21/77

SUPREME COURT OF VICTORIA

TAYLOR v STEVENSON

O'Bryan J

21 March 1977

CRIMINAL LAW – OFFENSIVE WEAPON – "BOOMERANG" – NATURE OF – STATEMENT BY DEFENDANT THAT HE COULD USE THE BOOMERANG TO DEFEND HIMSELF IF ATTACKED – AUTHENTIC OR SOUVENIR NOT AN OFFENSIVE WEAPON *PER SE* – SUFFICIENCY OF EVIDENCE AS TO USE FOR AGGRESSION OR ATTACK – NO-CASE SUBMISSION OVERRULED – WHETHER MAGISTRATE IN ERROR: *VAGRANCY ACT* 1966, S6.

The defendant was found in a laneway near Ozanam House, with a souvenir or imitation boomerang in his right hand. When asked what he was doing there, he replied the manager of that House had barred him from coming to the premises at any time, and he had come to sort the matter out with the manager. The manager had ordered him out. The defendant stated his reason for carrying the boomerang was that he could use it to defend himself if attacked. When asked by the informant if the boomerang could be used as a weapon, he replied, "That's obvious". After the informant had closed his case Counsel for the defendant made a submission of "no-case" to the Magistrate which was over-ruled. Upon Order Nisi to review—

HELD: Order discharged.

1. The boomerang produced to the Magistrate at the hearing was far removed from the boomerang originally produced by the culture of the Australian aboriginal, but whether the Magistrate was confronted by an authentic aboriginal boomerang or a souvenir boomerang, a boomerang should not be regarded as an offensive weapon *per se* within the meaning of the *Vagrancy Act* s6.

2. Today, in our civilised society, people regard the boomerang as an interesting toy, or aboriginal artifact, and not as a basically offensive or aggressive weapon. That is not to say that in particular circumstances it could not be used offensively or aggressively by an individual.

3. There is modern authority which shows clearly that the law draws a distinction between objects which are offensive weapons *per se* and objects which become offensive weapons because of the particular intent the individual handling the object had at the relevant time.

4. In relation to the question whether the defendant had an intention to use the boomerang for aggression or attack, it is a very different position if, knowing your presence is unwelcome, if not forbidden, you proceed to the place you are forbidden entry to, armed in the right hand with a piece of curved wood, albeit softwood, in the shape of an aboriginal boomerang.

5. The Magistrate was quite entitled to regard the actions of the defendant, in the circumstances as they appeared to be when the informant's case closed as highly provocative and aggressive and in no way indicative of a man present to defend himself from someone's aggression.

6. Accordingly, the Magistrate, acting reasonably, was entitled to hold, as he did, that in all the circumstances he could convict the defendant on the basis that in being so armed the defendant's intention at the time he was found armed was to use the boomerang for the purposes of aggression or attack. In other words, he was carrying the boomerang with him for an offensive rather than a defensive purpose. At that stage of the hearing the defendant had not given to the court, or even to the informant, 'a valid and satisfactory reason for his being so armed.' The Magistrate was not wrong in law in ruling there was a case for the defendant to answer.

O'BRYAN J: ... "I am unable to accept as sound law counsel's proposition that the boomerang produced to the Magistrate and to me is an offensive weapon *per se*. Before I proceed to consider legal authority to assist me to determine what the law regards as 'offensive weapons', I believe I should make some preliminary observations about the nature of a boomerang. The authentic Australian aboriginal boomerang is a very different article to the boomerang produced to me. The authentic boomerang is made from a carefully selected curved limb of a mulga tree, a hardwood, and the most widely used was the central Australian non-returning type. In more primitive times it was hurled at an enemy or prey.

I believe it is appropriate to cite from a publication *Australian Aboriginal Culture*, published for the Australian National Commission for the United Nations Educational Scientific and Cultural Organisation (UNESCO) by the Australian Government Publishing Service in 1973. At page 28 the following paragraph appears:

> 'In common with other aboriginal weapons the boomerang had a multiplicity of uses. Besides its normal function as a fighting or hunting weapon it served to clear grass and soil to prepare comfortable campsites or ceremonial grounds; it was used as a poker and shovel when cooking, the ashes being scraped away to make room for a carcase and the cooked food also being raked out from the ashes. The sharp end of a hardwood boomerang was sometimes employed for cutting up a cooked animal or for digging holes for an earth oven or the erection of ceremonial regalias; outcrops to stone were dug out with boomerangs to obtain unweathered material for implements; the sharp edge could be used to create friction in fire-making, two of these weapons tapped together were sometimes an accompaniment to ceremonies, the rapid vibrating sound only being properly made by experts. Other boomerangs served as sacred objects'.

The boomerang produced to the Magistrate at the hearing and before me is far removed from the boomerang originally produced by the culture of the Australian aboriginal, but whether the Magistrate was confronted by an authentic aboriginal boomerang or a souvenir boomerang, as I believe the boomerang produced to me to be, I do not consider a boomerang should be regarded as an offensive weapon *per se* within the meaning of the *Vagrancy Act* s6.

Today, in our civilised society, people regard the boomerang as an interesting toy, or aboriginal artifact, and not as a basically offensive or aggressive weapon. That is not to say that in particular circumstances it could not be used offensively or aggressively by an individual.

There is modern authority which shows clearly that the law draws a distinction between objects which are offensive weapons *per se* and objects which become offensive weapons because of the particular intent the individual handling the object had at the relevant time.

In *Threlfall v Panzera* [1958] VicRp 87; [1958] VR 547 at 550; [1958] ALR 1038, Gavan Duffy J drew a distinction between instruments constructed for the sole purpose of attacking and instruments which have multiple uses, one of which may be a use for purposes of attack. In an unreported decision in 1973 Little J in *Washington v Rengis* (delivered 12th September 1973), a case involving charges laid under s5 of the *Vagrancy Act* 1966, where the offensive weapons were knives and garden stakes, at page 8 said:

> '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* and *Evans v Wright* (1967) Criminal Law Review 466, or the loaded rubber cosh in the Scottish case of *Grieve v MacLeod* (1967) SCJ 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 had then any intention to use it for the purposes of combat or attack. See also *Pelvay v Brebner* (1963) SASR 36; *Considine v Kirkpatrick* (1971) SASR 73; *Evans v Hughes* [1972] 3 All ER 412; [1972] 1 WLR 1452.'

This decision of His Honour was in line with a decision reached by Casey J in *R v Carroll* (1975) 2 NZLR 474 a case where the offensive weapon was a German pistol. At page 479 His Honour said:

> 'These early authorities suggest a distinction between things which can be described as offensive weapons *per se*, and others which may or may not be used as a weapon, that is, to inflict bodily injury, and whose classification depends on the intention of their possessor. In the first category, *Cosans' case* implies that anything that is in common use as a weapon should be classed as an "offensive weapon" *per se* and this would include guns (whether loaded or not) thereby getting over one of the principal difficulties troubling Mr Williamson. This seems to be a practical approach according with the definition which Parliament saw fit to adopt in the *Police Offences Act*. It also commended itself to Gavan Duffy J in *Rowe v Conti* [1958] VicRp 87; [1958] VR 547; [1958] ALR 1038 where, dealing with "offensive weapon" in the Victorian *Police Offences Act*, 1957, he said:
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> "There are nisi prius cases reported which encourage me to read the words 'offensive weapons' as applying to instruments which like swords and bludgeons may fairly be said to be constructed or to be used for one purpose only — attacking — and to instruments which are adapted to

> inflicting injuries in combat or attack but have other uses only if they are carried on the occasion in question with the intention of using them for purposes of attack, be that the sole purpose or one among others".'

The decision of Lush J in *Miller v Hrvojevic* [1972] VicRp 31; [1972] VR 305, which was referred to by Little J in *Washington v Rengis* is not helpful to me because, in that case, the knuckle duster was held by His Honour to be a weapon the only ordinary use of which was in personal combat. A knuckle duster and a loaded rubber cosh really do not cause one much difficulty, because, by their very nature they are weapons of attack. Such weapons would clearly be regarded as notoriously offensive weapons in the community, whereas a boomerang, in my opinion, would not be so regarded in the community of 1976.

Mr Davis drew my attention to the case of *R v Cosans* (1785) Vol. 168 English Reports, page 274. In that case, the court held that not only guns, pistols, daggers and instruments of war, but also bludgeons, properly so-called, clubs and such other things as are not in common use for any other purpose but a weapon are clearly offensive weapons within the meaning of the *Smuggling Act* which prohibited persons 'with firearms and other offensive weapons feloniously assembling together'.

It is important to remember that before the *Vagrancy Act* 1966 in Victoria, the words 'offensive weapon' were preceded by the words sword, bludgeon. Applying the *ejusdem generis* rule of construction, as Gavan Duffy J did in *Threlfall v Panzera*, the only genus is a weapon apparently of such a nature that it has no other use than attack, or a weapon adapted to attack. Comparable English legislation either used a word such as 'firearm' as in *Cosans' case*, before the words offensive weapons, or defined offensive weapon in the legislation.

It is interesting to note, that in *Miller v Hrvojevic* counsel for the informant submitted to Lush J there were two alternative tests which determined whether a weapon or instrument was offensive. 'First, if the weapon or instrument was such that its only ordinary use would be in personal combat, then it was an offensive weapon without proof of anything further. Secondly if the weapon or instrument was one which had other normal uses, such as some knives and some sticks, it was an offensive weapon or instrument only if it were proved that the defendant was armed with it for some offensive, that is aggressive purpose'. Lush J did not have to consider the alternative test in the case before him, but it is clear to my mind Little J gave effect to such a test in *Washington v Rengis*, as did Casey J in *R v Carroll*.

Obviously objects which the law regards as offensive weapons *per se* have not been finally determined by the law and when the occasion arises another object will be added, but that does not affect me in the view I have reached concerning a boomerang".

[As to the question of the sufficient of evidence of the defendant's intention to use the "boomerang" for aggression or attack, His Honour said:] "Was there evidence that the defendant had any intention to use it for the purposes of aggression or attack when he was spoken to by the informant? If the Magistrate could have reasonably come to the conclusion that the defendant had the boomerang with him for the purpose of aggression or attack at the conclusion of the informant's case then there was evidence on which the defendant could be convicted and the Magistrate was entitled to rule there was a case to answer. I consider the relevant time to establish the intent of the defendant was when he was found armed in the laneway near Ozanam House, namely about 8.45 a.m.

When he was asked by the informant why he was carrying the boomerang the defendant replied that he could use it to defend himself if attacked. Now, it will be remembered that in answers to the informant, the defendant stated he had been banned by the manager from coming to Ozanam House and he had come to sort the matter out with the manager. It is sometimes said that 'attack is the best form of defence', but the legal consequence of so doing is usually not consistent with a situation of self-defence. It is a clear principle of the law of self-defence that you may use reasonable means to defend yourself from the attack of another and 'to retreat before employing force is no longer to be treated as an independent and imperative condition if a plea of self-defence is to be made out'. (Dixon CJ, *R v Howe* [1958] HCA 38; (1958) 100 CLR 448 at 463; [1958] ALR 753; 32 ALJR 212.)

However, it is a very different position if, knowing your presence is unwelcome, if not

forbidden, you proceed to the place you are forbidden entry to, armed in the right hand with a piece of curved wood, albeit softwood, in the shape of an aboriginal boomerang. I believe the Magistrate was quite entitled to regard the actions of the defendant, in the circumstances as they appeared to be when the informant's case closed as highly provocative and aggressive and in no way indicative of a man present to defend himself from someone's aggression.

I am of the opinion, the Magistrate, acting reasonably, was entitled to hold, as he did, that in all the circumstances he could convict the defendant on the basis that in being so armed the defendant's intention at the time he was found armed was to use the boomerang for the purposes of aggression or attack. In other words, he was carrying the boomerang with him for an offensive rather than a defensive purpose. At that stage of the hearing it will also be recalled that the defendant had not given to the court, or even to the informant, 'a valid and satisfactory reason for his being so armed.' The Magistrate was not wrong in law in ruling there was a case for the defendant to answer".
