30/96; [1996] VSC 49

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v DUONG TO NGUYEN

Winneke P, Charles and Callaway JJA

16 July 1996 — [1996] VICSC 49; [1997] 1 VR 551; (1996) 87 A Crim R 119

CRIMINAL LAW – ARMED ROBBERY – "OFFENSIVE WEAPON" – PHARMACY ASSISTANT THREATENED WITH PLASTIC SOFT DRINK BOTTLE – DRUGS THEN STOLEN FROM PHARMACY – WHETHER ACCUSED GUILTY OF ARMED ROBBERY: *CRIMES ACT* 1958, SS75A(1), 77(1)(b).

Section 75A of the *Crimes Act* 1958 ('Act') provides as follows:

> "A person is guilty of armed robbery if he commits any robbery and at the time has with him a firearm, imitation firearm, offensive weapon, explosive or imitation explosive within the meaning assigned to those terms for the purposes of s77(1)."

An "offensive weapon" is defined by s77(1)(b) of the Act as meaning:

> "…any article made or adapted for use for causing injury to or incapacitating a person or which the person having it with him intends or threatens to use for such a purpose."

1. The offence of armed robbery is committed within the meaning of these sections if a person commits a robbery and has with him at the time an article which that person then intends or threatens to use for the purpose of causing injury to or incapacitating another person.
***Considine v Kirkpatrick* [1971] SASR 73, referred to.**

2. Where a person who had entered a pharmacy, was denied the supply of drugs then resorted to the use of a plastic soft drink bottle to threaten the shop assistant and frighten her into submission and then stole drugs from the pharmacy, it was open to a jury to find the person guilty of armed robbery.

WINNEKE P: [1] I will ask Charles JA to deliver the first judgment.

CHARLES JA: The applicant was born on 3 March 1971. At the time of these offences he was 24 years old. On 14 February 1996 the applicant was presented before the County Court at Melbourne on one count of armed robbery and one count of theft. He pleaded guilty to the count of theft but not guilty to the count of armed robbery. On 16 February 1996, after a trial of three days, the jury found the applicant guilty of armed robbery. He admitted 37 previous convictions from 21 court appearances between 3 February 1989 and 6 December 1994. On the same day the learned judge sentenced the applicant to be imprisoned for six months on the count of theft and for twelve months on the count of armed robbery.

The Crown case, which was largely undisputed, was as follows. At approximately 3 p.m. on 28 June 1995 the applicant entered the Droop Street Pharmacy situated at 125A Droop Street, Footscray. There were some four or five customers in the shop as well as the relieving pharmacist, Marie Slavin, and the pharmacy assistant, Mary Balnozan. The applicant handed a prescription to Balnozan, who noticed that the prescription looked as though it had been forged or that something had been added to it. She asked Slavin if they should call the police. Slavin rang the prescribing doctor. When she did so the applicant moved from the shop area into the dispensing area and stood close to her. Balnozan then ran out of the shop to get the barber from the shop next door.

The applicant had a small plastic soft drink bottle carrying the brand name "Quench" in his hand, holding it **[2]** by the neck. The bottle was approximately half full of an orange-coloured fluid. He raised the bottle above his head and tried to hit Slavin over the head with it. She jumped back and the applicant then attempted to strike her with it. Slavin told him that she would not fill the prescription. He said "I want it" several times, and she told him he could not have it. The applicant swung the bottle at Slavin in all about three times, grazing her shoulder on one occasion. Slavin was crouching down to avoid the blows and was giving ground. She had the impression he

was forcing her back toward the shelf on which there were bottles of Temaze capsules, which were what the prescription indicated were required. The applicant reached past her and took two or three bottles of the drug. Nothing else was taken. Balnozan re-entered the store as the applicant was leaving. He raised the bottle over his head and threatened her with it as she attempted to hinder his progress. She grabbed him by the arm and tried to pull him back into the shop. The barber, who had apparently come with her, told her to let him go as he could have had a syringe or knife. She did so and he ran off along the street. He was arrested an hour later at a house in Fitzroy Street, Footscray, not far from the pharmacy.

The offence of armed robbery is created by s75A of the *Crimes Act* 1958 inserted by Act No. 9048 of 1977. Section 75A provides by sub-s(1):

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

[3] An offensive weapon is defined by s77(1)(b) of the Act as meaning:

> ".. any article made or adapted for use for causing injury to or incapacitating a person or which the person having it with him intends or threatens to use for such a purpose."

The main argument raised by counsel for the applicant before the learned judge was that in order for the soft drink bottle to be an offensive weapon it must be shown by the Crown that the accused was carrying the weapon and had the intent to use it offensively before any occasion for its actual use had arisen. The prosecutor conceded that the Crown could not prove any such intention. The accepted facts were that the applicant only resorted to the use of the soft drink bottle as a weapon when he was denied the drugs by the staff of the pharmacy and decided to steal the drugs from the pharmacy. It was not disputed at the trial that at the time of the robbery the applicant was using the bottle for the purpose of threatening the staff in the pharmacy. In the course of the record of interview, the admission into evidence of which was not challenged, the applicant admitted that he threatened the lady at the counter, Ms Slavin, by holding the bottle above his head, that he wanted to threaten her, to frighten her. Slavin's evidence was that the applicant "raised a soft drink bottle in his hand and tried to hit me over the head with it", that he swung the bottle at her three times, grazing her shoulder at one stage, and that she suffered no injuries, only fright, in consequence.

[4] The learned judge said that:

> "It is clear that the accused used the bottle to threaten the shop assistant and to frighten her into submission."

In these circumstances his Honour held that:

> "If an accused decides to rob someone and does not arm himself, then it is not armed robbery. In my mind it is not to the point that he may have come to the scene unarmed. If at the scene he picks up something to use as a weapon, and uses it and it is capable of being defined as an offensive weapon, then that is armed robbery. If he has an article in his possession innocently and decides to use it as an offensive weapon in the robbery, then he has committed armed robbery.In my view if the article is capable of causing injury, then once it is used in an offensive manner, it has been adapted by the accused into an offensive weapon.In my view, a half full plastic soft drink bottle is capable of causing an injury. If an offender enters a shop with a screwdriver in his back pocket and robs someone without ever drawing the screwdriver, then in all probability that could not be said to be armed robbery. Once, however, he decides that it is necessary to draw the screwdriver in order to suborn the will of his victim, he becomes, in my view, at that instant an armed robber. Similarly here, once the accused decided to use the soft drink bottle that he had previously held innocently in his hand, as a weapon, then he became an armed robber."

Later his Honour said:

> "In my view, it was an article which he adapted, by the way in which he brandished it, as a weapon."

This ruling and the jury's verdict of guilty to the count of armed robbery were challenged

in this Court on the grounds:

1. That the conviction is unsafe in all the circumstances.

2. That the learned trial judge was incorrect at law in directing the jury that "the plastic drink bottle is capable of being an offensive weapon".

3. That if such direction was correct the learned trial judge failed to make clear to the jury that the question as to whether such bottle was an offensive **[5]** weapon was a jury question.

4. That the learned trial judge failed to give the jury any or, if so, insufficient assistance in determining such question.

During oral argument the Court was informed that the first ground was intended to include the ground that no reasonable jury, properly directed, could have convicted the applicant. It is convenient to take first ground 2, which in substance repeats the submission unsuccessfully pressed on his Honour by the applicant's counsel at the trial. The argument was founded upon *Ohlson v Hylton* [1975] 2 All ER 490 [1975] 1 WLR 724 and *Wilson v Kuhl* [1979] VicRp 34; [1979] VR 315. *Ohlson's* case was concerned with an assault by a carpenter returning home from work who was carrying with him in a bag his tools of trade, including a hammer. After an altercation with a fellow passenger on a crowded train, he reached into his tool bag, produced the hammer and struck the other passenger. He was charged with assault and an offence against s1 of the *Prevention of Crime Act* 1953, which provided that:

"Any person who without lawful authority or reasonable excuse has with him in any public place any offensive weapon shall be guilty of an offence."

The expression "offensive weapon" was defined in terms almost identical with those used in s77 of the *Crimes Act*. Lord Widgery CJ, in holding that no offence was committed under the Act of 1953, where an assailant seizes a weapon for instant use on his victim, said, at p728:

"Immediately prior to the passing of the Act of 1953 the criminal law was adequate to deal with the actual use of weapons in the course of a criminal assault. **[6]** Where it was lacking, however, was that the mere carrying of offensive weapons was not an offence. The long title of the Act reads as follows: 'An Act to prohibit the carrying of offensive weapons in public places without lawful authority or reasonable excuse'. Parliament is there recognising the need for preventive justice where, by preventing the carriage of offensive weapons in a public place, it reduced the opportunity for the use of such weapons. I have no doubt that this was a worthy objective, and that the Act is an extremely important one. If, however, the prosecutor is right, the scope of s1 goes far beyond the mischief aimed at, and in every case where an assault is committed with a weapon and in a public place an offence under the Act of 1953 can be charged in addition to the charge of assault. In such a case the additional count does nothing except add to the complexity of the case and the possibility of confusion to the jury. This has in fact occurred. In the absence of authority I would hold that an offence under s.1 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 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."

A like offence under Victorian law was to be found in s6(1) of the *Vagrancy Act* 1966, which provided that:

"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."

In *Wilson v Kuhl* McGarvie J considered the principle applied in *Ohlson's* case should be applied in the interpretation of the *Vagrancy Act* in relation to an information laid under s6(1)(e), in circumstances where a man was found in a railway station toilet carrying a carving knife in a large carrybag and which he told the police constable who interviewed him that he always carried "in case someone attacks me or something". He had used the knife to threaten the occupant of the next cubicle. **[7]** Section 6(1)(e) of the *Vagrancy Act* was repealed by the *Control of Weapons Act* 1990, which now regulates the control or use of regulated weapons and dangerous articles.

The operation of this Act was considered by Beach J in *Deing v Tarola* [1993] VicRp 65; [1993] 2 VR 163.

Another line of cases which was relied upon in this Court by the applicant concerned charges under the *English Smuggling Act* (statute 11, George II, c.30) relating to the unlawful assembly of persons "armed with firearms or other offensive weapons": see *R v Hutchinson and others* [1784] EngR 185; 168 ER 273; (1784) 1 Leach 339. The cases collected in the reporter's note to *Hutchinson's* case (168 ER at p274) suggest that there was no offence under the relevant section except in the case of a thing which is not in common use for any other purpose than that of a weapon: see the references to the case of *Cornelius Rose*, *Ince's* case and the case of *George Cosans*. However, reference was also made to *Fletcher's* case, where Willes J and Mr Baron Perryn inclined to think that a person catching up a hatchet accidentally during the hurry and heat of an affray was not being armed with an offensive weapon within the meaning of this Act; see also *R v Noakes* [1832] EngR 611; 172 ER 996; (1832) 5 C & P 326.

A like approach was taken by Bray CJ in his dissenting judgment in *Considine v Kirkpatrick* [1971] SASR 73 when dealing with an information charging a person under s15 of the *Police Offences Act* 1953-1967(SA) with carrying an offensive weapon, namely a studded belt. When about to engage in a fight with another youth the defendant removed the belt and wrapped it around his **[8]** fist with the buckle swinging. Bray CJ said, at p74:

> "In my view it is necessary to distinguish between three cases. The first is the case of the carrying of 'a thing that is not in common use for any other purpose than a weapon'. I gratefully accept this definition from the report of the case of *Cosans* referred to in the note to *R v Hutchinson* because it seems to me to express better than any other the essential nature of guns, swords, coshes and the like. The second is the carrying of a thing whose normal use is for some purpose other than that of a weapon but which the defendant intended to use as a weapon at the time he first took it up or had it on or about his person on the occasion in question. The third is the carrying of a thing of the character last mentioned which the defendant at the time he first took it up or had it on or about his person intended to use for an innocent purpose only but which he subsequently decided to use or, alternatively, actually did use as a weapon of offence. In my view the first two cases are caught by the section but the third is not."

The distinction made by Bray CJ, with whose judgment McGarvie J stated his agreement in *Wilson v Kuhl* at p325, is important in demonstrating the proper reach of provisions such as s6(1)(e) of the *Vagrancy Act* 1966 and which deal with the carrying or possession of weapons rather than the use of weapons. The dangerously wide nature of any construction which permitted such provisions to transform an innocent into a guilty carrying, simply by the formation of an intention to use the article as a weapon of offence, was shown by the example given by Bray, CJ at p.80, of a person who, walking in the street, became minded without justification to kick someone and thereupon would become the carrier of or armed with an offensive weapon in the form of his shoe.

But very different considerations apply to offences involving the use, as opposed to the carrying, of weapons. Bray CJ in *Considine* referred, at pp75-76, to *R v David Jenkins* [1822] EngR 83; 168 ER 914; [1822] Russ & Ry 492, where the offence was assaulting with intent to steal. The accused **[9]** demanded money and struck the prosecutor with a common walking stick. The judge told the jury that if the prisoner used his stick by way of attack for the purpose of effecting the robbery, it might be considered as an offensive weapon within the meaning of the statute. The reporter noted that the relevant statute did not contain the words "armed with". Bray CJ said of this decision that:

> "In a statute worded in this way, it may well be the purpose at the time of the assault which is relevant."

Sections 75A and 77 of the *Crimes Act* relating to armed robbery are, as the learned judge here said, plainly to be read together. In my opinion the offence of armed robbery is committed within the meaning of these sections if a person commits a robbery and has with him at the time an article which that person then intends or threatens to use for the purpose of causing injury to or incapacitating another person. Where, as in this case, the conduct complained of amounts to threats, the threats must, of course, be real ones; the section could not apply to threats which are known by the victim to be fanciful. I also agree with the judge's statement in relation to a person who enters a shop carrying a screwdriver in his back pocket, that:

> "Once he decides it is necessary to draw the screwdriver in order to suborn the will of his victim, he becomes at that instant an armed robber".

I would make only two provisos to the learned judge's statement of the law in his ruling previously quoted. First, when his Honour said:

> "If an article is capable of causing injury, then once it is used in an offensive manner it has been adapted by the accused into an offensive weapon."

[10] The expression "adapted for use for causing injury" in my view is directed to the making of some physical change in an article, as by the smashing of a bottle to produce jagged edges. I do not think it can be correct to treat the manner in which an article is brandished, without more, as a form of adaptation. Secondly, his Honour was clearly not intending to exhaust the potential operation of s75A in the statement quoted. Section 77 is directed also to the use of any article made or adapted for incapacitation as well as for injury. Silk stockings, as Beach J pointed out in *Deing v Tarola* at p165, may be used to strangle and, when so used, become weapons, and they may also be used to incapacitate. No challenge was made (either at trial or in this Court) to the learned judge's statement, during the ruling, that the applicant had used the bottle to threaten the shop assistant and frighten her into submission. In my view his Honour was correct in ruling that the plastic soft drink bottle was capable of being an offensive weapon as defined in s77. It is quite irrelevant to this conclusion that the bottle was plastic, half full, comparatively small or only used as part of a threat to use force. Ground 2, the main ground argued by the applicant, therefore fails.

Grounds 1, 3 and 4 may be dealt with shortly. The applicant's counsel told the jury that the only issue for them was whether or not this was an armed robbery as distinct from a robbery. His Honour, however, reminded the jury that it was necessary for them to be satisfied beyond reasonable doubt as to all the elements of the charge, and that the question of an offensive weapon **[11]** loomed large in the trial. His Honour then directed the jury that as a matter of law the plastic soft drink bottle was capable of being an offensive weapon within s77, but said:

> "It is for you to decide whether, in all the circumstances of the case, that what the accused did amounted to armed robbery as I have defined the crime for you."

In addition to dealing with the various elements of the offence, his Honour then reminded the jury of the submissions made by the applicant's counsel on the question whether the bottle was an offensive weapon and that the jury had to be satisfied beyond reasonable doubt that it was indeed an offensive weapon. His Honour also told the jury that they were entitled to find the applicant not guilty of armed robbery but guilty of the lesser crime of robbery. At the conclusion of his Honour's charge no exception was taken in terms of either grounds 3 or 4. In my view each of the substituted grounds of the application for leave to appeal against conviction fails, and the application should be dismissed.

WINNEKE, P: I agree.

CALLAWAY, JA: I also agree.

WINNEKE, P: The formal order of the Court will be that the application is dismissed.

APPEARANCES: For the Crown: Mr JD McArdle, counsel. Solicitors: PC Wood, Solicitor for Public Prosecutions. For the Applicant: Mr I McIvor, counsel. Solicitors: Victoria Legal Aid.
