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20198/02341/B4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 22nd October 2019

B e f o r e:

LORD JUSTICE IRWIN

MRS JUSTICE ANDREWS DBE

and

HIS HONOUR JUDGE AUBREY QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

LEWIS SZEWCZYK

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Mr M Hodgetts appeared on behalf of the Appellant

Mr M Hollis appeared on behalf of the Crown

J U D G M E N T
(APPROVED)

Tuesday 22nd October 2019

LORD JUSTICE IRWIN:

1. On 29th May 2019, following a trial in the Crown Court at Reading before His Honour Judge Burgess QC and a jury, the appellant was convicted of two offences in each case of having an article with a blade or point, contrary to section 139(1) of the Criminal Justice Act 1988. He was sentenced to concurrent terms of twelve months' imprisonment on each count. A further term of twelve months' imprisonment of a suspended sentence of two years, which had been imposed previously in June 2017 in the Crown Court at Newport, was activated to run consecutively.

2. The appellant appeals against conviction by leave of the single judge.

3. The facts are not in dispute. They are helpfully summarised by Mr Hodgetts, who appears for the appellant, as follows:

> "Two police officers stopped [the appellant] on the morning of 4th August 2018. There was no dispute that at that point he had a black-handled kitchen knife wrapped in a cloth in his waistband and a silver-handled kitchen knife in a carrier bag. When stopped the [appellant] immediately told officers that he had been attacked by a man and had disarmed him.
>
> The police had been summoned by two members of the public who gave evidence at the trial. They both said that they had seen an altercation between the [appellant] and another man. The [appellant] had been holding a knife. They both accused him of acting threateningly to various degrees. Neither had seen the beginning of the altercation.
>
> The [appellant's] evidence to the jury was that shortly before the police had arrived, he had been attacked by the other man. This other man had had the knives but [the appellant] had managed to disarm him and so take possession of the knives. Thereafter they spoke for 10-15 minutes. [The appellant] was still holding one of the knives. He denied being threatening. He was intending to get rid of the knives. When the police arrived, he dropped them and told the officers what had happened."

4. The appeal in this case turns on a point of law. Once it was established that the appellant possessed the two knives, contrary to section 139(1) of the Criminal Justice Act 1988 – and we use the word "possessed" as a neutral term in the context of the appeal – was there a continuing obligation on the Crown to prove that he had them with him with any intent, or was it for him to show on a balance of probabilities that he had them with him for the innocent purpose he claimed, namely, to remove them from the other man and dispose of them safely?

5. Before considering the argument below and the ruling which is challenged, it is helpful to look at the relevant statutes and to touch on the principal authorities cited.

6. The material parts of the Prevention of Crime Act 1953, as amended, (which is not the statute

under which the appellant was indicted) reads as follows:

> "S1(1) Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence;
>
> …
>
> (4) In this section 'public place' includes any highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise; and '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, or by some other person."

7. This statute was closely considered by the Divisional Court in *Ohlson v Hylton* [1975] 1 WLR 724. That case concerned a carpenter who was carrying some of his tools, including a hammer, in his bag. There was no issue but that he had a legitimate reason for carrying the hammer that day. However, he became involved in a dispute with another man on Blackfriars underground platform, and he struck that man with the hammer. He was charged with and convicted of assault. The issue before the Divisional Court was whether his additional conviction for carrying an offensive weapon was well-founded. His argument was that it was not well-founded; that he had never possessed it as a weapon before the moment he used it. Giving the leading judgment, Lord Widgery CJ analysed the section which we have quoted, as follows:

> "The section thus divides offensive weapons into two categories. First, the type of weapon which is often described as offensive *per se*, namely, an article made or adapted for causing injury to the person. The second category relates to articles not so made or adapted and which have a perfectly innocent and legitimate use but which nevertheless may come into the category of offensive weapons if the person having the weapon with him so has it with an intention to use it for causing injury to the person."

8. The Lord Chief Justice then went on to analyse the 1953 Act and its purpose as follows (at page 728C-F):

> "This is a case in which the mischief at 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 that 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."

Later in the judgment (at page 730H-731A), the Lord Chief Justice added this:

> "The real question is whether the offensive use of the weapon is conclusive on the question of whether the defendant 'had it with him' within the meaning of the Act. Lord Goddard CJ thought that it was not, and that must now be accepted as correct. Accordingly, no offence is committed under the Act of 1953 where an assailant seizes a weapon for instant use on his victim. 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 the weapon, and had the intent to use it offensively before any occasion for its actual use had arisen."

The reference by Lord Widgery CJ to Lord Goddard CJ was to his judgment in *R v Jura* (1954) 38 Cr App R 53, where Lord Goddard, sitting in the Court of Criminal Appeal, had adopted this construction.

9. A significant aspect of the decision in *Ohlson v Hylton* and of the 1953 statute is that, in relation at least to items which are not offensive weapons *per se*, mere possession of the items at a time before they are rendered “offensive" by the formation of the relevant intent is no offence at all. Once the intention is formed, the accused acquires the obligation of proof of lawful authority or reasonable excuse.

10. As Mr Hodgetts readily acknowledged in the course of his submissions to this court, there is no existing authority on that aspect of the application of the 1953 Act in relation to weapons

which were offensive *per se*. We pause to observe that any carrying or possession of offensive weapons *per se*, which was more than instantaneous, must necessarily fall outside the conclusions reached in *Ohlson v Hylton*, as would the prolonged carrying of weapons with the requisite intent.

11. We now move to the statute under which the appellant was in fact prosecuted. The relevant parts of section 139 of the 1988 Act read:

> "(1) Subject to subsections (4) and (5) below, any person who has an article to which this section applies with him in a public place shall be guilty of an offence.
>
> (2) Subject to subsection (3) below, this section applies to any article which has a blade or is sharply pointed, except a folding pocket knife.
>
> (3) This section applies to a folding pocket knife if the cutting edge of its blade exceeds 3 inches.
>
> (4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place."

12. It will be immediately obvious that the relevant article under section 139 is not required to be either inherently offensive *per se*, nor carried with any offensive intent. For the *actus reus* of the offence to be made out, the article must simply conform to the description in the section.

13. Against that background, we turn to the submission advanced on the appellant's behalf below, which has been repeated to us with clarity and eloquence. Mr Hodgetts's submission to the judge began with the concession that the cases he cited, including *Ohlson v Hylton* and *Jura*, all concerned objects that were not offensive in their very nature, but became offensive by means of the intention formed for their use. He went on to argue that there must have been a period of time between the formation of that intent, which rendered the weapon offensive, and the substantive assault in *Ohlson v Hylton* or *Jura*, however short. If that was insufficient to make the weapon offensive, or insufficient to establish the offence and thus to place the burden of reasonable excuse on the accused, then, he says, consistency requires that the same must apply in the appellant's case. Mr Hodgetts phrased it in this way to the judge:

> "… if [the appellant] only acquired that knife, only ever had it as a result of that instant occasion, then he cannot have had it with him within the meaning of the Act because there was [no] carriage prior to the instant incident, if I can put it that way, which – on the evidence that we have heard at the moment – must only be a matter of minutes. And so notwithstanding that the facts [something inaudible] do concern weapons offensive by intent, it is clear, in my submission, the Divisional Court is addressing the meaning of 'have it with him', which is, of course, an expression on the instant indictment."

14. Mr Hodgetts argues that there are two interpretations of the case law concerning the 1953 Act: the broad and the narrow. Although he suggests that they must converge, if the Crown must prove carriage of an offensive weapon, it follows that the Crown had to prove that there was an offensive weapon prior to an offensive use. The need to prove prior intent in those cases only arises in the case law because the weapons were not offensive *per se*.

15. In our view, Mr Hodgetts is right in that submission. Under the 1953 Act, the offence is carrying an offensive weapon. The weapon can be shown to be offensive in two ways: by its inherent nature (for example, a sword); or the intention with which it is carried (for example, a small, folding penknife, which the accused then intends to use to stab). Unless and until the article is shown to be offensive in one way or the other, the primary facts are not made out, and the obligation to show reasonable excuse does not arise.

16. The phrase "has with him", appearing in both statutes, is the bridge by which Mr Hodgetts seeks to cross from the earlier to the later Act. Mr Hodgetts submits that similar considerations must apply to the 1988 Act as to the earlier statute. He says that the statute is aimed at the same mischief and that, in framing the later legislation, Parliament must have mirrored the language of the earlier Act, using the phrase "has with him", meaning had with him before a point of instant use.

17. The Crown rejects this interpretation, or at least seeks to rebut the proposition that it is relevant to the facts of this case.

18. We, too, reject this interpretation. The distinction between the two statutes is clear. It does not lie in the test of possession, but in the description or test of the relevant article, and in the formulation of the two different statutes.

19. The old-fashioned Latin analytical language is helpful in understanding both the earlier and the later statutes. The *actus reus* of the 1953 offence, where the article concerned is not offensive by its very nature, requires proof of the accused's intention at the time. To that extent, the *actus reus* and the *mens rea* overlap. In the 1988 legislation there is no requirement of proof that the bladed article was carried offensively, or indeed for any other particular reason. The context of the two statutes also differs. The object of the first was, as clearly distinguished by Lord Widgery in *Ohlson v Hylton*, to be separated from any assault which follows, and the mischief was the separate act of carrying before the instant events, which in that instance converted the article with an innocent quality to the article with an offensive quality. On a careful reading of that case, it was clearly the intention of the Divisional Court, as with the Court of Criminal Appeal in *R v Jura*, to apply a reading of the statute with a view to simple, straightforward charging; with a view to clarity – a clarity separating the charging of an offensive weapon being carried apart from assault, and the assault itself. That was the intention construed from the wording of that Act and applied with that purpose and function by those two senior courts.

20. In our view, that difficulty simply does not arise in relation to the later statute. The mischief aimed at by the later statute is the possession in public of a bladed article. The definition of "bladed article" is objective. The complication of rendering an innocent article offensive by intent does not arise. The application of the statute is, in our view, straightforward.

21. There is no extant authority under the earlier legislation bearing on this point as it affects weapons which are offensive *per se*. That must remain an open question until such a case is tested in an appellate court. It seems likely, in our view, that a different reading than the ratio of

Jura and *Ohlson v Hylton* might arise were a charge laid under the earlier Act in relation to possession of an offensive weapon which was offensive *per se*. Accepting from Lord Widgery's observations in *Ohlson v Hylton* that the mischief at which the legislation aimed was carrying offensive weapons in public, it would seem remarkable if the Act were not intended to criminalise the carrying of offensive weapons *per se*, irrespective of whether any actual assault arose. Indeed, such a reading would make for absurd results. The man who walked out of his front door carrying a sword and heading in the direction of an affray, but was very rapidly arrested, must surely be guilty of the offence, (subject to lawful authority or reasonable excuse). But the question remains unanswered by any authority.

22. In our view, what is clear is that the 1988 Act has a very straightforward meaning. If a person has with him for a short time – for a very short time – a bladed article, that proves the *actus reus* of the offence under that Act; and the burden of showing that he had good reason or lawful authority falls upon him.

23. In any event, on the facts of this case, the problem posited by Mr Hodgetts in his submission does not arise. The prosecution case was clear: that some little time after the moment when, on his own account, the appellant divested the other man of these weapons, he was still in possession of them. This was not an instantaneous possession, rendering possession of a weapon offensive only by the formation of an instant purpose, converting the knives from innocent objects to offensive weapons. The facts here do not give rise to, and could not found, the argument so eloquently formulated by Mr Hodgetts.

24. For those reasons, this appeal against conviction is dismissed.

25. **MR HODGETTS:** Would my Lords certify that this is a question of general public importance?

26. **LORD JUSTICE IRWIN:** No. The facts of the case preclude that.

27. **MR HODGETTS:** I am grateful, my Lord.

28. **LORD JUSTICE IRWIN:** Thank you.
