2/97

SUPREME COURT OF VICTORIA — COURT OF APPEAL

MILNE v O'NEILL

Tadgell, Ormiston and Phillips JJA

12 September 1996

CRIMINAL LAW – GOING EQUIPPED TO STEAL – PERSON OBSERVED AT 2:30AM RIDING BICYCLE IN POSSESSION OF FILED-DOWN CAR KEYS – WHETHER OPEN TO MAGISTRATE TO FIND THAT KEYS ADAPTED FOR USE IN COURSE OF OR IN CONNEXION WITH THEFT – "ADAPTED" – MEANING OF: *CRIMES ACT* 1958, S93(1), (3).

Section 91 of the *Crimes Act* 1958 ('Act') provides (so far as relevant):

> "(1) 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.
>
> (3) 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."

M. was observed by O'N., a police officer, at 2:20am dressed predominantly in black and riding a bicycle a short distance from his home. When intercepted, M. produced 2 small torches and a screwdriver from his tracksuit pocket and was observed to have a pair of grey gloves in another pocket. When M. was searched, a key ring with 5 keys was discovered in a pocket of his tracksuit. Two of the keys had been filed down. M. was later charged with an offence under s91(1) of the Act. In evidence, M. said that the keys were for use in a friend's motor vehicle which was at M.'s premises. In convicting M., the magistrate found that the keys had been altered or adapted and could be used for committing a theft. Upon appeal—

HELD: Appeal dismissed.
1. Section 91(3) is an evidentiary provision. Where certain facts are proved, they constitute evidence of the purpose or intention required by sub-section (1). Sub-s(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.

2. In the circumstances it was open to the magistrate to conclude that the keys found in M.'s possession had been adapted for use in committing theft and to hold that the offence had been proved.
***Milne v O'Neill* MC21/95, affirmed.**

3. Per Tadgell J. The expression "adapted" in sub-s(3) appears to be used in contrast to "made". "Adapted" would be apt at least to refer to an article which, while not made – that is to say brought into existence – for such a purpose or with such an intention, was altered or modified for the purpose or with the intention that it should be so used. The magistrate was entitled to take into account all the circumstances in which M. was proved to have been found with the keys in his possession including the fact that it was 2:30am and that M. was alone and wearing predominantly dark clothing.

TADGELL JA: [1] I will invite Ormiston, JA to deliver the first judgment.

ORMISTON JA: The appellant was convicted on 1st June 1995 at the Magistrates' Court at Preston on one count of the offence commonly known as going equipped to steal and was sentenced to be fined $200 and to be imprisoned for seven days, that term being wholly suspended for a period of twelve months. The appellant chose in the first place to bring an appeal on a question of law to the Supreme Court pursuant to s92 of the *Magistrates' Court Act* 1989. That appeal was dismissed by Ashley J on 13th September 1995 and a further appeal is now brought to this Court. The charge, brought against the appellant pursuant to s91 of the *Crimes Act* 1958, was expressed, in barely intelligible terms, as follows:

> "The defendant 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."

As is not unusual, a somewhat abbreviated account of the hearing in the Magistrates' Court was given on affidavit in support of the appeal. It appears that the appellant was observed by the respondent and one other senior constable at 2.30 in the morning of 6th February 1995, dressed predominantly in black and riding a bicycle north in Victoria Road, Thornbury, a short distance from the appellant's home. The two policemen requested the appellant's name, which he gave, and then, it seems, the appellant produced two small torches and a screwdriver from his tracksuit pocket and was observed to have a pair of grey gloves in another pocket. After some questioning as to his activities that night, the appellant was given **[2]** the customary warning. He was searched and in the left-hand pocket of his tracksuit a key ring with five keys was discovered. The respondent said the keys were consistent with their being car keys and expressed the opinion that they had been filed down. The appellant was then arrested and a taped interview conducted in which he chose to exercise his right to reply "No comment" to the questions put to him.

In cross-examination in the Magistrates' Court the respondent agreed that the appellant was about sixty metres from his home. He also agreed that only two of the keys appeared to be filed or worn down and that they were old style keys for an old vehicle. Senior Constable Turnbull confirmed the evidence of the respondent and in cross-examination "gave answers that were not dissimilar to the respondent", as it was expressed in the somewhat truncated account by the appellant's solicitor. It was also said that the police gave no direct evidence as to the appellant's intentions nor as to any recent thefts in the area. From an answering affidavit it appeared that, as a result of some observations by the appellant (to which objection was successfully made), the respondent tried to unlock a car to which his attention had been drawn by the appellant, but was unable to do so. The appellant then gave evidence that he had been repairing and riding his bike and had the torch and screwdriver in case something went wrong with the bike. He said the keys belonged to a friend and were for use in that friend's motor vehicle which was at his premises. He had received the keys that day from the friend after they had been working on the car and changing the car's **[3]** locks. He said that in his opinion the keys did not appear to be filed and that they were worn because they were old. He denied that he had filed the keys. It appears that at some time the keys were shown to the magistrate, although it is not clear whether they were tendered in evidence. The parties agreed that the magistrate might inspect the keys and in fact they also agreed that the learned judge hearing the appeal might inspect them. From that inspection both the magistrate and his Honour seemed to reach the firm conclusion that the two relevant keys had indeed been filed down.

According to the appellant's solicitor the magistrate then made the following findings, recounted, as they are so frequently, in indirect speech and in terms which suggest that the findings have been partly truncated, or, at the least, do not precisely represent what his Worship said. According to the affidavit, these were the findings:

> "His Worship made a finding beyond reasonable doubt that the keys had been altered or adapted and that in those circumstances they could be used for committing a theft. His Worship determined that pursuant to Section 91, sub-section (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, sub-section (3) of Section 91 made him liable for the offence of going equipped to steal. He thereupon convicted the Appellant and proceeded to pronounce sentence."

When the appeal came on for hearing, Ashley J granted leave to the appellant to re-formulate the questions of law raised by the appeal in the following terms:

> **[4]** "(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 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.
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> (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."

It may be observed that questions (a) and (c) appear to be an attempt to dress up an appeal

on questions of fact as an appeal on a question of law. In effect the appellant must show that there was no evidence upon which the magistrate could reasonably have made the impugned factual findings. No separate argument was addressed to Ashley J on question (c), and so it is unnecessary to examine it further. For reasons which will be examined, Ashley J. answered questions (a) and (b) in favour of the respondent and thus dismissed the appeal.

The appeal to this Court raises two grounds which are essentially the same as those raised by questions (a) and (b), and those first two grounds take this form:

> "1. The learned Judge should have held that 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.
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> 2. The learned Judge should have held that the Magistrate erred in applying s91(3) of the *Crimes Act* 1958 so as to direct himself 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."

A third ground of appeal took this form:

> "3. The learned Judge should have held that the Appellant was entitled to rely upon the reasons for decision as expressed by the Magistrate as the reasons for his decision to convict the Appellant."

[5] In my opinion no error has been demonstrated in the reasoning of either the magistrate or of Ashley J. The learned judge correctly analysed the matters raised by questions (a) and (b), and I can do no better than to repeat his reasoning, which I would adopt. His Honour said, after analysing the facts:

> "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." [That is, that in his opinion the keys did not appear to be filed.]
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> "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:
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> > '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 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.
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> Sub-section (3) of s91 is an evidentiary provision. Where certain facts are proved, they constitute evidence of the purpose or intention required by sub-s(1). Sub-section (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.
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> 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 [theft].
>
> **[6]** 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 sub-s(3) of s91. It follows that question of law (a) must be resolved in favour of the respondent.
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> 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 [theft]' 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 briefly already."

And his Honour repeated parts of the magistrate's reasons, in terms which I have set out above. His Honour continued:

> "If the Magistrate had determined that proof that the appellant had with him an article adapted for use in committing a [theft] for the purposes of sub-s(3) necessarily meant that the plaintiff must be found guilty of the substantive offence under sub-s(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.
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> 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 to imply that, having found that possession of the keys brought sub-s(3) into play, he balanced the evidentiary effect of that sub-section 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 sub-s(3) as being conclusive of guilt of the substantive offence. It **[7]** follows that, in my opinion, question of law (b) must be resolved in favour of the respondent."

For these reasons the first two grounds of appeal to this Court have not been made out. There remains the third ground of appeal. In essence, counsel for the appellant submitted that the learned judge should not have given the magistrate's reasons the benevolent construction he is said to have placed upon them. Counsel picked upon the observation:

> "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 argument before this Court was to the effect that his Honour had wrongly failed to treat the magistrate's reasons as literally representing the whole of his reasoning and had wrongly sought to interpret those reasons conformably with his understanding of the law.

I cannot accept this argument. The reasons appearing in the affidavit are an informal recounting by the appellant's solicitor of his recollection of what occurred in the Magistrates' Court. It is obvious that the account in the affidavit is not a full account of the whole hearing and, in the absence of a transcript, could not ordinarily be expected to be. When it came to setting out the magistrate's reasons the deponent described those findings in indirect speech and in terms which suggest that he was summarising what he had heard. It was argued that neither the respondent nor the magistrate had sought to correct this version of events. But that is not always practical or possible, and it has been accepted for many years, whether on orders to review or appeals from the Magistrates' Court, that reasons **[8]** recounted in this way should be construed benevolently and that reasonable allowance should be made to the magistrate. In that respect see, for example, cases such as *Foenander v Dabscheck* [1954] VicLawRp 6; [1954] VLR 38 at 42; [1954] ALR 168 and *Adamson v Noall* [1967] VicRp 14; [1967] VR 105 at 111, which have been followed on many occasions. At all events it is not appropriate, except when there is a full or verified transcript, to consider the stated reasons as representing a precise account of what was given by way of reasoning by a magistrate. What Ashley J did in the present case was entirely appropriate having regard to the form which the reasons took in the supporting affidavit. It is not to suggest that the magistrate should not give full and appropriate reasons for his decision: it is merely to adopt a common-sense approach to an account of those reasons which is informally recounted in nine cases out of ten. There is nothing in the third ground and I would therefore dismiss the appeal.

TADGELL JA: The informant, before the magistrate, undertook to prove that the appellant had with him articles for the purpose or with the intention that they would be used in the course of

or in connection with a theft*: R v Ellames* [1974] 1 WLR 1391; *R v Marijancevic* (1991) 54 A Crim R 431. There was no direct evidence that the appellant had any such purpose or intention in relation to any of the articles that he had in his possession when intercepted by the police. The question whether the keys found in the appellant's possession were "made or adapted for use" in committing a theft within the meaning of sub-s(3) of s91 of the *Crimes Act* was one of fact.

[9] The magistrate found, upon a physical inspection of the keys, that they, or some of them, had been adapted, that is, altered or modified. This finding could not be, and was not, challenged before the judge. The magistrate further found that the keys could be used for committing a theft. That was a finding of fact, not one of law. In my opinion, having made these two findings of fact, neither of which was shown not to have been open on the evidence, the magistrate was entitled to infer that some, at least, of the keys that the appellant had with him were adapted for use in committing a theft. Such an inference laid the foundation for the informant's reliance on sub-s(3) of s91 in order to provide evidence, that is to say some evidence, in support of proof of the charge under sub-s(1).

The expression "adapted" in sub-s(3) appears to be used in contrast to "made". Hence, "made" is apt to refer to an article which was brought into existence for the purpose or with the intention that it should be used in committing a theft; and "adapted" would be apt at least to refer to an article which, while not made - that is to say brought into existence - for such a purpose or with such an intention, was altered or modified for the purpose or with the intention that it should be so used. It may be that "adapted" is also apt to refer to an article which, while neither made nor adapted in these senses, is intended or proposed to be put to a proscribed use, even without alteration or modification: Cf. *Rowe v Conti* [1958] VicRp 87; [1958] VR 547 at 549-50; [1958] ALR 1038 per Gavan Duffy J It is not necessary here to decide whether "adapted" can **[10]** bear this second meaning in sub-s(3). In my opinion it plainly bears the first and there was, as the magistrate found, an adaptation of some of the keys.

The magistrate was entitled, plainly enough, to take into account all the circumstances in which the appellant was proved to have been found with the keys in his possession. Among the more obvious telling facts, not by themselves but taken globally, in association with all the others that were relevant, were that it was half-past two in the morning, and that the appellant was alone and wearing predominantly dark clothing. Looking at all the circumstances, I find it impossible to say that the learned judge was wrong in holding that the magistrate erred in concluding that the keys, or some of them, had been adapted for use in committing a theft. Having been satisfied that sub-s(3) of s91 applied, the magistrate was well enough entitled, on the evidence before him, to hold that the offence had been proved. It was put to us by counsel for the appellant that the magistrate's reasons, as the appellant in his affidavit purported to summarise them, treated the evidence afforded by sub-s(3) as, of itself, enough to lead to a conviction. It will suffice to say that I do not read the sketchy account in the appellant's affidavit as affording a sound basis for any such view of his Worship's reasons. It follows that the second and the third grounds of appeal must fail. The learned judge was, in my opinion, correct to uphold the decision of the magistrate. I agree, therefore, that the appeal should be dismissed.

[11] PHILLIPS JA: I too agree that the appeal should be dismissed. I do so for the reasons given by Ormiston, JA. I would only add two things. First, the learned presiding judge has mentioned the possible relevance to s91(3) of an article which, though neither made nor adapted for use in committing a burglary, may none the less be put to such a use. As at present advised, it appears to me that, if neither made nor adapted for use in committing a burglary, theft or cheat but none the less being carried for the purpose of its being put to use in the course of or in connection with any burglary, theft or cheat, such an article might be relevant directly under s91(1) without reference to sub-s(3). But that is not this case, and therefore, like the learned presiding judge, I express no concluded view about it.

The second point I would make is this. Much reference has already been made to the judgment below. To the references already made, I would add his Honour's concluding remarks, which, if I may say so, seem to me to have much force. His Honour said:

> "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.

[12] There are few cases in which it can be said that there was simply no evidence to support a particular 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."

As I have said, I see much force in those concluding remarks.

TADGELL JA: The judgment of this Court is that the appeal is dismissed with costs, including any reserved costs.

APPEARANCES: For the Appellant: Mr JJ Lavery, counsel. Toop Harris & Metcalfe, Solicitors. For the Respondent: Mr DG Just, counsel. Peter Wood, Solicitor for Public Prosecutions.
