75/78

SUPREME COURT OF VICTORIA

WILSON v KUHL; RYAN v KUHL

McGarvie J

16, 19, 20 June, 31 October 1978 — [1979] VicRp 34; [1979] VR 315

CRIMINAL LAW – CHARGED WITH BEING FOUND ARMED WITH AN OFFENSIVE WEAPON AND UNLAWFUL ASSAULT WITH A WEAPON – IN POSSESSION OF A LARGE CARVING KNIFE – SUBMISSION OF 'NO CASE' – SUBMISSION UPHELD – PROCEDURE TO BE FOLLOWED WHERE A 'NO CASE' SUBMISSION IS MADE – WHETHER KNIFE OFFENSIVE *PER SE* – BOTH CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: *VAGRANCY ACT* 1966, S6(1)(e).

HELD: Orders nisi discharged.

1. There are two steps which may in an appropriate case be involved when a Magistrate is called upon to rule on a 'no case' submission. The first step is to decide as a matter of law whether there is evidence before the court on which the defendant could lawfully be convicted. 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.

***May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at 658; [1955] ALR 671, applied.**

2. It is to be noted that in that passage of the joint judgment of the High Court the word 'could' appears in italics. The Magistrate is to decide whether there is evidence before the court which, if accepted, would provide evidence of each element of the charge. If there is not that evidence before the court, the information is, at least where there are not alternative charges to be dismissed. This is because the prosecutor has not made, what is often called 'a *prima facie* case'. If there is such evidence before the court the case proceeds unless, in an appropriate case, the Magistrate exercises the discretion discussed later.

3. In a case where there is evidence which, if accepted, would provide evidence of each element of the charge, a Magistrate may still in some cases be entitled to exercise a discretion to dismiss the information without calling on the defendant. Where technically there is evidence on which the defendant could lawfully be convicted but the Magistrate concludes that there is a mere scintilla of evidence or that the evidence is so lacking in weight or reliability that no reasonable tribunal could safely convict on it, he may dismiss the information.

***Benney v Dowling* [1959] VicRp 41; (1959) VR 237 at 242; [1959] ALR 644;**
***Mooney v James* [1949] VicLawRp 6; (1949) VLR 22 at 32;**
Practice Note (1962) 1 All ER 448; [1962] 1 WLR 227, referred to.

4. Was the carving knife an offensive weapon? Within the meaning of the section a physical article is an offensive weapon if it is an article of a kind normally used only to inflict or threaten injury. A knuckle duster is an article of this kind. An article such as a sawn-off shotgun is of itself an offensive weapon even though it may be shown that articles of that kind are normally used to threaten rather than inflict injury. A person armed with an article of a kind normally used only to inflict or threaten injury is armed with an offensive weapon whatever his intention. An article of a kind which is not normally used only to inflict or threaten injury is an offensive weapon only if the person found armed with it had then any intention to use it for an offensive, that is an aggressive, purpose. A carving knife is an article of this kind.

***Rowe v Conti; Threlfall v Panzera* [1958] VicRp 87; (1958) VR 547; [1958] ALR 1038;**
***Miller v Hrvojevic* [1972] VicRp 31; [1972] VR 305;**
***Washington v Rengis* (Little J, 12/9/73: unreported);**
***Taylor v Stevenson* (O'Bryan J, 21/3/77, unreported); and**
***R v Petrie* [1961] 1 All ER 466; (1961) 1 WLR 358, referred to.**

5. Under the Victorian section, a person found armed with a carving knife intended to be used only in self-defence is not found armed with an offensive weapon. He is found armed with a defensive weapon. Apart from cases depending on a special statutory provision there is no case which holds that an intention to use an object in self-defence is, in this context, to be regarded in the same light as an intention to use it in attack or combat.

6. The time when the defendant was found in the cubicle armed with an offensive weapon was the time when he was holding it through the hole in the cubicle wall. He was then using and intending to use the knife to threaten injury to Matthews if he came near to the wall. At that stage the occasion for its actual use had arisen and still continued. It is clear from the principle applied in *Ohlson v Hylton* [1975] 2 All ER 490; (1975) 1 WLR 724 that at that stage he was not offending against s6(1)(e) of the *Vagrancy Act* 1966. Whatever may have been his earlier general intention in relation to the use of the knife, it would be artificial to regard him as then having any intention other than the intention of sticking the knife through the hole in the wall to threaten Matthews.

7. It follows that there was no evidence before the court which, if accepted, would provide evidence that the carving knife was an offensive weapon at the time when the defendant was found in the cubicle. There was therefore no case to answer in respect of what occurred in the cubicles.

8. The later occasion when the defendant was found on the station stands in a different position. There was evidence before the court in the record of interview that the defendant always carried the carving knife in his bag in case somebody attacked him. These self-serving statements by the defendant provided some evidence that the defendant had the knife for use in self-defence. There was evidence that a short time before, the defendant had used the knife to threaten injury to Matthews. The fact that he had earlier had an intention to use the knife offensively and had so used it, did not of itself mean that it was still an offensive weapon. This earlier intention and use of the knife was one of the relevant circumstances to be taken into account in deciding the defendant's intention at the time when he was found on the station. The presence of the carving knife in the bag on the station was another relevant circumstance. It was open to the Magistrate to infer that at all times on the day the defendant had carried the carving knife with an intention of using it for offensive purposes.

9. It follows that there was evidence before the court which, if accepted, would provide evidence that the carving knife was an offensive weapon when the defendant was found on the station. There was therefore a case to answer in respect of that occasion.

10. The material in the present case did not show that it was not open to the Magistrate to conclude that, in relation to the occasion when the defendant was found on the station, the evidence that he then had an intention to use the carving knife for aggressive purposes was such that a reasonable tribunal could not have convicted him with safety. Nor does it show that the Magistrate did not reach that conclusion, or that there was error involved in the exercise of his discretion to dismiss the information.

11. In relation to the charge of assault with a weapon, it was a necessary element of this charge in this case that the defendant's conduct created in Matthews a fear of violence.
***R v McNamara* [1954] VicLawRp 22; (1954) VLR 137; [1954] ALR 291, referred to.**

12. As far as the element of fear was concerned there was not a case to answer because on the evidence it could not be inferred that the defendant's conduct created in Matthews fear of violence. Matthews said that he realised at the time that the person in the next cubicle could not harm him with the knife while he remained in his cubicle. He also said that the sight of the knife had not scared him and said that he had not gone to the station master because he was frightened. On the other hand he also gave evidence that the sight of the knife had shocked him, that he said out aloud 'Are you mad or something?', then opened the door and walked quickly out of the toilet. Considering the evidence as a whole the Magistrate could not have found that Matthews feared violence.

13. The Magistrate had heard Matthews' evidence and was satisfied that the sight of the knife had not produced fear in him. From this he was entitled to conclude that he could not safely convict on the evidence. This entitled him to exercise judicially a discretion whether, or not to dismiss the information. In considering how to exercise the discretion he was entitled to take into account that he had heard the only witness likely to be able to give evidence as to whether the sight of the knife had produced fear. The fact that the Magistrate stated in positive terms that he was satisfied that the sight of the knife had not produced fear is consistent with the Magistrate exercising a discretion to dismiss the information rather than ruling that there was no evidence on which the defendant could lawfully be convicted.

McGARVIE J: I have before me two orders to review decisions of the Magistrates' Court at Frankston constituted by Mr Clothier SM upon the hearing of two informations for summary offences. The offences were alleged to have occurred at Frankston on 17 June, 1977 and both informations were by consent heard together on 21 June, 1977. The first information alleged that the defendant was found armed with an offensive weapon, a 30 cm. carving knife. The second information alleged that the defendant unlawfully assaulted one Matthews with a weapon, a 30 cm. carving knife.

At the close of the prosecution case, counsel for the defendant submitted that there was no case to answer on either charge. The Magistrate upheld the submission and dismissed both informations. The informant on each information seeks to review the decision on the information, on the grounds that on the evidence, the Magistrate was not justified in deciding there was no case to answer and was not justified in dismissing the information.

There are some conflicts in the affidavits before me as to what occurred at the hearing. Mr Dyett of counsel who appeared for the informants conceded that in this case the usual rule of practice applied and that in the areas of conflict I should adopt the version which tended to support the decisions of the Magistrate. The summary which I now give of the evidence and proceedings adopts the defendant's version in areas where there is conflict between the informants' and the defendant's affidavits.

Mr Matthews gave evidence that at about 2.45 p.m. on 17 June, 1977 he entered a cubicle in the toilet at the Frankston railway station and closed the door. He noticed a hole in the wall between the cubicle and the next cubicle. The hole in the wall was directly in front of the pan in the cubicle in which he was. The hole was a vertical slot six inches long. Through the hole he saw the arm of a person in the next cubicle. Matthews put a piece of paper over the hole. He did this as he would be embarrassed if the person in the next cubicle could see him. He then turned around to take his pants down when he heard a noise behind him and again turned around. He saw the blade of a knife sticking through the hole. His reaction on seeing the knife was that he thought the man in the next cubicle might be mad. The effect on him at the sight of the knife was that he got a shock. Matthews said out aloud 'Are you mad or something?' then opened the door, walked quickly out of the toilet and found the station master. While in the toilet, he, Matthews, did not do or say anything suggestive or provocative to the man in the next cubicle.

Matthews was then cross-examined and said that the wall through which the knife blade protruded was some six feet from where he was standing. At no time was he closer than four feet from the blade. He did not believe the hole was large enough to permit a person's hand to pass through. He realised at the time that the person in the next cubicle could not harm him with the knife while he remained in his cubicle and no attempt was made by the other person to leave the next cubicle or to enter the cubicle occupied by Matthews. Whilst in the cubicle he was not in danger from the knife. The sight of the knife had not scared him but rather had shocked him. He left the toilet rather than shout for help because, from the location of the cubicle, he realised he could leave the cubicle he was in and the area of the toilets before the other man would have a chance to get out of the other cubicle. He had not gone to the station master because he was frightened but rather with a view to having the person with the knife apprehended.

Senior Constable Ryan then gave evidence that at about 3 p.m. he went to the Frankston railway station and had a conversation with Matthews. Soon after, he saw the defendant walk out of the toilet block with a large 'carry bag' in his left hand. He intercepted the defendant and took possession of the carry bag. Inside the carry bag was a large carving knife, personal papers, sex aids, and sex books and other articles including a newspaper supplement. The bag and its contents were tendered in evidence. He said to the defendant that it had been alleged that the defendant had assaulted Matthews with a carving knife in the toilets a short time before and he asked was that correct. The defendant replied, 'He was annoying me'. The defendant was taken to the Frankston Police Station and interviewed and signed a record of the interview. The record of the interview was tendered in evidence.

The record of interview showed that in the interview the defendant agreed that he had the carving knife in his carry bag when he came out of the toilets. The following questions and answers appear in the record of interview:

'Q. Why did you have the carving knife with you?
A. I always have it in my bag.
Q. For what reason do you have it in your bag?
A. In case somebody attacks me or something.
Q. It has been alleged that you brandished it at someone in the toilets at the Frankston Railway Station this afternoon.
A: I didn't brandish it, I showed it to him, to scare him off to leave me alone.
Q. What do you mean to scare him off?

A. He was annoying me and I told him to piss off.
Q. How was he annoying you?
A. Well when he came in, I was reading this paper, and he put his finger through the hole in the wall, I put some paper in the hole and he pushed it out and I showed the knife to him and said piss off you poofter, then he pulled his pants up and ran out.
Q. Did you do anything in the toilet before this other person entered the toilets today?
A. I looked at the pictures masturbated myself, and was going and I was nearly ready to go, when this person walked in.
Q. What did this other person do when he came into the toilets?
A. He walked in, I heard him walk in, I looked up from my book and saw his fingers through the hole in the wall.
Q. I put it to you that this other person put the paper up to cover the hole in the wall?
A. I put it up, it was wet and I stuffed it in the hole.'

In cross-examination, Senior Constable Ryan said that the cubicle in which Matthews had been was eight feet long and four feet wide. The cubicles were placed in an 'L' shape so that one cubicle faced the side of the other. The paper in the hole in the toilet wall was dry. The paper was tendered in evidence. The hole in the wall was about six inches in length and about the size of a lemonade can. At all times while the defendant was in his presence, he had consistently said that his only purpose in having the knife with him was for his protection and had consistently denied that he intended to use the knife to attack anyone. The case for the prosecution then closed. Counsel for the defendant submitted there was no case to answer and referred to *Rowe v Conti*; *Threlfall v Panzera* [1958] VicRp 87; (1958) VLR 547; [1958] ALR 1038.

After a brief adjournment the Magistrate said that even on the standard of proof required to establish a *prima facie* case he was not satisfied that the knife was an offensive weapon *per se*. Further, on the evidence, he was not satisfied that the defendant had either adapted or intended to use the knife for the purpose of attack or for causing injury. He then dismissed the information which charged that the defendant was found armed with an offensive weapon. In relation to the second information he said that even on the standard of proof required to establish a *prima facie* case; he was not satisfied that the defendant had assaulted Mr Matthews. He said that on the evidence, the position of the cubicles and the size of the hole in the wall made it impossible for the defendant to touch Mr Matthews with the knife. He stated that he was further satisfied that Mr Matthews had appreciated the impossibility at the time and that the sight of the knife had not produced fear or apprehension of attack in Mr Matthews. He then dismissed the second information which charged assault with a weapon.

It is first necessary to consider the submissions as to the principles to be applied by a Magistrate in deciding whether to dismiss an information at the close of the prosecution case without calling on the defendant. There are two steps which may in an appropriate case be involved when a Magistrate is called upon to make that decision. The first step is to decide as a matter of law whether there is evidence before the court on which the defendant could lawfully be convicted.

> '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.'

May v O'Sullivan [1955] HCA 38; (1955) 92 CLR 654 at 658; [1955] ALR 671.

It is to be noted that in that passage of the joint judgment of the High Court the word 'could' appears in italics. The Magistrate is to decide whether there is evidence before the court which, if accepted, would provide evidence of each element of the charge. If there is not that evidence before the court, the information is, at least where there are not alternative charges (*R v Plain* (1967) 1 WLR 565; [1967] 1 All ER 614; (1966) 51 Cr App R 91), to be dismissed. This is because the prosecutor has not made, what is often called 'a *prima facie* case'. If there is such evidence before the court the case proceeds unless, in an appropriate case, the Magistrate exercises the discretion discussed later.

Mr Canavan of counsel, who appeared for the respondent, submitted that the correct test was stated by Napier J in delivering the judgment of the Full Court of the Supreme Court of South Australia in *Wilson v Buttery* (1926) SASR 150 at 154, where, in discussing the question whether there was a case to answer, he said:—

> 'At this stage and for this purpose the question is not, are the facts proved by the prosecution capable of any reasonable construction consistent with innocence? but this, do they establish a substantial balance of probability in favour of the inference which the prosecution seeks to draw?'

Mr Canavan emphasized the fact that the High Court in *May v O'Sullivan*, while deliberately correcting an error of approach in the judgment in *Wilson v Buttery*, did not make any criticism of the passage quoted above. The High Court quoted earlier and later passages from the judgment delivered by Napier J but it did not quote the passage set out above.

In my view the High Court, emphasizing as it did, the word 'could' in the passage quoted, stated the principle in terms inconsistent with the principle stated by Napier J for the Full Court of the Supreme Court of South Australia. No case was drawn to my attention in which the principle had, since the decision in *May v O'Sullivan* been stated in the way in which it was stated in *Wilson v Buttery*. Recent statements have treated the position as entirely covered by *May v O'Sullivan*, e.g. *Downard v Babington* [1975] VicRp 85; [1975] VR 872 at 975; (1975) 31 LGRA 314; *Byrne v Baker* [1964] VicRp 57; (1964) VR 443 at 459; *Zanetti v Hill* [1962] HCA 62; (1962) 108 CLR 433 at 442; [1963] ALR 165; 36 ALJR 276. I consider that the test is not whether the evidence establishes a substantial balance of probability in favour of guilt but whether there is evidence which, if accepted, would provide evidence of each element of the charge.

In a case where there is evidence which, if accepted, would provide evidence of each element of the charge, a Magistrate may still in some cases be entitled to exercise a discretion to dismiss the information without calling on the defendant. Where technically there is evidence on which the defendant could lawfully be convicted but the Magistrate concludes that there is a mere scintilla of evidence or that the evidence is so lacking in weight or reliability that no reasonable tribunal could safely convict on it, he may dismiss the information. *Benney v Dowling* [1959] VicRp 41; (1959) VR 237 at 242; [1959] ALR 644; *Mooney v James* [1959] VicRp 41; (1949) VLR 22 at 32; [1948] 2 ALR 369; *Practice Note* (1962) 1 All ER 448; [1962] 1 WLR 227.

The position is similar upon a criminal trial before judge and jury. Where technically there is evidence on which the accused could lawfully be convicted but the judge concludes that it would be unsafe or unsatisfactory to convict on the evidence, he may withdraw the case from the jury. *R v Mansfield* [1978] 1 All ER 134; (1977) 1 WLR 1102.

The exercise of a discretion to dismiss an information notwithstanding that technically there is a case to answer is not strictly a ruling that there is no case to answer. However, it is often referred to as such: e.g. *Sharp v Hotel International Ltd* [1969] VicRp 12; (1969) VR 103 at 108; *R v Mansfield* [1978] 1 All ER 134; (1977) 1 WLR 1102 at 1105. The effect of the exercise of the discretion is, of course, that the defendant is not called on to answer the prosecution's case.

In this case it is necessary to decide in relation to each information whether at the close of the informant's case (a) there was evidence on which the defendant could lawfully be convicted, and if so, (b) whether the Magistrate was entitled (i) to conclude that no reasonable tribunal could safely convict and (ii) to exercise a discretion to dismiss the information.

WILSON v KUHL *Section:* On this information the defendant was charged with being found armed with an offensive weapon. Section 6(1)(e) of the *Vagrancy Act* 1966 provides that:

> '6(1) Any person who —
> (e) is found armed with an offensive weapon or instrument unless such person gives to the court a valid and satisfactory reason for being so armed —
> shall be guilty of an offence'.

Found: If the defendant was at the material time armed with an offensive weapon, he was found armed with it. Within the meaning of the section he was so found when he was discovered or seen armed with it. *R v Goodwin* (1944) KB 518; [1944] 1 All ER 506; *R v Lumsden* (1951) 2 KB 513; [1951] 1 All ER 1101; *R v Otten* (1977) 2 NZLR 44. He was found with the carving knife when Matthews, having seen through the hole, the arm of the person in the next cubicle saw the blade of the knife protruding through the hole. The knife was obviously held by the person in the next cubicle. The person who held the knife at this time was shown to be the defendant. In ordinary language, Matthews at that stage discovered the defendant with the knife. The defendant was

also found with the knife at the time when Senior Constable Ryan intercepted him on the station and saw the knife in the carry bag. No objection appears to have been taken at the hearing that on the one charge, evidence was admitted which showed that the defendant was found with the carving knife at two separate times and places — in the cubicles and on the station. Compare: *R v Goodwin* (1944) KB 518 at 521; [1944] 1 All ER 506. This was an irregularity.

Armed: Clearly, the defendant was armed with the knife when he held it in his hand in the cubicles. Whether he was armed with the knife when intercepted by Senior Constable Ryan on the station depends on whether the knife was then available to him for immediate use as a weapon. This involves questions of fact and degree. *Rowe v Conti; Threlfall v Panzera* [1958] VicRp 87; [1958] VR 547 at 548-9; [1958] ALR 1038; *Miller v Hrvojevic* [1972] VicRp 31; (1972) VR 305 at 306. The nature of the carry bag and the accessibility of the knife to the defendant's hand would be relevant. The material before me indicates that there was evidence on which the court could find that the defendant was armed with the knife when he was found by Senior Constable Ryan.

Offensive Weapon: I turn to consider whether the carving knife was an offensive weapon. I consider that within the meaning of the section a physical article is an offensive weapon if it is an article of a kind normally used only to inflict or threaten injury. A knuckle duster is an article of this kind. In my opinion an article such as a sawn-off shotgun is of itself an offensive weapon even though it may be shown that articles of that kind are normally used to threaten rather than inflict injury. A person armed with an article of a kind normally used only to inflict or threaten injury is armed with an offensive weapon whatever his intention. An article of a kind which is not normally used only to inflict or threaten injury is an offensive weapon only if the person found armed with it had then any intention to use it for an offensive, that is an aggressive, purpose. A carving knife is an article of this kind. *Rowe v Conti; Threlfall v Panzera* [1958] VicRp 87; (1958) VR 547; [1958] ALR 1038; *Miller v Hrvojevic* [1972] VicRp 31; (1972) VR 305; *Washington v Rengis* (Little J, 12/9/73: unreported) and *Taylor v Stevenson* (O'Bryan J, 21/3/77, unreported); *R v Petrie* [1961] 1 All ER 466; (1961) 1 WLR 358.

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, the other person. An intention to use articles for combat is illustrated by the facts of *Washington v Rengis* (above) where a group of youths armed themselves with knives and garden stakes with the intention of engaging in a street fight against another group of youths similarly armed.

An article is used for an offensive or aggressive purpose not only if it is used to inflict injury, but also if it is used to threaten injury: *Pelvey v Brebner* (1963) SASR 36 at 39-40. In Victoria, if a carving knife were carried with an intention of using it to threaten injury to another person, it would be an offensive weapon although the person carrying it may have no intention of inflicting physical injury with it. A person found carrying a carving knife towards a chemist's shop, intending to use it to menace the staff so as to rob the chemist, is found armed with an offensive weapon, although he has no intention of actually putting the knife to any of the staff. I think that a person found carrying a harmless imitation pistol towards a chemist's shop, intending to use it to menace the staff for the purpose of robbery, would be found armed with an offensive weapon.

However, the decision in *R v Carroll* (1975) 2 NZLR 474 indicates that in those circumstances the person is not armed with an offensive weapon and it is not necessary to decide that question in this case. In England, it has been held that an article not intrinsically an offensive weapon, which is intended to be used to threaten injury, is an offensive weapon only if the intended use amounts to threatening behaviour capable of producing injury through the operation of shock. *R v Edmonds* (1963) 2 QB 142. There, the statutory definition of offensive weapon requires an intention to use the article for causing injury to the person. There is no similar definition applying to the Victorian section. In my opinion, in Victoria, a person who at the time of being found with a carving knife has an intention of using it to threaten injury to another person falls within s6(1)(e) of the *Vagrancy Act* 1966.

Mr Dyett submitted that in certain situations the Victorian section also covered a person found armed with a carving knife with the intention of using it in self-defence. He contended that the knife would not be an offensive weapon if carried temporarily by the person with the

sole intention of defending himself against an attack of which he is in imminent danger; but he argued that it would be an offensive weapon if constantly carried with the intention of using it in defence against an attack of which the person is in constant danger or against any attack which may happen to occur. Mr Dyett relied mainly on *Evans v Hughes* [1972] 3 All ER 412; (1972) 1 WLR 1452 in support of this submission. I do not accept the submission. That decision turns on the particular words of the section being considered. Under the section an article intended by the person having it with him, for use for causing injury to the person, is defined as an offensive weapon. The Divisional Court held that as the small iron bar carried by the defendant in that case was intended to be used for self-defence if he were attacked, it was intended for use for causing injury to the person and was therefore an offensive weapon. The Court drew the distinction between a temporary carrying and a constant carrying of the article, only in explaining what had to be proved by a defendant to constitute, within the meaning of the section, a 'reasonable excuse' for having the article with him. Other English decisions relied on in support of this submission are in a similar position.

I consider that under the Victorian section, a person found armed with a carving knife intended to be used only in self-defence is not found armed with an offensive weapon. He is found armed with a defensive weapon. Apart from cases depending on a special statutory provision I have been referred to no case which holds that an intention to use an object in self-defence is, in this context, to be regarded in the same light as an intention to use it in attack or combat. In *Rowe v Conti, Threlfall v Panzera* [1958] VicRp 87; [1958] VR 547 at 549; [1958] ALR 1038 Gavan Duffy J said:-

> 'The expression "an offensive weapon" would appear to be tautological, though "offensive" may be, and in some cases has been, taken as limiting "weapon" to one carried for the purpose of attack, or perhaps attack not in the course of self-defence'.

In *Chadbourne v Ansell* (1975) WAR 104 the Full Court of the Supreme Court of Western Australia held that a small steel mallet carried for the purposes of protection or defence was not an offensive weapon within the section there considered. In *Taylor v Stevenson* (21/3/77, unreported) O'Bryan, J considered the case of a man who had been found carrying a boomerang. He held that the boomerang was not 'an offensive weapon *per se*'. The man claimed that he had the boomerang for the purpose of self-defence. In upholding the conviction, His Honour held (p10) that it was open to the Magistrate to convict the man on the basis that he was carrying the boomerang with him for an offensive rather than a defensive purpose.

Case to Answer: There were two occasions when the defendant was found armed with the carving knife. I now turn to consider whether there was, in respect of either occasion, a case to answer. This depends on whether there was evidence before the court which, if accepted, would provide evidence that the carving knife was an offensive weapon.

I regard the evidence as clear that in the cubicle the defendant held the knife for the purpose of threatening injury to Matthews if he came near to the wall of the cubicle through which the knife protruded. The evidence does not give support to any view that the defendant did this for the purposes of self-defence. Much more than annoyance is required before an occasion arises for presenting a knife in this way in self-defence. If it is relevant to consider the intention of the defendant in the cubicles from the time when he decided to present the knife in this way until he presented it, and during the time when he presented it through the hole in the wall, there was evidence of an intention during that period to use the knife for an offensive purpose. If his intention at this time is relevant, it would not matter whether Matthews was or was not intimidated or put in fear by the sight of the knife. Whether it is relevant to consider the defendant's intention at this time is a matter of some controversy upon the authorities.

That the defendant's intention at this time sufficiently provides the element necessary for the charge, is supported by the decision of the majority of the Full Court of the Supreme Court of South Australia in *Considine v Kirkpatrick* (1971) SASR 73. In that case the evidence was that, as two groups of youths approached each other to fight, the defendant, in one of the groups removed the studded belt he was wearing, wrapped it around his right hand and used it in the fight. A charge of carrying an offensive weapon was dismissed by the Magistrate and the complainant appealed. The majority of the Full Court (Chamberlain and Zelling JJ) held that the

defendant should have been convicted. The essence of the majority decision is contained in the statement by Zelling J that:

> 'The moment the accused formed the intention of using the belt as an offensive weapon it ceased to be a lawful instrument for keeping up his pants which it was previously, and came within the ambit of the section because he formed a new intention, namely to use it as an offensive weapon and the overt acts of twirling the belt like a bolo simply indicated outwardly what the new intention was'. (p87)

The third member of the Full Court, Bray CJ dissented. He summarized the question and his answer in the following passage:

> 'The question we have to answer can be posed, I think as follows. If the defendant wears or carries an article, the normal use of which is innocent, and which, on the occasion in question, he originally carried or wore or took upon his person for an innocent purpose, does he commit an offence under this section if he subsequently forms an intention to use it as a weapon of attack or, alternatively, he actually so uses it? In my view the question should be answered in the negative.' (p74)

In that case the Magistrate had treated himself as bound by the decision of the Court of Criminal Appeal in *R v Jura* (1954) 1 QB 503; [1954] 1 All ER 696. The majority of the Full Court held that the principle of that case was not to be applied to the South Australian section, while Bray CJ held that its principle should be applied. The difference of approach reflected a conflict of view within the English decisions as to the validity of the principle in *R v Jura*. A line of authority which stemmed from the decision of the Court of Criminal Appeal in *Woodward v Koessler* (1958) 1 WLR 1255; [1958] 3 All ER 557 gave support to the view taken by the majority in *Considine v Kirkpatrick*.

These authorities were considered by Mahon J in *Police v Smith* (1974) NZLR 32 in relation to a section similar to that considered in the English decision. Mahon J preferred the principle of the decision in *R v Jura*. He decided that a man holding a table knife for the lawful purpose of cutting and eating a pie at a pie cart, who upon a scuffle occurring, stood and brandished the knife at the proprietor of the pie cart was not guilty of having with him an offensive weapon.

In *R v Dayle* (1974) 1 WLR 181; [1973] 3 All ER 1151; the Court of Appeal considered the difference of approach and held that it was bound by the principle applied in *R v Jura*. The application of that principle was considered by the Divisional Court of the Queen's Bench Division in *Ohlson v Hylton* [1975] 2 All ER 490; (1975) 1 WLR 724. In that case the defendant, a carpenter, was travelling home from work with his tools of trade, including a hammer, in his brief case. He went to board a train. Due to an industrial dispute the train was very crowded. The defendant in attempting to board the train accidentally trod on the feet of a Mr Malcolm who told him there was no room. As the defendant pushed himself into the carriage Mr Malcolm pushed him out and both men then landed on the platform. The defendant almost immediately took the hammer from his brief case and deliberately struck Mr Malcolm on the head so that he fell to the ground. The defendant was charged with the following two offences, (1) assault occasioning actual bodily harm, and (2) without lawful authority or reasonable excuse, having with him in a public place an offensive weapon, namely a claw hammer. The justices convicted him on both charges. The Crown Court, on appeal quashed the second charge. The prosecution appealed to the Division Court by case stated.

The contentions of the parties were set out by Lord Widgery CJ with whose judgment Ashworth and Michael Downes JJ agreed:

> 'It was argued by the prosecutor both here and in the court below that, on a literal reading of the terms of the section, that offence was proved. It is pointed out that at the moment when the defendant seized his hammer he had the intention of using it on the unfortunate Mr Malcolm. Accordingly it is said that there was at all events a short period of time in which the hammer, formerly in the innocent possession of the defendant, became a weapon which he had with him with the intention of using it on Mr Malcolm. Accordingly, Mr Comyn submits, the offence is established.
>
> The defendant's argument, both in this court and in the court below, was that the section did not extend to the seizing and use of a weapon for the purpose of causing injury if the weapon was seized only at the moment when the intention to assault arose, and that the type of activity contemplated by the section is not the use of a weapon for offensive purposes but the premeditated carrying of a

> weapon for those purposes. On this approach it is argued that the weapon was never carried with the necessary intent, and that the fact that the intent must have been formed at a brief moment before the blow was struck is not enough to satisfy the terms of the Act. (pp727-8)

After considering the section and the legal background on which it was enacted Lord Widgery, CJ said:

> "In the absence of authority I would hold that an offence under s1 is not committed where a person arms himself with a weapon for instant attack on his victim. It seems to me that the section is concerned only with a man who, possessed of a weapon, forms the necessary intent before an occasion to use actual violence has arisen. In other words, it is not the actual use of the weapon with which the section is concerned, but the carrying of a weapon with intent to use it if occasion arises.' (p728)

Later he said:

> 'I accept that it is unnecessary for the prosecution to prove that the relevant intent was formed from the moment when the defendant set out on his expedition. An innocent carrying of, say, a hammer can be converted into an unlawful carrying when the defendant forms the guilty intent, provided, in my view, that the intent is formed before the actual occasion to use violence has arisen.' (p729)

He concluded his judgment:

> 'Accordingly, no offence is committed under the 1953 Act where an assailant seizes a weapon for instant use on his victim. Here the seizure and use of the weapon are all part and parcel of the assault or attempted assault. To support a conviction under the Act the prosecution must show that the defendant was carrying or otherwise equipped with the weapon, and had the intent to use it offensively before any occasion for its actual use had arisen.' (p730-731)

The appeal was dismissed. I consider that the principle applied in *Ohlson v Hylton* [1975] 2 All ER 490; (1975) 1 WLR 724 should be applied in the interpretation of the Victorian section. That case applies a principle approved by the Court of Appeal in England. The legal background on which the present section was introduced in its present form in 1966 was similar to the legal background considered in *Ohlson v Hylton*. Until Act No. 5503 in 1950, the predecessors of the present section applied to:

> 'Every person found between the hours of nine o'clock in the evening and six o'clock in the morning armed with any gun pistol sword bludgeon or other offensive weapon or instrument...'

The question now being considered is one which depends far more on principles developed by the decisions of the courts than upon the process of interpreting the words in the Victorian section. There are differences between the sections the subject of the decisions which I have mentioned. In particular, the connections required between the defendant and the offensive weapon are different. The section, considered in the English decisions, the *Prevention of Crime Act* 1953, s1 and the equivalent section in New Zealand apply to a person who 'has with him in any public place' an offensive weapon. The South Australian section, the *Police Offences Act* 1953-1967 s15 applies to a person who 'carries' an offensive weapon. 'Carry' includes to have on or about one's person. The Victorian section applies to a person who 'is found armed with an offensive weapon'. I do not think that these differences affect the application of the principle now being considered, although Bray CJ contemplated that the difference between the Victorian and South Australian provisions may be relevant in this regard. *Considine v Kirkpatrick* (1971) SASR 73 at 79.

I regard the reasons of the Divisional Court in *Ohlson v Hylton*, the reasons of Bray CJ in *Considine v Kirkpatrick* and the reasons of Mahon J in *Police v Smith* (1974) NZLR 32 at 43 as more persuasive overall than those of the majority in *Considine v Kirkpatrick*. It is important to bear in mind that in a provision creating a criminal offence, if there are two reasonable meanings open, and nothing to indicate which meaning is to be preferred, the interpretation which will give it the more limited operation is to be adopted. *Police v Smith* (1974) NZLR 32 at 43. Finally it is, I think, of significance that, except in one respect (i.e. whether the intention needs to exist when the article is first taken out or carried) the principle applied in *Ohlson v Hylton* is an application of the principle laid down in the first of the modern cases on the subject, *R v Jura* (1954) 1 QB 506; [1954] 1 All ER 696.

The time when the defendant was found in the cubicle armed with an offensive weapon was the time when he was holding it through the hole in the cubicle wall. He was then using and intending to use the knife to threaten injury to Matthews if he came near to the wall. At that stage the occasion for its actual use had arisen and still continued. It is clear from the principle applied in *Ohlson v Hylton* that at that stage he was not offending against s6(1)(e) of the *Vagrancy Act* 1966. Whatever may have been his earlier general intention in relation to the use of the knife, it would be artificial to regard him as then having any intention other than the intention of sticking the knife through the hole in the wall to threaten Matthews.

It follows that there was no evidence before the court which, if accepted, would provide evidence that the carving knife was an offensive weapon at the time when the defendant was found in the cubicle. There was therefore no case to answer in respect of what occurred in the cubicles.

The later occasion when the defendant was found on the station stands in a different position. There was evidence before the court in the record of interview that the defendant always carried the carving knife in his bag in case somebody attacked him. Evidence of statements by the defendant to a similar effect was given by Senior Constable Ryan. These self-serving statements by the defendant provided some evidence that the defendant had the knife for use in self-defence. *Allied Interstate Queensland Pty Ltd v Barnes* [1968] HCA 76; (1968) 118 CLR 581; 42 ALJR 348. The Magistrate was not obliged to accept that evidence. There was evidence that a short time before, the defendant had used the knife to threaten injury to Matthews. The fact that he had earlier had an intention to use the knife offensively and had so used it, did not of itself mean that it was still an offensive weapon. *R v Allamby* (1974) 1 WLR 1494; [1973] 3 All ER 126. This earlier intention and use of the knife was one of the relevant circumstances to be taken into account in deciding the defendant's intention at the time when he was found on the station. *R v Dayle* (1974) 1 WLR 181; [1973] 3 All ER 1151;. The presence of the carving knife in the bag on the station was another relevant circumstance. *R v Petrie* [1961] 1 All ER 466; (1961) 1 WLR 358 at 362; *Considine v Kirkpatrick* (1971) SASR 73 at 85-6 per Zelling J. It was open to the Magistrate to infer that at all times on the day the defendant had carried the carving knife with an intention of using it for offensive purposes.

It follows that there was evidence before the court which, if accepted, would provide evidence that the carving knife was an offensive weapon when the defendant was found on the station. There was therefore a case to answer in respect of that occasion.

Discretionary Dismissal

Mr Canavan argued in the alternative that if there was a case to answer, it was open to the Magistrate to exercise a discretion to dismiss the information. He argued that I should make every reasonable presumption in favour of the decision and relied on *Foenander v Dabscheck* [1954] VicLawRp 6; (1954) VLR 38 at 42; [1954] ALR 168. He submitted that I should presume that the Magistrate exercised this discretion.

As the discretion is one to depart from the ordinary rules of procedure, it is to be exercised only when the Magistrate is satisfied that it ought to be exercised. In this case that would involve the Magistrate being satisfied, first, that because of the paucity or the lack of weight or reliability of the evidence, no reasonable tribunal could safely convict and second, that, in the exercise of a judicial discretion he should dismiss the information. In my opinion this follows by analogy from the principle discussed in *R v Lee* [1950] HCA 25; (1950) 82 CLR 133, 152-3; [1950] ALR 517 and *Wendo v R* [1963] HCA 19; (1963) 109 CLR 559 at 565; [1964] ALR 292; 37 ALJR 77. See also: *O'Mara v Litfin; ex parte O'Mara* (1972) QWN 32. When a defendant submits that the discretion should be exercised, it is for the defendant to satisfy the Magistrate as to the weakness of the prosecution evidence and that the discretion should be exercised in his favour.

According to the defendant's affidavit the Magistrate said that on the evidence he was not satisfied that the defendant intended to use the knife for the purpose of attack or for causing injury. These are not the precise words which would be expected to be used if the Magistrate had concluded that because of weakness of the evidence no reasonable tribunal could safely convict on it and that he should dismiss the information. However his reference to his not being satisfied on the evidence, indicates that he was directing his mind to questions of the strength of

the evidence rather than to whether there was before him evidence on which the defendant could lawfully be convicted. There is not a great deal of difference between saying that on the evidence he was not satisfied of the existence of the necessary intention and saying that he concluded that he (i.e. the reasonable tribunal; see: *Ratten v R* [1974] HCA 35; (1974) 131 CLR 510 at 516; 4 ALR 93; 48 ALJR 380) could not safely convict on the evidence. Similar expressions were treated as amounting to an exercise of the discretion to dismiss, in *Benney v Dowling* [1959] VicRp 41; (1959) VR 237 at 242; [1959] ALR 644.

I consider that I should treat the Magistrate as having exercised a discretion rather than as having ruled that there was no evidence before him on which the defendant could lawfully be convicted. The material before me does not show that it was not open to the Magistrate to conclude that, in relation to the occasion when the defendant was found on the station, the evidence that he then had an intention to use the carving knife for aggressive purposes was such that a reasonable tribunal could not have convicted him with safety. Nor does it show that the Magistrate did not reach that conclusion, or that there was error involved in the exercise of his discretion to dismiss the information.

Whatever may have been the defendant's earlier intention it would be open to the Magistrate to infer that after the incident in the cubicles the defendant's only intention regarding the knife was to keep it concealed and get it away from the station as soon as possible. Further, there was evidence before the Magistrate that the defendant had admitted going to the railway station on that day in order to pick up a man or a boy for sex. It was open to the Magistrate to take the view that a man resorting to a public toilet with a view to accosting males for the purpose of sex may well carry something for self-defence. The result is that I am not satisfied that there was any error by the Magistrate and this order nisi will be discharged.

RYAN v KUHL

I can deal quite shortly with the charge of assault with a weapon. Section 24(2) of the *Summary Offences Act* 1966 provides that:

> 'Any person who by kicking or with any weapon or instrument whatsoever assaults another person shall be liable to imprisonment for two years.'

This charge may be disposed of by considering only one element of it. It was a necessary element of this charge in this case that the defendant's conduct created in Matthews a fear of violence, *R v McNamara* [1954] VicRp 87; (1954) VLR 137; [1954] ALR 291.

In my view as far as the element of fear was concerned there was not a case to answer because on the evidence it could not be inferred that the defendant's conduct created in Matthews fear of violence. Matthews said that he realised at the time that the person in the next cubicle could not harm him with the knife while he remained in his cubicle. He also said that the sight of the knife had not scared him and said that he had not gone to the station master because he was frightened. On the other hand he also gave evidence that the sight of the knife had shocked him, that he said out aloud 'Are you mad or something?', then opened the door and walked quickly out of the toilet. Considering the evidence as a whole I take the view that the Magistrate could not have found that Matthews feared violence.

Even if there was a scintilla of evidence from which it could be inferred that the defendant's conduct created a fear of violence in Matthews it was so weak that the Magistrate was in my opinion entitled to dismiss the information in the exercise of his discretion. He had heard Matthews' evidence and was satisfied that the sight of the knife had not produced fear in him. From this he was entitled to conclude that he could not safely convict on the evidence. This entitled him to exercise judicially a discretion whether, or not to dismiss the information. In considering how to exercise the discretion he was entitled to take into account that he had heard the only witness likely to be able to give evidence as to whether the sight of the knife had produced fear. The fact that the Magistrate stated in positive terms that he was satisfied that the sight of the knife had not produced fear is consistent with the Magistrate exercising a discretion to dismiss the information rather than ruling that there was no evidence on which the defendant could lawfully be convicted.

Mr Canavan argued that the Magistrate was entitled to rule that as a matter of law there

was no case to answer on the basis that at the time when the defendant stuck the knife through the wall he was not in a position to touch Matthews with the knife. He referred me to Bourke's *Summary Offences in Victoria* 3rd Ed. p610, and relied in particular on *Stephens v Myers* [1830] EWHC KB J37; 172 ER 735; (1830) 4 C & P 349; [1830] EngR 750; 172 ER 735. Mr Dyett referred me to *R v Kenneth Ralfe* (1952) 35 Cr App R 4.

In view of my other conclusions upon this charge, it is not necessary to consider this argument.

The order nisi will be discharged.
