

THE OFFENCE OF BEING FOUND IN DISGUISE IN SUSPICIOUS CIRCUMSTANCES

1 Introduction

The statutory criminal prohibition on the use of disguises in suspicious circumstances has a venerable history in South African law. A form of this offence can be found in the pre-Union legislation (as well as in s 9(2) of Proclamation 27 of 1920 and s 3(2) of Proclamation 5 of 1937 of the former South West Africa). It is noteworthy that there are very few reported cases dealing with the various forms of this offence. Nevertheless it is evident that the offence serves an important function. In its review of various statutes relating to justice, the South African Law Reform Commission comments (Discussion Paper 129 (Project 25) "Statutory Law Revision: Legislation Administered by the Department of Justice and Constitutional Development" October 2011 153), in respect of the current formulation of this offence found in section 1 of the Prohibition of Disguises Act (16 of 1969), that "it enables police officers to approach persons in suspicious circumstances, which could prevent crime occurring, for example, masked persons outside a bank", and consequently it is recommended by the SALRC that the offence should therefore be retained.

2 Early formulations of the offence

The first formulation of this offence derives from the Cape Province, where section 8(2) of the Police Offences Act (27 of 1882 (C)) provided that an offence was committed by:

"Any person found by night, having his face blackened or wearing felt or other slippers, or being dressed or otherwise disguised, with a criminal intent."

The proximity of this offence to offences relating to possession of housebreaking tools, and being found by night without a lawful excuse in various premises, or being found by night armed with a weapon (respectively ss 8(1), 8(3) and 8(4) of this Act) is instructive. It is evident that the offence was intended (like the other offences mentioned in s 8) to be used as a form of anticipatory offence, allowing for the apprehension and prosecution of the accused at an early stage in the process, so as to avert the commission of a more serious crime. A conviction for contravening section 8(2) was quashed in *R v Lesson* ((1906) 20 EDL 183), where the accused was found to be lying in a road, very drunk, and "dressed in female attire with a bottle of beer in his pocket" (184). The court held that in the absence of evidence that the

accused was thus disguised “with a criminal intent or for an unlawful purpose” the conviction could not stand (184).

Law 2 of 1891 was the first piece of legislation dealing with the issue of disguises in the Transvaal. Noting that fraud has been committed on a number of occasions through the use of disguises to mislead the public as to the actor’s identity, and that disguises have moreover been used to enable fugitives to evade justice, the Act provided that the wearing or use of disguises in public was prohibited (s 1). An exception was provided for in section 2 in respect of disguises used for plays or performances, or masked balls, which were held in places accessible to the public, although permission had to be granted by the appropriate authority if disguised persons appeared on public roads, for example as part of a procession.

The Appellate Division had occasion to consider this offence in *S v Kola* (1966 (4) SA 322 (A)). The accused was arrested in woman’s clothing, wearing make-up on his face and wearing his hair long. The evidence of the district surgeon, though not using this terminology, was to the effect that the accused was a transvestite, with a sexual preference for dressing in the clothes of the opposite sex. In the trial court the magistrate seemingly somewhat reluctantly convicted the accused under the section, referring to him as a “tragic case” in respect of whom there was no evidence that he was either committing or planning to commit a crime (*S v Kola supra* 325C–D). On appeal the court *a quo* set aside the conviction, holding that, since the meaning of section 1 was unclear, resort could be had to the preamble, which indicated that the section was intended to deal with cases of fraud or facilitating evasion of prosecution, and that the state had not proved that the accused had worn female clothing for either of these purposes (*S v Kola supra* 325D–E). On further appeal, the Appellate Division held that the legislative intent was “to prohibit persons from concealing their identity in public places” (*S v Kola supra* 325F–G), and that therefore (subject to s 2) “any man who appears in a public road or place dressed as a woman in order to conceal his identity would contravene s 1” (*S v Kola supra* 326D). The Appellate Division further held that the court *a quo* was wrong in holding that the intention to defraud the public or escape prosecution had to be proved to establish liability, instead liability would be established by proving the intention to conceal identity (*S v Kola supra* 326D–F). Holding that the accused therefore satisfied the requirements for liability under Law 2 of 1891, the court reinstated the conviction on appeal.

Other provisions followed the same model as the Cape legislation, placing the prohibition of disguises under the head of other more serious offences, which also function as anticipatory offences, such as housebreaking with intent to commit a crime. Thus section 26(2) of the Police Offences Ordinance of the Orange Free State was identical to the formulation in section 8(2). Section 7(c) of the Transvaal Crimes Ordinance (26 of 1904) was similar, in that it penalized a person found by night “having his face stained or disguised or his person dressed or otherwise disguised with intent to commit any offence mentioned in the preceding sections”. It may be

noted, however, that this formulation of the offence was narrower than the analogous Cape and Free State provisions, since the “preceding sections” essentially penalized various forms of “breaking and entering”, that is, housebreaking, whilst the other provisions merely referred without qualification to a “criminal intent”. This narrower formulation should be seen in the context of the associated general prohibition contained in Law 2 of 1891, which was unqualified (and which made no reference to any *mens rea* requirement). Lastly, the provision contained in section 6(2)(e) of the Criminal Law Amendment Act 1909 of Natal (10 of 1910), whilst, like the analogous provisions in the other jurisdictions, contained in a section which also focused on various forms of housebreaking and unlawful entry, was worded somewhat differently to the analogous offences. It provided that:

“(In the case of a male person) being found dressed as a woman in circumstances indicating a probable intention of availing himself of such disguise in order to commit a crime, whether such intended crime be known or not”.

This formulation has a couple of notable features: it is limited to male cross-dressers, and the intent requirement is rather broadly set out, in that the circumstances need merely indicate a “probable” intention to commit a crime by means of a disguise, and such intended crime need not be identified. However, in *R v Mkize* (1940 NPD 374) it was held that, where the accused had dressed as a woman, but there was no evidence that he did so in order to commit a crime, he could not be held liable for the offence set out in section 6(2)(e).

All these pre-Union offences (along with the South West African provisions mentioned earlier) were repealed in terms of section 2 (read with the Schedule) of the Prohibition of Disguises Act (16 of 1969).

3 The Prohibition of Disguises Act (16 of 1969)

The purpose of the Act was to do away with the splintered and varying provincial enforcement of the offence of prohibition of being in disguise in suspicious circumstances in favour of a single offence that would apply generally. The offence set out in section 1 of the Act, which differs from all its provincial antecedents in certain respects, is formulated as follows:

“(1) Any person found disguised in any manner whatsoever and whether effectively or not, in circumstances from which it may reasonably be inferred that such person has the intention of committing or inciting, encouraging or aiding any other person to commit, some offence or other, shall, unless he proves that when so found he had no such intention, be guilty of an offence ...

(2) In any prosecution for a contravention of subsection (1) it shall not be necessary to allege and prove that the circumstances in which the accused was found, gave rise to an inference that he had the intention of committing or inciting, encouraging or aiding any other person to commit, any particular offence.”

It is evident that the Act makes provision for an offence of broad application, in that the prohibited conduct of being found in disguise in

suspicious circumstances (that is, “in circumstances from which it may reasonably be inferred that such person has the intention of committing or inciting, encouraging or aiding any other person to commit [an offence]”) is not only associated with the commission of certain typical crimes such as housebreaking, but extends to all offences (“some offence or other”). The offence may also be committed in both a location open to the public or private premises. Further, the provision encompasses being found to be disguised “in any manner whatsoever”, whether such disguise achieves its intended goal or not. Thus the disguise need not be either extensive nor effective to fall within the ambit of the offence.

The breadth of the offence is clearly evident, but its reach is further extended by the reverse onus contained in the provision: “unless he proves that when so found he had no such intention”. Thus, once the state has established that the accused has been found disguised in circumstances from which an intention to commit an offence “may reasonably be inferred”, it is incumbent on the accused to prove that he had no such intention at that time. The nature of the onus placed on the accused is further elucidated by subsection (2), which specifically states that it is not necessary for the state to allege or prove “that the circumstances in which the accused was found, gave rise to an inference that he had the intention ... to commit ... [an] offence”. It is therefore clear that once the state has established the objective elements of liability (along with capacity) the burden of proving absence of intention to commit a crime falls squarely upon the accused.

It should be noted that the Constitutional Court has consistently struck down reverse onus provisions as unconstitutional for unjustifiably infringing the right to be presumed innocent (s 35(3)(h) of the Constitution, 1996), in that these provisions allow for the possibility of conviction despite the existence of a reasonable doubt (see, eg, *S v Zuma* 1995 (2) SA 642 (CC); *S v Bhulwana* 1996 (1) SA 388 (CC); *S v Coetzee* 1997 (3) SA 527 (CC); and see the majority judgment of the Court in *S v Manamela* 2000 (1) SACR 414 (CC), in the context of s 37 of Act 62 of 1955). Moreover, it has been held, by requiring the accused to prove or disprove an element of an offence, this creates the possibility of conviction despite the presence of a reasonable doubt (see Schwikkard “Arrested, Detained and Accused Persons” in Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 737 749).

Although the South African Law Reform Commission (Discussion Paper 129, 153) concludes that the Prohibition of Disguises Act (16 of 1969) does not contravene any provision of the Constitution, it is submitted that in fact the reverse-onus provision does unjustifiably infringe the right to be presumed innocent contained in section 35(3)(h) of the Constitution. It is further submitted that given that the provision serves an important function, it should not simply be struck down or abolished *in toto*, but that, as in the *Manamela* case, the problem can be remedied by replacing the reverse onus with an evidentiary burden. It is suggested that, in line with the revised wording of section 37 of Act 62 of 1955 adopted by the Constitutional Court in *Manamela*, the offending words in section 1(1) and (2) be scrapped in

favour of the following phrasing (or words to similar effect), which should be added to the Act:

“In the absence of evidence to the contrary which raises a reasonable doubt, proof of being found in such disguise in circumstances where an intention to commit or incite, encourage or aid the commission of an offence on the part of the accused may reasonably be inferred, shall be sufficient evidence of the intention to commit an offence.”

One further comment may be added in respect of the ambit of the Act. Milton (“Sexual Offences” in Milton, Hoctor and Cowling *South African Criminal Law and Procedure Vol III: Statutory Offences* 2ed (1988–) E3-72) states that persons engaging in the practice of transvestitism are liable to conviction under the provisions of the Prohibition of Disguises Act, citing the case of *S v Kola* (*supra*) in this regard. This comment is clearly mistaken. Although transvestites could be convicted under Law 2 of 1891 (T), as was the accused in *Kola*, this was not the case in respect of the legislation in other provinces (see *R v Lesson supra*; and *R v Mkize supra*), and would not be an accurate interpretation of the offence contained in section 1 of the Act, where merely dressing up in the clothing of the opposite sex would not suffice for liability in the absence of a separate criminal intent.

4 Other jurisdictions

The need for an offence criminalizing the assumption of disguise with criminal intent has been identified in other jurisdictions. Both New Zealand (s 233(1)(b) of the Crimes Act 1961) and Canada (s 351(2) of the Canadian Criminal Code) have adopted such an offence. In each case the offence is set out under the head of the prohibition against the possession of burglary (or break-in) instruments. Although in both jurisdictions the offence of being disguised with intent to commit a crime is not directly linked to the crime of burglary – any crime may be intended to establish liability – the logic of combining these offences under one head is clearly linked to the fact that both possession of burglary instruments and prohibition of disguise with intent to commit a crime are anticipatory crimes. The same logic applied to the pre-Union crimes detailed earlier (with the exception of Law 2 of 1891 (T)).

The wording of these provisions differs slightly. The New Zealand offence in section 233(1)(b) criminalizes the conduct of having one’s face “covered or ... otherwise disguised” with the intent to commit any crime, when this takes place “without lawful authority or excuse”. Although the phrase “without lawful excuse” applies to the offence of possession of a break-in instrument in section 351(1) of the Canadian Criminal Code, this phrase is not part of the wording of the section 351(2) offence, which provides that “[e]very one who, with intent to commit an indictable offence, has his face masked or coloured or is otherwise disguised is guilty of an indictable offence”. In the context of the Canadian offence, Watt and Fuerst (2009 *Tremear’s Criminal Code* (2008) 725) point out in respect of the external

circumstances of the offence required to be proved, described in the words “masked”, “coloured” and “disguised”, that while no definitions are provided, each is a word of common everyday usage. A similar comment applies to the New Zealand provision. Unlike the current formulation of the offence in the Prohibition of Disguises Act, in these jurisdictions it is necessary for the state to establish that the accused had the intention to commit a crime. In the Canadian case of *R v Shay* ((1976), 32 C.C.C. (2d) 13 (Ont. C.A.)), the Ontario Court of Appeal quashed the conviction under section 351(2) where, whilst it was established that the appellant was disguised, since he was wearing a handkerchief over his face, proof of intent to commit an indictable offence was lacking.

In England and Wales, the criminalization of the wearing of a disguise occurs in a more specific context. In terms of section 60 of the Criminal Justice and Public Order Act, 1994, where an authorized police officer reasonably believes that incidents involving serious violence may take place in any locality in his police area, or that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason, he may give an authorization that certain powers may be exercised in that locality for a period not exceeding 24 hours (which may be further extended for a further 24 hours by a duly authorized police officer). The authorization confers on any constable in uniform power to stop and search pedestrians or vehicles, and moreover, in terms of section 60AA(2)(a), power to require any person to remove any item which the constable reasonably believes that person is wearing wholly or mainly for the purpose of concealing his identity. In terms of section 60AA(7), any person who fails to remove an item worn by him when required to do so by a constable in the exercise of his power, commits an offence.

5 Concluding remarks

As has been demonstrated, the offence of prohibition of disguise in suspicious circumstances has its roots in pre-Union legislation, and still serves an important function in South Africa, as well as in other jurisdictions, to enable law-enforcement authorities to intervene at an early stage in the criminal process, before the more serious crime, which is intended by the accused, is committed. As with attempt liability, the existence of the offence can be justified on the basis of the need for the apprehension of potential harm to the community, that is, restraint of the dangerous offender (Burchell *Principles of Criminal Law* 3ed (2005) 620 and 621). The formulation of the offence in the Prohibition of Disguises Act is, however, deficient, in that the reverse-onus provision renders the section vulnerable to being adjudged to be an unconstitutional infringement of the right to be presumed innocent. It is therefore submitted that the section should be reformulated to include an evidentiary burden, in place of the offending reverse onus.

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