NZLR 14/5 X

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY M.1452/83

[redacted] 491

BETWEEN WATTS

Appellant

A N D THE NEW ZEALAND POLICE

Respondent

Hearing : 26th March 1984

Counsel : G.A. Howley for Appellant
Mrs Shaw for Respondent

Judgment : 26th March 1984

(ORAL) JUDGMENT OF BARKER, J.

This is an appeal against the conviction of the appellant in the District Court at North Shore on 19th July 1983. The appellant was convicted of a charge under Section 202A(4)(a) of the Crimes Act 1961 of having an offensive weapon with him in a public place without lawful authority or reasonable excuse.

The offensive weapon was ordered by the District Court Judge to be destroyed when he entered the conviction. The Police must have taken this direction of the District Court Judge literally without having any regard for the appeal rights of the appellant; a letter from the Takapuna Police, dated 4th October 1983, to the Registrar of the North Shore District Court indicates that the offensive weapon was destroyed even although the appellant's appeal was filed within time.

I must state at the outset that I think it was quite wrong for the Police to have destroyed this exhibit before the appeal to this Court had been dealt with. The effect is that I have been unable to view the alleged weapon; in the event, I doubt if that failure has mattered because the article is clearly described by the learned District Court Judge in the course of his judgment and there is little or no argument about its description.

The learned District Court Judge described the weapon as being a piece of timber which, in its original state, may have been part of a piece of furniture such as a chair leg or the leg of a household or domestic cabinet. He described it as looking like part of a baseball bat with a screw down the centre line, and that it could be something which had been altered from its original state into its present condition which bore all the signs of being a hand-held baton for striking people and things.

The evidence shows that, on 7th May 1983, in Chivalry Road, Glenfield, at 2.30 p.m., the Police had occasion to speak to the driver of a motor vehicle which was parked on the road. This vehicle was in fact owned by the appellant but was being driven by another person. The Police found this wooden baton in the vehicle. According to one Constable, he asked the appellant to whom the baton belonged; the appellant replied that it was his; the policeman asked why he had it; the appellant said "for protection"; "what would you do if you were attacked by blacks?". According to another Police Constable, he overheard the comment "what would you do if you were attacked by blacks?".

The appellant did not give evidence. The learned District Court Judge rejected a submission of no case to answer; after he had given that decision, he heard further submissions; he decided, on the whole of the case, that the prosecution had been proved and that a conviction should be entered. He then fined the appellant $125 and costs.

Section 202A of the Crimes Act was inserted into that Act by Section 48 of the Summary Proceedings Act 1981. Prior to that enactment, the offence of possession of an offensive weapon had been found in Section 53A of the Police Offences Act 1927. The effect of placing this particular offence in the Crimes Act means of course that it is not part of the Summary Offences Act which contains an extended definition of the term "public place" as applying to the situation of a person being in a public place if he is inside a vehicle which is in a public place. That definition does not necessarily apply to the Crimes Act even although the present section of the Crimes Act under consideration was introduced into that Act by the Summary Offences Act 1981. However, I have no submissions on that point and I am prepared to assume, in the circumstances of the present case, the matter not having been fully argued, that this offence, if offence there be, took place in a public place.

The learned District Court Judge reviewed Section 202A, the relevant parts of which are Subsections (1) and (4) which read as follows:

"(1) In subsection (4)(a) of this section 'offensive weapon' means any article made or altered for use for causing bodily injury, or intended by the person having it with him for such use.

(4) Everyone is liable to imprisonment for a term not exceeding 1 year -

(a) Who, without lawful authority or reasonable excuse, has with him in any public place any offensive weapon or disabling substance; or

(b) Who has in his possession in any place any offensive weapon or disabling substance in circumstances that prima facie show an intention to use it to commit an offence involving bodily injury or the threat or fear of violence."

The learned District Court Judge held that under Subsection (1), the term "offensive weapon" means an article either made or altered for use for causing bodily injury or else one intended by the person having it with him for such use. He held that this was an article altered for use for causing bodily injury and was therefore an offensive weapon per se. In this he was quite correct. The cases show that there are categories of offensive weapons per se such as flick knives or coshes. In R v. Petrie, (1961)1All E.R. 466, 468, the Court of Criminal Appeal held that, under the terms of the English legislation, possession of an offensive weapon per se in a public place, once proved, shifts the onus to the defence to prove on the balance of probabilities that there was lawful authority or reasonable excuse for carrying the weapon. The English section is almost identical, the only difference being that in the equivalent of Subsection (4), the words are added after "without lawful authority or reasonable excuse", "the proof whereof shall lie on him".

Salmon, J., delivering the judgment of the Court, held that a cosh, a knuckle duster and a revolver were examples of offensive weapons per se, and that a sandbag or a razor were examples of articles in the second class, namely, one where the prosecution has to prove intent to use it for the purposes of inflicting bodily injury.

In the present case, I think the learned District Court Judge was quite correct to hold that this was an offensive weapon per se, one altered for use for the purposes of causing bodily injury; it was a baton or a cosh; therefore, it was quite unnecessary for him, in my view, to consider the alternative definition of "offensive weapon", namely, one not initially offensive per se but one which the suspect intended to use. I would venture the opinion that there may be substance in Mr Howley's argument, if reliance were to be placed on the alternative; the evidence of intention was rather flimsy; i.e. the evidence contained in the conversation between the appellant and the Police. Because this was an offensive weapon per se, the numerous cases, such as for example my own decision in Waenga v. Police (M.1681/79, Auckland Registry, Judgment 12th February 1980) cited by counsel to me and to the District Court Judge, are of limited assistance.

Having found, as he was entitled to find, that this was an offensive weapon, the District Court Judge had then to consider whether the appellant had, on the whole of the evidence, shown lawful authority or reasonable excuse to have with him an offensive weapon in the public place.

Mrs Shaw submitted, in terms of Section 67(8) of the Summary Proceedings Act 1957, that the onus was on the defendant to demonstrate this, this being a matter of justification or excuse. I think that this submission is correct because this was a summary trial; the situation may well have been different had the appellant elected trial by jury.

The learned District Court Judge held that the appellant had not shown lawful authority or reasonable excuse. He noted that the appellant seems to have contemplated the possibility of trouble. He said:

> "In my judgment in the ordinary course of events ordinary citizens do not need to go around anticipating the possibility of trouble in our society. There are some people who look for it of course and some of them choose to equip themselves in various ways with things. There is no evidence before me indicating that the defendant should have been contemplating the possibility of trouble and therefore that there was a need for him to equip himself with some sort of protection per medium of a thing like this."

In my view, the learned District Court Judge was entitled to come to this view; indeed it accords with the decision of the Divisional Court in Evans v. Hughes, (1972) 1 W.L.R. 1452 where Lord Widgery C.J. said that a reading of the Act showed:

> "... that it may be a reasonable excuse for the carrying of an offensive weapon that the carrier is in anticipation of an imminent attack and is carrying it for his own personal defence, but what is abundantly clear to my mind is that this Act never intended to sanction the permanent or constant carriage of an offensive weapon merely because of some constant or enduring supposed or actual threat

> or danger to the carrier. People who are under that kind of continuing threat must protect themselves by other means, notably by enlisting the protection of the police, and in order that it may be a reasonable excuse to say, "I carried this for my own defence", the threat for which this defence is required must be an imminent particular threat affecting the particular circumstances in which the weapon was carried."

As the learned District Court Judge remarked, it was not as if the appellant was a Police Officer having specific authority to possess and carry a baton; he held that there was no reasonable excuse to show that the appellant was a person who had a proper apprehension of needing possession of this implement against the sort of trouble which the evidence failed to indicate that he was reasonably expecting.

In my view, therefore, the conviction was rightfully entered and the appeal must be dismissed.

R.D. Barker J.

SOLICITORS:

P.K. Khouri, Auckland, for Appellant.

Crown Solicitor, Auckland, for Respondent.