Possession of Knives and the Burden of Hunt

Elisabeth McDonald*

The answer to the question who bears the burden of proof for excuses is provided by the rules of statutory interpretation. The House of Lords in R *v* Hunt *changed the result of applying such rules by finding they may lead to an implied reversal of the probative onus, seemingly in direct contrast with the* Woolmington *tradition. This article examines a line of cases, dealing with the offence of possessing knives, in which the New Zealand courts have attempted to deal with the authority of* Hunt. *The article concludes with a proposal for consistency in the law of burden of proof which has been made possible by the enactment of section 25(c) of the New Zealand Bill of Rights Act 1990.*

I INTRODUCTION

On 10 December 1934 in England, a 21 year old man killed his estranged wife.[1] As with perpetrators of the many domestic crimes which have followed, the name and the circumstances of this young man could easily have become invisible history. The reality is that most law students and criminal lawyers in New Zealand today know of his actions. This is not because of the unique nature of his deeds, but because of what the House of Lords said about his innocence. They said that it should be presumed.[2]

The necessary corollary to this presumption of innocence, namely that it becomes the "duty of the prosecution to prove the prisoner's guilt ... [n]o matter what the charge or where the trial,"[3] has always been qualified by the power of Parliament to require that defendant's prove their innocence. Other circumstances in which the accused may bear the probative onus have also been accepted at common law. The example given in *Director of Public Prosecutions* v *Woolmington* was that of insanity, which is now contained in section 23 of the Crimes Act 1961.

Until recently, the recognised exceptions to *Woolmington*, that is, the situations where the defendant bears the probative onus, fell into two categories. First, where the legislation provides that a particular part of the offence must be proved by the defendant. In this context, the use of such phrases as "the proof of which shall be on [the accused]" has been held to be inconsistent with placing merely an evidentiary onus on the defendant. Most recently an analysis of the effect of such phrases has been made in the

* Lecturer in Law, Victoria University of Wellington.

1 *Director of Public Prosecutions* v *Woolmington* [1935] AC 462.

2 Above n 1, 481.

3 Above n 1, 482.

context of a discussion of section 25(c) of the New Zealand Bill of Rights Act 1990,[4] a point to which I shall return.

The second, more recently discovered, exception to *Woolmington* relates to public welfare offences. Despite the compelling dissent by McMullin J in *Civil Aviation Department* v *MacKenzie*,[5] it is now established law in New Zealand that a defendant who has the defence of total absence of fault available to her under a public welfare offence, has the burden of proving that defence on the balance of probabilities.[6] This approach has been justified on the basis that it is consistent with the object of this kind of legislation. Such a rule is not considered to be in conflict with *Woolmington* as that case concerned true crimes rather than regulatory offences.[7] This, and other judicially created exceptions, may be open to new challenges in the light of section 25(c) of the New Zealand Bill of Rights Act 1990.[8]

Before considering a third exception to *Woolmington,* which was more recently proposed by the House of Lords in *R* v *Hunt*,[9] it is necessary to consider the situations in which an accused may bear something less than the actual burden of proof. The recognition of these situations is essential to the understanding of the effect of *Hunt.*

Although the normal rule is that the prosecution must prove all the ingredients of an offence, which in most circumstances includes the actus reus and the mens rea or fault requirement, there may be other matters which do not obviously fall into either of those categories. These matters do, however, assume considerable importance for an accused. Defences, or more specifically, matters of excuse or justification, are not normally considered to be part of the offence and therefore the prosecution need not set out to disprove their application. For reasons of practicality, these matters do not become relevant at all until the defendant makes them a live issue, in other words, discharges an evidential onus. These are the so-called "defence elements" which do not operate to negate an ingredient of the offence but may nonetheless have the effect of exculpating the defendant. The imposition of an evidential onus on the accused in these situations is accepted as being both sensible and consistent with *Woolmington.*

---

4 *R* v *Phillips* [1991] 3 NZLR 175.

5 [1983] NZLR 78, 90.

6 *Millar* v *MOT* [1986] 1 NZLR 660, 668.

7 Above n 5, 85.

8 In relation to a "public welfare" offence, for which there was an express statutory reversal, a majority of the Supreme Court of Canada held that, although such a reversal violated the presumption of innocence in the Canadian Charter of Rights and Freedoms, it was justified under s 1 (the equivalent of s 5 of the New Zealand Bill of Rights Act 1990): *R* v *Wholesale Travel Group Inc* [1991] 3 SCR 154. It is unclear what the approach in New Zealand will be on this point. It is submitted that the presumption of innocence may well be broader in application than found in *Wholesale Travel*, especially in the case of a implied reversal which results from the categorisation process.

9 [1987] AC 352.

If an accused discharges the evidential onus when required to do so, the prosecution must then disprove the existence of such a defence. In this way, the probative onus still remains with the prosecution. Examples of such an approach abound. This approach has always been taken when dealing with general defences, whether they are codified or exist at common law. It is also the situation with implied mens rea offences, where the prosecution need only prove that the defendant had the requisite mens rea if he points to some evidence which operates to rebut the presumption of its presence.[10]

The difficult question, and one which it becomes even more essential to answer when applying *Hunt*, is when is an express ingredient of an offence a "defence element"? Distinguishing between prosecution and defence elements was already necessary in New Zealand, prior to *Hunt*, because of the application of section 67(8) of the Summary Offences Act 1957. This provision states that:[11]

> Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany the description of the offence in the enactment creating the offence, may be proved by the defendant, but, subject to the provisions of section 17 of this Act, need not be negatived in the information, and whether or not it is so negatived, no proof in relation to the matter shall be required on the part of the informant.

Section 67(8) operates, where it is applicable, to require the accused to *prove* any defence element. As such, it is a general express statutory exception to *Woolmington* which applies in summary proceedings. Its selective application has meant that an accused still only bears an evidentiary onus as to that same element in indictable proceedings. In New Zealand, therefore, it has long been accepted, for whatever reason, that the burden may be different depending solely on whether the charge is heard on indictment or in summary trial. In *Hunt* the House of Lords were concerned to remove such an apparently unprincipled distinction, as they saw it, between the two types of proceedings.[12]

Hunt was charged with possession of a controlled drug (morphine) pursuant to section 5 of the Misuse of Drugs Act 1971 (UK). It is not an offence, however, to possess compounds containing not more than 0.2% of morphine. In other words, if the compound Hunt had in his possession contained less than the prohibited amount of morphine, he would be acquitted. The issue in *Hunt* was who had to prove the composition of the compound. By examining the "true construction" of the legislation, the House of Lords held that the nature of the compound was an essential ingredient of the offence, and that as the evidence merely disclosed that the compound he possessed contained morphine, but not the percentage of morphine, there was no case to answer.[13]

---

10 Above n 6, 667.

11 Section 17 of the Act requires that the information contain sufficient particulars to fairly inform the defendant of the "substance of the offence" charged.

12 Above n 9, 373.

13 Above n 9, 377.

Hunt is important, not only because of the rules of construction the Law Lords formulated, but also because of the effect of applying these rules in indictable proceedings. If a material part of the offence is classified as a defence element, then to apply *Hunt* means that the accused must prove the defence is available to her. This, they held, is the situation whether a charge is heard indictably or summarily.[14] This result was supported by the claim that provisions like section 67(8) of the Summary Proceedings Act 1957 are merely declaratory of the common law. In the absence of express provisions such as section 67(8), therefore, the same rule would apply.

The decision in *Hunt* is viewed as the third exception to *Woolmington* because it means that the probative onus can be placed on a defendant by implication, that is, merely by the construction of the statute, not by any express words. The justification of the approach in *Hunt* is that it is merely discovering Parliamentary intent. If the material element is a matter of justification or excuse, then by implication, Parliament has required the defendant not only to make it a live issue, but to prove that its requirements are met. If it is an ingredient of the offence the normal rules apply, as they did in *Hunt*, and the prosecution bears both the evidentiary and probative onus. The application of *Hunt* in this way means that there is no room for the traditional "halfway" analysis where the defendant bears the evidential onus and the burden then shifts to the prosecution. The House of Lords did, however, arguably preserve the "well settled" view that the defendant only ever bears the evidentiary onus in relation to general defences.[15]

As noted previously, the rule in *Hunt* makes it even more important to establish which parts of any specific offence are defence elements. It is therefore necessary to examine the test for making this distinction which was proposed in *Hunt*.

According to *Hunt*, the method of deciding which part of the offence is a defence element is by application of ordinary principles of statutory interpretation. If there are no words that expressly reverse the onus, courts must examine the construction of the legislation to determine whether Parliament intended to place the burden of proof on the defendant.[16] The court should have regard to the form of the legislation and, if necessary, certain other considerations as well. These "certain other considerations" will probably be relevant when "what might be regarded as a matter of defence appears in a clause creating the offence rather than in some subsequent proviso."[17] That is, where the excuse does not appear as a separate "defence" but at first glance reads as part of the offence itself. In taking such an approach, the House of Lords followed the authority of

---

14 Above n 9, 374.
15 Above n 9, 369.
16 Above n 9, 374.
17 Above n 9, 374.

Nimmo v *Alexander Cowan & Sons Ltd*[18] and held that, if the linguistic construction of the statute does not clearly indicate who has the burden of proof:[19]

> [T]he court should look to other considerations ... such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden.

As Professor Orchard has argued, the consideration of "the mischief at which the Act was aimed" seems to be a reference to establishing the "substance" or "essence" of the offence.[20] It is submitted that the approval of the formula in *R* v *Edwards*,[21] where the English equivalent of section 67(8) was discussed,[22] also indicates the willingness of the House of Lords to use a test which seeks to establish what elements are "of the essence". In *Edwards* Lawton LJ held that the exception in the English equivalent of section 67(8):[23]

> ...is limited to offences arising under enactments which prohibit the doing of an act save in special circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely on the exception.

Lord Griffiths in *Hunt* treated this passage as "an excellent guide to construction".[24] As it has been argued, the approval of the decision in *Edwards* by the House of Lords in *Hunt* means that the burden of proof may be impliedly placed on the defendant; even though the relevant provision is an exception enacted in the clause creating the offence, rather than a subsequent proviso; and even though the facts are not "peculiarly within" the defendant's knowledge.[25] In this case at least, the defence element must have been identified by use of the *Edwards* essence test.

For reasons of uncertainty, a point which is convincingly made by Professor Orchard, an essence test can be seen as "ultimately unhelpful".[26] The emphasis on the comparative ease or difficulty which the parties would encounter in discharging the burden is viewed more positively, although its application may lead to a reconsideration of forms which have traditionally been classified as defence elements. It is unclear what the reference to "practical considerations affecting the burden of proof" means.

---

18 [1968] AC 107.
19 Above n 9, 374.
20 G Orchard "The Golden Thread - Somewhat Frayed" (1986) 6 Otago LR 615, 629.
21 [1975] QB 27.
22 Section 101 of the Magistrates' Courts Act 1980 (UK).
23 Above n 21, 40.
24 Above n 9, 375.
25 Above n 20, 630.
26 Above n 20, 625.

Nevertheless, what remains important, where the form itself is inconclusive, seems to be a consideration of the essence of the offence which may be supported by the ease of proof.

Prior to *Hunt*, one form of the essence test had been used to establish which were defence elements. This test was articulated by Gibson J in *R (Sheehan)* v *Cork JJ*[27] and was later applied in New Zealand by Richmond J in *Akehurst* v *Inspector of Quarries*:[28]

> The test or dividing line appears to be this: Does the statute make the act described an offence subject to particular exceptions, qualifications, etc., which, where applicable make the *prima facie* offence an innocent act? Or does the statute make an act, *prima facie* innocent, an offence when done under certain conditions? In the former case the exception need not be negatived; in the latter, words of exception may constitute the gist of the offence.

In *McFarlane Laboratories Ltd* v *Department of Health*[29] Barker J similarly relied on the decisions in *Nimmo*[30] and on the Australian case of *R* v *Garnet-Thomas*[31] to support his approach that the substance and effect of the enactment, as well as its form, had to be considered to determine whether it contained an exception, exemption, proviso, excuse or qualification, within the meaning of section 67(8).[32] Both these decisions therefore favoured an analysis based on the same wider considerations which gained approval from the House of Lords in *Hunt*.

It is still somewhat unclear how the New Zealand courts will approach the question of the burden of proof in indictable proceedings given the decision in *Hunt*. The issue has been raised in the context of at least two kinds of offences, driving without a licence[33] and the possession of a knife without reasonable excuse. In examining the line of cases on the possession of knives in public places, it can be seen that despite the approach in *Hunt*, the courts have preserved the distinction between summary and indictable proceedings. That is, despite identifying an excuse as a defence element, the burden of proof has not shifted to the accused in indictable proceedings. These decisions have been reached even though the courts have neither expressly declined to follow *Hunt* nor have they distinguish it.

This rest of this article will therefore involve an analysis of this case law, a discussion as to whether the courts have correctly applied *Hunt* and a proposal for some consistency in the law relating to the burden of proof in New Zealand.

---

27 [1907] 2 IR 5, 11.
28 [1964] NZLR 621, 625.
29 [1978] 1 NZLR 861.
30 Above n 18; referred to above n 29, 880.
31 [1974] 1 NSWLR 702, 712, above n 29, 878.
32 Above n 29, 881.
33 *Niven* v *MOT* (1988) 4 CRNZ 16; *MOT* v *Abram and Jays* [1990] DCR 193.

II POSSESSION OF KNIVES AND THE BURDEN OF PROOF

There are currently two offences which deal with the possession of knives. As part of the 1981 reform of the law of summary offences, section 53A(1) of the Police Offences Act 1927, which dealt with the possession of offensive weapons, became section 202A of the Crimes Act 1961. The maximum penalty for this offence was raised from 1 to 2 years in 1986. At the same time, section 13A(1) of the Summary Offences Act 1981 was enacted. It provides:

> (1) Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $1,000 who, in any public place, without reasonable excuse, has any knife in his or her possession.

It was not until 1987, however, that an amendment to section 202A(4) was made to include the possession of knives in the definition of the offence. This subsection now reads:

> Every one is liable to imprisonment for a term not exceeding 2 years-
>
> (a) Who, without lawful authority or reasonable excuse, has with him in any public place any knife or offensive weapon or disabling substance; or
> (b) Who has in his possession in any place any offensive weapon or disabling substance in circumstances that prima facie show an intention to use it to commit an offence involving bodily injury or the threat or fear of violence.

As a result of this amendment, police have the option of bringing either charge in response to exactly the same activity.[34] The existence of the two offences, one of which allows an election as to proceedings, raises issues concerning the burden of proof. As both offences contain the phrase "without reasonable excuse" the classification of this element, and possibly the proceedings, dictates who must prove it. As a result of the way the courts have interpreted these words, the anomalous situation addressed by the House of Lords in *Hunt* has arisen and remains unaddressed in New Zealand.

III *HUNT* IN THE NEW ZEALAND COURTS

There have been four reported cases concerning the offence of having knives in public places where the burden of proving a reasonable excuse was at issue. In three of these cases the Court considered the relevance of *Hunt*.

A Defence Elements in Summary Proceedings

In *Police* v *Wineera*[35] the accused was charged under section 13A(1) of the Summary Offences Act 1981. At the time of the alleged offence the defendant told police that he had used the knife at work earlier in the day and gave evidence to that effect on appeal.

---

34 Or they may try to bring both, as happened in *Rangi* [1992] DCR 92.
35 (1989) 4 CRNZ 449.

The District Court Judge dismissed the charge against the defendant on the basis that the police had not disproved his explanation. The Judge's conclusion on the question of who had the burden as to reasonable excuse was:[36]

> [T]hat the answer is halfway between, that it must come from the defendant but if he offered an explanation which is reasonable then the matter return[s] to the prosecution to establish beyond reasonable doubt.

This is an example of the traditional approach under *Woolmington* that the prosecution must prove every ingredient of the offence. In this case "without reasonable excuse" becomes an ingredient of the offence only if the defendant makes it a live issue. In reaching his decision, the Judge must have decided that "without reasonable excuse" was a defence element and not "of the essence." Accordingly, the defendant should have borne both the evidentiary and the probative onuses due to the operation of section 67(8). The only basis for a different result in summary proceedings is to define the offence as being one of *possessing a knife in a public place without reasonable excuse.* That is, to interpret the provision in such a way that "without reasonable excuse" becomes an element of the offence.

On appeal Greig J correctly considered that resolving the issue as to who had the burden depended on "the answer to the question whether the reference to 'without reasonable excuse' in section 13A(1) ... is an exception, exemption, proviso, excuse or qualification within 67(8) of the Summary Proceedings Act".[37] The answer to this depended on the application of the essence test.

Grieg J then referred both to the test applied by Richmond J in *Akehurst*[38] and to that of Lord Griffiths in *Hunt.*[39] His Honour also cited the formula from *Edwards,* which he held to be the same as that in *Akehurst.*[40] Greig J did not, however, discuss the application of the essence test to section 13A(1). Apart from stating the test from *Hunt,* and claiming he applied the principles, there is nothing in the judgment to support his finding that "without reasonable excuse" in section 13A(1) of the Summary Offences Act 1981 is a defence element which, pursuant to section 67(8), the defendant must prove. In terms of the essence test, this would be to define the act of having a knife as a prima facie offence, which may be made innocent in certain circumstances. It is the defendant, in summary proceedings at least, who must establish whether these certain circumstances exist.

One way of interpreting this decision it that the defence bears the evidentiary onus because it is not part of the essence of the offence, and the probative onus because

---

36 Above n 35, 450.
37 Above n 35, 450.
38 Above n 28.
39 Above n 19.
40 Above n 35, 455.

section 67(8) applies in summary proceedings. This may well have been the approach taken by Greig J given his identification of two questions for resolution in that case.[41]

The alternative way of viewing the effect of the essence test here is to say that it establishes whether an ingredient falls within section 67(8). It is therefore section 67(8), in summary proceedings, that operates to shift both onuses. This interpretation is consistent with the approach of the House of Lords in *Hunt* and given their argument that the English equivalent of section 67(8) is merely declaratory of the common law, this would seem to be the approach that should be taken in summary proceedings also. In the absence of section 67(8), the approach by the House of Lords should have been the same. That is, the application of the essence test dictates who bears the probative onus. There is no test under this approach which establishes where the evidentiary onus lies. The only example the House of Lords gave which recognised the division between the burden of raising an issue and the burden of proving it, was that of the general defences.

The debate about the interpretation of the essence test may historically have had no real significance in the context of summary proceedings, but with the migration of the test to indictable proceedings the debate must be resolved if offences are to be defined in a consistent manner.

Whichever interpretation of the test was applied, *Wineera* is authority that "without reasonable excuse" is not part of the section 13A(1) offence, and that because section 67(8) applies, the probative onus is on the defendant. There is certainly ample authority that section 67(8) operates to reverse the persuasive onus. What is not so clear, and this is the more interesting question arising from *Wineera,* is why "without reasonable excuse" comes within section 67(8). The essence test from *Akehurst* attempts a resolution of this issue but it is submitted that in *Wineera* the test was not applied at all.

In determining whether the excuse in section 13A(1) should be seen as part of the offence, the relevant inquiry, pursuant to the essence test, is whether possessing a knife in a public place is a prima facie offence. It if is then, "without reasonable excuse" would be treated as a defence element, as it does not define the offence but provides grounds for exculpation. If, however, possessing a knife in a public place is an offence *only* if you lack reasonable excuse, then it follows that lack of excuse helps define the boundaries of the offence and is therefore "of the essence".

It is arguable that the harm at which the section 13A(1) offence is directed is prevention of crimes committed with a knife or offensive weapon. The offensive

---

41 The second question identified in *Wineera* was whether section 67(8) operated to cast merely an evidential onus on the defendant or whether its effect is as an exception to *Woolmington*(see above n 35, 451). It has been applied with the latter effect in *Akehurst* (above n 28); and *Te Weehi* v *Regional Fisheries Officer* [1986] 1 NZLR 680; and more recently in another judgment of Greig J, *Green* v *Ministry of Agriculture and Fisheries* [1990] 1 NZLR 411.

weapons offence (section 202A(1)) contains this object within its definition. 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." The application of the essence test requires a decision as to whether the enactment of section 13A(1) and the amendment of section 202A(4)(a) was directed at a similar social concern or at the prevention of all knife carrying. If the law change was to prevent acquittals like that in *Tomuri* v *Police*[42] where it was accepted "that the knife was not *per se* an offensive weapon",[43] then there is a strong argument, based on the essence test, that "without reasonable excuse" is a defence element. That is, if the amendment was aimed at catching people merely for carrying knives, regardless of their intended use, it makes sense that the defendant should be the one to raise the purpose for which he had the knife. If the amendment was intended to bring the (mere) possession of a knife within the crime the result of the essence test would be that "reasonable excuse" is not an ingredient of the charge. It would be a defence element and in summary proceedings, as held in *Wineera,* the defendant must prove that reasonable excuse. It is submitted the analysis should be the same whether the charge is brought under section 13A(1) or section 202A(4)(a).

There are, however, many valid legal reasons for possessing or carrying a knife - beyond the common excuse of fishing. What of the faithful swiss army knife or my grandmother's blunt, but effective, fruit knife? In identifying a number of innocent occasions when knives may need to be carried in public places there seems to be a solid, if not compelling, argument for the reverse finding to be true - that the offence the prosecutor must prove is that of *possessing a knife without reasonable excuse.*[44] In this case there would be no legal *or* evidential burden on the accused as to the existence of a reasonable excuse. This must be so whether the offence is tried summarily or by way of indictment. A reasonable doubt may well be raised by the defence but there is no requirement that it must be. Of course, the defendant who fails to point to evidence to raise a doubt (the tactical onus) risks a conviction, as would a silent Reginald Woolmington.

Even accepting the finding in *Wineera,* that the core prohibition in section 13A(1) is the mere possession of a knife, the question remains as to the distinction between ingredients and defences in indictable proceedings. A useful starting point is to ask if the test proposed by the House of Lords in *Hunt* is in fact the same as that accepted by Greig J in *Wineera.* If it is the same, the test would (or should) produce the same analysis of the offence regardless of the proceeding, namely that "without reasonable excuse" is *not* an ingredient of the offence for the prosecution to prove. If the test is the same, it must operate in indictable proceedings not only to shift the evidentiary onus but also the probative onus. It is therefore important to examine the treatment of "without reasonable excuse" in indictable proceedings.

---

42 Unreported, 14 March 1986, High Court Auckland Registry, M1638/85.

43 Above n 42, 3.

44 As was found in *R* v *Rangi* [1992] 1 NZLR 385, 389.

B The Burden of Proof in Indictable Proceedings

In *R* v *Hyde*[45] Williamson J dismissed the information against the accused on a charge under section 202A(4)(a) of the Crimes Act 1961 because he found that the prosecution had not proved the lack of reasonable excuse. This means that His Honour must have taken the traditional approach that in indictable proceedings the defendant bears only the evidentiary onus in relation to defence elements. If Williamson J had actually applied *Hunt*, the defendant would have borne the probative onus if "without reasonable excuse" was viewed as a defence element. If he had applied *Hunt*, and in doing so placed the requirement of proving lack of reasonable excuse with the prosecution, he must have found that ingredient to be "of the essence". In placing an evidential onus on the accused, however, he must have decided it was not of the essence.

When examining counsel's arguments in reliance on *Hunt*, Williamson J made the following observation:[46]

> [T]he Court [in *Hunt*] said that the occasions on which a statute would be construed as imposing a burden of proof on the defendant were generally limited to offences arising under enactments which prohibited the doing of an act save in specified circumstances ...

Despite citing the essence test for excuses, Williamson J eventually decided the issue by looking at the "proper construction"[47] of section 202A(4)(a). It is true that the House of Lords in *Hunt* were engaged in construing statutory provisions, but the factors which Williamson J considered relevant in *Hyde* differ somewhat from the approach in that case. The inquiry of Williamson J is limited to an examination of the language of the subsection (which did not expressly reverse the onus), the severe nature of the penalty, the language of the original section and the necessity for a different standard of proof on indictment.

Even though His Honour does not elaborate on his reasoning, it is difficult to accept that the lack of an express reversal of the probative onus can be anything more than a supporting argument. *Hunt*, after all, was about implied reversals in the absence of any such express intention. The original provision (section 53A(1) of the Police Offences Act 1957) did contain an express statutory reversal which was omitted in the 1981 amendments, but this is a far from compelling argument.[48] Furthermore, it is unclear why there needs to be a different standard of proof on indictment. Again, the emphasis on this distinction completely disregards the reasoning of Lord Griffiths in *Hunt*, despite the fact that His Honour clearly found the decision helpful. The reference to the "severe nature of the penalty" is also, with respect, completely unhelpful in this context. The maximum penalty and the operation of section 202BA, which deals with the penalities for repeat offenders, is the same whether the charge is heard summarily or indictably.

---

45 (1990) 7 CRNZ 366.
46 Above n 45, 371.
47 Above n 45, 371.
48 See below, n 58 and accompanying text.

It is of significance that his decision on the construction of section 202A(4)(a) was made to direct who had the *probative* onus as to these elements. What is therefore inherent in this decision of Williamson J is the presumption that "without reasonable excuse" is in fact a defence element - that is, to follow the traditional approach, one where the accused must discharge an evidential onus. In other words, he may well have used the essence test (although he does not do so expressly) to establish only where the evidentiary onus lies. This becomes apparent in his comparison of "without reasonable excuse" to the general defences of provocation and self defence. As I have already argued, there is no room for this analysis if the essence test is applied in the way *Hunt* suggested. To apply *Hunt* is to use the essence test to shift both onuses. Neither of these things, an application of the essence test to decide the nature of the material element, nor the reversal of the onus, were done expressly in *Hyde*. There is an acceptance of "reasonable excuse" as a defence element but this classification does not result in the burden shifting to the accused. Instead his finding is that an evidentiary onus is on the accused. This result can only have been reached by failing to apply *Hunt*.

C *Burden of Proof Considered by the Court of Appeal*

The second case to consider the definition of "without reasonable excuse" in indictable proceedings was *R* v *Rangi*.[49] Rangi was found guilty by a jury of having a sheath knife with him in a public place (the Dunedin District Court) without reasonable excuse. Rangi had in fact told the detective at the time of his arrest that the knife was part of his fishing gear. With the knife was a small fishing line and a packet containing two hooks and a sinker which appeared to be unused. The Judge had told the jury it was Rangi who needed to prove he had lawful authority or reasonable excuse. Raising a reasonable doubt or discharging an evidentiary onus as to why he had the knife was not enough. Rangi appealed on the basis of an alleged misdirection.

In the case Casey J, giving the judgment of the Court of Appeal, traversed the arguments put forward in *Hunt*. In his judgment, Casey J stated that counsel for the prosecution argued, pursuant to the essence test, that the mischief at which the section is aimed is to curb the growing criminal use of such weapons.[50] Assuming that this was an accurate precis of her submission; then if "use", rather than possession, of such weapons is the mischief, it would seem that the prosecution should prove the potential for that use - that is, that the accused had no reasonable excuse for having the knife. The argument for reversal of the onus to follow *Hunt* must be that carrying knives is a bad thing per se and something we want to prevent because there is always a serious risk they will be used in unlawful ways. The argument is not difficult to support, but it must still be made if these types of distinctions are valid in summary proceedings. It is, after all, the same offence.

Casey J ultimately rejected the application of such a test, although he did not expressly decline to follow *Hunt*. His Honour took a number of "[other] considerations

---

49 Above n 44.
50 Above n 44, 388.

into account"[51] and decided that the offence under section 202A(4)(a) "must be understood as defining an offence of having a knife in a public place without lawful authority or reasonable excuse."[52] Although Casey J went on to say that in indictable proceedings the Crown carries the onus as to reasonable excuse, there was no need to do so. In defining the offence in this way, "reasonable excuse" became part of the offence to be proved by the prosecution. In doing so Casey J, had he applied the essence test, would have been accepting that possessing knives in public places is not the evil Parliament was seeking to address. This finding is in contrast with those in *Watts* v *Police*[53] (section 202A(4)(a) tried summarily), *Wineera* (section 13A(1)) and *Hyde* (section 202A(4)(a) tried indictably), where in all cases it was held that "reasonable excuse" was *not* part of the offence. If His Honour is right in *Rangi,* then the onus must also be on the prosecution in all these other situations. Had Casey J in fact applied the essence test from *Hunt* to this end (that possessing knives is not bad of itself), he would have reached the same result that he did in the case. The radical effect of *Hunt* occurs only where the element is identified as *not* being part of the essence of the offence. However, at the same time that he defined the offence in this way, he approved the distinction that could be made in summary proceedings.[54]

Rather than applying the essence test, Casey J, in deciding there was not "a sufficiently strong indication that the neutral language of subsection 4(a) [was] to be understood as imposing a burden on the accused",[55] considered the following to be of relevance:

(i) the lack of any express reversal of the probative onus;[56]
(ii) the "fundamental" requirement that in criminal proceedings the onus of proof remain on the Crown.[57]

In doing so Casey J did not apply either the test from *Hunt* or the test from *Akehurst* used in relation to section 67(8). Rather, he decided that neither the anomaly between summary and indictable proceedings (one of the reasons for the *Hunt* decision) nor the essence and ease of proof test (the application of the *Hunt* decision) could operate to override the presumption of innocence in the absence of an express reversal. The two reasons given for the decision in *Rangi* will now be considered in more detail.

---

51 Above n 44, 389.
52 Above n 44, 389.
53 (1984) 1 CRNZ 227, 229. See below n 61 and accompanying text.
54 Above n 44, 387.
55 Above n 44, 389.
56 As is done in s 202A(5) of the Crimes Act 1961.
57 For this point Casey J specifically relies on the judgment of Turner J in *Wright Stephenson & Co Ltd* v *Attorney-General* [1966] NZLR 271, 282 and s 25(c) of the New Zealand Bill of Rights Act 1990.

1 No express reversal

The lack of an express reversal was also one of the arguments raised in *Hyde* for not placing a probative onus on the accused.[58] It seemed to carry particular weight given the reversal in section 202A(5). Both cases also refer to the legislative predecessor to section 202A(4)(a), section 53A(1) of the Police Offences Act 1927, which provided that:

> 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. (Emphasis added.)

This argument, like that of Williamson J in *Hyde*, is that in the absence of express reversal the onus should not be shifted. Parliament knows how to do this - in its absence courts should not be too ready to find it. Here, Parliament has actually repealed the express reversal; therefore, it should not be read it back in.

There is no doubt that Parliament has shown on many occasions that it knows how to reverse the burden of proof.[59] *Hunt*, however, held that even in the absence of such express reversals Parliament can have intended the same result. On its face then, the repeal of the express reversal clause appears a compelling argument for not reversing the onus pursuant to *Hunt* but there is a significant problem with this analysis.

It is true that section 53A(1) of the Police Offences Act 1927 is the legislative predecessor to section 202A(4)(a). The existing offence was added to the Crimes Act 1961 in the 1981 amendments which reformed the law of summary offences. Rather than include a provision in the Summary Offences Act 1981 a decision was made to recognise the seriousness of carrying offensive weapons by creating a new crime. However, several of the offences from the Police Offences Act 1927 which were re-enacted in the Summary Offences Act 1981 also had, in their original form, an express reversal of the onus of proof as to the element of lawful or reasonable excuse. None of these offences have retained the express reversal in their current form.[60]

Applying the reasoning of Casey J, such removal evidences an intention that the burden in such cases should not be reversed. What, then, of section 67(8)? There seems to have been no real challenge to the general application of section 67(8) to the element "reasonable excuse" in any of the offences in the Summary Offences Act 1981. In other words, despite a contrary intention evidenced by the removal of the express reversal, the effect of section 67(8) is to override this and require reversal in summary proceedings. This has been confirmed by Barker J in *Watts*[61] where a charge under section 202A(4)(a)

---

58 Above n 45, 372.

59 See for example, ss 229(2) and 233(2) of the Crimes Act 1961.

60 Section 52A (peeping or peering into dwellinghouse) became s 30; s 54 (being found on property with out reasonable excuse) is now s 29 of the Summary Offences Act 1981 and s 52(1)(f) (possession of burglary tools) became s 14.

61 Above n 53.

was heard in summary proceedings. His Honour held that lawful authority or reasonable excuse was a matter or justification or excuse so section 67(8) operated to reverse the onus. *Wineera* is also on point. Greig J stated in that case that he had applied the principles from *Akehurst* and *Hunt* in reaching his conclusion that "any reasonable excuse" is an excuse that falls within section 67(8).[62] Casey J also stated in *Rangi* that if the onus is placed on the Crown under section 202A(4)(a) "there would be one rule for prosecutions laid indictably, and another for those laid summarily; and for those brought under section 13A(1) . . . the onus would also lie on the accused. . . ", clearly accepting the classification of "reasonable excuse" both in *Wineera* and in *Watts*.

2 *The New Zealand Bill of Rights Act 1990*

The second basis of the decision in *Rangi* was the affirmation of the presumption of innocence. This is the "golden thread" of *Woolmington* said to be frayed by the House of Lords in *Hunt*.[63] It has never been argued, however, that Parliament should not have the power to depart from *Woolmington* by enacting express statutory reversals requiring proof of innocence from the defendant. Section 25(c) of the New Zealand Bill of Rights Act 1990[64] is clearly declaratory of the presumption of innocence but the argument it makes still cannot remove the power of Parliament to ignore it.

Section 6 of the New Zealand Bill of Rights Act 1990 provides that:[65]

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The question of the application of section 6 to sections which expressly reverse the burden of proof was considered in *R* v *Phillips*.[66] The reversal in that case related to the presumption of possession for supply in section 6(6) of the Misuse of Drugs Act 1975. The Court of Appeal rejected the argument that "until the contrary is proved" could be interpreted as meaning the defendant merely had an evidentiary onus.[67] On this basis, any of the express statutory reversals which employ these words, or any similar variation, must apply, notwithstanding section 25(c). The existence of sections 6 and 25(c) of the New Zealand Bill of Rights Act 1990 do, however, support the rejection of that part of the reasoning in *Hunt* where the House of Lords sought to discover implied statutory reversals. The more useful question is the effect of section 25(c) on the interpretation of section 67(8) of the Summary Proceedings Act 1957.

---

62 Above n 39 and accompanying text.

63 See Orchard, above n 20.

64 Section 25 states that: "Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:...
(c) The right to be presumed innocent until proved guilty according to law."

65 This section was first considered by the Court of Appeal in *Flickinger* v *Crown Colony of Hong Kong* [1991] 1 NZLR 439.

66 Above n 4.

67 Above n 4, 176.

The words of section 67(8) which reverse the burden are, it is submitted, "no proof in relation to [any exception, exemption etc] shall be required on the part of the informant". If "proof" in this context can be interpreted as referring only, as was argued in *Phillips*, to an evidentiary onus, that interpretation under section 6 should be preferred. The Court of Appeal, however, indicated in that case that "the ordinary and natural meaning of the word proof or proved is not capable of extending so far".[68] If this is so, then the anomaly addressed in *Hunt* still remains in New Zealand due to this provision and the courts' application of it.

IV A PROPOSAL FOR CONSISTENCY

This note has examined the inconsistencies in the case law concerning proving a reasonable excuse for possessing a knife in a public place. The potential for confusion is not, however, limited to these offences. The classification of an exemption, exception, proviso or excuse as part of the offence to be (dis)proved by the prosecution in only indictable proceedings creates a further unnecessary distinction. This distinction may arise whenever the same offence may be heard in either proceedings. It is submitted that the confusion has become real because of the failure of the courts to apply the same test for defence elements in both proceedings. It is true that the essence test is not the most predictable or appropriate method of deciding this but until it has a worthy successor it must be applied. The consistent application of the test will force the New Zealand courts to make a decision about the authority of *Hunt* rather than making unconvincing arguments for not reversing the onus in indictable proceedings which have resulted in defining the same offence in two different ways. This consequence, it is submitted, is the result of a desire to retain three options as to the burden of proof. They are:

(i) The defendant bears both the evidentiary and the probative onus. This is the traditional application of section 67(8) where the element is not of the essence, but it is contrary to the rule in *Woolmington*. This is also the case where there are express statutory reversals but this approach does not depend on the application of the essence test.

(ii) The prosecution bears both onuses. This is the case where the material ingredient is part of the offence. This is the normal rule from *Woolmington*.

(iii) The defendant bears the evidentiary onus. When this is discharged, the probative onus falls on the prosecution. In other words, the material ingredient becomes part of the offence only if the defendant makes it a live issue. This is the situation with implied mens rea offences and with general defences. It has been held to be consistent with *Woolmington* as it does not require proof from the accused.

It is the third option which, it is submitted, cannot be retained if *Hunt* is to be adopted as read. As I have argued, the application of the essence test in the way

---

68 Above n 4, 177.

suggested by the House of Lords results in the disappearance of the evidentiary onus except in the two exceptions stated above. If section 67(8) is indeed declaratory of the common law then it too must be read in light of this interpretation. This means that if the result of the essence test is to classify an excuse as not being part of the offence, the defendant must prove that she has that excuse. There is no room for the approach taken in *Hyde* that the defendant merely has the evidentiary onus. To make this sort of distinction is to fail to follow *Hunt*.

As a distinction between the definitions of the same offence depending on procedure cannot be supported, there is a need for the courts to adopt a more consistent approach to this issue. Any approach must be preceded by a decision on the merits of *Hunt*. If the courts do not wish to follow *Hunt* but do wish to preserve the distinction between summary and indictable proceedings, it would seem a simple matter to read any statute as being consistent with section 25(c) of the New Zealand Bill of Rights Act 1990. In other words, in the absence of an express statutory reversal, the burden of proof always remains with the prosecution. This does not, however, solve the question of the disappearing evidentiary onus. If the courts, as I suspect they do, wish to retain option (iii) as a generally available alternative, the essence test and the application of section 67(8) must be clearly interpreted. The essence test must only be used to discover who has the evidentiary onus. If the answer is the accused, then in summary proceedings section 67(8) will operate to shift the probative onus as well. In indictable proceedings, in the absence of section 67(8), the probative onus would, to follow *Woolmington*, stay with the prosecution. This is, of course, not to apply *Hunt*, which would result in both onuses falling together, or, at the very least, in the probative onus also shifting in indictable proceedings. The attraction of this option is that it will allow the courts to apply the essence test consistently in both proceedings. Offences will be defined in the same way regardless of how the offence is being tried. It will, however, mean a rejection of *Hunt* unless there is a way of addressing the argument about consistency with the approach of section 67(8). This interpretation may well provide a solution to both.

If it is possible to apply *Hunt* and rescue the evidentiary onus, the consistency between proceedings is retained. It may even be possible to apply *Hunt* but fail to reverse the onus in indictable proceedings because of section 25(c) of the Bill of Rights Act 1990. In other words, the New Zealand courts could follow *Hunt* yet render its effect minimal by recognising our local statutory context. It is submitted, however, that in the absence of any compelling argument to the contrary this should be the situation in both proceedings. Given the commitment to a presumption of innocence in indictable proceedings, the same presumption should operate in favour of those who appear before a district court judge sitting alone. This would require either interpreting section 67(8) consistently with section 25(c), so that it would operate only to require the accused to discharge an evidentiary onus, or repealing section 67(8). Unless a somewhat strained reading of the language in section 67(8) can be made, the first option is not a real possibility. Even if "proof" could be interpreted as requiring less than a probative standard, this would challenge the ability of Parliament to reverse the onus by such words in all other situations. It would also would make the subsection redundant in the light of the analysis I propose. There is very weighty judicial authority to consider before this interpretation could be said to be the true one at common law. In the absence of a predictable test for the classification of defence elements, and in the presence of a

clear commitment to the presumption of innocence, the option to repeal section 67(8) seems to be the only responsible measure.