

26/73

## SUPREME COURT OF VICTORIA

**WASHINGTON v RENGIS**

Little J

12 September 1973

**CRIMINAL LAW – PERSONS FOUND ARMED WITH OFFENSIVE WEAPONS – STICKS AND KNIVES – WHETHER OFFENSIVE WEAPONS – CHARGES LAID – DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: VAGRANCY ACT 1966, S6.**

**HELD:** Order nisi absolute. Dismissals set aside. Remitted for hearing and determination in accordance with the law.

1. There was ample evidence as against each defendant that the sticks were immediately available for use by them. In relation to the knives, it was conceded that there was no *prima facie* case against two of the defendants, that he was armed with a knife. There was no evidence associating either of those defendants with any of the knives found in the car and it is at least doubtful on the evidence whether they had at any material time knowledge of the presence of the knives in the car. As against the defendant Guzel, however, there was evidence that the knife found by the police in the car belonged to him; that he had it with him when he entered the car and later whilst in the car had taken it out of his pocket.

2. Accordingly as the ruling of the Magistrate that there was no case to answer, was based on the view there was no evidence that the defendants were found armed, the ruling was erroneous.

3. As to the question whether there was evidence that the sticks and the knife were offensive weapons within the meaning of s6(1)(e) of the *Vagrancy Act* 1966, a weapon or instrument capable of inflicting injury in combat may be an offensive weapon or instrument within s6(1)(e) of the *Vagrancy Act*, even though its normal or ordinary use is for quite innocent purposes. Such a weapon or instrument is an offensive weapon if the person found armed with it has then any intention to use it for the purposes of combat or attack.

4. The Magistrate did not appear to have adverted to the matter of the intention of the defendants in having the sticks, or in the case of Guzel, the knife, in the car. There was evidence on which it could properly be held as against each defendant that at the time he was intercepted by the police, he had an intention to use a stick, and in the case of Guzel a knife, for the purposes of aggression of combat.

5. Accordingly, the Magistrate was in error in his view that on the evidence before him there was no case to answer.

**LITTLE J:** Orders nisi to review orders made by the Magistrates' Court at Brunswick on the 10 November 1971, dismissing in each of three cases informations under the *Vagrancy Act* 1966.

The information in each instance charged the defendant that on the 4 November 1971 at Brunswick, he was found armed with offensive weapons, namely, three knives and five garden stakes. The evidence before the Magistrates' Court was that the three defendants with three other youths were, on the 4 November 1971, at about 1.30 p.m., seen by police officers in a Holden motor car in Pearson Street, Brunswick. Five sticks (referred to in the evidence as "sticks" or "garden stakes") were on the floor at the back of the car; two knives were under the front seat and the third knife was on the floor near the gear shift lever.

The defendants were taken to the Brunswick Police Station and were there questioned. It is not necessary to refer to the answers orally given by the defendants to the questions they were then severally asked. It will be sufficient to refer in each case to the material portions of the relevant record of interview which was made and which was received in evidence.

In the case of Fidele, the record of interview contains the following questions and answers:

"What were you all doing in this motor car? ---That friend of mine, Jack, he told me about some kids belting him up the other day and he asked me if I could help him out so I went down there with the others.

I take it then that you went there with the intention of fighting with some boys at the Brunswick High School, is that correct? ---That's true.

The police who intercepted you found five garden stakes on the floor in the rear of the car. How did these stakes come to be in the car? ---We were going up Melville Road and we saw some of these boys that we had come to fight, there were about four of them" (later corrected to ten to fourteen) "and they had knives in their hands, one of them had a screwdriver, I think, we decided to get something, seeing they had something, we went around a corner and saw some sticks in the front garden of a house, we went and got them.

Did you actually go and get one of these sticks? ---Yes.

When the car was intercepted by the police it was also found that there were three knives on the floor in the back of the car, what do you know about this (indicated knives)? ---When the police pulled us up there was a knife on the dashboard, Jack the driver told me to put it away and I put it under the dashboard (indicated butcher's knife).

What about the other two knives that were found in the car?---I don't know nothing about them.

I believe that you and the rest of these boys had armed yourselves with these knives and sticks and that you were going to use them on these boys that you had gone there to fight, is that so?---I don't know about the knives, we were going to use the sticks because they had knives."

In the case of Guzel, the record of interview — after recording a statement by him "We saw a big lot of the kids and we decided to fight them but there were, too many" — proceeds with the following questions and answers:

"What did you do then?---Someone said 'let's get some sticks out of the garden.' We can belt them all up.

What happened then?---I was driving again. I stopped the car and everyone got out and went into the front garden and took a stick and got back into the car.

What made you all decide to go looking for the kids from the High School to belt them up? ---Because they belt us last Monday.

There were also three knives in the car today. Which of the knives belongs to you ---The small one with the wooden handle.

Why were you carrying that knife today? ---Because I lost the screwdriver and I wanted something to protect myself with.

What did you do with the knife when you saw the policeman telling you to stop? ---I put it in the car when I first got into the car. When I was sitting down it was too bad in my pocket. It was too tight.

Were you on the way to fight with the High School boys when you were pulled up by the policeman? ---No. after we got the sticks, we decided there was still too many boys to fight and we were going to go away and that's when the policeman stopped us."

In the case of Rengis, the following questions and answers appear in the record of interviews.

"When you were asked by Eski to help him, what did he mean?---There were these kids that he was going to fight and we were just going along to help him.

In the car when you were stopped there were wooden sticks. Where did they come from? ---In a side street off Melville Road.

How did you come to be down at Melville Road?---We drove past the High school, looking for the kids and we saw some kids up Melville Road, so he drove past and there was about ten or fifteen and he said, 'There's too many let's get some sticks.'

What happened then?---So he drove past that house and the other Turkish fellows got out of the car

and jumped over the fence and got some sticks.

Where were the sticks in the car?---Some were in the front, some were in the back.

What were you going to do with the sticks?---We were going to have a punch-on."

The sticks and knives referred to in the record of interview were put in evidence. One of the knives (referred to as a butcher's knife) had a narrow blade. Another was described as a flick knife and the third was a smaller knife belonging to Guzel. The sticks were not heavy and varied in length from approximately two feet six to three feet six.

At the conclusion of the case for the informant (the three informations being heard together) the Stipendiary Magistrate asked the prosecuting officer how it was said in view of the decision in *Rowe v Conti* [1958] VicRp 87; [1958] VR 547; [1958] ALR 1038 that the defendants were found armed with offensive weapons. The prosecutor then referred to differences between the facts in the present cases and those in *Rowe v Conti*, *supra* and to the evidence as to the stated intention of the defendants.

The Stipendiary Magistrate then asked the prosecutor whether he was suggesting that any person who drives a motor car around with a rifle in the car is found armed with an offensive weapon. The prosecutor replied that he was not making that submission and that the matters in evidence went beyond just carrying weapons around. The Stipendiary Magistrate said he did not think the defendants had a case to answer and he accordingly dismissed the information. The order nisi in each case was granted on the following grounds:

(A) THAT the Stipendiary Magistrate was wrong in law in dismissing the said Information without considering and determining whether at the time and place alleged in the said Information the Defendant—

(i) had any proprietary or possessory or other interest in or connection with the knives and stakes or any of them:

(ii) was so situated in relation to the said knives and stakes as to be able readily make use of them or any of them:

(iii) had any present intention to use them or any of them as a weapon.

(B) THAT the Stipendiary Magistrate should have held that the evidence established a *prima facie* case against the Defendant of being found armed with the said knives and stakes or with one of them."

On the return thereof Mr Porter of Counsel appeared to move the order absolute. There was no appearance by or on behalf of any of the defendants.

Proof of the offence alleged in the information requires, as was emphasised in *Rowe v Conti supra*, proof that the person charged was (1) Found; (2) Armed; (3) With an offensive weapon. The reference made by the Stipendiary Magistrate to the decision in that case indicates that his mind was then directed to the question whether in the present instance the defendant was "found armed" for the decision of Gavan Duffy J upholding the dismissal of the Information in the court below was based solely on the ground that the alleged offender was not "found armed".

The facts in *Rowe v Conti* were that the defendant was searched by police outside a hotel in Shepparton and it was found he was not in possession of a knife or other weapon. A utility owned by him, which was in the backyard of the hotel, was then searched and in it there was found the knife which was alleged to be the offensive weapon. The evidence indicated that the knife belonged to the defendant. In the course of the reasons for judgment Gavan Duffy J said;

"The word 'found' is not to be disregarded and the offence treated as if it were equivalent to 'having offensive weapons in his possession.' When Conti was searched by the police he was not 'armed' in any sense. I do not say that man must necessarily have the weapon in his hand to be armed with it but he must have it immediately ready for use. The fact that he has in his vehicle a weapon with which he can arm himself in a few minutes is not enough."

The same opinion was expressed in *Miller v Hrvojevic* [1972] VicRp 31; [1972] VR 305 where Lush J said at p306:

"To be armed with a weapon means something more than to be in possession of it: the weapon must also be available for immediate use as a weapon. No doubt questions of fact and degree are involved."

The facts in the present cases are markedly different from those in *Rowe v Conti*, *supra* and, in my opinion there was ample evidence as against each defendant that the sticks were immediately available for use by him. In relation to the knives, it was conceded before me that there was no *prima facie* case against Fidele or Rengis, that he was armed with a knife. There was no evidence associating either of those defendants with any of the knives found in the car and it is at least doubtful on the evidence whether they had at any material time knowledge of the presence of the knives in the car. As against Guzel, however, there was evidence that the knife found by the police in the car belonged to him; that he had it with him when he entered the car and later whilst in the car had taken it out of his pocket.

Insofar accordingly as the ruling of the Stipendiary Magistrate that there was no case to answer, was based on the view there was no evidence that the defendants were found armed, the ruling was in my opinion erroneous.

The question remains whether there was evidence that the sticks and the knife were offensive weapons within the meaning of s6(1)(e) of the *Vagrancy Act* 1966. In *Threlfall v Panzera* [1958] VicRp 87; [1958] VR 547; [1958] ALR 1038 Gavan Duffy J had to consider what was an offensive weapon in the context of s69(i)(f) of the *Police Offences Act* 1957, the language of which differs from that of s6(i)(e) of the *Vagrancy Act* 1966.

Where is no occasion under the present legislation to have recourse, in relation to that question, to any *ejusdem generis* rule as referred to in *Threlfall's case*; and insofar as any of the views expressed by His Honor in that case were affected by such a rule of construction they must now be regarded with the change of language in mind. In that case the offensive weapon alleged was a knife, the appearance of which suggested that it could have uses other than for purposes of aggression or causing injury.

Gavan Duffy J decided that in the absence of evidence that when the defendant was found he had an intention of using the knife for attack, the Magistrate was certainly justified in finding that it was not an offensive weapon. In the course of the reasons for judgment His Honor referred to early authority at common law.

In *Rex v Jenkins* [1822] EngR 83; 168 ER 914; [1822] Russ & Ry 492, the prisoner was charged with assault with an offensive weapon with intent to rob. The weapon was a walking stick about one yard long and not very thick. The trial judge directed the jury that if the prisoner used the stick by way of attack for the purpose of effecting the robbery, it might be considered an offensive weapon. The jury convicted the prisoner and at a meeting of all the judges the conviction was affirmed.

Similarly in *R v Fry and Webb* (1837) 2 Mo and R 42; [1837] EngR 609; 174 ER 208, the prisoners were indicted for entering land by night armed with offensive weapons. The only weapon proved was a common walking stick. It was said by Gurney B that if a man goes out with a common walking stick and there are circumstances to show that he intended it for the purposes of offence, it might be called an offensive weapon. See also *R v Turner* (1849) 3 Cox Criminal Cases 384; [1849] EngR 65; 175 ER 306; (1849) 2 Car & Kir 732; *R v Noakes* [1832] EngR 611; 172 ER 996; (1832) 5 C & P 326; *R v Merry* (1847) 9 LTOS 202. Compare the decisions referred to in the footnote to I Leach 339 at pp342/343 in which, as Lush J observed in *Miller's case* (*supra*), "Only the nature of the weapon appears to have been considered and no reference was made to the intention of the person carrying it."

The expression "offensive weapons" as used in s6(1)(e) of the *Vagrancy Act* is not, in my opinion, confined to weapons the ordinary or common use of which is for the purposes of aggression or causing injury. Such objects may be described as offensive weapons *per se* e.g. a knuckle duster, as in *Miller's Case* (*supra*); and *Evans v Wright* [1964] Crim LR 466, or the loaded rubber cosh in the Scottish case of *Grieve v MacLeod* [1967] SLT 70; [1967] Crim LR 424; (1967) SC (J) 32.

Quite apart from that class, however, a weapon or instrument capable of inflicting injury in combat may be an offensive weapon or instrument within s6(1)(e) of the *Vagrancy Act*, even though its normal or ordinary use is for quite innocent purposes. Such a weapon or instrument

is an offensive weapon if the person found armed with it has then any intention to use it for the purposes of combat or attack. See also *Pelway v Brebner* [1963] SASR 36; *Considine v Kirkpatrick* [1971] SASR 73; *Evans v Hughes* [1972] 3 All ER 412; [1972] 1 WLR 1452.

The Stipendiary Magistrate does not appear to have adverted to the matter of the intention of the defendants in having the sticks, or in the case of Guzel the knife, in the car. There was evidence on which it could properly be held as against each defendant that at the time he was intercepted by the police, he had an intention to use a stick, and in the case of Guzel a knife, for the purposes of aggression of combat.

In view of what I have earlier said, there was, accordingly, a *prima facie* case against each defendant that he was found armed with an offensive weapon. It follows that the Stipendiary Magistrate was in error in his view that on the evidence before him there was no case to answer. In each case the order nisi must be made absolute. The order dismissing the informations must be set aside and the informations remitted to the Magistrates' Court at Brunswick for further hearing in accordance with this judgment. I will make no order as to the costs of the orders nisi,

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