Tomlins v Brennan [2006] NTSC 23

PARTIES:	TOMLINS, PETRINA
	v
	BRENNAN, MICHAEL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	No JA 78/05 (20411916)
DELIVERED:	22 MARCH 2006
HEARING DATES:	17 MARCH 2006
JUDGMENT OF:	ANGEL J

CATCHWORDS:

CRIMINAL LAW – aggravated unlawful assault – Words & phrases – "Offensive weapon" – "article" – Whether dog an article – Whether dog an offensive weapon – Criminal Code Act (NT) ss1, 188(2).

REPRESENTATION:

Counsel:

Appellant:	P Dwyer
Respondent:	L McDade

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of Director of Public Prosecutions

Judgment category classification:	A
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Tomlins v Brennan [2006] NTSC 23
No. JA 78/05 (20411916)

BETWEEN:

PETRINA TOMLINS

Appellant

AND:

MICHAEL BRENNAN

Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 22 March 2006)

[1] On 1 November 2005 the appellant appeared before the Darwin Court of Summary Jurisdiction and entered a plea of not guilty to one count of aggravated unlawful assault contrary to s 188(2) Criminal Code (NT). The circumstances of aggravation alleged were:

1. that the victim suffered bodily harm

2. that the victim was threatened with an offensive weapon, namely a dog.

[2] Following her trial the accused was found guilty as charged, convicted and released on a bond. The sole ground of appeal pressed in this Court is that the learned Magistrate erred in holding that a dog could be an offensive weapon.

[3] Section 1 Criminal Code NT provides, inter alia:

> ‘ “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] 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).

[5] Although both counsel for the appellant and counsel for the prosecutor raised the issue before the learned Magistrate, he dealt with it in a surprisingly cursory fashion. The following exchange appears at pages 94 and 95 of the transcript of the hearing before the Court of Summary Jurisdiction, Ms Dwyer

being counsel for the appellant and Ms McDade counsel for the prosecutor.

"Ms Dwyer:	There is a matter I've discussed with my friend that I neglected to add in my submissions yesterday and I think my friend accepts the submission. Perhaps I might be pre-empting anything your Honour might say, but perhaps I would certainly feel like I have neglected to say it if I didn't. It's a short point.
His Honour:	All right, go on.
Ms Dwyer:	And the point is, your Honour that I was in my submissions focused on the issue of whether there had been an assault and any defence, but I didn't address your Honour on what amounts to an offensive weapon. Your Honour may have had looked at that without me having – – –
His Honour:	Well, I formed a view about it, but yes, make your submissions.
Ms Dwyer:	That the definition in the Criminal Code is any article made or adapted to cause injury or fear and your Honour I would respectfully submit that a dog simply can't be an article. An article refers to an inanimate object and it couldn't be argued in any way that a dog could be an article, so that charge simply can't be made out and I should have submitted that there was no prima facie case to answer in respect of that charge.

His Honour: Yes.

What do you say about that, Ms McDade?

Ms McDade: The definition seems to be pretty explicit in relation to article.

His Honour: Well, I mean if someone – just because a dog is an inanimate object, as I said before if someone picked up the dog or pup and threw it at a person, is that not using the dog as a weapon? That's the way I've looked at it.

Ms Dwyer: Well, that's article.

Ms McDade: That's as I put it to you at the beginning of the case in relation to – – –

His Honour: Because it doesn't say article or living creature or animal. It just says article.

Ms Dwyer: Well, that's right your Honour. That's what the legislation says.

His Honour: Yes, well I think someone else may well have to decide that.

Ms McDade: Indeed.

His Honour: I'm going to decide it for now.

Mc McDade: I appreciate that sir.

His Honour: Someone better than me will have to review that."

[6] In the course of his findings, the learned Magistrate said at page 105 of the Court of Summary Jurisdiction transcript:

> "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 that matter."

[7] Before this Court on appeal it was submitted that the word "article" in the definition of "offensive weapon" suggests an inanimate object. It was submitted that a dog is no more capable of being an "article" than a person. It was submitted that it was outside the scope of the definition of "offensive weapon" to suggest that any animal was capable of being described as an "article". It was further submitted that the words following "article" in the definition of offensive weapon, namely the words "made or adapted" indicate an intention to confine the word "article" to inanimate objects.

[8] Submitting that the definition embraced only inanimate objects, counsel for the appellant submitted that "article" did not ordinarily include animals. Indicative of this, it was said, were the statutory definitions of "article" in s 29 Wrongs Act 1958

(Victoria) and s 1(5) of the Damage by Aircraft Act (NSW) in each of which the word "article" was defined as including animals.

[9] It was submitted that a dog was quite unlike things usually regarded in the ordinary sense as weapons and reference was made to the Oxford Dictionary definition of "weapon" and the New Zealand case of *Carroll* [1975] 2 NZLR 474. Reference was also made to *Porter v Pryce & Ryan* [2001] NTSC 11 where Martin CJ said that hot water did not fall within the usual meaning of "weapon", nor the definition of "offensive weapon" in s 1 Criminal Code (NT). It was submitted that line of reasoning ought to be followed and that because dogs were outside the scope of the usual things considered as weapons it was thus even less likely that a dog could come within the s 1 Criminal Code definition of "offensive weapon".

[10] Both counsel for the appellant and the respondent submitted that the learned Magistrate erred in the present case in so far as he found the appellant guilty of the second aggravating circumstance.

[11] As Sir Carlton Allen QC observed in What is an Article? (1961) 77 LQR 237 at 239, the philological history of the word is an interesting study in semantics.

[12] In *Longhurst v Guildford Water Board* [1963] AC 265 the House of Lords held that water contained in filter beds was an "article" for the purposes of the Factories Act 1937 (UK). In my view hot water is an "article" for the purposes of the definition of "offensive weapon" in the Criminal Code (NT) and that *Porter v Pryce & Ryan* to the contrary is wrong and should be overruled.

[13] In *Longhurst*, Lord Reid said (at 273): "The word 'article' has many different meanings or shades of meaning and therefore the context in which it occurs is of crucial importance". He went on to say (at 273): " … the word 'article' itself appears to me to be capable of meaning anything corporeal." As Mason J, as he then was, noted in *Federal Commissioner for Taxation v Faichney* (1972) 129 CLR 38 at 46:

> "The word 'article' according to the Shorter Oxford Dictionary bears the meaning 'a piece of goods or property'."

The Oxford Dictionary itself defines the word "article", inter alia, as "A commodity; a piece of goods or property, a chattel, a thing material." Interestingly, the Oxford Dictionary quotes from a book dated 1856 thus:

> "Lady Selina was just the article he wished for."

Women in Australia enjoy a different status today.

[14] During the hearing I drew counsels' attention to the Court of Appeal decision in *Fatstock Marketing Corporation Ltd v Morgan (Valuation Officer)* [1958] 1 WLR 357. The question there was whether the whole series of operations which went on in a slaughter house including the killing of animals and the preparation of cuts of meat for human consumption amounted to "adoption of an article for sale" for the purposes of UK Factories Act legislation. Lord Evershed MR said that the question for the court was whether looking at the whole of the process carried on could it fairly and properly be said that the premises were being used for the purpose of adopting for sale an 'article' and he held that it was: see at pages 365–366. Parker LJ, on the other hand, said, at 368:

> "The whole process carried out in the premises is undoubtedly the preparation of food for human consumption, but the question is whether any part of that process amounts to the adapting for sale of an article. Clearly the actual killing is not, since a live animal is not, I think, an article."

Sellers LJ did not expressly deal with the point. He simply agreed (at 371) that "on the facts which have been revealed here and, as I understand it, on the finding of the Lands Tribunal, the processes carried on in this slaughter house amount to adapting for sale …".

[15] That case is cited in Stroud's Judicial Dictionary of Words and Phrases, 6th edition, as authority for the bald proposition that "A live animal is not an 'article'." I do not, with respect, think it is authority for any such absolute proposition.

[16] The case law shows that the word "article" itself is not confined to inanimate objects. Depending on the context, "article" has been held to include a horse, a maggot, *Palmer v B J Clarke's (Hampton) Pty Ltd* [1966] VR 7, but not a goldfish, *Daly v Cannon* [1954] 1 WLR 261. These cases are instructive.

[17] In *Daly v Cannon* the question was whether a goldfish was an "article" within the meaning of s 154(1) Public Health Act 1936 (UK). Lord Goddard CJ, with the concurrence of Byrne and Parker JJ, said (at 262–264):

> "… I cannot contend that our judgment will add a great deal to the jurisprudence of this country.
>
> …
>
> … This is a penal statute, because there is a penalty of £5 for breach of the section, and it is a 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.
>
> Would anybody in ordinary common parlance talk about a goldfish as an article? I do not think that they would. If the statute had said 'article or thing,' as some statutes have said, there could be no doubt, I think, that a goldfish

> would be a thing. That was a point which came before the High Court of Northern Ireland in *Rex (Urban District Council of Portadown) v Armagh Chairman and Justices*, where Moore CJ, having to construe a section which dealt with 'article' and 'thing,' said he thought that 'article' was applicable to something inanimate, and 'thing' to both live and dead matter. I think that it is a difficult point in some respects and, if it is thought that goldfish spread disease – I do not know whether they do or not – it would be quite easy for Parliament to alter the law on this point; but bearing in mind that if there is a doubt as to the construction, we ought to prefer the construction which is against the imposition of a penalty, I think that it is a straining of language to say that a goldfish is an article."

[18] In Palmer v B J Clarke's (Hampton) Pty Ltd Starke J said (at 8):

> "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) & 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."

[19] I respectfully agree with the judgment of Starke J who applied ordinary rules of construction. The judgment of Lord Goddard CJ reflects what nowadays is regarded as an outmoded approach

to the interpretation of penal provisions, or at least, a strained application of a rule of last resort. As Gibbs J (as he then was) said in *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 … . The rule is perhaps one of last resort."

This was endorsed as the "modern approach in construing penal statutes" by Gibbs CJ, Mason, Wilson and Dawson JJ in *Waugh v Kippen* (1986) 160 CLR 156 at 164. See, generally, Pearce & Geddes Statutory Interpretation in Australia, 5th edition (2001) para 9.6 ff.

[20] A domestic dog is corporeal property, subject to possession and ownership and capable of sale . The dog here was owned by and in the possession of the appellant. The dog was set upon the victim. It was employed or used by the appellant to attack the victim. I think the words "… article … adapted to cause injury or fear of injury to the person etc" mean and are directed to any use or employment of corporeal property in such a manner as to cause injury or fear of injury to another. "Adapted" in the context does not involve any change in the nature or substance of

the “article” but rather addresses the means by which use of the “article” causes injury or fear of injury.

[21] 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.

[22] The appeal is dismissed.
