CITATION: *Police v Izod* [2008] NTMC 032

PARTIES:	GAVIN KENNEDY
	v
	IAN IZOD
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	Criminal
FILE NO(s):	20631086
DELIVERED ON:	6 May 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	22 February 2008
JUDGMENT OF:	Dr John Allan Lowndes

CATCHWORDS:

CRIMINAL LAW – GOING ARMED IN PUBLIC – MEANING OF EACH OF THE OFFENCE ELEMENTS – CASE TO ANSWER

Criminal Code (NT) s 69
Parmbuck v McMaster [2005] NTSC 72 Applied
R v Anderson [1910] QWN 19 Considered
R v Hildebrandt [1964] Qd R 43 Considered
R v Bennett [1998] 2 Qd R 174 Applied
Australasian Performing Right Association Ltd v Cth Bank of Australia (1992) 111 ALR 671 Considered
R v Campbell (unreported 5.4.90) Considered
Morrisons Holdings Ltd v Inland Revenue Commissioner (1996) 1 ALL ER 789 Applied
Jennings v Stephens [1936] Ch 469 Applied
R v Sharp; Sharp v Johnson [1957] QB 552 Applied

REPRESENTATION:

Counsel:

Prosecution:	Mr A Woodcock
Defendant:	Ms J Truman

Solicitors:

Prosecution:	Woodcock Solicitors
Defendant:	John Toohey Chambers
Judgment category classification:	A
Judgment ID number:	[2008] NTMC 032
Number of paragraphs:	53

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20631086

[2008] NTMC 032

BETWEEN:

GAVIN KENNEDY
Prosecutor

AND:

IAN IZOD
Defendant

REASONS FOR DECISION

(Delivered 6 May 2008)

Dr John Allan Lowndes SM:

THE CHARGE

1. The defendant has been charged with an offence contrary to s 69 of the *Criminal Code* (NT), to wit:

> "Did go armed in public, namely with a firearm, without lawful occasion and in such a manner as to cause fear to a person of reasonable firmness and courage".

2. At the close of the prosecution case I found a case to answer. That ruling was given on 7 March 2008. Given the somewhat unusual circumstances of this case and the paucity of law in relation to the subject offence, I indicated that I would give written reasons for finding a case to answer. Those reasons are contained herein.

THE EVIDENCE IN THE PROSECUTION CASE

3. Mrs Hayne gave evidence that on 26 May 2006 she saw the defendant enter private property owned by herself and her husband. At that time Mrs Hayne

and her two children along with an invitee, Mr Devereux, were on the said property. While on the said property the defendant removed a rifle from the boot of his vehicle. He then approached Mrs Haynes and Mr Devereux, in a crouched position, carrying the rifle in a horizontal position. He appeared to be ready to use the firearm. Fearing for the safety of her two children, Mrs Hayne started moving towards the defendant imploring him to put the rifle down. Mrs Hayne said that she was "absolutely terrified" that the defendant might accidentally shoot her two children who were off to the side. It was only when Mrs Hayne identified herself that the defendant put the rifle away.

4. During cross–examination it was put to Mrs Hayne that she had told Sergeant Berry, the investigating officer, that the rifle had been pointed down to the ground. Her reply was "well I don't recall ever saying that actually, ever".[1]

5. Mr Devereux, who was at the time working on the property shooting buffalo, gave evidence that he saw the defendant pull out a rifle from his car and start walking straight towards himself and Mrs Hayne, while holding the rifle. He said that the defendant was looking straight at them. Mr Devereux said that the defendant had his right hand around the trigger area and his left hand underneath the barrel on the stock. He said that the gun was pointed towards himself and Mrs Hayne. The two children were nearby. Mr Devereux said that although he was not frightened, he felt "pretty nervous". He said that he had never been approached with a gun before, adding "I know what a firearm does and I know how easy it is to – just to make a mistake…so I didn't know whether to move, I just stayed there and told the kids just get cover…".Subsequently, Mr Devereux said that he "was just worried about looking at the gun".

[1] Sergeant Berry gave evidence to the effect that he had been told by Mrs Hayne that the firearm being carried by the defendant was pointed to the ground and not pointed at her. This evidence was objected to on the basis that it was hearsay. However, it appears to be admissible on the ground that it is evidence of a prior inconsistent statement.

THE ELEMENTS OF THE OFFENCE

6. The alleged offence consists of the following three elements:

- going armed in public;
- without lawful occasion;
- in such a manner as to cause fear to a person of reasonable firmness and courage.

7. In order to find a case to answer there must be sufficient evidence of each of those three elements to enable a properly instructed jury to be satisfied beyond reasonable doubt as to the defendant's guilt. In my opinion, the evidence adduced by the prosecution satisfied that threshold test.

"Going armed in public"

(1) Going armed

8. Of all of the elements of the offence, the element of "going armed" is perhaps the most straightforward, as it has received the most judicial consideration.

9. In *Parmbuk v McMaster* [2005] NTSC 72 at [9] Southwood J said:

> "…to be armed with a weapon means to be something more than to be in possession of it; the weapon must also be available for immediate use as a weapon or for an offence: *Dixon v Seears* (1982) 16 NTR 20; *Miller v Hrvojevic* [1972] VR 305 at 306; *R v Standley* (1996) 90 A Crim R 67. It is not necessary that an accused has a weapon in his hand: *R v Kolb & Adams* (unreported, Vic CCA, 14 December 1979. A weapon is a physical object that may be used to injure or overcome an opponent in any way".

10. In the same case at [10] Southwood J had this to say about the element of "going":

> "…"Goes" means to go about. "Go" is not synonymous with the word "be" – to "be armed" is not to "go armed". "Goes armed" refers to the manner of a person proceeding in public. It refers to the open exhibition of a weapon, for example, by the parading or promenading of arms. The following factors apply to the second element of the offence: (a) it is not necessarily satisfied by a user alone: Dearnley v The King [1947] Qd R 51 at 65; (b) "going" may not require

> physical progress (or motion) by reference to the position of other people: R v Hildebrandt [1964] Qd R 43 at 63; an assault committed by a person who threatens another with a weapon does not necessarily constitute a going armed even if it is done in public: R v Burnett (1983) 19 Qld Lawyer Reports 23 at 24. I agree with what is stated in a helpful paper published in the Queensland Lawyer that the second element of the offence essentially involves a state of affairs namely, being armed and a degree of continuity of that particular state: J Aberdeen "What is Going Armed?" (1998) 19 The Queensland Lawyer 57 at 62".

11. Although the element of "going armed" may not require progression with reference to the position of other persons, and refers to the manner of "going", there is ample evidence, in the present case, of physical progress (or motion), on the part of the defendant, by reference to the position of Mrs Hayne and her two children, as well as that of Mr Devereux. Furthermore, the defendant's manner of going clearly established a "state of things, namely being armed and a degree of continuity of that particular state".

12. Account has to be taken of the conflicting evidence in the prosecution case, that is, the discrepancy between Mrs Hayne's evidence that the firearm was pointed in her direction and Sergeant Berry's evidence that she had told him that the firearm was pointed to the ground. However, that evidence must be juxtaposed with the evidence of Mr Devereux that the firearm was being pointed at both himself and Mrs Hayne. The test at this stage is whether a jury properly instructed could convict on the evidence. In my opinion, a jury appropriately instructed could convict on the basis that the firearm was in fact being pointed at Mrs Hayne and Mrs Devereux. Accordingly, I have found a case to answer on that basis.

13. However having said that, it needs to be borne in mind that the circumstance of the firearm having been pointed at Mrs Hayne and Mr Devereux is not critical to finding a case to answer in the present proceedings. As pointed out by Southwood J in *Parmbuk v McMaster* (supra) at [5], the element of "going armed" refers to "the open exhibition of a weapon, for example, by the parading or promenading of arms". Even if the defendant was pointing

the firearm to the ground, the defendant's manner of "going" still satisfied the requirement of "going armed".

14. I find a case to answer in relation to this element of the offence.

(2) In public

15. The notion of "in public" is more problematic, primarily because of the dearth of law in relation to the meaning of those words in the overall context of the offence. It is difficult to distil from the existing authorities a coherent set of principles.

16. In order to divine the true meaning of the words "in public" in s 69 of the Code, it is necessary to go back to first principles. As the offence with which the defendant has been charged is a statutory offence, s 69 is to be "interpreted in accordance with the principles applicable to a codifying statute".[2]

17. Adopting the purposive approach to statutory interpretation, which now prevails at common law and under statute,[3] one needs to ask what was the object or the purpose of the statutory enactment – what is the rationale behind s 69?

18. In *R v Anderson* [1910] QWN 19 Chubb J spoke of the rationale behind the 1328 Statute of Northampton (2 Edw 111 c 3) – the historical origin of the latter day offence of "going armed in public":

> "The object and intention of the Act was to prevent persons openly carrying arms in order to terrify the King's subjects or which would naturally have that effect".

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[2] See Aberdeen J What is 'Going Armed' (1998) The Queensland Lawyer Vol 19 57 at 61 where the author cites as authority for that proposition *Dearnley v The King* [1947] St R Qd 51 at 65 per Philp J; *Ashcroft* (1989) 38 A Crim R 327 at 327 per Kennedy J.

[3] *Mills v Meeking and Another* (1989-1990) 169 CLR 214, 222-224,227, 233-235, 242-243; *Kingston v Keprese Pty Ltd* (1987) 11 NSW LR 404, 423-424; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381; *Interpretation Act* (NT) s 62A.

19. In my opinion, s 69 serves the same purpose.[4] The words "in public" must not be read in isolation, in a state of complete detachment from the element of "going armed". The words "going armed" must be read in conjunction with the phrase "in public". At first glance, Aberdeen's observation that "going armed under s 69 must be committed in public"[5] might appear to be stating the obvious; however, in my opinion, it captures the underlying purpose of the offence and its essential nature.

20. "Going armed in public" conveys the notion of "going armed" openly, that is in a way that is accessible to or observable by the public. This is consistent with one of the common interpretations of the word "public", that is "open to general observation; existing, done or made in public".[6] The words "in public" connote something which is "manifest; not concealed"[7] and invoke the notion of an audience.

21. Aberdeen correctly observes that the notion of "in public" is "probably quite a different concept to the more familiar terminology 'public place', although the two expressions may, in a particular case, have common elements". [8]

22. In *R v Hildebrandt* [1964] Qd R 43 at 65 Stable J was alert to the distinction between the two concepts:

> "I do not find the "public place" cases of great assistance when I am dealing with s 69 of the Code, where the words are "in public'.

23. In *R v Bennet* [1998] 2 QD R 174 at 179 McPherson JA stated:

> "The section does not require the offence to be committed in a public place, but only that the offender go armed "in public": see *R v Hildebrandt* [1964] Qd R 43 at 65".

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[4] See *Parmbuk v McMaster* (supra at [8]) per Southwood J: "The object of the section (ie s 69) is to prevent people going about openly carrying arms".
[5] See Aberdeen, n 2, p 61.
[6] See *The Shorter Oxford Dictionary* which is cited by Aberdeen, n 2 at 61.
[7] See *The Shorter Oxford Dictionary* again cited by Aberdeen, n 2 at 61.
[8] Aberdeen, n 2 at 61.

24. It is important to keep firmly in mind that the notion of "going armed in a public place" is not synonymous with "going armed in public", and the two concepts have different emphases. The former places emphasis on the situational aspects whereas the latter focuses on the existence of an audience.

25. Certain observations made by Stanley J in *R v Hildebrandt* (supra) assist in illuminating the meaning of the words "in public" in the present context. At page 53 of his judgment his Honour said:

> "This conviction was attacked also on the ground that being in an aircraft he (the accused) was not "in public" in terms of s 69. I cannot distinguish this case from a man terrorising the passengers in a lift. They would be (qua an accused) just members of the public exercising their rights to assemble in a particular place for their individual purposes. Such rights are independent of him and of one another. I think it absurd to say that if the appellant had caused terror to the same people on the ground outside the aircraft, he could have been convicted; but that he is entitled to go free because the doors of the aircraft had closed behind them".

26. Observations made by Stable J in the same case also throw light on the meaning of "in public" in the current context. At page 64 of his judgment his Honour stated:

> "The judge directed the jury, inter alia, that evidence that an aircraft is plied for hire to ordinary passengers indicates that it is public transport and that it is a public place, and that a person who does something in such an aircraft while it is in use is in public. I do not know that the learned judge need have gone so far as to equate the aircraft with a public place…
>
> Those in the aircraft were not members of same club at an outing, or of the same family, but were on the evidence, ordinary citizens who had paid a fare to be taken by a common carrier from one place to another. I consider that a person going armed in such company in such an aircraft is doing so in public within the meaning of s 69".

27. The observations of Stanley and Stable JJ in *R v Hildebrandt* demonstrate that, in context of s 69, what is important is that a person going armed must do so in the company or view of persons who at the relevant time can be properly regarded as members of the public. It is not essential that the conduct of "going armed" occur in a public place provided that the persons

in whose company or view the conduct is occurring are members of the public qua the accused.

28. The question to be asked is whether the persons in the present case – Michelle Hayne and her two children and Greg Devereux – were at the relevant time members of the public qua the defendant.

29. Some assistance can be derived from Gummow J's discussion of the notion of "in public" in *Australasian Performing Right Association Ltd v Cth Bank of Australia* (1992) 111 ALR 671 at 685:

> "… a performance will be in public if it is not private – perception of an antithesis between performances which are in public and those which are domestic or private in character. In determining whether a performance answers the latter description, the nature of the audience is important. In coming together to form the audience were the persons concerned bound together by a domestic or private tie or by an aspect of public life? Their "public life" would include their attendance at their place of employment for the supply of a performance to assist the commercial purposes of their employer".

30. In *R v Campbell* (unreported 5 April 1990)[9] Angel J considered the scope of s 154 of the *Criminal Code* (NT), with particular reference to the words "the public or any member of it", which appear in the provision. Although his Honour was not considering the meaning of the words "in public", his observations in relation to s 154 are informative in relation to who might be properly regarded as a member of the public, at least for the purposes of that statutory provision:

> Section 154 speaks of acts in relation to "the public or to any member of it". This section does not speak of acts in relation to "a person" or "any person". The section, or so it seems to me, is not directed to actions by an accused directed to a person who is well known to the accused. It is rather directed to protecting the uninvolved public at large or a particular person who, vis-a- vis the accused's act, is a member of the public. When the victim, vis-a -vis the accused's act, is not a member of the public, it seems to me the section has no application. Here the unfriendly altercation was private and between people describing themselves as friends. It was not a bar room brawl between strangers. Whether the latter is within s 154 may be debatable – I would guard myself against expressing any view in that debate here – but I am firmly of the view that s 154 has no application to the case before me. Of course a person may be a member of the public for one purpose and at the same time not a member of the

[9] Cited in *Attorney-General v Wurrabadlumba* (unreported 5 December 1990, p 6.

> public for another. For example, if two friends went to the football and one assaulted the other in the course of a private argument about the merits of umpiring, the assault by one on the other could not, in my view, be said to an act directed against a member of the public. If on the other hand, one of the friends threw a missile indiscriminately into the crowd and hit a stranger, that would, in my view, clearly be an act in respect of a member of the public. If the missile were to hit the friend rather than a stranger, I can see no reason why that also would not constitute an act in relation to a member of the public. As I have said, the accused's act, vis-a vis a particular victim, must be vis-a vis the victim as a member of the public.

31. In relation to s 69 of the Code, the relationship between the accused and any victim in relation to the defendant's conduct plays a critical part in determining whether the act of an accused person was vis-a vis the victim as a member of the public. The following observation made by Pennycuick J in *Morrisons Holdings Ltd v Inland Revenue Commissioners* (1966) 1 ALL ER 789 at 798 is pertinent to that exercise:

> "One would not, on any ordinary use of the word, describe a man's child or partner, and above all his wife, as being a member of the public in relation to himself".[10]

32. A result of the preceding analysis I have concluded that to go armed in public is to go armed in a manner that is accessible to or observable by members of the public.

33. In my view, all four persons in whose presence or vicinity the defendant was openly carrying the firearm were members of the public qua the accused for the purposes of s 69 of the Code. Michelle Hayne and her two children were not known to the defendant – for all intents and purposes, the defendant was a stranger. Those three persons were members of the public qua the defendant's act. The position in relation to Greg Devereux is even stronger. It is not clear on the evidence whether the defendant was previously known to Mr Devereux. However, what is significant is that Mr Devereux was an employee of Mr and Mrs Hayne who had been invited onto their property to perform certain work. Mr Devereux was at the relevant time attending his

[10] Cited in *Attorney-General and Wurrabadlumba* (supra), p 8.

place of employment and engaging in an aspect of "public life". Mr Devereux was clearly a member of the public vis-a -vis the defendant's act.

34. If I have erred in concluding that Mrs Hayne and her two children were members of the public vis –a- vis the defendant's act, there is still a case to answer in relation to the charge of going armed in public on the basis that Mr Devereux was, as found above, a member of the public qua the defendant's act.

35. For the purposes of s 69, it is sufficient if the offending conduct occur in the presence or vicinity of a single member of the public – that the conduct be accessible to or observable by that person. That conclusion is consistent with a line of authority in related areas of the criminal law that deal with an element of "publicness".

36. As pointed out by Lord Wright MR in *Jennings v Stephens* [1936] Ch 469 at 476:

> "…public meant a portion of the public and that the particular portion may be sometimes very small indeed": See also Rank Film Production Ltd and Ors v Dodds [1983] 2 NSWLR 553".

37. A single person might be the public for the purposes of the *Copyright Act*: see *Telstra v Australasian Performing Rights Association Limited* (1997) 146 ALR 649.

38. Most relevantly, in *Burnside v The Queen* [1962] VR 96 at 98, Scholl J said that it was sufficient if one member of the public was put in actual or potential danger in relation to the offence of driving at a speed or in a manner dangerous to the public.

39. I find a case to answer in relation to this element of the offence.

"Without Lawful Occasion"

40. As indicated by Aberdeen, this negative element of the offence – without lawful occasion – takes "account of defensive acts".[11] However, as pointed out by McPherson J A in *R v Bennett* (SC (Qld), Nos 211, 212 and 213 of 1998, 24 November 1998, unreported, BC 9806205), confining the words "without lawful occasion" to self defence is adopting too narrow view of the expression "without lawful occasion". Taking up that observation, Shanahan Irwin and Smith in *Carters Criminal Law of Queensland 12 edition* p 269 suggest that the following circumstances may excuse criminal responsibility under the provision:

> "Other lawful occasions are excuses that can readily be imagined, for example, using a rifle to shoot a rabbit or a wild pig. Firing a shot harmlessly in the air to bring to order two persons engaged in a serious attack on another person might also provide lawful excuse".[12]

41. The expression "without lawful occasion" has potentially wide application, and it is not possible to exhaustively define in advance those circumstances which might amount to a "lawful occasion". The circumstances of each case must be closely examined to see whether they amount to a "lawful occasion". The expression "without lawful occasion" is intended to cover situations where the defendant has no lawful reason for his or her conduct.

42. In relation to the burden of proof concerning the negative element of the offence, McPherson JA made the following observation in *R v Bennett* (supra (at 8)):

> In accordance with the general rule adopted in applying exculpatory provisions in the Code, it would ordinarily be for the prosecution to establish beyond reasonable doubt. At least that would be so once it appeared in evidence that the act of going armed in public was in the circumstances of the case fairly capable of being regarded as being not "without lawful occasion" (emphasis added)

[11] Aberdeen, n 2 p 61.
[12] See also Aberdeen, n 2 p 61 where the author says that " 'lawful occasion' could also cover those situations where the carriage of weapons was acceptable by contemporary standards and not otherwise prohibited…"

43. The analysis of the burden of proof in relation to statutory offences, including a stipulation that the accused perform the incriminating act without reasonable or lawful cause or excuse, made by Gillies *Criminal Law* 4th edition p 210 applies equally to the offence created by s 69 of the Code. The author says that where the stipulated element is to be viewed as part of the definition of the offence, it is usually the case that the prosecution must disprove "the facts pointed to by D as constituting reasonable excuse".

44. The expression "without lawful occasion" appears as an element in s 69 of the Code. Therefore, it is incumbent upon the prosecution to prove beyond reasonable doubt that the alleged going armed in public was "without lawful occasion", once it appears from the evidence that what the accused did was not "without lawful occasion".

45. The question in the present case is whether it appears from the evidence that the defendant's conduct was in the circumstances fairly capable of being regarded as being not "without lawful occasion"; and if so, whether the evidence as a whole is capable of persuading a jury reasonably instructed that the defendant's act of going armed in public was without lawful occasion. In other words, is there sufficient evidence to find a case to answer in relation to the element of "without lawful occasion"?

46. Sergeant Berry gave evidence to the effect that the defendant had on 29 May 2006 reported to him an incident that had occurred the previous day. The defendant informed Sergeant Berry that he had approached some persons whom he believed to be cattle poachers. He told the Sergeant that he was in possession of an axe handle at the time. He further said that one of those persons turned out to be Mrs Hayne. He provided this information just in case there was a complaint from the other party. This evidence was not objected to, presumably on the basis that it constituted an exception to the hearsay rule, that is to say, it contained statements adverse to the

defendant's case, as well as what might be considered to be exculpatory material.

47. Although the exculpatory part of the defendant's out of court statement is to be treated as evidence of the truth of the matters asserted therein, the weight to be attributed to that material would be a matter for the jury. The jury would be entitled to take into account the fact that the explanation given by the defendant was not the subject of sworn evidence, nor was it subjected to cross-examination. No doubt the jury would be entitled to take into account the fact that the defendant subsequently contradicted himself in a later statement to police, where he admitted that he had a firearm on the occasion in question. Furthermore, the jury would need to consider the sworn evidence of the prosecution witnesses which gives rise to a powerful inference that what the defendant did was "without lawful occasion".

48. In my opinion, the evidence suggesting that the conduct of the defendant was not "without lawful occasion" is so slender that it is highly doubtful that the issue has been fairly raised on the evidence. However, I have formed the opinion that a jury properly instructed – and even after giving due consideration to the exculpatory material contained in the defendant's out of court statement - could be satisfied beyond reasonable doubt that the defendant's conduct was "without lawful occasion". Accordingly, I find a case to answer in relation to that element of the offence.

In such a manner as to cause fear to a person of reasonable firmness and courage

49. In order to prove this element of the offence, it is not necessary for there to be evidence that any person was actually put in fear: see Shanahan, Irwin and Smith *Carter's Criminal Law of Queensland* 12th edition p 269 citing as authority *R v Sharp; R v Johnson* [1957] 1 QB 552; [1957] 1 ALL ER 577; (1957) 41 Cr App R 86. It is open to the Court to find that the circumstances were such as to cause fear to a person of reasonable firmness and courage: *R*

v Sharp; R v Johnson [1957] 1 QB 552; [1957] 1 ALL ER 577; (1957) 41 Crim App R 86.[13]

50. In my view, the language used in s 69 of the Code makes it abundantly clear that this fourth and final element of the offence need not be the subject of direct evidence from a person and may be established by way of circumstantial evidence.

51. However, in the present case, there was direct evidence from both Mrs Hayne and Mr Devereux as to their state of mind engendered by the defendant going armed in public. As stated earlier, Mrs Hayne was in "absolute terror", fearing that her two children might be shot accidentally. Although Mr Devereux did not appear to be in fear of his own safety, he was fearful of the safety of the two children.

52. In addition to that direct evidence, the circumstances of the defendant going armed in public, as testified to by the two witnesses, were by themselves sufficient to establish the final element of the offence. The very manner of the defendant going armed in public was such as to cause fear to a person of reasonable firmness and courage.

53. In my view, there is clearly a case to answer in relation to the final element of the offence.

Dated this 6th day of May 2008.

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Dr John Allan Lowndes
STIPENDIARY MAGISTRATE

[13] For a contrary view see Aberdeen, n 2 p 61