Neutral Citation Number: [2001] EWHC Admin 1093
IN THE HIGH COURT OF JUSTICE CO/2987/2001
QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)

Birmingham Crown Court
Newton Street
Birmingham B4

Monday, 17th December 2001

B e f o r e:

MR JUSTICE ELIAS

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"C"

-v-

DIRECTOR OF PUBLIC PROSECUTIONS

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MR J CHALLINOR (instructed by Clive Shepherd & Co, 25 Station Street, Walsall, West Midlands WS2 9JS) appeared on behalf of the Appellant.

MR M DUKE (instructed by the Crown Prosecution Service, Wolverhampton) appeared on behalf of the Respondent.

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J U D G M E N T
(As Approved by the Court)

Monday, 17th December 2001

J U D G M E N T

1. MR JUSTICE ELIAS: This is an appeal by way of case stated against a decision of the Aldridge and Brownhill Justices sitting as the Aldridge Youth Court, in which they convicted the appellant of possessing an offensive weapon, namely a dog lead, in a public place contrary to section 1(1) of the Prevention of Crime Act 1953. The appellant submits that, on the facts found by the justices, the offence has not been committed.

The background

2. The appellant, C, is a 14-year-old girl. She was involved in an incident involving three policemen. She was, as a result, charged with affray, assaulting the three police officers and possession of an offensive weapon. Because of certain difficulties concerning the availability of crucial police witnesses, the charges of affray and assaulting two of the officers were not proceeded with. The appellant was found not guilty of assaulting the third officer, but guilty of possessing an offensive weapon.

3. There was a conflict of evidence about exactly what happened, but the justices have stated that they accepted the evidence of the prosecution witnesses. The relevant facts as found by the justices are summarised in the case stated as follows:

> "The relevant evidence against C came from PC's Webb and Skidmore. They stated that they were in a police carrier with other officers having been called to the Bentley estate as a result of a report of disorder. Both officers stated that they saw the defendant walking a bull terrier on a lead together with another female person. The defendant was waving her arms about and PC Skidmore, the driver of the carrier stopped the vehicle to see what was wrong. Both PC Webb and PC Skidmore got out of the vehicle together with other officers. PC Webb stated that PC Tromans approached the defendant. She was about twelve feet away from the police carrier and was shouting and swearing. She said 'Fuck off you bunch of soft cunts'. She then picked up the dog and passed it over a nearby wall, but retained the lead. PC Tromans told her to calm down but she replied 'Fuck you cunt'. She was holding the lead, which was interlinking metal with a leather strap at the end, aggressively in her one hand and her other hand was clenched into a fist. She then swung the chain twice at PC Tromans, who was two to three feet away from her, narrowly missing his face. PC Tromans drew his CASCO baton and adopted a high profile stance. She swung the chain again and PC Tromans blocked it with his baton."

4. A further description of the attitude of the appellant during the attack is given in paragraph 7 of the case stated, where the justices say this:

> "We found that she confronted the officers with violent intent and that her aggressive behaviour, including the words spoken, started before she put the dog over the wall.
>
> We found that she retained the dog chain and took up an aggressive pose thereby making the dog chain an offensive weapon which she then swung towards PC Tromans."

5. And then finally at paragraph 12, they state their conclusions as follows:

> "We were of the opinion that she waved the
>
> police carrier down and on her own admission she used abusive language towards them; that after putting the dog over the wall she took up a proactive and aggressive pose with one hand clenched and the other holding the dog chain in a raised position with a view to using it as an offensive weapon. We were also of the opinion that she then swung the chain twice in the direction of PC Tromans. The officers at this time having done nothing to contribute or influence the actions of the defendant.
>
> We therefore found that she had formed the necessary intent to use the dog chain as an offensive weapon and indeed swung the chain three times at the police officer."

The legislation

6. Section 1 of the Prevention of Crime Act 1953 reads as follows:

> "(1) Any person who without lawful authority or reasonable excuse, the proof whereof shall rely on him, has with him in any public place any offensive weapon shall be guilty of an offence,..."

7. Then subsection (4) is as follows:

> "In this section...'offensive weapon' means 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."

8. In this case it is accepted that the dog lead was not an article made or adapted for use for causing injury to a person, but, as we have seen, the justices concluded that it was intended by the appellant to be used for that purpose.

The authorities

9. I turn to consider the authorities. A number have been cited to me, perhaps the most important of which is the decision of the Divisional Court in Ohlson v Hylton [1975] 1 WLR page 724. In that case the defendant was a carpenter who had various tools of his trade in a briefcase. On his way home at an underground station he had an altercation with another man and the two men fell out of an underground train onto the platform. The defendant then took from his briefcase a hammer and deliberately struck the other man on the head with it so that he fell to the ground. The defendant was convicted both of assault and also of possessing an offensive weapon contrary to section 1 of the 1953 Act. The Crown Court quashed the conviction and the prosecutor pursued an appeal to the Divisional Court. That appeal was dismissed. The judgment was given by Lord Widgery CJ. First he set out the arguments of the respective parties as follows (page 727G):

> "It was argued by the prosecutor both here and in the court below that, on a literal reading of the terms of the section, that offence was proved. It is pointed out that at the moment when the defendant seized his hammer he had the intention of using it on the unfortunate Mr Malcolm. Accordingly it is said that there was at all events a short period of time in which the hammer,

formerly in the innocent possession of the defendant, became a weapon which he had with him with the intention of using it on Mr Malcolm. Accordingly, Mr Comyn submits, the offence is established.

The defendant's argument, both in this court and in the court below, was that the section did not extend to the seizing and use of a weapon for the purpose of causing injury if the weapon was seized only at the moment when the intention to assault arose, and that the type of activity contemplated by the section is not the use of a weapon for offensive purposes but the premeditated carrying of a weapon for those purposes. Upon this approach it is argued that the weapon was never carried with the necessary intent, and that the fact that the intent must have been formed at a brief moment before the blow was struck is not enough to satisfy the terms of the Act.

The Crown Court adopted the reasoning of the defendant and in its opinion used these words.

> 'The unlawful use of the hammer was covered by the charge of assault occasioning actual bodily harm. There was insufficient time between taking the hammer from the briefcase and the injury to Mr Malcolm for it properly to be said that the defendant was carrying the hammer as an offensive weapon. Accordingly the court allowed the appeal.'"

10. Lord Widgery then considered the mischief at which the statute was aimed. He said this:

> "This is a case in which the mischief of which the statute is aimed appears to me to be very clear. 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. 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 the Act is an extremely important one. If, however, the prosecutor is right, the scope of section 1 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 of the jury. This has in fact occurred. In the absence of authority I would hold that an offence under section 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 only with a man who, possessed of a weapon, forms the necessary intent before an occasion to use actual violence has arisen. In other words, it is not the actual use of the weapon with which the section is concerned, but the carrying of a weapon with intent to use it if occasion arises."

11. Later Lord Widgery pointed out that it was not necessary for the prosecution to prove the relevant intent was formed from the moment when a defendant set out on his expedition

with the article which is alleged to have become an offensive weapon. Such an article will, however, be converted into an unlawful carrying when the defendant forms the guilty intent provided "that the intent is formed before the actual occasion to use violence has arisen." Then finally at page 730 to 731 of the judgment, his Lordship added this:

> "Here the seizure and use of the weapon are all part and parcel of the assault or attempted assault. To support a conviction under the Act the prosecution must show that the defendant was carrying or otherwise equipped with a weapon, and had the intention to use it offensively before any occasion for its actual use had arisen."

12. The parties in this case accept, in the light of that authority, that the fundamental issue is whether or not the relevant intent was formed before the actual occasion to use violence had arisen. Indeed, the question posed for the opinion of the Court is this:

> "Whether there was evidence upon which we were entitled to hold that the defendant had formed the intent to use the dog chain offensively before the occasion of its actual use had arisen."

13. The Ohlson case was followed in the subsequent case of R v Humphreys [1977] Crim LR 225. In that case the defendant had stabbed another with a penknife which he extracted from an inside jacket pocket while being assaulted by several youths. He was convicted of unlawful wounding and having an offensive weapon in a public place. His appeal against the latter conviction was successful. The Court of Appeal Criminal Division held, following Ohlson v Hylton, that if a person happens to have an offensive weapon, and in desperation or in the heat of the moment, draws upon that weapon ad hoc, then he is not guilty of the offence of having an offensive weapon in a public place because he has not been carrying that weapon in a public place with the necessary intent to cause injury.

14. The appellant also relied upon the case of R v Jura [1954] 1 QB 503, another decision of the Court of Appeal, in which a man using an air rifle at a shooting gallery, in a moment of anger turned the rifle towards his woman companion and fired at her. The judge, in summing-up, held that the crime of possession could be committed if the jury considered that he had deliberately fired at the woman. The defendant was convicted and his appeal succeeded. Lord Goddard CJ said this:

> "If a person having a rifle in his hand for a lawful purpose suddenly uses the rifle for an unlawful purpose, the Offences against the Person Act, 1861, provides appropriate punishment. The Act of 1953 is meant to deal with a person who goes out with an offensive weapon, it may be a cosh or a knife, without any reasonable excuse. If the judge's direction were right it would mean that anybody in possession of a shotgun going to a shooting party who used the gun for an unlawful purpose would be guilty of an offence under this Act."

15. In my judgment, the real issue in this case is whether it was open to the justices to find that there was a sufficient break in the nexus between the intention of the defendant to use the dog lead as a weapon and its actual use so as to enable them to say that the relevant intention was formed before the occasion to use the violence arose. That would be a matter of fact and degree, bearing in mind in particular the length of time involved between forming the intent and carrying it into effect, and the context in which the events took place, as well as the purpose which section 1 is designed to achieve. Another way of putting the point is to ask whether the adoption of the article and the intention to use it as an offensive weapon can

properly be considered to be part and parcel of the attack itself or can be seen as distinct from it. Plainly, since the thought is father to the deed, the intent to use a weapon in a violent way will always precede its actual use. As the Ohlson and Jura cases both make clear, if the requisite intent prior to actual use were sufficient to constitute the intention necessary for the offence, then every assault with a weapon would also amount to unlawful possession contrary to section 1 of the 1953 Act, and plainly that is not the law.

16. In my judgment, the justices properly framed the appropriate question they had to determine. In answering it, they said this (para 6):

> "...C originally had the dog lead in her possession for a lawful purpose, namely walking her dog. At this time the lead was not an offensive weapon. The prosecution had to prove that it subsequently became an offensive weapon. This would be done by proving that she had formed an intent to use the dog lead for causing injury to another. In light of the [relevant] authorities, the key question is this: had the occasion for the violent use of the lead already arisen by this time? We found as fact that there was nothing in the actions or behaviour of the police officers to draw the conclusion that an occasion for violence had occurred and that the transposition of the dog lead as an innocent item into a weapon were all inherently retained by the defendant. We found as fact that it was the behaviour of the defendant which created a violent occasion towards the officers and by this time the defendant had formed the intent to use the dog lead as a weapon. This intent was not contributed to or influenced by any police action towards the defendant."

17. However, although they posed the right question, I consider that they erred in their approach to the solution to that question. They treated the conduct of the police as relevant to the question whether the occasion to use violence had occurred. They appear to have concluded that the occasion could not have arisen because the police had given no justification for the use of violence. In my judgment, this is irrelevant. The relevant occasion may be the result of a unilateral, unreasonable and possibly wholly unprovoked act by the defendant, as, for example, in the Jura case. The only issue is whether the intent was formed prior to the occasion or was part and parcel of it.

18. In my view, given the findings of the justices in the last sentence of paragraph 7 in particular, and formulated in an essentially similar way in paragraph 12, I do not think it was open to them to find that there was a sufficient break in the chain of formulating the intent and then carrying it into effect to conclude that the intent to use the dog lead as an offensive weapon was formed before the occasion for its actual use. The intent was formed, on their analysis, after she put the dog over the wall and when she took a provocative and aggressive pose, and almost immediately thereafter she swung the chain in the direction of PC Tromans. In these circumstances, I do not consider that the evidence was capable of sustaining their conclusion that the intent had been formed prior to the occasion of its actual use. I am reinforced in this view by a consideration of the mischief which this section is designed to achieve. It seems to me it would be highly artificial in this case to say that there was any carrying of an offensive weapon prior to its use.

19. It follows that in my opinion this appeal succeeds, and the answer to the question posed by the justices is that there was not evidence upon which they were entitled to hold the defendant had formed the intent to use the dog chain offensively before the occasion of its actual use had arisen. Accordingly, the particular conviction should be quashed.

MR CHALLINOR: My Lord, the appellant is legally aided. Might I ask for legal aid taxation of the

costs.

MR JUSTICE ELIAS: Assuming the relevant certificates have been lodged, yes.

MR CHALLINOR: I believe they have, my Lord. Thank you.

MR JUSTICE ELIAS: I thank you both.