind referred to in the second part of the definition of 'offensive weapon' and that intention had to exist at the time of entry. That would appear to follow from the definition and the words 'at the time' in s77(1)(a)."

26. Finally, in *R v Stones*[20], the English Court of Appeal considered the offence of aggravated burglary created by a statutory provision not relevantly distinguishable from s77(1) of the *Crimes Act*. The facts were very similar to those of the present case. The accused had been apprehended by police immediately after burgling a house. When searched, he was found to have a household knife in his pocket. When asked why he had it with him, he replied: "For self-defence, because some lads from Blyth are after me". It was held that if the accused knowingly had the knife with him at the time of the burglary with the intention of using it to cause injury to or incapacitate the lads from Blyth if he met them, the offence was proved. It was not necessary to prove the intention to use the knife to cause injury etc during the course of the burglary. The mischief at which the section was aimed was that if a burglar has a weapon which he intends to use to injure some person unconnected with the premises burgled, he may nevertheless be tempted to use it if challenged during the course of the burglary and put under sufficient pressure.[21]

27. It can be seen from the Victorian authorities, and from the terms of the relevant statutory provisions, that there would have been scope for the accused to argue, or for the Magistrate to form the view, that it was an implied element of the offence under s77(1)(a) that the accused have the relevant article with him or her for the purpose of the burglary. After all, on the face of it, there seems to be little reason to distinguish between s77(1) and s75A in that respect. However there are arguments to the contrary, and the appellant put them to the Magistrate and to me. He relied in particular on the presence of the words "armed with" in s75A and their absence in s77(1)(a). He also argued that *R v Stones* was indistinguishable and should be followed. He denied that *R v Stones* was in conflict with *Wilson v Kuhl* and with the passage from *R v Pope* cited above. He said that "carrying" offences were to be distinguished from "use" offences.[22] As indicated above, and for reasons which I will further develop below, I consider that I have no need to decide this issue.

28. The appellant also argued that in *R v Pope* the only basis to conclude that Mr Pope's pocket knife was an offensive weapon was his intention at the time of entry into the premises, as inferred from his actions immediately after entry. By contrast, the appellant said, in the present case there is ample evidence on which the Court could conclude that the pocket knife was "generally" an offensive weapon as discussed by McGarvie J in *Wilson v Kuhl*[23]. The evidence included the respondent's interview with the police, his carrying of the weapon to and from the premises, the concealment of the knife down the front of his pants (as distinct from his pocket) and the nature of the knife itself. Once again, I need not decide whether a pocket knife or household knife can ever be deemed to be "generally" an offensive weapon in the hands of a particular person. *R v Pope*, supra, seems to suggest the contrary, ie that in each case one must assess the situation as at the relevant time. In any event, all of the evidence was considered by the learned Magistrate and it did not lead him to find that the accused was "generally", or on the relevant particular occasion, in possession of an "offensive weapon". Absent some vitiating error of law I could not gainsay the Magistrate in this regard.

29. In a case like the present involving a pocket knife or other household knife, there is substantial room for overlap between facts which would bear on the question of intention in relation to the definition of "offensive weapon" and facts which would bear on the question of purpose in relation to the suggested implied element of s77(1)(a). Indeed, as just mentioned, the relevant time in both respects seems to be the time of the burglary. With these considerations in mind I turn to the actual course of the proceedings before the Magistrate.

The proceedings before the Magistrate

30. The only evidence before the Magistrate was the evidence contained in the hand-up brief. It was admitted by consent. No oral evidence was adduced. By prior agreement, the matter proceeded by way of a plea on the seven admitted charges and by way of a contest, in the form of oral argument by counsel, on the remaining charge of aggravated burglary. The same counsel appeared before the Magistrate as later appeared before me.

31. The hand-up brief included a transcript of an interview between the police and the respondent conducted on the day of the burglary in question (7 April 2005), after the respondent's apprehension. The critical questions and answers were as follows:

> "Q 154 Okay. Do you agree that you had a – a knife?
> A Yeah, yeah.
> Q 155 Whereabouts was that?
> A At the front of me pants.
> Q 156 Yeah. So, how long'd that been there?
> It's always there.
> Q 157 It's always there?
> A Yeah.
> Q 158 Okay. So, was the knife down the – well, why do you carry a knife down the front of your pants?
> A Just in case something happens.
> Q 159 Well, w-, what'd you mean 'something'? What'd you mean by 'something'?
> A Someone – something – someone attacks me, or something like that.
> Q 160 Okay.
> A Protect meself, s'pose.
> Q 161 Okay. So, you obviously don't sleep with it down your pants, do you?
> A No.

Q 162 So, where was it this morning when you woke up?
A Pardon?
Q 163 Where was it this morning when you woke up?
A On the bench.
Q 164 Okay. Di-, and – so you slept at 17 Palmer Street, this morning?
A Yeah.
Q 165 What time did you go out?
A I'm not sure.
Q 166 Roughly?
A About ei-, 8.30.
Q 167 Okay.
A Quarter to 9.00.
Q 168 And was – so, did you put your knife – the knife down your pants at that point?
A Uh huh.
Q 169 Sorry?
A Yep.
Q 170 Okay. A-, and did it come out of your pants at any time between when you put it in this morning and when you were arrested?
A Nah.
Q 171 Mm. So, was the knife down the front of your pants when you committed the burglary?
A Yeah. ...
Q 200 Just going back to the – the knife that you carry down your – your pants. Is there any particular reason why you – you carry a knife when you're committing a burglary?
A It's not just when I'm committing a burglary, it's at all times. Always carry a knife with me just in case something happens.
Q 201 Okay.
A ... someone attacked me or assaults me or something like that.
Q 202 Well, we'll just take it one step further, as far as that reasoning goes. If you were to commit a burglary and you're confronted by a person in the house. Would that be an occasion - - - ?
A Nah.
Q 203 When you might produce a knife?
A Nah, nah, nah, nah.
Q 204 Sorry?
A No.
Q 205 Can you say that for certain?
A Yeah. Yeah."

32. Before the Magistrate, Mr Regan, as counsel for Mr Woodward, repeatedly submitted that in the light of Mr Woodward's "intention" as revealed by these questions and answers the Magistrate should not find that the pocket knife was, at the relevant time, an offensive weapon within the meaning of s77(1A) of the *Crimes Act*.[24] In making these submissions, Mr Regan principally relied on *Wilson v Kuhl* and *R v Pope* rather than *R v Kolb & Adams* and *R v Tommy Reid*.

33. Initially, the Magistrate appeared to think that Mr Regan was or should be relying on the approach taken in *R v Kolb & Adams* and *R v Tommy Reid*. However he soon appreciated that there was also a dispute as to whether the pocket knife was to be regarded as an "offensive weapon" at all. This is clear not only from the Magistrate's responses[25] to the submissions referred to in the previous paragraph, but also from certain exchanges between the Magistrate and counsel for the informant, Mr Hughan. For example, at one point[26] the Magistrate interrupted Mr Regan and turned to Mr Hughan and discussed with him whether the knife was an "offensive weapon" within the definition. Mr Hughan effectively conceded, on the authority of *Wilson v Kuhl*, that the pocket knife should not be regarded as an offensive weapon "per se", ie within the first limb of the definition, and that it would be necessary to consider the second limb of the definition and the question of Mr Woodward's "intention".

34. Some of the debate between the Magistrate and counsel related specifically to the holding in *Wilson v Kuhl* that a person found armed with a carving knife intended to be used only in self-defence is not found armed with an offensive weapon.[27] Mr Hughan submitted that the concept of self-defence for this purpose should be restricted to its legal sense as expounded in *Zecevic v DPP*[28]. The Magistrate seemed unconvinced by this.[29]

35. At a relatively early stage, the Magistrate was fully alive to the fact that Mr Regan was putting his submission as a separate and preliminary point. For example, he said early on to Mr Regan[30]:

> "So what, your preliminary point is that under *Wilson v Kuhl* unless I'm satisfied that he carries the knife for an aggressive – intentionally for an aggressive purpose and not for any sort of – if as he says in his record of interview he carries it for self defence it's not an offensive weapon and the argument is lost there?"

Mr Regan replied: "That's right". On the other hand, the Magistrate twice[31] thereafter indicated that he thought that the question whether the knife was an offensive weapon, and the cases relating to that question, were largely "academic", because the real issue was whether the Crown could satisfy him beyond reasonable doubt that the accused had the knife on him specifically for the purpose of the burglary. However, a little later, after some school children had apparently come into the Court to observe proceedings, the Magistrate addressed them and said, among other things:

> "So the argument now is whether the burglary is aggravated by him allegedly being in possession of the knife. That involves questions of whether it's an offensive weapon. That involves questions of what purpose the Crown can satisfy me that the man had the knife and all of those sorts of matters."[32]

Later again, the Magistrate put to Mr Hughan, and Mr Hughan effectively conceded, that if the pocket knife was not an offensive weapon the prosecution must fail.[33]

36. It is true that the Magistrate repeatedly expressed the view that *R v Kolb & Adams* and *R v Tommy Reid* were important cases.[34] Mr Regan himself did refer in some detail[35] to *R v Kolb & Adams* and *R v Tommy Reid* and, perhaps encouraged by the Magistrate's enthusiasm for those cases, he sought in a sense to rely on them, but principally he said that they were distinguishable.[36] The very last submission he made was that "the Crown can't get up beyond reasonable doubt on the offensive weapon".[37]

37. After this extensive debate the Magistrate adjourned for a short time to consider his decision. It seems very unlikely that during that period he would have forgotten or overlooked that Mr Regan's main submission was that the informant had not proved that the accused's intention at the time of the burglary was to use the knife, or to threaten to use it, to cause injury to or incapacitate a person, and that therefore the informant had not proved that the accused had with him at the time of the burglary an "offensive weapon" as defined. In my view this background casts significant light on the meaning and import of the observations made by the Magistrate in the course of giving his reasons, to which I now turn.

The Magistrate's reasons for decision

38. The learned Magistrate began his reasons by referring briefly to certain common ground as to what the accused had done on the day in question. He then referred to the relevant part of s77(1)(a) of the *Crimes Act* and, significantly, he went on to recite in full the definition of "offensive weapon" in s77(1A). His Honour then said:

> "It's conceded by the prosecution that the knife in this case does not meet the words, 'Any article made or adapted for use for causing injury to or incapacitating a person' and so if it's an offensive weapon or if offensive weapon is relevant here, it can only be constituted by the second part of that definition being an article which the person having it with him intends or threatens to use for such a purpose."[38]

Next his Honour said that he would not go into the detail of all of the cases to which he had been referred but would state his conclusions. He continued:

> "In my view to establish this charge against the defendant the prosecution must satisfy me of the following: firstly, that the defendant at the time he entered into the residential premises did so with an intention to steal and secondly, that at the time he entered he was in possession of an offensive weapon in the sense that he had on his person an article which he either intended to use or intended to threaten to use to cause injury or to incapacitate a person inside the house if he was disturbed during the burglary."[39]

His Honour then referred to *R v Pope* at some length and went on:

> "I find this judgment helpful in resolving issues dealt with in argument in the following ways: (1) in my view the comment about 'obvious affinity' between s.75A and s.77(1) clearly supports my suggestion in argument to Mr Hughan that there did not appear to me to be a legitimate basis for suggesting that

> the cases of [*R v Kolb and Adams*], Court of Criminal Appeal of Victoria 14/12/1979 and *R v Tommy Reid*, Court of Criminal Appeal 7/4/1998 dealing with armed robbery and clearly requiring that for that offence at least the requirement that the possession of the weapon be for a purpose connected with the offence should not be applied to the offence of aggravated burglary but that the approach of the Court of Appeal in England [as] shown in *R v Stones* (1989) 1 WLR 156 should be adopted.
>
> In my view *Pope's* case is inconsistent with *Stones* on this point and I would of course follow *Pope's* case. In my view, [Mr Justice Callaway's] talking about the obvious affinity. In my view, it's clear authority that the argument relied on by Mr Hughan on the basis of *Stones'* case is not the law here in Victoria at least. In my view the prosecution must prove that at the time of entry the defendant was in possession of an offensive weapon and that he had the weapon for a purpose connected with the burglary as talked about albeit for armed robbery [in *R v Kolb & Adams*] and *Tommy Reid*.
>
> Even allowing for this, in argument a number of additional matters were raised. It seemed common ground that on the issue of offensive weapon the cases of *Wilson v Kuhl, Ryan v Kuhl*, (1979) VR 315 were pertinent but issues remain. What is the relevant time to look at the question of being in possession of an offensive weapon? The evidence might seek to establish that the defendant carries a knife for an aggressive purpose when going about his interactions in society and as such the defendant could be said to have been armed with an offensive weapon according to the principles of *Wilson v Kuhl* when he attended at the house. But what was required to prove that he also was in possession of the knife for a purpose connected with the burglary? Would it be enough to establish that although there was a doubt about whether he would use it to injure or threaten injury if disturbed during the course of the burglary, it was open to be satisfied that he took it to jemmy a window if he needed to or to cut something once inside the house.
>
> What I mean by that is it seemed in argument that arguably what was being suggested or what the law might allow for is that a person, if you put the burglary to one side, if a person could otherwise be said to be in possession of an offensive weapon outside the house, that that somehow could transfer and form part of the – you would commit an aggravated burglary if you then used, in connection with the burglary, that offensive weapon, albeit not in a way to threaten or injure someone. But again in my view *Pope's* case makes it clear what is required. The question of the defendant's intention in possessing the knife is not in the air so to speak as to time. **What is required given the particular knife in this case on this issue is proof beyond reasonable doubt that at the time of entry into the premises with an intent to steal the defendant 'had with him an offensive weapon' in the sense that he was in possession of an article which he either intended to use or intended to threaten to use to cause injury to a person inside the house if he was disturbed during the burglary.**
>
> I think *Pope's* case just makes this as clear as it can possibly be. I don't think the law is at all unclear in this matter. I think it is very much as I thought really at the time a matter of – I take that back. **It's probably been clarified that it really is a question of looking at the ingredients of what might make an offensive weapon but I think Pope's case, Callaway J's decision is very, very clear. So am I satisfied that at the time he entered with an intent to steal he was in possession of an article which he either intended to use or intended to threaten to use to cause injury to a person inside the house if he was disturbed during the burglary**."[40] (Emphasis added)

39. His Honour then closely and carefully examined Mr Woodward's record of interview. He stressed Mr Woodward's vehement denial that the knife would have been produced if he had encountered someone in the house. His Honour said[41] that he was "certainly" not satisfied beyond reasonable doubt that the answers given by the accused were not truthful. I would infer from this that his Honour was not satisfied that Mr Woodward's general intention in carrying the knife went beyond self-defence, and it is clearer still that his Honour was not satisfied that Mr Woodward had a specific intention to use the knife in the event that he encountered someone in the course of the burglary. His Honour concluded:

> "Ultimately I'm not satisfied that the defendant had possession of the knife at the time of the burglary with the requisite intention to use it either to – if the occasion arose to threaten a householder. I am not satisfied that on the evidence this is an aggravated burglary and the charge is dismissed."[42]

40. I acknowledge that at no stage during the giving of his reasons did the Magistrate explicitly and distinctly state a finding that he was not satisfied that the pocket knife was to be regarded as an "offensive weapon" within the meaning of section 77(1A). However I think that the Magistrate did ask himself the corresponding question, and that in effect he answered it, adversely to the appellant, without committing any vitiating legal error.

41. The best indication that the relevant question was asked is provided by the two passages towards the end of his Honour's reasons which are emphasised above. In those passages the word "intention" is used and the word "purpose" is not. The language closely reflects the definition of "offensive weapon" in s77(1A).

42. That the Magistrate went on to answer that very question, and that he answered it adversely to the appellant, is indicated strongly by the language of the last two sentences of his Honour's reasons, set out above.

43. The appellant however points out that the Magistrate had also said, previously, that the prosecution had to prove "purpose" as mentioned in *R v Kolb & Adams* and *R v Tommy Reid*. The appellant further points out that in each of the three passages just mentioned the Magistrate refers to what the accused might have done had he been "disturbed during the burglary" or "if the occasion arose to threaten a householder". The appellant submits that these references indicate that the Magistrate was really asking himself, only, whether the accused had the pocket knife with him "for the purpose of the burglary", rather than the question posed by the definition of "offensive weapon".

44. I disagree. It may be that the Magistrate asked himself the "purpose" question, but even if he did, he also asked himself the "intention" question, in my opinion. Once the Magistrate held, as he did, that *R v Stones* was not good law in Victoria[43], and once he held, as he did, that it was necessary to consider the accused's intention not "in the air" but as at the time of entry into the premises[44], it was inevitable and proper that the Magistrate's attention should be focused on what the accused might do if disturbed during the burglary or if he came upon the householder. No-one other than a person whom the accused might encounter in the course of burgling the premises was of any relevance or significance for the purpose of assessing whether, at the time of entering the premises, the accused intended to use or to threaten to use the pocket knife to cause injury or to incapacitate.

45. As mentioned above, the appellant bore the onus of persuading me that the Magistrate erred in law in the manner alleged. I am not so persuaded. Indeed I am satisfied that, in the end, the Magistrate correctly understood and applied the definition of "offensive weapon" in s77(1A). It was common ground that the prosecution had to prove, at least, that this definition was met, whereas there was a dispute about the existence of the other suggested requirement. It would be very odd for a Magistrate in that situation to make no finding on an issue that admittedly arose (and was critical), whether or not the Magistrate also chose to venture a ruling on the other matter. As indicated above, I accept that the Magistrate may have concluded that both issues arose and that he may have actually decided both. But I am satisfied that he did at least decide the "preliminary" issue (as to whether or not there was an "offensive weapon").

46. Even if I am wrong in that regard, and even if I assume further –

- that the Magistrate dismissed the charge only because he was not satisfied that the accused had the pocket knife with him "for the purpose of the burglary"; and
- that as a matter of law there is no implied "purpose" element in the general words of s 77(1)(a),

nevertheless I would not be satisfied that the Magistrate's assumed error vitiated his decision. I would not be satisfied that the decision might have been different if the assumed error had not occurred. In the present case, given the Magistrate's actual decision, the hypothesis involves the proposition that the Magistrate asked and answered the wrong question. But, if so, he answered it adversely to the appellant. In other words the hypothesis involves the proposition that the Magistrate was not satisfied beyond reasonable doubt that the accused had the pocket knife with him for the purpose of the burglary. This would mean that the Magistrate was not satisfied (beyond reasonable doubt) that the accused was in possession of the pocket knife for any purpose connected with the burglary. On this hypothesis it would follow, in my opinion, that the Magistrate could not properly have been satisfied beyond reasonable doubt that the accused intended to use or to threaten to use the pocket knife for causing injury to or incapacitating a householder or anyone else at the relevant time. Further and in any event, as indicated in paragraph 39 above, I would infer that the Magistrate was not satisfied that the accused ever had the pocket-knife for "offensive" purposes as distinct from "self-defence" purposes. For these reasons the Magistrate would have been required to answer the "correct" question adversely to the appellant, and therefore would have been required to dismiss the charge in any event.

47. For the avoidance of doubt, I reiterate that nothing I have said above should be taken as expressing a view on the pure question of law whether there is an implied "purpose" element in the general words of s 77(1)(a).[45] The consideration and determination of that issue should await a case in which it truly arises.[46]

Conclusion

48. For these reasons I would dismiss this appeal. Subject to any submissions to the contrary, I would order the appellant to pay the respondent's costs.

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[1] See *Comcare v Etheridge* [2006] FCAFC 27 at [11]-[31] and cases there cited; (2006) 149 FCR 522; (2006) 227 ALR 75; (2006) 90 ALD 31; 42 AAR 335.
[2] See r58.08(3); compare Order 58 rule 13 of the *Supreme Court Rules* 1996 and *Barneveld v Hume City Council* [2004] VSC 350 (Redlich J) at [72]-[76].
[3] Transcript of argument, page 12 lines 3-5.
[4] [1979] VicRp 34; [1979] VR 315. See further below.
[5] *Dura (Australia) Constructions Pty Ltd v Girgin* [2002] VSC 449 at [5]-[6] and cases there cited; *Transport Accident Commission v Hoffman* [1989] VicRp 18; [1989] VR 197; (1988) 7 MVR 193; *DPP v Canty*, unreported, Supreme Court of Victoria (JD Phillips J), 20 August 1992 at p5.
[6] See *Portland Properties Pty Ltd v MMBW* (1971) 38 LGRA 6 at 18; *Rumpf v Mornington Peninsula Shire* Council (2000) 2 VR 76 at [8]; *Kuek v Wellens* [2000] VSC 326 (Gillard J) at [93]-[94]; *Barneveld v Hume City Council* [2004] VSC 350 (Redlich J) at [31]; cf *Day v Electronik Fabric Makers (Vic) Pty Ltd* [2004] VSC 24 (Nettle J) at [21]-[26]. In his reply, Mr Hughan for the appellant was inclined to concede that any ambiguity should be resolved in favour of the conclusion that supports the Magistrate's decision: see transcript page 51.
[7] *Rumpf v Mornington Peninsula Shire Council* (2000) 2 VR 69 (Balmford J) at [8]; *B Marsh Nominees Pty Ltd v Moonee Valley CC* (2004) 17 VPR 338 (Osborn J) at [29]-[31].
[8] *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 384 per Toohey and Gaudron JJ; see also at 353 per Mason CJ with whom Brennan J agreed; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1. See also *Department of Premier and Cabinet v Hulls* [1999] VSCA 117; [1999] 3 VR 331 at [9]; (1999) 15 VAR 360.
[9] [2005] VSCA 303.
[10] [2005] VSCA 303 at [19], and see at [45] per Eames JA; cf at [46] per Ashley JA. See also *Perkins v County Court of Victoria* [2000] VSCA 171; (2000) 2 VR 246 at 273; (2000) 115 A Crim R 528; *Day v Electronik Fabric Makers (Vic) Pty Ltd* [2004] VSC 24 (Nettle J) at [25].
[11] [1979] VicRp 34; [1979] VR 315.
[12] [1979] VicRp 34; [1979] VR 315 at 321-322.
[13] [2000] VSCA 108; (2000) 112 A Crim R 588 at 594.
[14] Unreported, Victorian Court of Criminal Appeal, 14 December 1979 at p 12.
[15] Unreported, Victorian Court of Appeal (Phillips, Charles and Buchanan JJ) 7 April 1998.
[16] Ibid, at 7.
[17] [1996] VICSC 49; [1997] 1 VR 551; (1996) 87 A Crim R 119.
[18] [2000] VSCA 108; (2000) 112 A Crim R 588.
[19] Ibid, at 594.
[20] [1989] 1 WLR 156.
[21] Ibid at 158, 160.
[22] MC transcript page 53. See also *R v Allamby* [1973] 3 All ER 126 [1974] 1 WLR 1494. Compare *R v Mason* [2006] NZCA 63 (11 April 2006) (Court of Appeal of New Zealand) at [1]-[11] and cases there cited.
[23] [1979] VicRp 34; [1979] VR 315 esp. at 321.
[24] See, eg, Magistrates' Court transcript page 6 lines 22-25, page 8 lines 5-13, page 9 lines 12-17, page 10 lines 17-22, page 12 lines 4-9, page 18 lines 20-23, page 19 lines 6-17, page 19 line 26 – page 30 line 8, and page 21 lines 5-14, page 29 lines 25-26, page 31 line 29 – page 32 line 5, page 58 lines 17-24 and page 59 lines 15-27 (among others).
[25] Which are included in the transcript passages referred to in footnote 24.
[26] MC transcript pages 12-14.
[27] See, eg, transcript page 19 line 25 – page 30 line 1, page 25 lines 20-25, page 7 line 26 – page 48 line 27.
[28] (1987) 162 CLR 654. See MC transcript page 48 line 2 and page 53 line 1.
[29] MC transcript page 52 lines 23-24.
[30] MC transcript page 19 line 26 – Page 20 line 1.
[31] MC transcript page 30 line 2 and page 31 line 27.
[32] MC transcript p 37.
[33] MC transcript page 47 lines 22-31.
[34] See, eg MC transcript page 5 lines 18-23, page 6 lines 11-13, page 7 lines 29-30, page 8 lines 9-12, page 9 line 29 – page 10 line 5, page 26 lines 4-7, page 28 lines 11-15, page 41 lines 13-17.
[35] MC transcript pages 25-36.
[36] MC transcript page 26 lines 15-31, page 36 lines 11-15.
[37] MC transcript page 61 lines 2-3.
[38] MC transcript page 64 lines 16-24.

[39] MC transcript page 65 lines 1-10.
[40] MC transcript pages 66-69.
[41] MC transcript page 74.
[42] MC transcript page 75.
[43] For present purpose it is unnecessary to decide whether the Magistrate was right to hold that *R v Stones* is not good law in Victoria. However it can at least be said that the decision seems to be out of step with *Wilson v Kuhl* supra insofar as it fails to distinguish between "offensive" and "defensive" uses for knives.
[44] As the passage from *R v Pope* cited above would seem to require.
[45] If there is such an element, it could, of course, have significance even in a case involving a firearm (as distinct from a household knife): cf *R v Kolb & Adams*, supra.
[46] Being, preferably, a case in which, unlike the present case, there is a contradictor of the proposition that no such element exists.

APPEARANCES: For the appellant DPP: Mr G Hughan, counsel. Office of Public Prosecutions. For the respondent Woodward: Mr ME Regan counsel. Dowling McGregor Thomas, solicitors.
