21/04; [2004] VSC 97

SUPREME COURT OF VICTORIA

DPP v VERIGOS and ANOR

Nettle J

11, 31 March 2004 — (2004) 145 A Crim R 82

CRIMINAL LAW – MAGISTRATES' COURT'S JURISDICTION – DEFENDANT CHARGED WITH AGGRAVATED BURGLARY WITH INTENT TO ASSAULT – COMMITTAL PROCEEDINGS COMMENCED BEFORE MAGISTRATE – APPLICATION FOR CHARGE TO BE DEALT WITH SUMMARILY – OBJECTION BY PROSECUTOR – APPLICATION GRANTED – WHETHER MAGISTRATE IN ERROR – STATUTORY INTERPRETATION – IMPLYING WORDS INTO LEGISLATION – WHETHER MAGISTRATE IN ERROR IN IMPLYING ADDITIONAL WORDS: *MAGISTRATES' COURT ACT* 1989, S53 and Schedule 4, Items 18, 19.

1. Sections 76 and 77 of the *Crimes Act* 1958 provide for two different sorts of burglary. The first, which is proscribed by s76(1)(a) has as its elements breaking and entering with intent to steal. The second, which is proscribed by s76(1)(b) has as its elements breaking and entering with intent to commit an offence involving an assault or damage to the building or to property. Unless there is reason to construe s76 or items 18 and 19 of Schedule 4 of the *Magistrates' Court Act* 1989 otherwise than in accordance with the plain and ordinary meaning of their terms, it follows that the summary jurisdiction which is conferred by s53 and items 18 and 19 of schedule 4 is limited to burglary of the kind provided for in s76(1)(a), which is to say burglary constituted by breaking and entering with intent to steal, and aggravated burglary constituted by a burglary of that kind when committed in the aggravating circumstances prescribed by s77. Accordingly, a magistrate did not have jurisdiction to deal summarily with a charge of aggravated burglary which did not involve an intent to steal.

2. The words of a statutory provision take their meaning from their context. The legislation makes it clear that summary jurisdiction with respect to burglary is limited according to the intent with which it is committed. Having regard to the way in which the legislation has evolved and there is no suggestion that Parliament intended to expand the summary jurisdiction with respect to burglary, the magistrate was in error in departing from the plain and ordinary meaning of the language of the legislation.

NETTLE J:

1. This is an application for an order in the nature of *certiorari* to quash orders of the Magistrates' Court at Geelong made on 9 July 2003. The question is whether the Magistrate erred in assuming jurisdiction under s53 of the *Magistrates Court Act* 1989 to determine summarily a charge of aggravated burglary contrary to s77 of the *Crimes Act* 1958 constituted of entering a dwelling house, armed with a knife, with intent to commit an offence involving an assault on a person.

The facts

2. On 7 March 2003 the first defendant, Arthur Verigos, was charged with an offence of aggravated burglary (with intent to assault) contrary to s77(1) of the *Crimes Act* 1958, in that on 4 March 2003 he did as a trespasser enter a building or part of a building known as private premises with intent to assault a person and at the time had with him an offensive weapon, namely, a silver knife. He was also charged with offences of assault with a weapon and unlawful assault contrary to s23 of the *Summary Offences Act* 1966.

3. According to the Summary of Evidence included in the hand up brief, the essential facts of the offence were as follows:

> * At about 5.30 pm on Tuesday 4 March 2003, the victim (who was a woman of 52 years of age) was at her home in East Geelong with her defacto partner. She was preparing to leave the premises when she heard the front door bell ring and she opened the front door. As she did so, she saw the accused standing in the doorway. * The accused dangled a pink clip in front of the victim and asked her: "Would you like this on your head against your head?". The accused then held the clip up as he stepped onto the doorstep. The victim had no idea what the accused was referring to and told

> the accused to go away. The accused ignored the instruction and moved forward into the doorway and entered the house where he then stood in the hallway. * The accused then grabbed the victim's hair with his left hand and forcefully pulled her head towards the ground and pushed backwards up against the wall in the hallway. The accused kept asking the victim: " Do you want to, do you want to, do you?". The victim feared for her safety and screamed for her defacto partner to come and help her. * The victim's defacto partner then walked out from the living room at the rear of the house and saw the accused holding the victim by the hair. He grabbed a broomstick and approached the accused and asked him what he was doing and told him to let go of the victim. The accused loosened his grip on the victim's hair and asked the victim: "Where is my girl?". At that time the victim saw the accused holding a silver coloured smooth bladed knife in his right hand and she became more concerned for her safety. The accused started to back out of the door and said: "If she's here and I know she's here, I'll come back if she's here. I'll be back". The accused had no permission to enter the premises * The accused then walked sideways into the front yard towards the road and entered his vehicle and drove off along the road. The ordeal made the victim feel very scared and threatened and she believed she was going to be physically injured, sexually assaulted or robbed. * As the accused left, the victim inquired who or what was his girl but the accused didn't reply. The victim didn't receive any physical injuries during the attack nor did she provoke or intimidate the accused. Prior to 4 March 2000, she had never met the accused or seen the accused so far as she was aware. * When interviewed by police on 7 March 2003, the accused denied committing aggravated burglary, assaulting the victim with a weapon or unlawfully assaulting her. The explanation he gave during the tape recorded interview was that the victim had stolen his dog and he was trying to recover the dog from her.

4. The matter was listed to be heard as a contested committal hearing at the Magistrates' Court at Geelong on 9 July 2003 and came on for hearing that day. At the outset of the hearing, however, counsel who then appeared for the accused moved that the Magistrate "exercise (his) discretion to have this matter heard summarily". The prosecutor argued against the application. He submitted that the jurisdiction to try a count of aggravated burglary summarily only arises in cases of aggravated burglary which *involve* an intent to steal (by which he meant regardless of whether or not they may also involve an intent to commit some other offence), or alternatively that the jurisdiction extends only to offences of burglary constituted of entering premises with intent to steal, and thus excludes offences of burglary constituted of entering a building with intent to commit an offence involving assault or involving damage to the building or property in the building.

5. The Magistrate allowed the application. His Worship held that:

> "... there are two arguments. The argument on the one hand is that under the provisions of the schedule, the court is empowered to hear an aggravated burglary, and an aggravated burglary by definition, is one which encompasses an assault. If it encompasses an assault with an intent to steal, it is plain, the court has power to hear that sort of case. The argument is that if it involves a lesser crime, that is just an assault without an intent to steal, even though the assault may be in factual terms, identical, then this court cannot hear such a case summarily, which would appear to be nonsense, given that the court has clearly got power to hear a case of greater gravity, why would it be eliminated from hearing a case of lesser gravity. That is one argument. The other argument is that the schedule provision says that the court can only hear a case of aggravated burglary if the offence involves an intent to steal, which doesn't exceed $25,000 and if it doesn't involve that intent to steal then it is excluded and that is the literal interpretation of that particular paragraph. My view is though, that in construing that paragraph, paragraph 19, you must look at paragraphs that surround it, 16, 17, 18 and 19 and each of them deal (sic) with theft, robbery and burglary and then aggravated burglary and each of them say (sic) that this court has got power to deal with theft if the amount stolen doesn't exceed $25,000, robbery, same, $25,000, burglary, same, $25,000 aggravated burglary, same $25,000. What the legislature is doing is saying, not that this court is prevented from hearing a case of aggravated burglary or is allowed to hear a case of aggravated burglary, I should say, if the offence involves an intent to steal property, but if the offence involves an intent to steal property less than $25,000, including one that involves no intent to steal, in my view, ought to be a matter that is included in what is intended by the legislature. The intention is to make the cut off $25,000, not an intention to steal with an aggravated burglary. *To construe it in that manner, in my view, would be nonsensical and wouldn't make sense because it would mean that this court wouldn't have power to hear a lesser offence while it has got power to hear a greater offence.*" (My emphasis)

6. In my opinion, the Magistrate erred. The first argument put by the prosecutor was wrong, both as formulated by the prosecutor and in the modified form in which it was adopted by the Magistrate. The second argument put by the prosecutor was right and should not have been rejected.

The current legislation

7. Sections 76 and 77 of the *Crimes Act* 1958 provide that:

> "76 Burglary (1) A person is guilty of burglary if he enters any building or part of a building as a trespasser with intent—
> (a) to steal anything in the building or part in question; or
> (b) to commit an offence—
> (i) involving an assault to a person in the building or part in question; or (ii) involving any damage to the building or to property in the building or part in question - which is punishable with imprisonment for a term of five years or more. (2) References in sub-section (1) to a building shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is (3) A person guilty of burglary is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).
>
> 77. **Aggravated burglary** (1) A person is guilty of aggravated burglary if he or she commits a burglary and - (a) at the time has with him or her any firearm or imitation firearm, any offensive weapon or any explosive or imitation explosive; or
> (b) at the time of entering the building or the part of the building a person was then present in the building or part of the building and he or she knew that a person was then so present or was reckless as to whether or not a person was then so present.
> (1A) For the purposes of sub-section (1)—
> 'explosive' means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him or her for that purpose;
> 'firearm' has the same meaning as in the *Firearms Act* 1996
> 'imitation explosive' means any article which might reasonably be taken to be or to contain an explosive;
> 'imitation firearm' means anything which has the appearance of being a firearm. Whether capable of being discharged or not;
> 'offensive weapon' means any article made or adapted for use for causing injury to or incapacitating a person, or which the person having it with him or her intends or threatens to use for such a purpose. (2) A person guilty of aggravated burglary is guilty of an indictable offence and liable to level 2 imprisonment (25 years maximum)."

8. Section 53 of the *Magistrates' Court* Act 1989 provides that:

> "53. **Indictable offences triable summarily** (1) If a defendant is charged before the Court with any offence referred to in Schedule 4 or with any other indictable offence to which this sub-section applies, the Court may hear and determine the charge summarily if— (a) the Court is of the opinion that the charge is appropriate to be determined summarily; and (b) the defendant consents to a summary hearing.
>
> (1A) In addition to the offences referred to in Schedule 4, sub-section (1) applies to an indictable offence under an Act if the Act describes the offence as being level 5 or 6 or as being punishable by level 5 or 6 imprisonment or fine or both.
>
> (1B) If an offence is described as being punishable in more than one way or in one of two or more ways, sub-section (1) does not apply to it if any one of those ways is not referred to in sub-section (1A).
>
> (1C) Sub-section (1) does not apply to an indictable offence by virtue of sub-section (1A) if that offence is referred to in Schedule 4 but the reference to that offence in that Schedule is qualified by reference to a specified amount or value or a specified kind of property. (2) Sub-section (1) applies even though the proceeding may have been commenced more than 12 months after the date on which the offence is alleged to have been committed."

9. Items 16 to 23 of Schedule 4 to the *Magistrates' Court Act* are as follows:

> "16. Theft Offences under section 74 of the *Crimes Act* 1958, if the amount or value of the property alleged to have been stolen does not in the judgment of the court exceed $25,000 or if the property alleged to have been stolen is a motor vehicle.
> 17. Robbery Offences under section 75 of the *Crimes Act* 1958, if the amount or value of the property alleged to have been stolen does not in the judgment of the Court exceed $25,000.
> 18. Burglary Offences under section 76 of the *Crimes Act* 1958, if the offence involves an intent to steal property the amount or value of which does not in the judgment of the Court exceed $25,000.
> 19. Aggravated burglary Offences under Section 77 of the *Crimes Act* 1958, if the offence involves an intent to steal property the amount or value of which does not in the judgment of the Court exceed $25,000.

20. Removal of articles from places open to the public Offences under section 78 of the *Crimes Act* 1958, if the amount or value of the article alleged to have been removed does not in the judgment of the Court exceed $25,000.
21. Obtaining property by deception Offences under section 81 of the *Crimes Act* 1958, if the amount or value of the property alleged to have been obtained does not in the judgment of the Court exceed $25,000.
22. Obtaining financial advantage by deception Offences under section 82 of the *Crimes Act* 1958, if the amount or value of the financial advantage alleged to have been obtained does not in the judgment of the Court exceed $25,000.
23. False accounting Offences under section 83 of the *Crimes Act* 1958, if the amount or value of the alleged gain or loss does not in the judgment of the Court exceed $25,000."

The summary jurisdiction

10. As will be apparent from the provisions just set out, the jurisdiction under s53 of the *Magistrates' Court Act* to deal summarily with a charge of burglary or aggravated burglary is limited by items 18 and 19 of Schedule 4 to offences of burglary and aggravated burglary which "involve... an intent to steal property the amount or value of which does not ... exceed $25,000". More specifically, the jurisdiction does not extend to an offence of burglary unless it "involves an intent to steal".

11. As will also be apparent, s76 (and, hence s77) provides for two different sorts of burglary and consequently for two different offences. The first, which is proscribed by in s76(1)(a), has as its elements breaking and entering "with intent to steal"; and the second, which is proscribed by paragraph (b), has as its elements breaking and entering "with intent to commit an offence involving an assault...or involving any damage to the building or to property".

12. According to the plain and ordinary meaning of language, a breaking of which the *animus quo* is an intent to steal is an offence which involves an intent to steal, and a breaking of which the *animus quo* is an intent to commit assault or damage to property is not an offence which involves an intent to steal.

13. Unless there is reason to construe s76 or items 18 and 19 of Schedule 4 otherwise than in accordance with the plain and ordinary meaning of their terms, it follows that the summary jurisdiction which is conferred by s53 and items 18 and 19 of schedule 4 is limited to burglary of the kind provided for in s76(1)(a), which is to say burglary constituted of breaking with intent to steal, and aggravated burglary constituted of a burglary of that kind when committed in the aggravating circumstances prescribed by s77.

The Magistrate's analysis

14. As has been seen the Magistrate rejected the plain and ordinary meaning of the language because he considered that it would result in the nonsense of the Magistrates' Court having jurisdiction to deal with a "greater offence" but not being able to deal with a "lesser offence". In other words, as I understand what his Worship said, he considered that, because an offence of burglary which involves an intent to steal less than $25,000 is within item 18, it would be nonsense to conclude that an offence of burglary which does not involve an intent to steal (which his Worship characterised as an offence which involves an intent to steal nothing) were not within item 18, and hence Parliament must have intended that it be included. That analysis appears to me to break down at a number of levels.

(i) The intent to steal nothing

15. In the first place, the analysis is based upon a fallacy that because an offence of burglary of the type defined by s76(1)(a) involves an intent to steal, and an offence of the type defined by s76(1)(b) does not, the former offence is necessarily a graver offence than the latter. Plainly, that is not so. Some offences of breaking with intent to steal may be more serious than offences of breaking with intent to assault or do damage to property, but that will not often be so. Most times, a breaking which involves an intent to assault or to do damage to property is likely to be judged more harshly.

(ii) The history of the legislation

16. In the second place the analysis overlooks the legislative antecedents of s53 and Items 18 and 19 of the Schedule 4 to the *Magistrates' Court Act*, and that historically the summary

jurisdiction with respect to burglary was always limited to offences constituted of entry with intent to steal.

17. The power of justices to deal summarily with indictable offences was provided for in s77 of the *Crimes Act* 1958. In that form it was confined to offences of larceny and embezzlement where the amount or value of the property alleged to have been stolen or embezzled did not exceed twenty five pounds; offences contrary to ss330 and 331 of the *Crimes Act* of receiving stolen property of value not greater than twenty-five pounds; offences contrary to s187 of the *Crimes Act* of obtaining money by false pretences or false promises of an amount of not greater than twenty-five pounds; and offences of illegally pawning contrary to s22 or 34 of the *Pawnbrokers Act* 1958 where the value of the item pledged did not exceed twenty-five pounds. The justices did not then have any jurisdiction to deal summarily with an offence of burglary or house breaking, whether or not it involved an intent to steal.

18. Section 77 of the *Crimes Act* 1958 was repealed by s7 of the *Justices (Amendment) Act* 1962, and in effect was replaced and expanded by s8 of that Act, by the insertion in the *Justices Act* 1962 of a new s102A. That section continued the jurisdiction to deal summarily with offences of larceny and embezzlement; and offences contrary to s331 of the *Crimes Act* (of receiving stolen property where the amount or value of the property alleged to have been received did not exceed five hundred pounds); and offences contrary to s187 of the *Crimes Act* (of obtaining money by false pretences, if the amount of the debt or liability alleged to have been incurred did not exceed five hundred pounds); and offences contrary to ss22 or 34 of the *Pawnbrokers Act* (of illegally pawning where the value of the article pledged or to which the pledge-ticket referred did not exceed five hundred pounds). It also added jurisdiction to deal summarily with offences contrary to s134 of the *Crimes Act* (of break and enter (other than a dwelling house) if the amount or value of the property the subject matter of the offence did not exceed five hundred pounds)[1]; offences contrary to s188 of the *Crimes Act* (of obtaining delivery of property by false pretences where the value of the money, chattel or valuable security alleged to have been paid or delivered did not exceed five hundred pounds)[2]; and offences contrary to s135 of the *Crimes Act* (of break and enter (other than a place of worship or dwelling house) with intent to commit a felony)[3]; and offences of wounding, contrary to s19 of the *Crimes Act*[4]; and offences of assault occasioning actual bodily harm, contrary to s37 of the *Crimes Act*[5]; and offences of indecent assault contrary to s55(1) of the *Crimes Act*[6]. The new section did not, however, confer any jurisdiction to deal summarily with a charge of burglary contrary to s128 of the *Crimes Act* (which is to say, entering a dwelling-house with intent to commit a felony therein or being in such dwelling-house, committing a felony and breaking out by night)[7].

19. The *Magistrates' Court Act* 1971 provided for the first time for the establishment of Magistrates' Courts and s9 of the *Magistrates' Courts (Jurisdiction) Act* 1973 inserted a new Part VIII in the *Magistrates' Court Act* 1971 conferring jurisdiction upon every Magistrates' Court to do any act or exercise any power which justices were empowered or authorised by any Act of Parliament to do. Section 69 in the new Part VIII expressly conferred on Magistrates' Courts jurisdiction to deal summarily with the same range of offences as the justices had been authorised to deal by s102A of the *Justices Act* 1962, and also the offences of larceny or killing of cattle, where the value of the animal did not exceed $1,000; stealing from ships or docks where the value of the property did not exceed $1,000; obtaining secret commissions, where the consideration received or solicited did not exceed $200; destroying trees, where the value of the trees did not exceed $1,000; and forging bills of exchange where the value of the bills or notes did not exceed $1,000. At that point there was still no jurisdiction to deal summarily with offences of burglary.

20. That changed with s3 of the *Crimes (Theft) Act* 1973. It abolished the common law offences of larceny, robbery, burglary and receiving stolen property and replaced them with a new range of "theft and similar or associated offences" in a new Division 2 of Part I of the *Crimes Act* 1958. It included the new offences of burglary and aggravated burglary in ss76 and 77 set out above.

21. Consequentially, by operation of s2(2) and paragraph 2 of the Schedule to the *Crimes (Theft) Act* the first six paragraphs of s102A of the *Justices Act*[8] were repealed and replaced with the following:

> "(a) with the offence of theft where the amount or value of the property alleged to have been stolen

> does not in the judgment of the Justices exceed the sum of $2,000; (b) with any offence of burglary where the offence involves the stealing of any property and the amount or value of the property the subject-matter of the offence does not in the judgment of the Justices exceed the sum of $2,000 (my emphasis); (c) with any offence against section 78 of the *Crimes Act* 1958 where the amount or value of the property the subject-matter of the offence does not in the judgment of the Justices exceed the sum of $2,000; (d) with any offence against section 80, 81 or 87 of the *Crimes Act* 1958 where the amount or value of the property or financial advantage alleged to have been obtained does not in the judgment of the Justices exceed the sum $2,000."

22. Evidently, the reference to the new offence of theft in paragraph (a) of s102A of the *Justices Act* was intended to replace the previous references to the old offences of larceny and embezzlement; and the reference to the new offence of obtaining property by deception (created by s81 of the *Crimes Act*) was intended to replace the previous reference to the old offences of obtaining money or property by false pretences. Contrastingly, the references to the new offence of removing articles from public places (created by s78 of the *Crimes Act*), unlawfully taking control of an aircraft (created by s80 of the *Crimes Act*), and blackmail (created by s87 of the *Crimes Act*) appear intended to expand the range of offences which could be dealt with summarily; although there is some overlap with the old offence of larceny.

23. More significantly for present purposes, the reference in the new paragraph (b) to the new offence of burglary (of which the intention to steal or commit other offences is an essential element) appears intended to replace references to the old offence of breaking and entering with intent to commit a felony therein, although it seems that it was not intended to cover the old offence of breaking and stealing (of which intent to steal or intent to commit other offences – as opposed to actual stealing – was not an element). Presumably, that was left to the reference to the new offence of theft in paragraph (a).

24. Most importantly for present purposes the limitation in the new paragraph (b) to offences "where the offence involves the stealing of any property and the amount or value of the property the subject-matter of the offence", appears plainly to have been designed to limit the summary jurisdiction in respect of burglary to burglaries of the kind defined in s76(1)(a) (which is to say burglaries constituted of entering with intent and thus having stolen property as their subject matter), and to exclude burglaries of the kind defined in s76(1)(b) (which is to say burglaries constituted of entering with intent to commit an offence other than stealing, and therefore not having stolen property as their subject matter).

25. Looked at with the benefit of hindsight it may be that the words "involves the stealing of property and the amount or value of the property the subject-matter of the offence" were not as well chosen as they might have been. Perhaps it would have been more accurate to say: "involves an intent to steal property of which the value". But given that the s76(1)(a) form of burglary was the only kind of burglary that involved stealing in any sense at all, or at least the only form of burglary of which it could be said that it had the stealing of property as its subject matter, there can be no doubt about what was intended.

26. Of course it is possible that an offence of burglary of the s76(1)(b) variety could be committed in conjunction with an offence of stealing. If so it might be argued that it "involved the stealing of property". Although it is difficult to conceive of an offence as involving an intent to steal unless the intent to steal is an element of the offence, it has been held in another context that the word "involves" is not necessarily to be equated to an element of an offence. In *Australian Securities Commission v Lord*[9] Davies J held that it was not necessary to establish that fraud or dishonesty was an element of an offence the subject of investigation for the purposes of the expression "involves fraud or dishonesty" in s28 of the *Australian Securities Commission Law.* It was enough that it was suspected that there was associated fraud or dishonesty. The word "involved" also has an established meaning in the area of revenue law concerned with the problem of whether a decision the subject of appeal is one that involves a question of law[10]. In as much as those lines of authority ascribe a meaning to "involved" that is equivalent or close to "associated with", as opposed to "part of", they may be thought of as some support for the idea that a s76(1)(b) offence is one that involves an intent to steal if committed in conjunction with an offence of stealing.

27. But I do not think that is the case. The words of a statutory provision take their meaning from their context, and in the context of s102A of the *Justices Act* I do not think that there can be

any doubt that "involves" was used in the sense of "an element of the offence". The section referred to an offence that "involves the stealing of property and the amount or value of the property *the subject-matter* of the offence" (my emphasis). Regardless of the circumstances, the only form of burglary of which it could be said that it had the stealing of property as its "subject matter" was burglary of which the intent to steal was an element of the offence.

28. To read the words in any other fashion would also have made nonsense of the provision. As the history of the legislation to that point showed, the purpose of the limitation to offences involving property of value of not more than $2,000 was to confine the jurisdiction to offences of burglary of lesser gravity. If "involves the stealing of property and the amount or value of the property the subject-matter of the offence does not exceed $2,000" had meant "committed in conjunction with an offence of the stealing property which does not exceed $2,000" the jurisdiction would not have been so limited. It would have extended to all offences of burglary, no matter how grave, so long as there were present the fortuitous circumstance of being committed in conjunction with the stealing of property of value up to $2,000.

29. In 1975, s102A of the *Justices Act* was replaced by the insertion by s4 of the *Magistrates' Court (Amendment) Act* 1975 of a new s69 in the *Magistrates' Court Act* 1971. *Mutatis mutandis*, it was in terms the same as s102A of the *Justices Act*, until the amounts of $2,000 referred to in the section were increased to amounts of $10,000 by the *Magistrates' Court (Jurisdiction)* Act 1980.

30. The *Magistrates' Court Act* 1989 repealed the *Magistrates' Court Act* 1971 and in effect replaced s69 of the 1971 Act with the new s53 and Schedule 4 of the 1989 Act. Item 18 of the new Schedule 4 corresponds to paragraph (b) of the old s69 but the drafting of the new provision is different. According to the Second Reading Speech it has the benefit of having been drafted in "plain English"[11]. Consequently, instead of defining the summary jurisdiction with respect to burglary in terms of an offence of burglary which "involves the stealing of property where the amount or value of the property the subject-matter of the offence" is not more than a specified value, as was done in s69 of the 1971 Act, item 18 speaks of an offence under section 76 "if the offence involves an intent to steal property".

31. In most respects the new drafting was a significant improvement. It gave explicit recognition to the fact that the offence of burglary is constituted of entering with intent to steal, as opposed to actually entering and stealing, and in that way it made clearer than before that summary jurisdiction with respect to burglary is limited according to the intent with which it is committed. On the other hand, by dispensing with the words "the subject matter of the offence" the change in drafting created the possibility, albeit remote, for argument of the kind which found favour with the Magistrate[12]. But apart from the inherent improbability of the argument, once it is remembered how the legislation evolved and it is understood that there is no suggestion in the explanatory memorandum or second reading speech or any other extraneous indication that item 18 was intended to expand the summary jurisdiction with respect to burglary, the argument becomes untenable.

(iii) Purposive construction

32. Finally, I should say that while the Magistrate's departure from the plain and ordinary meaning of the language of the legislation was said to be necessitated by the need to avoid a nonsense, and thus at least in principle might be thought of as grounded in the sort of purposive approach to statutory construction employed by the High Court in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[13], what the Magistrate ultimately did in this case was to read into or imply in items 18 and 19 of Schedule 4 a large number of words without any regard to the way in which the High Court in *Cooper Brookes* justified their departure from the literal construction of the legislation and without any apparent thought for the sorts of limitations which McHugh JA identified in *Kingston v Keprose Pty Ltd (No 3)*[14] and in *Newcastle City Council v GIO Insurance Ltd*[15].

33. In *Cooper Brookes (Wollongong)* the High Court looked to the history of s80C(3) of the *Income Tax Assessment Act* 1936 in order to conclude that Parliament could not have intended the result which would have been produced by a literal construction of that section and that the draftsman had made a mistake[16]. Contrastingly, in this case, if the Magistrate had had the

history of s53 of the *Magistrates' Court Act* drawn to his attention, it would have been seen that there was no mistake. The literal meaning of the legislation accords with the meaning which the history of the legislation suggests.

34. In *Kingston v Keprose* and again in *Newcastle City Council v GIO Insurance*[17] McHugh J summarised the constraints which apply to the reading in or implication of words in a section of a statute. His Honour spoke of a need for the court clearly to identify the mischief or purpose at which the provision is aimed, a need for the court to be satisfied that by inadvertence Parliament overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved and a need for the court to be able to state with certainty the words that Parliament would have used to overcome the omission if its attention had been drawn to the defect.

35. It is easy to be wise after the event, but I suspect that this application might have been avoided if the Magistrate had been told of those requirements.

The Magistrate lacked jurisdiction

36. For the reasons given, I consider that the summary jurisdiction with respect to burglary and aggravated burglary is confined to burglaries of the kind proscribed by s76(1)(a) and to aggravated burglaries of the kind proscribed by s76(1)(a) in conjunction with s77 of the *Crimes Act* 1958. It follows in my opinion that the Magistrate did not have jurisdiction to deal summarily with the charge of aggravated burglary that was before him.

The relief which is sought

37. It was submitted on behalf of the defendant that I ought refuse relief in the nature of *certiorari*, even if I were satisfied that the Magistrate did not have jurisdiction. The argument was that the plaintiff could have proceeded by way of appeal under s92 of the *Magistrates' Court Act* and it was submitted that the decision of the Court of Appeal in *Kuek v Victoria Legal Aid*[18] is authority that, unless there are exceptional circumstances, a litigant ought not be permitted to raise as an alleged error of law for determination under O56 a matter or thing proper for determination under s92 of the Act.

38. I do not accept the submission. To start with I am not persuaded that the plaintiff did have a right of appeal under s92. That section does not apply to "a committal proceeding"[19] and while I have not reached a concluded view about the meaning of "a committal proceeding" in the context of s92, it is at least arguable that the orders of the Magistrate were made in the course of "a committal proceeding". That is to say, because the Magistrate lacked jurisdiction to proceed with a summary determination of the charges, what he purported to do was a nullity, and therefore that what started out as a committal hearing remained a committal hearing despite the Magistrate's attempt to turn it into a summary determination.

39. In the second place, this is not a case, like *Kuek,* in which a plaintiff sought to escape the time limit for appeal by the unmeritorious device of attempting to characterise as an application for prerogative relief for jurisdictional error a question of law which should properly have been agitated by way of appeal. In this case the plaintiff chose to proceed under O56 for the very good reason that there are doubts about the application of s92.

40. In the third place, this application is concerned with and only with a question of fundamental jurisdictional error. In that respect it stands in contrast to the sorts of case that more frequently arise, in which one or even several questions of jurisdictional error are bundled with other alleged errors of law properly the subject of appeal. Although of course I cannot know, it may be that this is the very sort of case that Phillips JA suggested in *Kuek*[20] would be appropriate for the exercise of discretion in favour of relief by way of judicial review (even if the same result could have been achieved by way of appeal).

Conclusion

41. In my opinion the Magistrate did not have jurisdiction to deal summarily with the charge of aggravated burglary that was before him. I am not disposed to refuse relief in the exercise of discretion. There will be an order in the nature of *certiorari* to quash the orders which are the subject of the application and the matter will be remitted to the Magistrates' Court to be dealt with in accordance with law. I shall hear counsel on the form of orders.

[1] For which the penalty was not more than ten years imprisonment.
[2] For which the penalty was not more than five years imprisonment.
[3] For which the penalty was not more than seven years imprisonment.
[4] For which the penalty was not more than three years imprisonment.
[5] For which the penalty was not more than two years imprisonment.
[6] For which the penalty was not more than three years imprisonment.
[7] For which the penalty was up to fifteen years imprisonment.
[8] Which referred to the offences of larceny and embezzlement of not more than $1,000; breaking and stealing of not more than $1,000, contrary to s134 of the *Crimes Act*; breaking and entering (other than a dwelling house) with intent to commit a felony therein, contrary to s135 of the *Crimes Act*; obtaining money or property of not more than $1,000 by false pretences contrary to ss187 or 188 of the *Crimes Act;* and receiving stolen property of not more than $1,000, contrary to ss130 or 131 of the *Crimes Act.*
[9] (1991) 33 FCR 144 at p149; 105 ALR 347; (1992) 10 ACLC 50; 6 ACSR 350.
[10] See, for example, *FCT v Shaw* [1950] HCA 2; (1950) 80 CLR 1 at p7 per Latham CJ
[11] *Hansard*, 23 March 1989, p487 (Assembly) .
[12] Namely, that a s76(1)(b) offence of burglary is within jurisdiction if it is committed in conjunction with an offence which involves an intent to steal, because it may be said that an offence committed in conjunction with stealing is an offence that involves stealing and hence involves an intent to steal.
[13] [1981] HCA 26; (1981) 147 CLR 297; (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 55 ALJR 434.
[14] (1987) 11 NSWLR 404 at p422; (1988) 12 ACLR 609; 6 ACLC 226.
[15] [1997] HCA 53; (1997) 191 CLR 85; (1997) 149 ALR 623; (1997) 72 ALJR 97; (1997) 9 ANZ Insurance Cases 61-380; (1997) 19 Leg Rep 2.
[16] ibid at p307, per Gibbs CJ, at p312, per Stephen J and at p322 per Mason and Wilson JJ.
[17] *supra* at p113; see also *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681 at p687-8; 107 A Crim R 1, per Spigelman CJ; Pearce & Geddes, *Statutory Interpretation in Australia*, 5th Ed. at [2.27]- [2.31].
[18] [2001] VSCA 80; (2001) 3 VR 289.
[19] S92(1) provides that:
"(1)A party to a criminal proceeding (other than a committal proceeding) in the Court may appeal the Supreme Court on a question of law, from a final order of the Court in that proceeding."
[20] ibid, at p 294[17].

APPEARANCES: For the plaintiff DPP: Mr CW Beale, counsel. Kay Robertson, Solicitor for Public Prosecutions. For the first defendant Verigos: Mr MJ Croucher, counsel. Theo Magazis & Associates, solicitors.
