CITATION: *Police v Swan* [2010] NTMC 056

PARTIES:	LINDSAY WESTPHAL
	v
	JARED KEITH SWAN
TITLE OF COURT:	Summary Jurisdiction
JURISDICTION:	Summary Jurisdiction - Alice Springs
FILE NO(s):	21004320
DELIVERED ON:	7 September 2010
DELIVERED AT:	Alice Springs
HEARING DATE(s):	13 July and 20 August 2010
JUDGMENT OF:	J M R Neill

CATCHWORDS:

Weapons Control Act – meaning of "in a public place" – s.7(1) and of "offensive weapon" – s.8(1)

REPRESENTATION:

Counsel:

Prosecutor:	Roman Micairan
Defendant:	Tamara Redding

Solicitors:

Prosecutor:	Police Prosecutions
Defendant:	CAALAS

Judgment category classification:	C
Judgment ID number:	[2010] NTMC 056
Number of paragraphs:	42

IN THE COURT OF SUMMARY JURISDICTION
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21004320

BETWEEN:

LINDSAY WESTPHAL
Police

AND:

JARED KEITH SWAN
Defendant

REASONS FOR JUDGMENT

(Delivered 7 September 2010)

Mr JOHN NEILL SM:

1. The Defendant Jared Keith Swan has been charged with possessing a controlled weapon namely a 24cm Bowie knife, in a public place namely Hoppy's Camp, without lawful excuse, contrary to subsection 7 (1) of the Weapons Control Act.

2. He has further been charged with possessing an offensive weapon namely a metre long metal pole, without lawful excuse, contrary to s.8 (1) of the Weapons Control Act.

3. He pleaded not guilty to each count at a hearing before me on 13 July and 20 August 2010.

4. At the commencement of the hearing counsel for the prosecution and the defence by consent tendered Agreed Facts, which became exhibit P1. No live evidence was called. Accordingly, the evidence of the facts before me is limited to those Agreed Facts and inferences which can properly be drawn from them.

5. The Agreed Facts state that the Defendant was pulled over by police as he drove his motor vehicle along the main road in Hoppy's Camp, Alice Springs. The Agreed Facts are silent as to why the Defendant was pulled over, or whether this was a lawful action by police. In the absence of any further evidence or any submissions before me as to the police action, I proceed on the basis that it was lawful. There is no evidence before me that the police action was related to the issue of weapons.

6. The Agreed Facts state that the Defendant had previously placed a 24cm Bowie knife under the driver's seat of his vehicle and a 1 metre long, gold coloured metal pole beside the front passenger's seat of his vehicle ("the weapons").

7. The Agreed Facts concede that the Defendant was in possession of the weapons pursuant to the Weapons Control Act. I find that he was in possession of the weapons inside his motor vehicle.

8. The Agreed Facts concede that the 24cm Bowie knife is a "controlled weapon" as defined in section 3 of the Weapons Control Act, and I so find.

9. The Agreed Facts conceded that the main road in Hoppy's Camp, Alice Springs is a public place pursuant to the Weapons Control Act. I was not prepared to accept this concession without further information before me, and Ms Redding for the Defendant then withdrew the concession. Mr Micairan for the prosecution undertook the task of researching the status of Alice Springs Town Camps generally, and the main road in Hoppy's Camp specifically. He presented the results of his researches to me on 20 August 2010 and tendered title and lease deeds on that occasion which became exhibits P4, P5 and P6. These documents clearly established the public nature of the main road in Hoppy's Camp. Ms Redding conceded the issue and I then ruled that that road is a public place pursuant to the Weapons Control Act.

10. The Agreed Facts state that the police observed the gold metal pole resting next to the front passenger's seat and the 24cm Bowie knife protruding from under the driver's seat, after they pulled over the Defendant's motor vehicle. I infer that police had to look inside the stationary motor vehicle to observe the

weapons located as stated. I find that the police did not see the weapons before they had pulled over the Defendant's motor vehicle. I further find that the weapons were not readily visible to persons outside the motor vehicle while it was fully enclosed.

11. The Agreed Facts state that upon being questioned why he was carrying the 24cm Bowie knife in his motor vehicle the Defendant replied "for protection when I am travelling". When asked his reason for carrying the 1 metre long gold metal pole he replied "for protection".

12. Subsection 7(1) of the Weapons Control Act specifies that proof of the existence of a lawful excuse is on the person in possession of a controlled weapon. Subsection 7(4) of the Act excludes self defence as a lawful excuse. Subsections 8(1) and (3) of the Act deal similarly with possession of an offensive weapon.

13. No further evidence was offered by the defence as to the existence of any lawful excuse for the Defendant's possession of either of the weapons. Ms Redding for the Defendant effectively conceded the issue. I find that the Defendant had no lawful excuse within the meaning of either subsection 7(1) or subsection 8(1) of the Weapons Control Act for his possession of either the 24cm Bowie knife or the 1 metre long gold coloured metal pole.

14. The issues come down to two. The first is whether the 1 metre long gold coloured metal pole was an offensive weapon as defined in s.3 of the Weapons Control Act. The second is whether the Defendant's possession of the 24cm Bowie knife in his motor vehicle in these circumstances was possession in a public place, for the purposes of subsection 7(1) of the Weapons Control Act.

Offensive Weapon

15. The common law position in Australia is that a weapon or instrument which may have a use other than for attack, but which can be used for attack, is an offensive weapon only if on the occasion in question it was being carried for the purposes of attack – see *Threlfall v Panzere* [1958] V.R. 547.

16. In *Chadbourne v Ansell* [1975] W.A.R.105 it was held that a small steel mallet carried for the purposes of protection or defence in the event of attack was not an offensive weapon because there was no evidence of any intention to use it on the occasion charged. The general intention of using it for protection was not sufficient.

17. In the present case the common law is only part of the consideration because we are dealing with a statutory definition. Section 3 of the Weapons Control Act defines "offensive weapon" to mean an article –

> " (a) made or adapted to cause damage to property or to cause injury or fear of injury to a person; or
>
> (b) by which the person having it intends to cause damage to property or to cause injury or fear of injury to a person…"

18. "Make" is relevantly defined in the Shorter Oxford English Dictionary to mean "to produce by combination of parts, or by giving a certain form to a portion of matter; to construct, frame, fashion, bring into existence". "Adapt" is defined to mean "1. to fit, to make suitable, 2. to alter so as to fit for a new use". "Adapted" is defined as "fitted, fit (to, for); altered so as to fit". Neither word is synonymous in its past tense with "used" or "intended to be used".

19. The language of definition (a) therefore necessarily requires that some person has either made/ brought the article into existence for the stated purpose or alternatively, has taken some action to adapt/alter that article for the stated purpose. There is no evidence before me that the Defendant or anyone else made or adapted the 1 metre long gold coloured metal pole for any purpose.

20. Definition (b) of "offensive weapon" requires that the person having the weapon has or had the specific intention "… to cause damage to property or to cause injury or fear of injury to a person".

21. The language of definition (b) requires the existence of an intention directed to "a person" rather than to "any person". The Defendant's admission that he possessed the 1 metre long gold coloured metal pole "for protection" was not

specific to any identifiable person. There is no evidence before me that the Defendant had any intention to use the pole on the occasion charged. Further, there is no evidence before me of any intention of the Defendant with respect to any property.

22. I find that the 1 metre long metal pole has not been proven to be an offensive weapon as defined in the Weapons Control Act. I dismiss Count 2.

In a Public Place

23. . The Weapons Control Act in section 3 adopts the definition of "public place" which is to be found in the Summary Offences Act. The Summary Offences Act deals with relatively minor offences. That Act relevantly defines "public place" in s.3 to include:

> " (a) every place to which free access is permitted to the public, with the express or tacit consent of the owner or occupier thereof; and
>
> (b) ……; and
>
> (c) every road, street, footway, court, alley or thoroughfare which the public are allowed to use, notwithstanding that the road, street, footway, court, alley or thoroughfare may be formed on private property".

24. The question is whether the Defendant's possession of the 24cm Bowie knife within his motor vehicle was possession of that controlled weapon in a public place. The interior of the Defendant's motor vehicle is not itself a public place as defined in s.3 of the Summary Offences Act. However, that does not necessarily answer the question. This case does not turn on the meaning of the qualified noun "public place". It turns on the meaning of the phrase "in a public place" in subsection 7(1) of the Weapons Control Act (NT).

25. If a man carries a 24cm Bowie knife inside his overcoat as he walks along the street, can it be said that he possesses it in a public place? I believe the answer is that he does.

26. If a man carries a 24cm Bowie knife inside a drawer in a caravan that he tows behind his motor vehicle along the street, can it be said that he possesses it in a public place? The answer in that case may be that he does not. The caravan is a dwelling which just happens to be in transit along a street, which street is a public place as defined in s.3 of the Summary Offences Act. That happenstance in my opinion would not convert the interior of that caravan/dwelling to a public place, as defined.

27. Would the answer be different if a man carries the knife in a motor vehicle which is a mobile home incorporating the features of both a motor vehicle and a dwelling, and the knife is (i) inside the living quarters of that mobile home, or (ii) inside the cabin of the motor vehicle but not within the living quarters of the mobile home? If a man carries the knife under the seat in his fully enclosed motor vehicle as it travels along a street, is it now being possessed in a public place, as defined? Would the answer be different if the knife was in the closed boot of the car? What is the point of distinction, if any, in these various hypothetical circumstances?

28. The Weapons Control Act does not prohibit the possession of controlled weapons. Sub section 7(1) limits its regulation of controlled weapons to such possession **in a public place or school** (emphasis added). The Second Reading Speech prior to the introduction of the Weapons Control Act in 2001 characterised "controlled weapons" as weapons "…that by their nature have a legitimate place within the community. Carriage of 'controlled weapons' in a public place is of particular concern". The mischief to which this subsection is directed has a public nature.

29. In *McKenzie v Stratton* [1971] V.R. 848 at 851, Nelson J considered that a person in a motor car in a public place is in that place in the sense of being there physically. He went on to say in paragraphs 5 to 30: "Whether, however, for the purpose of certain statutory offences he should be held to have done a certain act in that place or to be found in a certain condition in that place may require a consideration of something more than the fact the act was done or that he was found in the required condition while he was within the physical confines of the place. **It may and probably does require a consideration of**

the nature and subject-matter of the particular enactment and the evil which it was intended to restrain…**Generally when an offence is defined in terms of a public place, it is the public nature of the offence which is the evil which the legislation is designed to restrain** (emphasis added). In the case of a man in or on a vehicle in a public place, if he exposed himself while riding on a bicycle, or while seated in an old-fashioned sidecar attached to the bicycle, he would, I think, in each case have exposed himself in a public place. On the other hand, if he were in a fully enclosed caravan and exposed himself only to someone therein the necessary public element may be lacking and he may well be held not to have exposed himself in a public place".

30. In *Forte v Sweeney, ex parte Forte* 1982 Qd.R. 127, W.B. Campbell J delivered the leading judgement of the Full Court of Queensland. He was dealing with a situation where a man had been found with a loaded firearm in a private motor vehicle on a public street. The public street was a public place as defined in the Firearms and Offensive Weapons Act 1979 (Qld). At page 129.1 he stated: "Whether the motor car was in itself a public place is in my opinion immaterial **in this case** (emphasis added).The question here is whether the respondent himself was in a public place, and in my opinion the respondent was at the material time in a public place. He was physically within the confines of the public place and whether he was at that time in a motor vehicle does not seem to me to matter. **It may be material** (emphasis added) for the purposes of certain legislation as to what he was doing in the particular motor vehicle, and in that regard I might refer to the case of *Mansfield v Kelly* [1972] V.R. 744. In that case Newton J, who delivered the judgement of the Full Court of Victoria, said at p.746: **'There are of course numerous statutory provisions which make conduct of various descriptions in a public place an offence. In every such case the nature and subject matter of the provision and the evil which it was intended to prevent are no doubt relevant to its interpretation, as was in fact pointed out in by Nelson J in *McKenzie v Stratton*** (emphasis added)…'".

31. W.B.Campbell J nevertheless went on to hold that in the case before him the defendant was in a public place.

32. In *Forte v Sweeney; ex parte Forte*, the defendant was charged under section 75 of the Queensland Act, which made it an offence for a person without reasonable excuse, the proof of which shall be on him, to have a firearm in any public place whilst such firearm is loaded or contains live ammunition. This offence and its elements are distinguishable in their relative seriousness and the nature of "the evil it was intended to prevent" from the offence in the present case of possessing a controlled weapon namely a 24 cm Bowie knife in a public place.

33. Even more readily distinguishable is the definition of "public place" in the Queensland case from the definition of that phrase in the present case. The definition of "public place" in *Forte v Sweeney; ex parte Forte* was as follows: " 'public place' includes every road, and every place of public resort open to or used by the public as of right: The term includes – (a) any vessel, vehicle, aircraft, shop, room, office, house, outhouse, yard, licensed premises within the meaning of the Liquor Act 1912–1978, field, ground, park, reserve, garden, wharf, pier, jetty, platform, market, passage or other building, premises or place for the time being used for a public purpose or for the time being open to access by the public, whether on payment or otherwise, or for the time being open to access by the public by the express or tacit consent or sufferance of the owner or occupier, and whether the same is or is not at all times so open". This definition is very much wider than the definition pursuant to the Weapons Control Act (NT).

34. Subsection 7(1) of the Act regulates the three activities of possession, carrying or use of a controlled weapon, in a public place. Subsection 7(2) regulates only the single activity of carrying a controlled weapon, if it is done otherwise than in a safe and secure manner. Subsection 7(2) does not limit its reach to a public place – it applies to all places. This distinction as to location is significant.

35. The safe and secure possession of a controlled weapon does not pose the same risk to the public as does the unsafe and insecure carrying of that weapon. This is one reason for the distinction as to location in the two subsections. Another reason is the difference between the broader activity of "possession"

of a weapon and the narrower activity of "carrying" that weapon. The latter implies having on the person, with a commensurately greater risk to the public.

36. The possession of a controlled weapon inside a fully enclosed motor vehicle which happens to be in a public place but where the very existence of that weapon is unknown to members of the public who are also in that public place, poses little risk and less concern to the public.

37. The Weapons Control Act (NT) specifically excludes firearms – see s.4. In its title it is described as "An Act to regulate weapons (other than firearms) and body armour". Possession and use of firearms are dealt with in the Firearms Act (NT). The legislature has thus seen fit to distinguish between firearms and all other weapons.

38. The meaning of the phrase "in a public place" is to be derived from the terms of the legislation in question, and from a consideration of the purpose of that legislation. I am satisfied that the terms of the definition of "public place" as adopted by the Weapons Control Act from the Summary Offences Act, and also the nature of the mischief intended to be restrained by subsection 7(1) of the Weapons Control Act, strongly distinguish this case from that considered in *Forte v Sweeney; ex parte Forte* (supra). The definition here is far narrower, as outlined in paragraph (33) above. The mischief sought to be restrained in the present case involving the possession of a knife is of significantly less gravity than that considered in *Forte* involving the possession of a loaded firearm. The Northern Territory legislature has seen fit to separate and thus distinguish between firearms offences and offences involving other weapons.

39. I conclude that the scheme of the Weapons Control Act is more akin to the type of legislation involving the so-called "public decency offences" discussed in *McKenzie v Stratton* and *Mansfield v Kelly* (supra).That is, the elements of posing a risk to and/or causing concern to the public constitute the mischief which the Weapons Control Act is intended to restrain. That being so, the regulation of possessing, carrying or using a controlled weapon

in a public place involves this public element and the interpretation of "in a public place" requires this public element be taken into account..

40. The possession of a controlled weapon under the driver's seat of a private motor vehicle in transit along a public street does not involve the requisite public element. This does not change because of the action by police in causing that motor vehicle containing the weapons to come to a stop in that public street.

41. I find that the Defendant's possession of the 24cm Bowie knife under the driver's seat in his motor vehicle when that motor vehicle was in a public place, namely the main road in Hoppy's Camp, was not possession in a public place within the meaning of the Weapons Control Act. I dismiss count 1.

42. The Defendant is discharged.

Dated this 7th day of September 2010.

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John Neill
STIPENDIARY MAGISTRATE