42/08; [2008] VSC 335

SUPREME COURT OF VICTORIA

BROWN v PALMER

Williams J

8 April, 25 August, 4 September 2008 — [2008] 192 A Crim R 18

CRIMINAL LAW – USE OF AN OPTICAL SURVEILLANCE DEVICE – SET UP BY HOTEL PUBLICAN HIDDEN IN A LOCKER IN THE STAFF CHANGE-ROOM AT THE HOTEL – LENS OF THE DEVICE FACED THE SHOWER STALL THROUGH THE GRILLE OF THE LOCKER – RECEIVER TO VIEW IMAGE PLACED IN ANOTHER ROOM IN THE HOTEL – PUBLICAN DESCRIBED IMAGE ON THE TELEVISION AS FUZZY – DEVICE DISCOVERED BY EMPLOYEE AT HOTEL – ADMISSION BY PUBLICAN THAT HE SET UP THE DEVICE IN ORDER TO TEST IT FOR USE ELSEWHERE IN THE HOTEL – AT THE TIME THE HOTEL HAD 16 PROFESSIONALLY INSTALLED SECURITY CAMERAS – PUBLICAN CHARGED WITH AN OFFENCE – FINDING BY MAGISTRATE THAT DEVICE WAS AN OPTICAL SURVEILLANCE DEVICE AND WAS INSTALLED BY DEFENDANT – WHETHER MAGISTRATE IN ERROR IN FINDING CHARGE PROVED – DEFENDANT CONVICTED AND FINED – WHETHER MAGISTRATE IN ERROR IN THE EXERCISE OF THE SENTENCING DISCRETION: *SURVEILLANCES DEVICES ACT* 1999, SS3(1), 7(1); *SENTENCING ACT* 1991, S8(1).

B., a publican, set up a device (comprising a camera with an audio microphone and power supply and a receiver with an aerial and audio and video connections to a monitor) in a locker in the staff change-room at the hotel. The camera was placed inside a roll of masking tape and so positioned in the locker that the lens faced the shower stall through the grille in the locker door. B. went to another room where he plugged the receiver into a television and attempted to tune it in order to observe the images produced by the camera in the change-room. B. later described the image on the television as fuzzy. When a member of staff found the device in the locker, the matter was reported to police who then interviewed B. In the interview, B, said that he had placed the device in the locker to see whether it would work and to test it for use elsewhere in the hotel for security surveillance. At the time, there were 16 professionally-installed security cameras already at the hotel. B. was later charged with an offence under s7(1) of the *Surveillance Devices Act* 1999 ('Act') in that he knowingly installed an optical surveillance device to record visually or observe a private activity to which the person was not a party without the express or implied consent of each party to the activity. B. was convicted of the charge and fined the sum of $5000. Upon appeal—

HELD: Appeal dismissed.
1. Sections 7(1) and 3(1) of the Act must be read in their statutory context of relating to surveillance devices. Section 7(1) reflects the statutory purpose of regulating the installation, use and maintenance of surveillance devices in s1. Section 7(1) proscribes the installation, use and maintenance of the widely defined "optical surveillance device" for the described purpose, as opposed to the recording or observation of a private activity *per se*. The targeted impropriety referred to in s1(d) would appear to relate to the purpose, described in s7(1), for which the device is installed or used. The proscribed behaviour in this case was the installation of an optical surveillance device rather than that relating to its use or maintenance.

2. It was open to the magistrate to conclude that the device had the technical capability required for its use to observe a "private activity", within the definition in s3(1), from the evidence of testing by the police and it was open to the magistrate to conclude that B. had "installed" the device by putting the camera in place for the purpose of use in the locker and the receiver in place for the same purpose in another room. Further, it was open to the magistrate to conclude that the activity which might be observed inside the change-room would constitute "a private activity" as defined; and there was no evidence of consent being obtained by B. Further, it was open to the magistrate to conclude that B. knowingly installed the device for the purpose of observing a private activity in the change-room. So much was implicit in his admissions that he put the disguised device in position to test it and that he knew that it was directed at the shower stall in the staff change-room.

3. Whilst s8(1)(c) of the *Sentencing Act* 1991 required the court to take into account the effect of recording a conviction on B.'s economic and social well-being and his employment prospects, the magistrate did not err in law in the exercise of his sentencing discretion.

WILLIAMS J:
The appeal

1. This is an appeal from orders of the Magistrates' Court at Geelong on 3 August 2007, convicting the appellant of an offence under s7(1) of the *Surveillance Devices Act* 1999 ("the Act") and fining him the sum of $5,000. The appeal relates to both the conviction and the appellant's sentence.

2. I note that, after reserving my decision in this appeal, it became apparent that the case had proceeded both in this Court and before the learned Magistrate on the erroneous basis that the definition of "optical surveillance device" in s3(1) the Act at the date of the alleged offence on 21 April 2006 had been as it subsequently appeared on 23 July 2007 when the appellant came before the Magistrates' Court.

3. The parties were given the opportunity to address the Court further on the matter. The appellant was given leave to amend the first three questions of law in the appeal so that they would refer to the correct version of the Act. Neither party sought to rely upon the error of law made by the learned magistrate in so far as he had applied the incorrect definition.

The Act

4. The offence was created by s7(1) which was in the following terms on 21 April 2006:

> **7. Regulation of installation, use and maintenance of optical surveillance devices**
> (1) Subject to sub-section (2), a person must not knowingly install, use or maintain an optical surveillance device to record visually or observe a private activity to which the person is not a party, without the express or implied consent of each party to the activity.
> Penalty: In the case of a natural person, level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both;
>
> In the case of a body corporate, 1000 penalty units for a first offence and 2000 penalty units for a subsequent offence.
>
> (2) Sub-section (1) does not apply to—
> (a) the installation, use or maintenance of an optical surveillance device in accordance with a warrant or an emergency authorisation; or
> (b) the installation, use or maintenance of an optical surveillance device in accordance with a law of the Commonwealth; or
> (c) the installation, use or maintenance of an optical surveillance device by a law enforcement officer in the performance of his or her duty on premises if—
> (i) an occupier of the premises authorises that installation, use or maintenance; and
> (ii) the installation, use or maintenance is reasonably necessary for the protection of any person's lawful interests.

5. Section 3 (1) as it stood on 21 April 2006 contained relevant definitions:

> "**install**" includes attach;
>
> "**optical surveillance device**" means any device capable of being used to record visually or observe a private activity, but does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome that impairment;
>
> "**private activity**" means an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves, but does not include—
> (a) an activity carried on outside a building; or
>
> (b) an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else;

6. The definition of "optical surveillance device" was subsequently amended by the *Surveillance Devices (Amendment) Act* 2004 ("the amending Act"), with effect from 1 July 2006. The word "an" was substituted for the words "a private" before the word "activity" and the amended definition read:

> "**optical surveillance device**" means any device capable of being used to record visually or observe *an activity*, but does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome that impairment; (emphasis added)

7. The Act's purposes are relevant and they were stated in s1 in this way:

> **1. Purposes**
> The purposes of this Act are—
> (a) to regulate the installation, use and maintenance of surveillance devices;
>
> (b) to restrict the communication and publication of records of private conversations and activities obtained through the use of surveillance devices;
>
> (c) to establish procedures for law enforcement officers to obtain warrants or emergency authorisations for the installation and use of surveillance devices;
>
> (d) to create offences relating to the improper installation or use of surveillance devices;
>
> (e) to impose requirements for the secure storage and destruction of records obtained by law enforcement officers through the use of surveillance devices;
>
> (f) to repeal the *Listening Devices Act* 1969.

The evidence in the Magistrates' Court

8. Many of the relevant facts were not in dispute before the Magistrate. The appellant had voluntarily submitted to a police interview and the record of interview was tendered in evidence in the Magistrates' Court.

9. The appellant had admitted to police and in evidence that, during a visit to Thailand in February 2006, he purchased the device which was the subject of the charge.[1] It comprised a camera with an audio microphone and power supply and a receiver with an aerial and audio and video connections to a monitor. He had admitted that, after returning home, he had tested the device in his own living room and had found that it worked there.[2]

10. He had brought the device to his hotel, "The Rookery Nook" at Wye River. He claimed that he had wanted to use it as a security camera at the hotel. At the time, there were sixteen professionally installed security cameras already at the hotel and the appellant claimed that they were not working well. He said that he had been assured by the installer that they were of the best quality available in Australia and that they would not produce a clearer picture.[3]

11. The appellant admitted that on the evening of 21 April 2006, he had placed the camera part of the device in a locker in the staff change-room at the hotel. He claimed that he did so in order to test the device. He had a key to the locker. The change-room had in it a toilet, a shower and a hand basin, as well as staff lockers. The appellant claimed to have searched for an available source of power, before noticing a power point beside the lockers when he was using the change room.

12. The appellant had placed the camera inside a roll of masking tape secured by Blu Tack so that it was "effectively hidden inside the roll"[4] and had stood the roll on soap dishes inside the locker, with the lens facing the shower stall through the grille in the locker door. He told the magistrate that he installed the device inside a roll of masking tape because he had seen television programs in which people had "secretive cameras for baby monitoring and child abuse cases" and for different forms of surveillance.[5] He maintained in evidence in chief that he intended to use the camera for surveillance in other nominated areas. He also agreed that there were "thousands" of other places in the hotel where he could have placed the camera to test it, but that he had chosen to set it up facing the showers in the staff change room.[6] He said that he hoped that the camera would work as well as it had at home.[7] He knew that it worked in certain circumstances.[8] He agreed that if the camera had worked he may have been able to view the showers.[9] He did not tell anyone about the camera because of his distrust of others.[10]

13. The appellant then went to what was described as "room 4" in the hotel. Room 4 was about 13 metres away from the change-room. There, he claimed to have plugged the receiver into a television (which was working) and to have attempted to tune it in order to observe the images produced by the camera in the change-room. He followed instructions given to him when he purchased the device. He said that he was unable to view any signal or see any image. He described the image on the television as "fuzzy".[11] He had returned to the change-room and turned off the

camera, but had chosen to leave it in the locker.[12] He had packed the receiver up in an ice-cream container and put it into a shed at the hotel, before leaving for home with his daughter.[13]

14. The power cord was plugged into the wall power point and a young male staff member gave evidence that he had noticed the cord and investigated.[14] That staff member had a master key which opened a panel at the front which opened all eight lockers at once. He saw the lens facing him from inside the roll of tape.[15] He said that he had reported his find to the female bar manager on duty that night.

15. Staff called the appellant back to the hotel from home. It was suggested that the police be called and the appellant asked whether the matter could be dealt with amongst themselves as he wanted to go on a holiday.[16] The duty manager gave evidence that, at one point, when the appellant was deliberating whether to call police, she had told him to just tell the truth to police and the appellant had responded that he had to work out what to say.[17]

16. Eventually, police were called that afternoon and the appellant said nothing about any involvement with the device. He explained in evidence that he didn't want staff to find out that he had set the device up because they would leave work and not return and he did not want to forego a planned holiday the following week.[18] He claimed to have been surprised by the staff reaction to the discovery of the camera. The camera was seized by police who found no stored images when they searched the hotel premises that afternoon.

17. Two days later, on 24 April 2006, the appellant voluntarily presented himself for a police interview. The record of interview contains his admissions that he had placed the device in the locker in the change room between 8.30 and 9.00 pm on 21 April 2006. He told police that he did that to see whether the device would work when concealed, in order to test it for use elsewhere in the hotel for security surveillance. He told police that the security cameras already in place in the hotel were giving a "fuzzy image".

18. The appellant told police about taking the receiver to the hotel room and had attempted to tune it. He said that it "didn't pick up the way it was supposed to do" and "it was blurry and fuzzy".

19. When asked why he had concealed the camera, if he was only testing it, and why he did not tell staff that he had it and about what he was doing, he replied:

> ... Yes, that's – yes, look I understand that, it's just – I don't know, I just – I just wanted to try it out and I knew that basically if it – I knew that if someone bloody saw it, I'd probably be in a bit of strife, so I guess I knew what I was doing, but ...[19]

20. Police took possession of the receiver and the respondent, the informant, Detective Sergeant Palmer, gave evidence that he tested the device and viewed material using it.[20] He conceded that he did not, however, try the device with the camera in the locker and the receiver plugged into the television in room 4.[21]

21. Acting Sergeant Desousa, a technical operative in charge of the Video Cell Technical Support Unit of the Victoria Police gave evidence that he subsequently tested the device in a laboratory.[22] He plugged the receiver leads into a monitor. He found that the camera transmitted a visual image which could be received by the receiver and viewed on a monitor up to 30 metres away from the camera before the quality of the image deteriorated.[23]

The Magistrate's decision

22. The learned magistrate made adverse findings as to the appellant's credit, describing his explanation to police as a concocted version which "beggar[ed] belief". He concluded that the device was an "optical surveillance device" under the definition in s3(1) of the Act (without the words "a private" preceding "activity") stating:

> On the evidence of Acting Sergeant Desousa, the [appellant] and Detective Palmer, who all tested the equipment, the device as a whole or the camera in particular, were all capable of recording, or more importantly, observing the activities in the change room of The Rookery Nook Hotel in Wye River.

23. As far as the appellant's evidence about his efforts to obtain a signal in room 4 were concerned, the magistrate said:

> The mere fact that the [appellant] says that he could not obtain a clear picture on the day in question does not mean that the device was not capable of doing so. Indeed if it had been set up differently in a room closer to the bathroom or change room, or had it been tuned in properly, I'm sure it would have been capable of observing persons in the shower.

24. His Honour concluded that there was no other reasonable inference to be drawn than that the appellant knew what he was doing and that his actions were wrong and unlawful when he concealed the camera in the locker where the only people he would expect to observe would be those having a shower or using the bathroom.

25. The learned magistrate rejected the suggestion that the appellant had made some "misguided mistake". He referred to his observations of the appellant in the witness box and took into account his record of interview and the evidence of staff as to his evasive manner and his reluctance to have police involved.

26. The magistrate found that the appellant had "installed" the device and referred to his admissions to police. He concluded that the activities of people in the change room, which could be locked from the inside, were properly characterised as "private" under s7(1). His Honour said that the ultimate use to which the device might be put was irrelevant to his determination as to whether an offence had been committed.

27. The magistrate convicted the appellant of an offence under s7(1), notwithstanding his finding that there was no evidence that he actually observed anyone showering.

The sentence

28. The learned magistrate referred to the appellant's position of trust as the employer of the people who used the change room. He considered the offence serious and took the view that the victims would be affected by it. He noted the evidence of a female staff member that she felt sick after discovering the camera. His Honour took into account the appellant's previous conviction for recklessly engaging in conduct endangering life in relation to a motor vehicle for which he was convicted and fined $800.

29. The learned magistrate relevantly went on to say:

> The other thing that I have to take into account is the impact of recording a conviction on your economic and social well-being, or on your employment prospects. And whilst I am sure that the publicity that you have received, the denunciation of this Court today as to your conduct and behaviour, and the time upon which this matter has taken (sic), will all be – will have all impacted upon you quite substantially. But I also think they have probably impacted on the witnesses that had to give evidence in this court, because I am sure that if you had have pleaded guilty at the first available opportunity, that it may well have been a case where I would've considered a non-conviction. However, in this case, I am not prepared to do so because I do think it is a serious offence, and one which I must send out a message to all those people that were like-minded and might do something like this, their cases would be dealt with in a way that would at least record a conviction. If I had have had any evidence that you had been using – that you had recorded any of the – any person showering or if I had any evidence that the camera was properly working and you had observed it, I would've considered imprisonment. However, there was no such evidence that I can rely on in this case. In all the circumstances, you are convicted and fined $5,000 and I order you to pay $920 costs.

The appeal

30. The grounds of appeal in the notice of appeal filed on 3 September 2007, as amended, are stated as follows:

> 1. That the Magistrate erred in law by finding that the device in question was an "optical surveillance device" within the meaning of s3(1) of the [Act], being a "device capable of being used to record visually or observe a private activity", in the absence of any evidence that the device in question was used, or capable of being used, to record visually or observe a private activity in the circumstances in which it was alleged to have been installed by the Appellant.
>
> 2. Further and alternatively, to the extent that the Magistrate found that the device in question

was capable of being used to record visually or observe a private activity in the circumstances in which it was alleged to have been installed by the Appellant, the Magistrate erred in law in so doing in the absence of any evidence that the device in question was used, or capable of being used, to record visually or observe a private activity in the circumstances in which it was alleged to have been installed by the Appellant.

3. That the Magistrate should have found that the device in question was not an "optical surveillance device" within the meaning s3(1) of the [Act] and that therefore the Appellant was not guilty of an offence under s7(1) of the [Act] as there was no evidence that the device in question was used, or capable of being used, to record visually or observe a private activity in the circumstances in which it was alleged to have been installed by the Appellant.

4. That the Magistrate erred in law by finding that the device in question was "installed" by the Appellant "to record visually or observe a private activity" within the meaning of s7(1) of the [Act] in the absence of any evidence that the device in question was used, or capable of being used, to record visually or observe a private activity in the circumstances in which it was alleged to have been installed by the Appellant.

5. Further and alternatively, to the extent that the Magistrate found that the device in question was capable of being used to record visually or observe a private activity in the circumstances in which it was alleged to have been installed by the Appellant, the Magistrate erred in law in so doing in the absence of any evidence that the device in question was used, or capable of being used, to record visually or observe a private activity in the circumstances in which it is alleged to have been installed by the Appellant.

6. That the Magistrate should have found that the device in question was not "installed" by the Appellant "to record visually or observe a private activity" within the meaning of s7(1) of the [Act] and that therefore the Appellant was not guilty of an offence under s7(1) of the [Act] as there was no evidence that the device in question was used, or capable of being used, to record visually or observe a private activity in the circumstances in which it was alleged to have been installed by the Appellant.

7. That the Magistrate erred in law by finding the Appellant guilty of an offence under s7(1) of the [Act] in the absence of any evidence, or any evidence sufficient to support the permissible inference according to the requisite standard of proof (ie beyond reasonable doubt), that the Appellant had the necessary intent "to record visually or observe a private activity" within the meaning of s7(1) of the [Act].

8. That the Magistrate should have found the Appellant not guilty of an offence under s7(1) of the [Act] as there was no evidence, or no evidence sufficient to support permissible inference according to the requisite standard of proof (ie beyond reasonable doubt), that the Appellant had the necessary intent "to record visually or observe a private activity" within the meaning of s7(1) of the [Act].

9. That the Magistrate erred in law in exercising his discretion as to sentencing in accordance with s8(1) of the *Sentencing Act* 1991 (Vic) by recording a conviction against the Appellant in that:

(i) the Magistrate failed to give adequate weight to the impact of the recording of a conviction on the Appellant's economic and social well-being and on his employment prospects; and/or

(ii) the recording of a conviction against the Appellant in all the circumstances was manifestly excessive in the sense that it was so unreasonable or plainly unjust as to be erroneous.

10. That in properly exercising his discretion in accordance with s8(1) of the *Sentencing Act* 1991 (Vic) the Magistrate should not have imposed a sentence recording a conviction against the Appellant.

31. Counsel for the appellant summarised the point made in paragraphs 1 to 3 as being that the s3(1) definition, properly construed in the context in which it appears in s7(1), required that the device must be capable of 'recording visually or observing' an activity in the circumstances in which it is alleged to have been 'installed' before an offence would have been committed.

32. Counsel for the appellant's written submissions explain that paragraphs 4 to 6 relate to the meaning of "install" in s7(1). The subsection, he argues, prohibits the installation of a device capable of being used to record or observe a private activity in the circumstances in which it is installed.

33. Grounds 7 and 8 are explained as a challenge to the magistrate's finding of *mens rea*, being

the intent to install an optical surveillance device to record or observe a private activity without permission. The appellant contends that there were not facts established by the evidence from which the inference could be drawn to the requisite standard of proof. He relies upon his assertion to the effect that he intended to install the device in order to test it, when it was concealed, for later use as a security surveillance device elsewhere in the hotel.

34. Grounds 9 and 10 challenge the exercise of the sentencing discretion on the grounds that the magistrate failed to take into account the effect of the sentence on the appellant's economic and social well-being and, in particular, upon his ability to satisfy licensing requirements.

Submissions

Finding of guilt

35. Counsel for the appellant argues that the magistrate was wrong to find the appellant guilty of the offence under s7(1) in the absence of evidence that the device was capable, in the position in which it had been installed, of being used to observe a private activity.

36. The appellant argues that there was no evidence that the device, as installed, was capable of being used to observe a private activity because there was no evidence that the signal could be effectively transmitted from inside the metal locker to be received for the purposes of observing any activity.

37. Counsel refers to the *New Shorter Oxford Dictionary* definition of the verb "install" of "to place (an apparatus, system, etc) in position for service or use".[24] He also argues that absurd and anomalous results would flow and the ordinary and grammatical meaning of the provision would be defeated if s7(1) were to be interpreted otherwise than as he contends. He argues that many devices (such as a camera used with a computer to transmit images) have the capacity of being used for the prohibited purpose. He contends that their innocent installation would constitute an offence and resulting injustice if his interpretation of s7(1) were not correct.

38. Counsel then argues that the magistrate erred in law in concluding that he had the requisite intent for the offence,[25] in the absence of evidence from which he could draw the necessary inference. Counsel points in this regard to the appellant's evidence as to the purpose of the test and his opportunistic use of an available power point in the change room, together with what he describes as evidence that the appellant's failure to understand that his actions might be viewed by others as wrong. He relies upon what he submits is the consistency of his accounts to police and the court. He argues that the evidence raises a doubt about intent.

39. Emphasising the importance of the text in statutory construction and the need to resolve ambiguity or doubt by refusing to extend the category of criminal offences,[26] counsel reminds the Court that the purposive approach is not a substitute for close attention to the statutory text.[27] He argues for an interpretation of s7(1) which is consistent with the statutory purpose of creating offences relating to the "improper" installation of surveillance devices under s1(d).[28]

40. Senior counsel for the respondent contends that the subject offence is clearly but one of three alternative offences under s7(1) of the Act. The proscribed behaviour is the installation of an optical surveillance device in the appellant's case, rather than that relating to its use or maintenance.

41. The respondent argues that there was evidence upon which it was open to the magistrate to find that the device installed by the appellant was capable of being used to observe the private activity referred to in s7(1).

42. Senior counsel for the respondent submits that the relevant issue was as to whether or not there had been an installation of an optical surveillance device within the meaning in s3(1), not as to whether the device worked in the circumstances in which it was installed. He contends that it is apparent, from the listed items excluded, that the definition in s3(1) covers a wide variety of items capable of certain uses and that whether an item is an "optical surveillance device" depends on its nature and not the circumstances or effectiveness of its installation or use.

43. Senior counsel for the respondent notes that the Act does not focus upon any breach of

privacy and would not appear to relate to the unassisted observation of the specified activity *per se* without the use of a device. Its title indicates its subject matter. The emphasis is on the item, not on its efficiency or effectiveness in relation to the intended purpose of its installation. The question whether the device is an optical surveillance device is answered by reference to whether or not it has the capability described in the s3(1) definition.

44. He submits that s7(1) proscribes and concerns the installation, use and maintenance of a device and not necessarily the recording or observation of a private activity. It should be interpreted accordingly. Whether the optical surveillance device in question is capable of recording or allowing the observation of a private activity after its installation is not to the point.

45. Senior counsel for the respondent argues that the inference of *mens rea* was open in the context of evidence of the disguising of the camera which was pointed towards the shower in a staff change-room.

Sentence

46. Counsel for the appellant relies upon what he submits was the learned magistrate's failure to do more than mention the effect of a conviction upon the appellant's economic or social well-being or employment prospects. He argues that there is no statement as to how he has taken into account the pending inquiry into the appellant's capacity to hold a liquor licence or how he has addressed the mandatory consideration more generally.

47. Senior counsel for the respondent argues that the learned magistrate sufficiently indicated that he had taken the relevant effects of the conviction. His reasons should be read bearing in mind the processes in the Magistrates' Court.

Conclusions — Finding of Guilt

48. Sections 7(1) and 3(1) must be read in their statutory context.[29] I agree with the respondent's submission that that context is one relating to surveillance devices. Section 7(1) reflects the statutory purpose of regulating the installation, use and maintenance of surveillance devices in s1. Section 7(1) proscribes the installation, use and maintenance of the widely defined "optical surveillance device" for the described purpose, as opposed to the recording or observation of a private activity *per se*. The targeted impropriety referred to in s1(d) would appear to relate to the purpose, described in s7(1), for which the device is installed or used.

49. The definition of "optical surveillance device" in s3(1) does not refer to any capability to be used in any particular circumstances, such as those which would exist after the device has been installed.

50. I am not persuaded that the learned magistrate erred in finding the offence proven in the absence of evidence that the appellant successfully operated the device with the camera in the locker and the receiver in room 4 or evidence that the device was tested with the camera in the locker and the receiver in room 4 or anywhere else.

51. It is not to the point whether the device, as installed, had the capability referred to in the s3(1) definition. A finding of guilt was open once there was evidence that a device, with the capability of being used to observe a private activity in some circumstances, was put in place for the purpose of the use described in s7(1), with the requisite intent.

52. In this case, it was open to the learned magistrate to conclude that the device had the technical capability required for its use to observe a "private activity", within the definition in s3(1), from the evidence of testing by the respondent, Acting Senior Constable Desousa and the appellant himself.

53. The appellant's admissions constituted evidence from which it was open to the magistrate to conclude that he had "installed" the device by putting the camera in place for the purpose of use in the locker and the receiver in place for the same purpose in room 4. The appellant claimed that his purpose was to test the device. The "testing" involved viewing the images of activity in the change room within the line of sight of the lens.

54. There was also evidence upon which it was open to the magistrate to conclude that the activity which might be observed inside that change-room would constitute "a private activity" as defined. Finally, there was no evidence of consent being obtained by the appellant.

55. There was evidence upon which it was open to the learned magistrate to conclude that the appellant knowingly installed the device for the purpose of observing a private activity in the change room. So much is implicit in his admissions that he put the disguised device in position to test it and that he knew that it was directed at the shower stall in the staff change-room.

56. It was also open to the magistrate to reject the appellant's explanation that he only placed the device in the locker to test it for security surveillance use when he was unable to find an available power point and to conclude that the appellant knew that what he was doing was wrong. I am not persuaded that the magistrate's conclusion was not open because the appellant had given evidence that he made a mistake and was surprised by the staff reaction to the discovery of the device.

57. The short answer to the appellant's argument about the innocent installation of equipment capable of being used in the prohibited way is that no offence under s7(1) would be committed unless the device were to be installed for the purpose of observing a private activity in the requisite circumstances.

58. The apparent speculation by the magistrate as to what might have been the case, had the receiver been tuned or set up differently in a room closer to the change room, does not affect my conclusion that there was evidence upon which it was open to him to conclude that the device had the capability required under the s3(1) definition and, therefore, that required under s7(1).

59. I do not consider either s3(1) or s7(1), as they stood on 21 April 2006, to be ambiguous and am not assisted by reference to the amendments to the definition in the amending Act or the extrinsic materials relating to the amendment to which the appellant referred in his supplementary submissions on 25 August 2008. It was common ground that the relevant amendment to the definition was directed at the harmonisation of national laws governing surveillance devices.

60. I am not persuaded to a contrary view by the appellant's reference to the dictionary definition of the verb "install". I adopt that meaning but reject the appellant's argument that it supports his submission as to the meaning of the definition of "optical surveillance device" in s3(1) or his construction of s7(1).

61. Although the learned magistrate did err in law in relying upon the provisions of the Act as subsequently amended, I am of the view that his decision would have been correct, in any event, had he referred to the applicable definition of "optical surveillance device" in s3(1). His Honour was right to find the appellant guilty of the charge under s7(1) under the Act as it stood at the date of the alleged offence.

Sentence

62. I am not persuaded that the learned magistrate erred in law in the exercise of his sentencing discretion. Whilst s8(1)(c) of the *Sentencing Act* 1991 did require the court to take into account the effect of recording a conviction on the appellant's economic and social well-being and his employment prospects, the learned magistrate clearly did so in the quoted extract from his reasons. [30]

63. The magistrate was clearly aware of the appellant's previous occupation as a publican. The transcript of the plea in the Magistrates' Court on 3 August 2007 records counsel's submission that the court should take it into account that there was a pending enquiry as to whether the appellant was a fit and proper person to hold a liquor licence.[31] Counsel told the court that the licensing authority was likely to argue that the appellant was not a fit and proper person to hold a licence, whether or not he was acquitted or convicted. He emphasised the importance of the issue in the exercise of the court's discretion as to whether or not to impose a conviction.

64. In all the circumstances and bearing in mind that the hearing and sentencing took place in the Magistrates' Court, I am not persuaded that the learned magistrate failed to address the

consideration referred to in s8(1)(c) of the *Sentencing Act* 1991 taking into account the matters about which he had been informed by counsel in the plea hearing.

65. The appeal should be dismissed.

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[1] Transcript, Magistrates' Court ("MT"), 33 lines 15-20.
[2] MT 37 line 18.
[3] MT 34 lines 1–11.
[4] MT 34 lines 23-6.
[5] MT 34 line 31 – MT 35 line 3.
[6] MT 41 lines 16-20.
[7] MT 45 lines 20-1.
[8] MT 45 lines 17-18.
[9] MT 45 lines 28-9.
[10] MT 46 line 7.
[11] MT 42 line 27-8.
[12] MT 44 lines 25-6.
[13] MT 50 lines 4-29.
[14] MT 14 lines 5-20.
[15] MT 15 lines 4-10.
[16] MT 22 lines 12-15.
[17] MT 23 lines 18-23.
[18] MT 39 line 27 – MT 40 line 2.
[19] Record of Interview question 97.
[20] MT 27 lines 18-21.
[21] MT 27 lines 22-4.
[22] MT 7 line 10 - MT 8 line 7.
[23] MT 7 lines 22- 24.
[24] *New Shorter Oxford Dictionary* (1993), vol 1 at 1381; see: *The Oxford English Dictionary* (2nd ed.) 1039.
[25] Citing *Roads Corporation v Dacakis* [1995] VicRp 70; [1995] 2 VR 508 at 520 per Batt J.
[26] *Beckwith v R* [1976] HCA 55; (1976) 135 CLR 569; (1976) 12 ALR 333 at 339; 51 ALJR 247; 28 ALT 39 per Gibbs J.
[27] *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; (2005) 224 CLR 193, at 206 [30]; (2005) 221 ALR 448; (2005) 79 ALJR 1850; 65 IPR 513; [2005] AIPC 92-140 per Gleeson CJ, Gummow, Hayne and Heydon JJ.
[28] Citing: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, at 381 [69]; 153 ALR 490; (1998) 72 ALJR 841; (1998) 8 Leg Rep 41 per McHugh, Gummow, Kirby and Hayne JJ; s35(a) of the *Interpretation of Legislation Act* 1984; *Mills v Meeking* (1990) 91 ALR 16 at 30-1 per Dawson J; *Chugg v Pacific Dunlop Ltd* (1990) 95 ALR 481; (1990) 64 ALJR 599 per Dawson, Toohey and Gaudron JJ.
[29] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; (1985) 157 CLR 309; (1985) 60 ALR 509 at 514; [1985] Aust Torts Reports 80-323; (1985) 3 ANZ Insurance Cases 60-653; (1985) 2 MVR 289; (1985) 59 ALJR 658 per Mason J.
[30] At [29] above.
[31] Plea Transcript 21 line 3 – 23 line 5.

APPEARANCES: For the appellant Brown: Mr TJP Walker, counsel. Logie-Smith Lanyon, solicitors. For the respondent Palmer: Mr J McArdle QC, counsel. The Office of Public Prosecutions.
