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SUPREME COURT OF VICTORIA

Burr v Shields

Beach J

15, 18 December 1995

CRIMINAL LAW – POSSESSION OF REGULATED WEAPON – EXTENDABLE BATON – SECURITY BUSINESS – POSSESSED FOR RESALE – WHETHER LAWFUL EXCUSE: CONTROL OF WEAPONS ACT 1990, S6.

B., who owns a security business, was found in possession of a regulated weapon namely, an extendable baton. B. said that he had the baton in his possession for resale as part of his security business but had not offered it for sale in the 6 weeks prior to interception by police. On the hearing of the charge, the magistrate found that B. did not have a lawful excuse for his possession of the baton because he had not offered it for sale on a very regular basis and found the charge proved. Upon appeal—

HELD: Appeal allowed. Order quashed. Information dismissed.

1. The words “lawful excuse” in s6 of the Control of Weapons Act 1990 (‘Act’) place a burden on the person in possession to show that the possession was not for any criminal purpose.

Carter v Reaper [1920] VicLawRp 67; [1920] VLR 337; and

Haisman v Smelcher [1953] VicLawRp 83; [1953] VLR 625; [1953] ALR 1019, applied.

2. In the present case, there was evidence to show that B. possessed the baton in the furtherance of a legitimate purpose not for a criminal purpose. Merely because B. did not make active efforts on a regular basis to sell the baton did not deprive B. of the statutory ‘protection’ in s6(3) of the Act.

BEACH J: [1] Leslie Thomas Burr is the proprietor of a registered security business. He specialises in removing electronic eavesdropping devices which have been installed secretly in premises. On 20th March 1995 Burr was intercepted by Constable John Shields whilst he was driving his station wagon in Boundary Road, Newcomb. Having inspected Burr's driving licence, Constable Shields then searched the vehicle. In a black satchel in the rear of the vehicle he discovered a black metal extendable baton. Constable Shields then had the following conversation with Burr:

Shields: "Who does this baton belong to?" Burr: "It's mine."

Shields: "What do you do for a living?" Burr: "I own a security business."

Shields: "What does that entail?" Burr: "I check for bugs in houses and telephones."

Shields then told Burr that he would take the baton back to the police station and make further enquiries. On Tuesday 21st March 1995 Constable Shields conducted a formal interview with Burr. The following is the portion of the interview relevant for present purposes:

Shields: "Where did you purchase the baton?" Burr: "It was purchased in Melbourne from a security suppliers, I can't think of the name of it at the moment."

Shields: "Can you describe this baton to me?" Burr: "It's metal and it extends triple its length to about 18 inches."

Shields: "What do you use it for?" Burr: "I use it in my business to try and sell them as a security item."

Shields: "Have you any other reason for possessing it?" Burr: "No." [2]

Shields: "How many have you sold prior to being intercepted yesterday?" Burr: "None."

Shields: "Why is that?" Burr: "People think they're too heavy and the price as well. I was trying to sell them for about \$160 to \$180 each and there's confusion as to whether they were going to be legal after Police gained possession of them themselves."

Shields: "Is this the only one you have purchased?" Burr: "Yes."

Shields: "How much did you pay for it?" Burr: "From memory \$130."

Shields: "Who do you try and sell the batons to?" Burr: "To anybody I go and do security work for."

Shields: "Do you try and sell any other security items to customers?" Burr: "Yeah, I do mention other items such as spray, etc."

Shields: "Are you a registered private agent or are you registered on the private agents register?"

Burr: "No I've just got a registered security business."

Shields: "What does your work entail with your security business?" Burr: "My main business is debugging, looking for electronic eavesdropping devices."

Shields: "Do you use the baton with this line of work?" Burr: "Only to try and flog them for an extra quid."

Shields: "And what was your purpose for going there?" Burr: "I was just visiting a friend in Oxford Street."

Shields: "Were you working?" Burr: "No."

Shields: "Why were you carrying the baton in your vehicle when intercepted by Police?" Burr: "It was just in my security bag with my security machine."

Shields: "Are you aware that there are certain guide-lines in relation to the possession of an extendable baton?" Burr: "No, I didn't know that."

Shields: "Were you aware that only certain people can carry these weapons, people in the lawful [3] execution of their duties and collectors?" Burr: "No, I wasn't aware of that at all."

Shields: "Do you have any lawful excuse or written permission from anybody to be in the possession of the extendable baton?" Burr: "I had no knowledge that I had to have permission."

Shields: "Is it true that you don't use the baton in your line of work?" Burr: "No, that's not true, it is a security item and is sold as such."

Shields: "What have you had to use the baton for in your line of work?" Burr: "Only to sell, resale."

Shields: "So you have never had to use the baton in the execution of your duty, is that correct?"

Burr: "Other than to try and sell it, yes."

Shields: "What is your reason for being in possession of the metal extendable baton being a regulated weapon under the *Control of Weapons Act*?" Burr: "Strictly for resale as a security item."

Shields then informed Burr that he may receive a summons at a later date. In due course Burr was charged with possessing a regulated weapon without lawful excuse contrary to the provisions of s6 of the *Control of Weapons Act* 1990. That section reads:

"Control of Regulated Weapons.

6.(1) A person must not possess, carry or use any regulated weapon without lawful excuse. Penalty: 60 penalty units or imprisonment for six months.

(2) A person must not carry a regulated weapon unless it is carried in a safe and secure manner consistent with the lawful excuse for which it is possessed or is carried or is to be used. Penalty: 10 penalty units.

(3) In this section lawful excuse includes—

- (a) the pursuit of any lawful employment, duty or activity;
- (b) participation in any lawful sport, recreation or entertainment; and
- (c) the legitimate collection, display or exhibition of weapons but does not include for the purpose of self-defence."

[4] An extendable baton of the type in question is a regulated weapon by virtue of the provisions of reg.5 of the *Control of Weapons Regulations* 1990. The relevant sub-regulation of reg.5 reads:

"(d) extendable baton, which means a baton designed or adapted so that the length of the baton extends by gravity or centrifugal force or by any pressure applied to a button, spring or device in or attached to the handle of the baton."

The information came before the Magistrates' Court at Geelong on 14th August 1995. Constable Shields gave evidence of his interception of Burr, of finding the baton in the satchel, of his conversation with Burr at the scene and of his later interview with Burr. Burr then gave sworn evidence in relation to the matter. His account of that evidence and his cross-examination is set out in paras.13 and following of his affidavit sworn 26th September 1995. Those paragraphs read:

"13. I testified:

- (a) I have been carrying on a security business since 1990;
- (b) I conduct the business under the registered name 'Umaz Electronics Security';
- (c) the main activity of the business is debugging telephones;
- (d) the main article of my business is a debugging machine which I carry in a satchel;
- (e) the satchel has a pouch;
- (f) I have the satchel in my Mitsubishi station wagon at all times;
- (g) the Mitsubishi is my only car and I use it for both business and private purposes;
- (h) when I was intercepted by police the satchel was located in the rear of my car;

- (i) in the pouch attached to the satchel was a black coloured extendable baton;
 - (j) when the Informant located the baton he asked me who it belonged to and I told him it was mine and I had it to sell as a security item as part of my security business;
 - (k) I purchased the baton in Melbourne about 12 to 18 months prior to March 1995 and I thought I paid \$130 for the baton but I could not remember the name of the shop where I bought it. [5]
 - (l) I had the baton in the satchel to re-sell because as part of my security business I have some security items for sale. 14. Under cross-examination I was asked:
 - (a) when I had done my last security job and I answered on the Friday before the Court day;
 - (b) whether I had ever used the baton and I said no;
 - (c) whether I had ever seen one being used and I said that I had by a person named Robert Cunningham;
 - (d) whether I had sold any batons and I replied that I had not. I said that I believed there was a fault with that particular baton insofar as the extending mechanism was jammed.
15. The Learned Magistrate asked me when was the last time I had demonstrated the baton to someone for the purpose of offering it for sale and I answered about 6 weeks prior to the police seizing the baton from me."

What then occurred is set out in the concluding paragraphs of Burr's affidavit, which read:

"16. At the conclusion of my evidence my Counsel commenced to make a submission to the Magistrate that having the baton for the purpose of resale was a lawful excuse which exculpated me. Before Mr Ambrose had completed his submission the Learned Magistrate told Mr Ambrose that he was against him. 17. The Learned Magistrate then gave his ruling. He said that he accepted my evidence that I operate a security business and that I had the baton for the purpose of resale. However he ruled that the legislation did not intend that I should have it for such a long period of time without selling it. He said that it was not enough to hold on to the baton in some forlorn hope that I might be able to get rid of it. He said that there was no evidence of attempts by me to sell the baton on a regular basis and since I had not offered the baton for sale on a "very regular basis" it could not be said that I was in possession of the baton with a lawful excuse within the meaning of the Act."

Burr was then convicted of the charge, fined \$500, and the baton was confiscated. He now appeals from that decision to this court.

The following questions of law are said to be raised by the appeal: [6]

- (1) Whether for the purpose of s6 of the *Control of Weapons Act* 1990 the appellant had lawful excuse for his possession of a regulated weapon.
- (2) Whether the learned magistrate erred in ruling the legislature intended that for the purpose of lawful excuse the appellant was required to have offered the baton for sale on a very regular basis.

The plaintiff's defence to the charge laid against him is that he had a lawful excuse for possessing the baton within the meaning of s6 of the Act, in that the baton had been acquired by him in the pursuit of his lawful employment as proprietor of his security business.

The words "lawful excuse" were considered by Hood J in *Carter v Reaper* [1920] VicLawRp 67; [1920] VLR 337. That was a case in which a person had entered another's dwelling house and to avoid conviction for the offence of being found in a house without lawful excuse was required to show that he had a lawful excuse for being there. At p341 his Honour said:

"Looking at the legislation, I think the meaning to be perfectly clear. It is a criminal section, and in this sub-section the burden of proof is placed upon any person found on the premises; that person must show that his presence was not for any criminal purpose. If he does that, his trespass is excused, not merely because he had any right or any belief in any right, though that would be sufficient, but simply by the absence of any wrong intention. His excuse is lawful because it is honest - see *Hodgson v Collier* [1898] 24 VLR 28 - and therefore he is not to be treated as a criminal."

That the view of Hood J as to the interpretation to be given to the words "lawful excuse" was the correct one was confirmed by the Full Court in *Haisman v Smelcher* [1953] VicLawRp 83; [1953] VLR 625; [1953] ALR 1019. At VLR p628 the Court said:

"From what we have said it will be seen that we consider that the decision of Hood J in *Carter v Reaper* (*supra*) represents a sound interpretation of the [7] provision. When that learned Judge spoke ([1920] VLR at pp340, 341) of the section being "a criminal section", and expressed the opinion

that the person charged "must show that his presence was not for any criminal purpose", he was stressing the nature of the conduct at which the section is aimed. It is not directed at behaviour that may, because of an infringement of some civil right, give rise merely to a civil remedy; it is designed to make punishable conduct that is preparatory to or in furtherance of some criminal purpose, or which, by reason of its violating recognised standards of decency, tranquillity and decorum and the accepted usages of the community, is likely to put occupants in fear or apprehension and thus justify a binding over order."

In the present case the magistrate held in effect that, as the plaintiff had not attempted to sell the baton on a "very regular basis", he had not brought himself within the provisions of sub-s(3) of s6. Counsel for the respondent sought to uphold that view on the footing that the use of the words "the pursuit of any lawful employment" in sub-s(3)(a) required the plaintiff in the circumstances of this case to establish that he had made regular efforts to sell the baton; that as he had made no active effort to do so over the period of six weeks prior to his apprehension, it could not be said that his possession of it was in pursuit of his employment as proprietor of his security business.

I am unable to accept that proposition. In my opinion, when one is talking of the pursuit by a person of his occupation, one is simply talking about the practice by that person of his occupation. If a person has implements in his possession for sale in his business, implements which are regulated weapons within the meaning of the Act, he does not lose the protection of sub-s(3) merely because he does not make active efforts on a regular basis to use or sell them. That clearly was not the intention of the legislature, as is evidenced by the [8] Minister's Second Reading Speech in relation to the Act as recorded in *Hansard* on 15th May 1990. At p1447 the Minister is reported as saying:

"The Bill introduces two new categories of offence. Firstly, it provides for articles to be prescribed as regulated weapons which must not be possessed, carried or used unless the person has a lawful excuse such as employment, recreation or sporting uses. Items that are likely to fall into this category are crossbows and a range of martial arts weapons. The purpose of this section is to restrict the ownership of articles that are designated as weapons to those people who use them in legitimate pursuits. This proposal has the support of the Martial Arts Control Board, which is concerned at the proliferation and misuse of these weapons." (The emphasis is mine.)

The plaintiff in the present case had possession of the baton in the furtherance of his legitimate purpose. He did not have it for a criminal purpose. In my opinion, once the magistrate accepted the plaintiff's evidence that he operated a security business and that he had the baton for the purpose of re-sale, as he did, then the plaintiff had established the onus which rested upon him and he was entitled to be acquitted of the charge.

The order of the Court is that the order of the Magistrates' Court at Geelong made on 14th August 1995 is quashed. The information is dismissed. I order that the appellant's costs of the proceeding before the Magistrates' Court and this Court, including any reserved costs, be taxed and when taxed paid by the respondent. I will grant to the respondent a stay of 30 days.

APPEARANCES: For the appellant: Mr S Stuckey, counsel. Solicitors: Wighton & McDonald. For the Respondent: Mr D Just, counsel. Solicitors: Solicitor to the DPP.
