Tomlins v Brennan [2006] NTCA 5

PARTIES:	TOMLINS, Petrina
	v
	BRENNAN, Michael
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP5 of 2006 (20411916)
DELIVERED:	10 August 2006
HEARING DATE:	3 July 2006
JUDGMENT OF:	MARTIN (BR) CJ, THOMAS and SOUTHWOOD JJ
APPEAL FROM:	*Tomlins v Brennan* [2006] NTSC 23

CATCHWORDS:

CRIMINAL LAW
Appeal – whether a dog can be an offensive weapon under the Northern Territory Criminal Code – a live animal is not an article – appeal allowed.

Criminal Code (NT), s 1 and s 188.

Quarries Limited v Federal Commission of Taxation (1961) 106 CLR 310; *Longhurst v Guildford, Godalming and District Water Board* [1963] AC 265; *The Llandaff and Canton District Market Company v Lyndon* (1860) 30 LJMC 105; *Fatstock Marketing Corporation Ltd v Morgan (Valuation Officer)* [1958] 1 WLR 357; *J M Knowles Ltd v Rand* [1962] 1 WLR 893; *Palmer v B J Clark's (Hampton) Pty Ltd* [1966] VR 7, considered.

Daly v Cannon [1954] 1 WLR 261, applied.

Porter v Pryce [2001] NTSC 11, doubted.

REPRESENTATION:

Counsel:

Appellant:	P Dwyer
Respondent:	A Elliott

Solicitors:

Appellant:	Northern Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Tomlins v Brennan [2006] NTCA 5
No. AP5/06 (20411916)

BETWEEN:

PETRINA TOMLINS
Appellant

AND:

MICHAEL BRENNAN
Respondent

CORAM: MARTIN (BR) CJ, THOMAS AND SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 10 August 2006)

Martin (BR) CJ:

Introduction

[1] The appellant was convicted following a trial in the Darwin Court of Summary Jurisdiction of Unlawful Assault accompanied by two circumstances of aggravation; first, that the victim suffered bodily harm; secondly, that the victim was threatened with an offensive weapon, namely, a dog. The appellant appealed to a Judge against the finding of guilt of the second circumstance of aggravation on the single ground that the learned Magistrate erred in determining that a dog could be an offensive weapon for the purposes of the Criminal Code. Notwithstanding that both the appellant

and respondent submitted that the Magistrate was in error, the learned Judge dismissed the appeal. The sole ground of appeal to this Court is that his Honour erred in finding that a dog could be an offensive weapon.

Competing Contentions

[2] The offence of common assault is found in s 188 of the Criminal Code. Subsection (2) prescribes an increase in the maximum penalty if any of the specified aggravating circumstances exist. In particular, s 188(2)(m) provides for an increased maximum penalty if the person assaulted "is threatened with a firearm or other dangerous or offensive weapon".

[3] Section 1 of the Code defines offensive weapon in the following terms:

> "'Offensive weapon' means any article made or adapted to cause injury or fear of injury to the person or by which the person having it intends to cause injury or fear of injury to the person."

[4] Dogs can be trained to attack on command and, therefore, in one sense can be "adapted" to cause injury or fear of injury. Similarly, a person in control of a dog could intend that the dog cause injury or fear of injury. However, "article" is not defined leaving the critical question as to whether the word "article" in s 1 encompasses a live dog such that a dog could amount to an offensive weapon for the purposes of s 188(2)(m) and other provisions of the Code.

[5] In the context of the provisions of the Code which have the purpose of protecting the community against the use of offensive weapons, counsel for

the appellant urged that the ordinary and natural meaning of the word "article" does not encompass live animals. In essence counsel submitted that "article" in this context and for these purposes is limited to inanimate objects. If the Legislature had intended that "article" be given a wider meaning to include animals, the definition would specifically have included reference to animals.

[6] As I have said, before the Judge the Crown agreed with the appellant. Notwithstanding that concession, in this Court the Crown took the role of contradictor. In essence the Crown submitted that the word "article" has many and varied meanings and animals have, historically, been used as weapons of war. Common usage of the word has included reference, both in a flattering and unflattering manner, to human beings. Animals can readily be used as weapons and there is no reason in logic or principle to confine the word "article" to inanimate objects.

Authorities

[7] The authorities demonstrate that, depending upon the context, the word "article" has been given wide and varied meanings. In *Quarries Limited v Federal Commissioner of Taxation* (1961) 106 CLR 310, Taylor J agreed with the observation of Lord Strathclyde in *M'Intyre v M'Intee* [1915] SC (J) 27 that it was not surprising that the statute gave no definition of article because "a more comprehensive word could not by any possibility have been

used". In *Longhurst v Guildford, Godalming and District Water Board* [1963] AC 265, Lord Reid observed (273):

> "The word 'article' has many different meanings or shades of meaning and therefore the context in which it occurs is of crucial importance."

[8] In the context of animals, the authorities are not unanimous. A horse was held to be an "article" in *The Llandaff and Canton District Market Company v Lyndon* (1860) 30 LJMC 105. The Court was considering the word "article" for the purposes of a District Markets Act which incorporated a market company for the purpose of erecting a market house for the sale of livestock and other commodities. Significantly, the Act provided for those undertaking the work to be compensated by tolls and annexed to the Act was a schedule of the tolls which contained specific reference to horses.

[9] A goldfish was held not to be an animal in *Daly v Cannon* [1954] 1 WLR 261. The Court was concerned with the Public Health Act 1936 which prohibited a person dealing in rags, commonly known as a "rag and bone man", from selling or delivering any article of food or drink or any article whatsoever to a person under the age of 14 years while engaged in collecting rags. Observing that he could not contend that the judgment would "add a great deal to the jurisprudence of this country", Lord Goddard, with whom Byrne and Parker JJ agreed, noted that the Public Health Act under consideration dealt with the prevention of the spreading of disease. His Lordship posed the question whether anyone in "ordinary common parlance"

would talk about a goldfish as an article and answered that question in the negative. He added that if the statute had referred to "article or thing", there would be no doubt that a goldfish would be a thing. Lord Goddard also relied upon what he perceived was an ambiguity and doubt as to the proper construction. As a penalty was involved, his Lordship was of the view that the Court should apply the "very well-known canon of construction that if one has an ambiguity one always applies the construction which is most favourable to an accused person and a construction which will not involve the imposition of a penalty."

[10] In *Fatstock Marketing Corporation Ltd v Morgan (Valuation Officer)* [1958] 1 WLR 357 the Court of Appeal was concerned with a determination by the Lands Tribunal that a slaughterhouse was not a factory or workshop within the Factory and Workshop Act 1901. In issue was the interpretation of definitions that provided that "factory" and "workshop" meant premises in which manual labour was exercised by way of trade for a number of purposes including "the adapting for sale of any article". Lord Evershed MR observed that the ultimate question was "whether it can be said that the operations in the appellants' slaughterhouse are conducted for the purpose of adapting articles for sale".

[11] Lord Evershed MR commented that, at first sight, to an ordinary reader it would not "easily appear" that the operations of a slaughterhouse can be described as adapting an article for sale. However, His Lordship noted that as the Factory Acts were passed for the safety and protection of workers, it

might be said that the Acts would not "be unnaturally extended to cover the operations in a slaughterhouse". In that context His Lordship held that the Factory Act was "clearly capable of applying to slaughterhouses" and that whether the series of operations occurring in the slaughterhouse amounted to adaptation of an article for sale was a matter of degree and fact. His Lordship concluded that as the primary use of the premises was to produce meat for human consumption and the killing of animals was subsidiary to that main purpose, the operations amounted to adapting an article for sale. It is unclear whether His Lordship was of the view that a live horse was an article for the purposes of the legislation under consideration.

[12] Lord Parker agreed that the steps after the actual killing amounted to dressing of a carcass for sale which, on the facts of the particular case, could be said to amount to adapting an article for sale. However, in the course of his judgment, His Lordship expressed the positive view that the actual killing was not adapting an article for sale because, in His Lordship's view, a live animal was not an article. Sellers LJ did not comment specifically on the question of whether a live animal could be an "article".

[13] The context in which the word "article" was used was again important in *J M Knowles Ltd v Rand* [1962] 1 WLR 893. The Court was concerned with whether a vehicle carrying hatching eggs was carrying articles required for the purposes of agriculture and agricultural land. Lord Parker CJ, with whom Streatfeild and Lawton JJ agreed, acknowledged that it could be said that reference to "articles" required for the purposes of the land was dealing

with what would normally be treated as articles, such as seeds, fertilisers, tools and matters of that sort used for the working of the land. However, in the context of the particular legislation, His Lordship held that "articles in that connection must include livestock which is being brought onto the land and being brought onto the land for the use to which the farmer is putting the land" (897).

[14] In *Palmer v B J Clark's (Hampton) Pty Ltd* [1966] VR 7, Starke J held that a maggot is an article within the meaning of "substance" in s 3 of the Health Act 1958 (Vic). The word "substance" was defined as including "any article or compound".

[15] The decision of Starke J was in the context of the Health Act and a prosecution for selling adulterated meat which contained maggots. Having observed that the word "article" is a word of the "widest scope", Starke J said:

> "A consideration of the definition of 'article' in the Oxford Dictionary would lead one to the view that an article is wide enough to include almost any substance other than land or anything which is not attached to the land. Indeed, in England a horse has been held to be an article within the meaning of a statute, and within the meaning of another statute gas has been held to be an article (*Cox v Cutler(s) and Sons Ltd*., [1948] 2 All ER 665), and when dealing with a word the scope of which is as wide as this, I can see no reason for construing it as excluding an object animate or inanimate however small it may be. Consequently, I have reached the conclusion, without much hesitation, that a maggot is an article within the meaning of s 240 of the Health Act."

[16] It is unnecessary to canvass other authorities except to note that both coal gas and water have been held to be an article: *Cox v S Cutler and Sons Ltd* [1948] 2 All ER 665; *Longhurst v Guildford, Godalming and District Water Board* [1963] AC 265. I mention these authorities because in *Porter v Pryce* [2001] NTSC 11 Martin (BF) CJ observed that it did not "seem" to him that hot water fell within the usual meaning of "weapon" or the definition of "offensive weapon" in s 1 of the Code. His Honour made that observation without the benefit of submissions or authority as to the meaning of "article". In my opinion hot water is an "article" for the purposes of the definition of offensive weapon in s 1 and his Honour was in error.

Legislative Scheme

[17] The starting point is the ordinary and natural meaning of the words considered in the context in which they appear. Included in the definitions of "article" in the Oxford Dictionary is the following:

> "A commodity; a piece of goods or property, a chattel, a thing material."

[18] The Oxford Dictionary also refers to the application of the word to persons, but identifies this use as slang. Examples are a slave considered as an article of merchandise or reference to a "wench" in terms of a "prime article". In this context of slang the dictionary also refers to a person as the "genuine article".

[19] Section 188 of the Code is one of a number of provisions aimed at protecting members of the community from the perpetration of unlawful violence upon them. In particular, the purpose of s 188(2)(m) is to protect the public against the use of weapons.

[20] The same underlying purpose can be found in other provisions concerned with the carrying or the use of offensive weapons.

[21] Section 62 is concerned with persons entering or being found within the precincts of the Legislative Assembly "being armed with a firearm or other dangerous or offensive weapon". Section 189 prohibits stalking and provides for an increase in penalty where the offence is aggravated by the circumstance that at the time of the stalking the offender was in "possession" of an offensive weapon. Section 211 concerns robbery while "armed" with a firearm or any other dangerous or offensive weapon, while s 212 creates the offence of assault with intent to steal and specifies an increased penalty if the offender is "armed" with a firearm or any other dangerous or offensive weapon. It is an aggravating circumstance of unlawfully entering a building if the offender is "armed" with a firearm or any other dangerous or offensive weapon (s 213). Similarly, the offence of unlawfully taking control of an aircraft is aggravated if the offender is "armed" with an offensive weapon. Section 248 concerns the carriage of dangerous goods on board an aircraft and, for those purposes, dangerous goods include offensive weapons.

[22] It is not difficult to mount an argument that the intention of the Legislature was to protect the public from the use of all things capable of being used as weapons. On the other hand, taken to its logical conclusion, that argument would include not only animals, but human beings. Counsel for the appellant contended that if throwing a live dog is adapting an article to cause injury or fear of injury, it is difficult to avoid the conclusion that throwing a live baby or small child also amounts to adapting an article for such a purpose. In response, counsel for the Crown submitted that a dog is capable of being a chattel that can be traded and the line should be drawn by reason of the element of humanity.

[23] Although animals have been used as weapons of war, and notwithstanding the wide and varied meanings given to the word "article" in different contexts, in the context of protecting the public from the use of "firearms or other dangerous or offensive weapons" the word "article" is more readily and naturally associated with inanimate objects than with live animals. I doubt that in "ordinary common parlance" a live animal would be described or regarded as an "article" for these purposes. At the least there is ambiguity and, while recognising the emphasis on a construction which assists the purposes of the legislation, in the face of such ambiguity in a penal statute in my view it is inappropriate to strain the ordinary and natural meaning of the word "article" so as to encompass a live animal. In these circumstances the stricter approach to which Lord Goddard referred in *Daly v Cannon* is appropriate.

[24] For these reasons, and the reasons given by Southwood J with which I agree, in my opinion a live animal is not an "article" for the purposes of the definition of offensive weapon in s 1 of the Code. The appeal should be allowed and the conviction for the circumstance of aggravation quashed. Notwithstanding that the conviction for the particular circumstance of aggravation is quashed, counsel for the appellant did not suggest that there should be any reconsideration of the penalty imposed.

Thomas J

[25] This appeal raises the issue of whether a dog can be an offensive weapon within the definition of "offensive weapon" under the Criminal Code as it pertains to a charge of aggravated assault contrary to s 188(2) of the Criminal Code (NT).

[26] The appellant appeared before the Darwin Court of Summary Jurisdiction on 1 November 2005. On that date the appellant entered a plea of not guilty to the following charge:

> "On the 23rd August 2003 at Darwin in the Northern Territory of Australia.
>
> 1. unlawfully assaulted Michael Francis FOLEY:
>
> AND THAT the said unlawful assault involved the following circumstances of aggravation, namely:
>
> (i) That the said Michael Francis FOLEY suffered bodily harm.
>
> (ii) That the said Michael Francis FOLEY was threatened with an offensive weapon, namely a dog.
>
> Contrary to Section 188(2) of the Criminal Code."

[27] The learned stipendiary magistrate effectively held that a dog could be an offensive weapon when he found as follows (AB 11-12):

> "Now, the submissions made this morning are to the effect that the definition of weapon, namely, as an article means that a dog cannot be a weapon, as it requires that to be some sort of tangible, but inanimate article.
>
> I don't see that it should be read down in that way, as I said, by example if someone picked up the dog and thrown it at a person and thereby struck him, then that animate object is still being used as a weapon.
>
> As far as I know and I've not been referred to any authorities, there are no authorities on that point and that is my view and I will apply that to the facts. In doing so I find the circumstance of aggravation in relation to the offensive weapon made out. …"

[28] The learned stipendiary magistrate convicted the appellant on the charges after finding the offence proved. He discharged the appellant upon her entering into a recognisance for 12 months in the sum of $1000 to be of good behaviour during that period.

[29] The appellant lodged a notice of appeal citing a number of grounds. This appeal came before a single Judge of this Court.

[30] The sole ground of appeal which was ultimately argued before the single Judge was that:

> "… the learned Magistrate erred in holding that a dog could be an offensive weapon."

[31] In the appeal to a single judge of this Court, counsel for the appellant and the respondent both submitted that the learned magistrate erred in the

present case in so far as he found the appellant guilty of the second aggravating circumstance. Both counsel were in agreement that a dog was outside the definition of "offensive weapon".

[32] The learned judge, on appeal, dismissed the appeal from the Court of Summary Jurisdiction.

[33] His Honour, the appeal judge, found as follows at paragraph 21 of his reasons for decision (AB 28-29):

> "In the present case the facts as found disclose that the appellant's dog was used by the appellant as an offensive weapon as defined in the Criminal Code (NT). Clearly the word "article" in the context is not confined to manufactured goods and includes inanimate naturally occurring objects, such as a rock. I see no reason in the context here to confine the word "article" to inanimate objects. As I have said a domestic dog is "a piece of property," "a chattel," "a thing material" and it seems to me the definition of offensive weapon when read into s 188 Criminal Code (NT) is directed to prohibiting the use of any property, animate or inanimate, in such a manner as to cause injury or fear of injury to other people."

[34] There is one ground of appeal from this decision:

> "1. That the learned Justice erred in finding that a dog could be an 'offensive weapon' as defined in the Criminal Code Act."

[35] The appellant seeks the following orders:

1. That the appeal be allowed.

2. A finding that a dog cannot be considered an "offensive weapon" for the purposes of the definition contained within the Criminal Code Act (NT).

[36] His Honour, on appeal at first instance, summarised the essential facts in paragraph 4 of his reasons for judgment as follows:

> "The learned Magistrate found that the appellant had urged her family dog to bite the victim and that the dog had bitten the victim accordingly. In evidence the appellant denied having instructed her dog to bite the victim but the learned Magistrate did not accept the appellant's evidence in this regard. No complaint is made of the learned Magistrate's findings of fact. The only issue is whether the appellant urging her dog to bite the victim constituted her threatening the victim with an offensive weapon for the purposes of s 188 Criminal Code (NT)."

[37] In the appeal to this Court, counsel for the respondent Mr Tony Elliott, took up the role of contradictor, despite the earlier concession that had been made on the appeal from a magistrate to a single judge. Mr Elliott argued in support of the decision of Angel J.

[38] The definition of "offensive weapon" in the NT Criminal Code is as follows:

> ""offensive weapon" means any article made or adapted to cause injury or fear of injury to the person or by which the person having it intends to cause injury or fear of injury to the person"

[39] Counsel for the appellant, Ms Peggy Dwyer, submits that the word "article" means an inanimate object and cannot include a dog. Ms Dwyer made reference to the dictionary definition of "article" in her submissions as follows :

> "[12] An article is defined in the Australian Oxford [Paperback] Dictionary (1989) as a:
>
> 1. **particular or separate thing**; articles of clothing; *toilet articles, things of the kind named.*

2. a piece of writing, complete in itself, in a newspaper or periodical, *an article on immigration*.

3. a separate clause or item in an agreement, *articles of apprenticeship*.

4. a word used before a noun to identify what it refers to.

[13] In Webster's Dictionary and Thesaurus (1988), an article is defined as a:

'clause, head, paragraph, section; literary composition in a journal etc.; rule or condition; **commodity or thing**.'"

[40] Mr Elliott, on behalf of the respondent, also referred to the dictionary definitions of the word "article" including this definition from the Oxford English Dictionary (Second Edition) 14(a):

> "*elliptically (= article of trade, commerce, food, clothing, use, property): A commodity; a piece of goods or property, a chattel, a thing material*"

[41] Ms Dwyer drew a comparison between women who were once regarded as chattels and falling within the definition of article, to the domesticated family pet dog. She submitted that nowadays neither women nor the domesticated family pet dog would be regarded as a material thing, a piece of property or commodity.

[42] In support of her argument, Ms Dwyer referred the Court to the existence of legislation dealing with animate objects and articles, these included the Damage by Aircraft Act 1952 (NSW) and the Wrongs Act 1958 (Vic). Under the latter Act, s 31 provides for liability for damage by aircraft or

articles falling there from. Section 29 of that Act provides that "article includes mail and postal articles and animals".

[43] It is submitted on behalf of the appellant that the fact that these two pieces of legislation are specifically worded so as to include animals, is strongly suggestive that ordinarily (and without a specific statutory indication) an article will not be taken to have included an animal.

[44] There does not appear to be any case law in the Northern Territory that has dealt with the issue of whether a dog or other animate object can fall within the definition of an "offensive weapon".

[45] In *Pitcher v Trenerry* JA8 of 1997 unreported 7 May 1997, Mildren J confirmed the magistrate's finding that a bottle was an offensive weapon as defined in the Criminal Code. In *Morris v R* (1993) 68 A Crim R 556, the applicant was charged with an aggravating circumstance of robbery, that he was armed with an offensive weapon, namely a water pistol. Kearney J was considering an application for a stay of an indictment pending a fresh committal. In the orders made by Kearney J, he noted the applicant was at liberty to have the Crown witness called at a s 26L hearing. This was for the purpose of testing their evidence relevant to the "intent" aspect of the definition of "offensive weapon" and whether it was their belief that the water pistol was a real gun.

[46] In *Porter v Pryce & Ryan* [2001] NTSC 11, Martin (BF) CJ held that "hot water" did not fall within the usual meaning of a weapon, nor the definition of "offensive weapon".

[47] Angel J also referred to a number of decisions in other jurisdictions on the issue of whether an animal can be considered to be an "article". In *Fatstock Marketing Corporation Ltd v Morgan (Valuation Officer)* [1958] 1 WLR 357, differing interpretations of whether an article could include an animal were expressed by respective judges. In the matter of *Palmer v BJ Clarke's (Hampton) Pty Ltd* [1966] VR 7, a maggot was held to be an article whilst in *Daly v Canon* [1954] 1 WLR 261 the Court held the delivery of a goldfish to a boy under the age of 14, by a rag and bone man while engaged in collecting rags, was not an offence under the Public Health Act as a goldfish is not an "article" within the meaning of s 154(1) of that Act.

[48] In the New Zealand case of *R v Carroll* [1975] 2 NZLR 474, the Court applied the reasoning of Duffy J in *Rowe v Conti* [1958] VR 547 and held that "offensive weapons" fall into two classes "(a) instruments which firstly may be said to be constructed or used for one purpose only – attacking; and (b) instruments which are adaptable for inflicting injuries but have other uses and are only offensive if carried, on the occasion in question, with intention to use them for the purpose of attack solely or among others".

[49] Ms Dwyer referred to the decision of *R v Hutchinson* (1784) 1 Leach 339 at 343 where the Court stated it could not say that an offensive weapon should

be confined to guns, daggers and instruments of war, bludgeons, clubs, and anything that is not in common use for any other purpose but a weapon, are clearly offensive weapons within the meaning of the legislature. It is Ms Dwyer's submission that a dog has nothing in common with any of the items listed by the Court which were inanimate objects commonly used and understood as weapons.

[50] The next submission made on behalf of the appellant is that the statute creating the offence of aggravated assault is a penal statute and that where there is ambiguity, or doubt, that must be resolved in favour of the subject.

[51] In the matter of *Beckwith v R* (1976) 135 CLR 569 at 576:

> "The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences: see *R v Adams* (1935) 53 CLR 563 at 567–568; *Craies on Statute Law* 7th ed (1971), pp 529–534. The rule is perhaps one of last resort. …"

[52] It is the submission on behalf of the appellant that in the absence of specific legislative amendment including an animal within the definition of article, a domesticated dog cannot be considered to come within the definition of "offensive weapon". Ms Dwyer argues that this is so from a plain reading of the statute. She further submitted that if the Court considered there to be ambiguity it should be resolved in favour of the appellant.

[53] I agree with the submission based on the authority of *Beckwith v R* (supra), that in construing a penal statute the ordinary rules of construction must be applied. Any ambiguity or doubt may be resolved in favour of an accused.

[54] Mr Elliott, on behalf of the Crown, referred to a number of decisions from other jurisdictions where a Court has considered the meaning of the word "article". These include *JM Knowles Ltd v Rand* [1962] 1 WLR 893 where the Court was asked to consider the word "article" in connection with a prosecution under s 164(1) of the Road Traffic Act 1960. Lord Parker CJ, who allowed an appeal from a conviction imposed by the Justices, stated as follows:

> "… It might, of course, be said that the reference to 'articles' required for the purposes of the land was dealing with what would normally be treated as articles, such as seeds, fertilisers, tools and matters of that sort which are going to be used for the working of the land. But it is admitted, and I think rightly admitted, that articles in that connection must include livestock which is being brought on to the land and being brought on to the land for the use to which the farmer is putting the land. Once one realises that 'articles' must be given a wide meaning, …"

[55] In *Quarries Ltd v Federal Commissioner of Taxation* (1961) 106 CLR 310, Taylor J held that sleeping units used to provide sleeping accommodation for the taxpayer's employees at the various sites where its operations were carried on, fell within the meaning of the word "plant or articles" for the purposes of producing assessable income within the meaning of s 54(1) of the Income Tax and Social Services Contribution Assessment Act 1936-1957 (Cth). Taylor J stated at 316:

> "… As I understand the proposition the operation of the section should be confined to 'articles' which share some undefined common quality with 'plant'. The answer to this proposition is, I think, to be found in the section itself; the common quality is to be sought not inherently but in the use which may, and is, in fact, made of the 'articles'. That is to say that all 'plant' and all 'articles' are within the section if they may fairly be said to be used for the purpose of producing assessable income."

[56] In *Llandaff and Canton District Market Company v Lyndon* [1860] 30 Law Journal Report Magistrate's Cases 105, the Court held that a horse was an "article" for the purpose of s 25 of the Llandaff and Canton District Markets Act 21 and 22 Vict. c. cv.

[57] In *Granada TV Network Ltd v Kerridge (Valuation Officer)* [1963] 61 LGR 332, the Court heard an appeal by the rate payers from the Lands Tribunal which held that premises described as "television studio and premises" were not an industrial hereditament. Lord Denning MR, with whom the other two Judges agreed, dismissed the appeal. Lord Denning is reported to have said at p 61:

> "… that the first question was whether an electrical impulse was an 'article' within the 1901 Act. The court had been referred to cases in which gas and water had been held to be articles, but his lordship agreed with Lord Reid in *Longhurst v Guildford Water Board* [1961] 3 WLR 915, at p 919, that an article was something corporeal, something you could see and get hold of. Electrical impulses which operated simply by means of vibrations put out along a land line could not be said to be an 'article'. Moreover, in s 103(5) of the Factories Act, 1937, Parliament had stated that electrical energy should not be deemed to be an article for the purposes of s 151 of that Act, and that only made plain what was plain without such provision, namely, that electrical impulses were not an article within the meaning of the Act. …"

[58] In the respondent's submissions "corporeal" is defined in the Shorter Oxford Dictionary as being (paragraph 19):

> "*1 Of the nature of matter, material.*
> *2a Of the nature of the body rather than the spirit; bodily; mortal.*
> *b Pertaining to or affecting the body, corporal.*
> *3 Law Tangible; consisting of material objects"*

[59] I agree with the submission made by Mr Elliott, that many of the decisions to which he has referred depend entirely on the legislation then under consideration.

[60] There is, however, authority in these cases for two propositions that are relevant to the meaning of the word "article" as contained in the definition of "offensive weapon" under the Criminal Code.

1) On its natural construction the word "article" has a very wide meaning.

2) The word "article" is not confined to inanimate objects but can embrace something which is animate.

[61] In his reasons for judgment, Angel J expressed agreement with the judgment of Starke J, who Angel J said "applied ordinary rules of construction" in *Palmer v BJ Clark's (Hampton) Pty Ltd* (1966) VR 7 at 8:

> "Now, substance in s 3 is defined as 'including any article or compound'. The definition is clearly not exhaustive. The word 'article' is a word of the widest scope and, indeed, in construing a

> different statute altogether, Taylor J, has said this (or the meaning of his judgment carries this necessary implication) in *Quarries Ltd v Federal Commissioner of Taxation* (1961), 106 CLR 310, at p. 312; [1962] ALR 160, at p. 161. A consideration of the definition of 'article' in the Oxford dictionary would lead one to the view that an article is wide enough to include almost any substance other than land or anything which is not attached to the land. Indeed, in England a horse has been held to be an article within the meaning of a statute, and within the meaning of another statute gas has been held to be an article (*Cox v Cutler(s) and Sons Ltd*, [1948] 2 All ER 665), and when dealing with a word the scope of which is as wide as this, I can see no reason for construing it as excluding an object animate or inanimate however small it may be. Consequently, I have reached the conclusion, without much hesitation, that a maggot is an article within the meaning of s 240 of the Health Act."

[62] I am also in agreement with the judgment of Starke J and his exposition on the meaning of the word "article".

[63] I have come to the conclusion that on the ordinary rules of construction, a dog comes within the meaning of "article". A dog is subject to the will and command of its owner. It is an animal which can be sold or gifted away. In the particular facts of this case, the appellant exercised her authority over the dog to have it attack the victim. The dog acted in accordance with the will and intent of the appellant to attack the victim. In these circumstances the dog was similar to an inanimate object, such as a gun or a knife, which is subject to the will and intent of the person controlling the gun or the knife. The dog was the means by which an assault could be made on a person. The appellant utilised the dog to inflict an attack upon another person. In this sense the appellant adapted the dog to utilise it as an "offensive weapon".

[64] The final submission put forward by Ms Dwyer, on behalf of the appellant, is that there is in existence other legislation which imposes a penalty on a person who owns or controls a dog which attacks another person or animal. Specifically, Ms Dwyer was referring to s 75A of the Summary Offences Act. This section provides a penalty, being a maximum fine of $5000 upon a person who owns or controls a dog that attacks or menaces another person. It is Ms Dwyer's submission that the prosecution could have laid a charge under the Summary Offences Act in addition to the charge of aggravated assault under the Criminal Code or alternately the Court could have taken into account the factual circumstances relevant to the charge of assault in determining the appropriate penalty.

[65] I do not accept this submission. It is not unusual to have some overlap in various legislative provisions prescribing certain behaviour as an offence.

[66] In this instance the appellant does not seek to raise any complaint about the actual sentence imposed by the magistrate. The Crown elected to proceed under the provisions of s 188(2) of the Criminal Code which carries a penalty of a maximum five years imprisonment or two years in the Court of Summary Jurisdiction. The findings of the magistrate who heard the evidence supports the prosecution position in that the nature of the offence was serious enough to lay a charge under the Criminal Code which provides a heavier penalty than is provided under s 75A of the Summary Offences Act.

[67] In his reasons for decision given at the conclusion of the hearing, the learned stipendiary magistrate summarised the evidence given by the various witnesses to the incident. He made a finding that with respect to the key issues in the case, the evidence of the appellant should be rejected and the evidence of the victim was to be preferred. The learned stipendiary magistrate made a finding that the appellant was a party to the assault on Mr Foley by Mr Stagg, and that afterwards she turned the dog Ben onto the victim. His Honour made findings, in the course of giving his reasons for finding the offence proved, that the victim suffered bodily harm. He stated as follows (AB 6):

> "It appears that bystanders then helped him. He was subsequently taken to the Royal Darwin Hospital where he was admitted for four days and treated there. The affects and injuries described, couple[d] with the medical evidence that namely, the statutory declaration of Doctor Prasad, clearly satisfy me that if that version of events is accepted that at least the aggravation of bodily harm is made out.
>
> I don't think that that was seriously in issue in any event."

and AB 10:

> "… I was most unimpressed with the way that she [referring to the appellant] attempted to demean Mr Foley's injuries. I thought it was quite outrageous given the aftermath as described. He was clearly injured …"

[68] During the course of his comments on sentence following submissions made to him, on the question of sentence, the learned stipendiary magistrate stated as follows (AB 14):

> "The assault I think is serious by reason of the fact that it's in company, that on my findings if it wasn't for Mrs Tomlins' involvement then Mr Foley may well have been able to defend himself and may well have been able to avoid the rather serious consequences that occurred.
>
> I find the turning of the dog onto him, at whatever point, quite distasteful. He was on the ground at that point. Now, whether at what stage that happens I think that is a particularly aggravating factor. My view of that does not change and I know some issue is taken as to whether the circumstance of aggravation and as to whether that's an offensive weapon or not.
>
> However, whether that is right or not, the simple fact of the dog being used as part of the assault I think aggravates the matter."

[69] The prosecution elected, as is their right, to lay the charge under s 188(2) of the Criminal Code. I do not consider it to the point that there may also have been a charge available under the Summary Offences Act or that it "could have been left to the Court to take account of all the factual circumstances relevant to the charge of assault without having to consider the further aggravating circumstances relevant to the use of a dog as an offensive weapon". The offence of aggravated assault had serious consequences for the victim. I consider the charge was quite properly laid under s 188(2) of the Criminal Code.

[70] I have concluded on the facts found by the learned stipendiary magistrate, that the dog was an "offensive weapon" as defined in the Criminal Code.

[71] I would dismiss the appeal.

Southwood J:

Issue

[72] The appellant was convicted in the Court of Summary Jurisdiction of aggravated assault contrary to s 188(1) and (2)(m) of the Criminal Code after it was found by the presiding magistrate that she had urged her family dog to bite the victim and the dog had bitten the victim accordingly. She appeals against her conviction for the circumstance of aggravation of threaten with an offensive weapon – her dog.

[73] The principal question in the appeal is whether a dog is an "article" within the definition of "offensive weapon" in s 1 of the Criminal Code. In my opinion a dog is not an "article" and the appeal should be allowed.

Dogs as weapons

[74] Dogs have been used as weapons for thousands of years. This was recognised by William Shakespeare in the words he gave Mark Anthony in "Julius Caesar", "Cry 'Havoc!' and let slip the dogs of war;" Act III scene i line 298. Ramses used dogs as weapons in his war with the Hittites which was fought at Kadesh. A scene from this war showing the use of dogs to attack the enemy appears on the tomb of Amenhotep III who reigned in Egypt about 1380BC.

[75] In her book, *Greek Fire, Poison Arrows and Scorpion Bombs – Biological and Chemical Warfare in the Ancient World* (Overlook Press), Adrienne Mayor writes:

> According to Pliny, the King of the Garamantes of Africa had two hundred trained war dogs "that did battle with those who resisted him." The cities of Colophon and Castabala in Asia Minor also maintained troops of war dogs that fought ferociously in the front ranks … The Hyrcanians of the Caspian Sea and the Magnesians… were also feared for the large hounds with spiked collars that accompanied them on the battlefield. Polyaenus reports that Cimmerians were driven out of Asia Minor in 6th Century BC by the vicious hounds of King Alyattes, who set his strongest dogs upon the barbarians as if they were wild animals… killed many and forced the rest to flee shamefully. And there was an Athenian war dog during Marathon, who served as a fellow soldier in battle (p 191-2).

[76] Dogs crossed the Alps with Hannibal and marched with Rome's legions. The 'Molossians', predecessors of today's Neapolitan Mastiff, were sometimes featured in the arena where they were pitted against various other animals or gladiators. When Sir Peers Legh was wounded in the Battle of Agincourt, his mastiff stood over and protected him for many hours through the battle. Although Sir Peers Legh later died, the mastiff was returned to his home and was the foundation of the Lyme Hall Mastiffs: Homan, M *A Complete History of Fighting Dogs* (Ringpress Books, Howell Book House, IDG Books Worldwide, Inc 1999). The crusaders also used mastiffs in battle.

[77] During the 15th and 16th centuries the Conquistadors used dogs against the Indians in South America. The Conquistadors' dogs were specifically bred and trained to hunt down and disembowel Indians: Derr, M *A Dog's History of America* (North Point Press, 2004). In 1840 Joel Poinsett, the Secretary of War, authorised the purchase of 33 bloodhounds from Cuba for an offensive against the Seminole Indians in Florida and Louisiana to recapture

escaped slaves. During the American Civil War, Confederate regiments unleashed bloodhounds against Negro regiments. The Germans used dogs in World War 1. The Russians trained anti-tank dogs also known as mine dogs to place mines under tanks during World War 2. The dogs would be starved and then trained to find food under a tank. The armed forces of the United States of America used dogs known as devil dogs during the Bougainville Operation in November 1943. Dogs were used by the armed forces of the United States of America in liberating Guam in 1944. Dogs were also used during the Korean War and the Vietnam War. In Vietnam dogs were used by the armed forces of the United States to clear Vietcong tunnels and to sniff out booby traps.

The argument of the appellant

[78] Ms Dwyer, who appeared on behalf of the appellant, argued that for the court to conclude that a dog was an article for the purposes of the definition of "offensive weapon" in the Criminal Code would be a procrustean interpretation of the provisions of the Criminal Code. Such a construction of "offensive weapon" stretched the meaning of "article" too far.

[79] Procrustes is a brigand in Greek Mythology who inhabited the coastal road from Troezen to Athens. He lived in the hills near Eleusis where he kept an iron bed which he invited passersby to use. If the guest was too tall, he would amputate his limbs; if the guest was too short, the guest was stretched on the rack until he fitted the bed. Nobody would ever fit the bed because it

was secretly adjustable. Hence the adjective 'procrustean'. Procrustes was killed by Theseus, who was the national hero of Athens.

[80] Ms Dwyer argued that an "offensive weapon" is an "article" which is an inanimate object. If the legislature had intended to give "offensive weapon" a wider meaning so as to include animals the legislature would have explicitly included a reference to animals in the definition.

The respondent's argument

[81] The respondent argued that although many of the decisions to which the court was referred depended entirely on the peculiarities of the legislation then under consideration, animate objects have previously been held by courts to be articles. "Article" is a word of the widest scope. In order for the court to correctly interpret the meaning of "offensive weapon" and "article" it was necessary for the court to give consideration to the purpose of s 188(2) of the Criminal Code. The purpose of the subsection was to render more serious certain categories of assaults, in particular assaults which involve the use of a thing to effect more serious violence upon the victim. A dog was capable of being adapted to cause injury or fear of injury to the person.

Offensive weapon

[82] "Offensive weapon" is defined in s 1 of the Criminal Code as follows:

> "offensive weapon" means any article made or adapted to cause injury or fear of injury to the person or by which the person having it intends to cause injury or fear of injury to the person;

[83] The various authorities cited by counsel show that the meaning to be given to the word "article" has varied; much is dependent upon the context in which the word is used. I agree with Martin CJ that the starting point is the ordinary and natural meaning of the words considered in the context in which they appear: *Maunsell v Olins* [1975] AC 373 at 391; *K & S Lakes City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 406; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381. A word of indefinite meaning may well include certain things when used in one Act, but have its scope limited in the context of another: *Longhurst v Guildford, Godalming and District Water Board* [1963] AC 265 at 273; *The Llandaff and Canton District Market Company v Lyndon* (1860) 30 LJMC 105; *Daly v Cannon* [1954] 1 WLR 261.

[84] The text of the definition of "offensive weapon" in which the word "article" appears must also be considered. It is important to note that the grammatical structure of the definition is such that there are two broad categories of offensive weapon. "Offensive weapon" means either –

> any article made or adapted to cause injury or fear of injury to the person
>
> or

> any article by which the person having it intends to cause injury or fear of injury to the person.

[85] In the first category of offensive weapon the word "article" is qualified by the words "made or adapted". These words tend to denote that an "article" is an inanimate object not a living thing. The word "made" in this context means built or constructed or formed for the purpose to which the definition is applicable namely, the causing of injury or fear of injury to the person. The word adapted in this context means made suitable for or suitable for or applicable to the purpose of causing injury or fear of injury to the person. Adapted is not a word which would ordinarily be used to refer to either the training of a dog to threaten or attack someone or to instructing, rousing, encouraging or exciting a dog to threaten or attack someone. Consistency requires that a similar construction be given to the word article in the second category of "offensive weapon". It was not the intention of the legislature to exclude live animals from the first category of offensive weapon but include them in the second category. The two categories may overlap. In the circumstances the word "article" is not reasonably capable of being construed to include a dog. Where the words actually used are not reasonably capable of being construed in a particular manner they should not be so construed: *McAlister v The Queen* (1990) 169 CLR 324 at 330; *R v Di Maria* (1996) 67 SASR 466 at 472-474.

[86] The interpretation of article as an inanimate object is consistent with the Oxford English Dictionary definition of the word which is "a commodity; a

piece of goods or property, a chattel, a thing material." The word article ordinarily has a narrower meaning than the word thing. The interpretation is also consistent with the line of authorities that hold that offensive weapons fall into two classes, "(a) instruments which firstly may be said to be constructed or used for one purpose only – attacking; and (b) instruments which are adaptable for inflicting injuries but have other uses and are only offensive if carried, on the occasion in question, with the intention to use them for the purpose of attack solely or among others": *R v Carroll* [1975] 2 NZLR 474; *Rowe v Conti* [1958] VR 547 at 549 - 550.

[87] To the extent that the denotation of "article" is not sufficiently explicit or is uncertain then the definition of "offensive weapon" ought not to be construed as extending any penal category: *R v Adams* (1935) 53 CLR 563 at 567 – 568; *Director-General of Land and Water Conservation v Bailey* [2003] NSWCCA 361 at [24]. The creation of offences is now solely the function of parliament: *R v Rogerson* (1992) 174 CLR 268 per McHugh J at 304.

[88] The appeal should be allowed and the appellant's conviction for the circumstance of aggravation, of threaten with an offensive weapon, quashed.
