IN THE SUPREME COURT OF NEW ZEALAND M. 91/70

CANTERBURY DISTRICT

CHRISTCHURCH REGISTRY

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No

BETWEEN NEIL MURRAY HESSON

Appellant

AND GEORGE VICTOR STRONG

Respondent

Hearing: 31 July 1970

Judgment: 18 DEC 1970

Counsel: Palmer for the appellant.
Smith for the respondent.

JUDGMENT OF MACARTHUR J.

Appeal from the Children's Court at Christchurch (Mr P.L. Molineaux S.M.) against conviction of the appellant on a charge of being in possession of an offensive weapon in a public place; s. 53A of the Police Offences Act 1927.

The relevant parts of s. 53A are as follows: -

"53A (1) Every person commits an offence who, without lawful authority or reasonable excuse, the proof of which shall be on him, has with him in any public place any offensive weapon.

.....

(7) For the purposes of this section, the expression "offensive weapon" means any article made or altered for use for causing bodily injury, or intended by the person having it with him for such use; but does not include any tool of trade in the possession of any person in the course of his employment or while he is going to or returning from his work".

The appellant is an apprentice panel beater. He attained 17 years of age on 1 April 1970. As a result of certain incidents which occurred at Motunau Beach on 28 March 1970 the appellant was charged with two offences, viz. (i) assaulting one W.F. Pooley (charge laid under s. 4 of the Police Offences Amendment Act (No. 2) 1952), and (ii) being in possession of an offensive weapon in a public place. The hearing of these charges in the Children's Court occupied two full days. A great deal of evidence was given. At the end

of the hearing the Magistrate gave an oral decision in which he dismissed the charge of assault but found the other charge proved and accordingly convicted the appellant of that charge. It is against that conviction that the present appeal is brought.

Stated shortly, the facts were as follows. On the evening of 28 March 1970 the appellant and three other youths were sitting around a fire at Motunau Beach. They were cooking a meal. Some girls were with them. The appellant had with him a sheath-knife. It was a skin diver's or spear fisherman's knife which he had purchased at a sports shop for use in skin diving. On this particular evening he was not skin diving, but he had used the knife for prising mussels off rocks at the beach and later he had been using it for turning over the mushrooms that he was cooking. The sheath was tied to his leg outside his trousers and when he was not actually using the knife he kept it in the sheath. At about 8.30 p.m. two of the youths left the fire without saying where they were going. While they were away they assaulted some children. One of these children was the son of the complainant in this case, Mr W.F. Pooley, a fisherman aged 35 years who resides at Motunau. The assault upon the children involved the threatening use of a knife (not the appellant's), by one of the youths. After the assault the youths returned to the fire but did not tell the appellant or their other friends about the assault. The boy Pooley went to his home. When he arrived he was in a distressed state. Shortly afterwards his father and three other men drove to the beach and parked their car not far from the group of young people at the fire. Some of the men were carrying "sticks" which were in fact pieces of 4" x 2" timber. Pooley inquired for "the boy with the knife". Not receiving an answer that satisfied him, Pooley seized the appellant and knocked him to the ground. The youths then scattered, pursued by Pooley and at least two of the other men. The appellant hid himself in some bushes

nearby. What I have stated so far is undisputed. There was no evidence that up to this stage the appellant drew his knife from its sheath. Shortly afterwards however the appellant came out of hiding for the purpose of rendering assistance to one of his friends, Rahuriri, who was involved with the complainant Pooley some 200 yards away. There was a conflict of evidence as to what then occurred. Pooley stated that the appellant ran towards him with his knife in his hand, that he (Pooley) hit the appellant "around his ankles" with a piece of wood, and that the appellant then put his knife away in the sheath that he had tied to his leg. On the other hand the appellant stated that he drew his knife only when threatened by Pooley with the piece of wood, that he was terrified of Pooley, that he produced the knife only with a view to scaring Pooley and had no intention of using it, and that he had put it away in the sheath as soon as Pooley told him to do so.

I turn now to the law. There are three categories of offensive weapon within the definition of that expression in subs. (7) of s. 53A, viz. (i) articles made for use for causing bodily injury, e.g. a service rifle or bayonet or a revolver, (ii) articles altered for use for causing bodily injury, e.g. a bottle broken for the purpose, and (iii) articles neither made nor altered for use for causing bodily injury but carried (or used) for that purpose, e.g. a sheath-knife (Woodward v. Koessler (1958) 3 All E.R. 557) a sand-bag or a razor (Petrie (1961) Crim L.R. 288): see Smith & Hogan, Criminal Law (2nd Ed.) at p. 282, where the similar though not identical provisions of the Prevention of Crime Act 1953 (U.K.) are discussed. Section 1(4) of that Act defines offensive weapon as meaning "any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him". That definition differs in wording, though not in effect, from the definition in our s. 53A. The learned authors of the last-mentioned work point out at p. 283 the

importance of the distinction between the categories of offensive weapon. In the case of the first and second categories the prosecution have to prove no more than possession in a public place, and the defendant will then be convicted unless he can prove, on a balance of probability, that he had lawful authority or reasonable excuse. But if the article falls into the third category the onus is on the prosecution to show that it was carried with intent to injure: see Petrie (supra), per Salmon J. delivering the judgment of the Court of Criminal Appeal, at p. 488. I may mention in passing that whereas our s. 53A was brought in by amendment to an existing statute, the United Kingdom legislation is a separate statute which is described by its long title as "An Act to prohibit the carrying of offensive weapons in public places, without lawful authority or reasonable excuse". Soon after the last mentioned Act was passed it was laid down in Jura (1954) 1 Q.B. 503 that, if possession is originally lawful, it does not become unlawful because the weapon is used in an illegal manner. But in subsequent cases that view has not been adhered to: See Smith & Hogan, op. cit. at p. 284 for a general discussion. In Woodward v. Koessler (supra) Donovan J. said obiter: -

> "All that one has to do for the purpose of ascertaining what the intention is is to look and see what use is in fact made of it. If it is found that the accused did in fact make use of it for the purpose of causing injury, he had it with him for that purpose".

In Powell (1963) Crim L.R. 511 the Court of Criminal Appeal held that a toy pistol (coming within the third category above) was an offensive weapon because the accused had in fact used it in a public place to cause injury. I should mention that in Woodward v. Koessler (supra) the question was whether the defendant intended to cause injury to the person within the meaning of the Act if he intended merely to frighten or intimidate by displaying a knife. The

Divisional Court in that case held that he did, and that therefore the knife was an offensive weapon. However, the Court of Criminal Appeal in Edmonds (1963) 2 Q.B. 142 has since emphasized that intent to cause injury must be shown, and that intent to frighten is not the equivalent of intent to cause injury; and the Court went on to say this concerning Woodward v. Koessler (supra): -

> "That was a case where upon the facts it was plain that a sheath knife had been so brandished with such accompanying threatening behaviour that injury might very well be conclusively assumed to have been done as a result of the shock thereby caused. Whether or not that case must stand upon its own facts, it seems to the court that it is, to put it at its lowest, unsafe and undesirable that directions to juries based upon subsection (4) of section 1 of the Prevention of Crime Act 1953, should include any references to intent to frighten unless it be made clear in the passage in which such reference is made that the frightening must be of a kind for which the term "intimidation" is far more appropriate and of a sort which is capable of producing injury through the operation of shock; in the absence at any rate, of such limitation of definition, it is far preferable that the matter be left upon the terms of the statute itself".

I was informed at the Bar that in the present case the prosecution put forward the charge of assault on the basis that the appellant threatened Pooley with the knife in such a way as to bring the case within the definition of assault in s. 2 of the Crimes Act 1961 which includes "threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose". Thus the charge of assault and the charge of being in possession of an offensive weapon in a public place were submitted by the prosecution as arising out of the same set of circumstances, i.e. the happenings after the appellant came out of hiding for the purpose of assisting Rahuriri.

The Magistrate, in his short judgment given at the close of the hearing, said: -

> "the charge of assault ... is not established at any rate to the point where I would be required, if this had been held in the Magistrate's Court to enter a conviction".

He did not give reasons for this conclusion. He went on to say that the charge of having an offensive weapon in a public place was established. The evidence showed that Motunau Beach was a public place. In his view, the appellant need not have left his hiding place at all. The appellant, he said, walked or ran 200 yards to the place where Rahuriri was, then ran towards Pooley carrying the knife in a forward position, and thus "turned what was quite an ordinary incident into an ugly affair". But the Magistrate did not purport to hold that the appellant had aimed any blow at Pooley with the knife; and indeed there was no evidence to that effect.

It should be mentioned that none of the authorities to which I have referred were cited to the Magistrate; and I may perhaps add that they were not cited to me. It is clear, I think, that the appellant's sheath-knife falls within the third category of offensive weapons mentioned above; on the evidence, the sheath-knife was not made or altered for use for causing bodily injury. Therefore, as regards the charge under s. 53A, the onus rested on the prosecution to prove that the appellant used the knife with intent to cause bodily injury to Pooley. However, I find it difficult to see how there could be a conviction on that charge and yet a dismissal of the charge of assault. Both charges were put forward as arising out of the same set of circumstances. They should in my opinion stand or fall together. But even if I am wrong in that view, I think that in any event the evidence falls short of establishing the intent which must be shown. I am very conscious of the advantage possessed by the Magistrate, in that he saw and heard the witnesses. But having studied the record, I think that the evidence shows, at most, that the appellant pointed the knife towards Pooley; and having regard to the authorities already mentioned, it falls short of establishing that the appellant used the knife with intent to cause bodily injury to Pooley. In my opinion the charge under s. 53A was not proved beyond reasonable doubt and therefore it should have been dismissed.

For these reasons my opinion is that this appeal should be allowed. It is allowed accordingly, and the conviction is quashed. No order as to costs.

Solicitors

for appellant	-	Weston, Ward & Lascelles, Christchurch.
for respondent	-	N.W. Williamson, Crown Solicitor, Christchurch.