

CITATION: *Police v Izod* [2008] NTMC 036

PARTIES: GAVIN KENNEDY
v
IAN IZOD

TITLE OF COURT: COURT OF SUMMARY JURISDICTION

JURISDICTION: Criminal

FILE NO(s): 20631086

DELIVERED ON: 12 May 2008

DELIVERED AT: Darwin

HEARING DATE(s): 6 May 2008

JUDGMENT OF: Dr John Allan Lowndes

CATCHWORDS:

CRIMINAL LAW – GOING ARMED IN PUBLIC – MEANING OF EACH OF THE OFFENCE ELEMENTS – CRIMINAL STANDARD OF PROOF
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
Morrison 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 036
Number of paragraphs:

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

No. 20631086

[2008] NTMC 036

BETWEEN:

GAVIN KENNEDY
Prosecutor

AND:

IAN IZOD
Defendant

REASONS FOR DECISION

(Delivered as an Oral Decision 12 May 2008)

Dr John Allan Lowndes SM:

Dated this 12th day of May 2008.

Dr John Allan Lowndes
STIPENDIARY MAGISTRATE

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NORTHERN TERRITORY OF AUSTRALIA

COURT OF SUMMARY JURISDICTION

No 20631086

POLICE

and

IAN CHARLES IZOD

DR J. LOWNDES, SM

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON MONDAY 12 MAY 2008

Certified true transcript of a
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Izod

HIS HONOUR: Yes, well, I'll be as short as I can but there are a number of issues I have to address.

Yes, well, the defendant has been charged with an offence of going armed in public. At the close of the prosecution case I found a case to answer and following that the defence went into evidence and the defendant gave evidence as well as his wife.

In light of all the evidence now, of course, the test is somewhat different to the test which applies at the 'no case to answer stage. In order to find the defendant guilty of the offence the court must be satisfied beyond reasonable doubt as to each and every element of the offence.

New issues, of course, arose during the defence case. The first issue was to the effect that Mr Izod had permission to enter the property, that's the Haines' (?) property on the day in question. I suppose that had been obliquely adverted to in the prosecution case, but it certainly became a live issue in the defence case and, furthermore, the issue as to how the gun was being carried that became an even more live issue in the defence case and the defence position was that the barrel of the firearm was pointed to the ground.

They really were the two major issues. Of course, there was that further issue that what the defendant did on the day in question was with lawful occasion and the defence of honest and reasonable mistake of fact was raised under s32 of the Criminal Code.

In terms of the facts in this case, I'm satisfied beyond reasonable doubt that on the day in question Mr Izod entered the Haines' property. He walked in the direction of two vehicles which he observed on that property. He was carrying a shot gun at that stage. The shot gun was unloaded. I can't be satisfied beyond reasonable doubt that the firearm was being pointed at the persons on the Haines' property.

My reasons for that will be fairly brief, but they are along these lines that Sergeant Berry had given evidence earlier in these proceedings to the effect that Mrs Haines had told him that the firearm had been pointed to the ground. Sergeant Berry is an independent witness in this case, beyond any reproach and I consider his evidence is enough in this case to raise a reasonable doubt about how the gun was being pointed. I accept Mr Deveraux said it was being pointed in their direction and I also accept that Mrs Haines said that in her evidence, but given the state of the evidence, I must have a reasonable doubt about that.

In terms of permission, again, I can't be satisfied beyond a reasonable doubt that Mr Izod did not have permission to enter the property. I think that there is a real possibility that on the day in question he did have permission to enter the property and I must proceed to deal with the matter on that basis. I can't be satisfied that he was a trespasser.

Having reconsidered the law, I really haven't changed my position a great deal in relation to my view of the law. In relation to the element of 'in public', I have to say this, that my reference to R B Hildebrand was just that, in fact a reference to that case and how the court decided to deal with the issue of 'in public'.

In my view that case did not really lay down a general principle to be applied in these cases. You will recall there the court made the observation that it is important that the people concerned be members of the public qua the accused. Now, I remain of the view that that is an important test.

Ms Truman went on to say that that case also made it clear that those members of the public had to be exercising their rights to assemble in a particular place for individual purposes and that such rights were independent of each of the persons.

That particular aspect of the case I don't think really lays down any general principle. They were simply statements made by the court in the context of the particular facts of that case. Though, at the end of the day, I'm of the view that the court's observations that the people in question must be properly considered to be members of the public qua the accused remains a general principle but I don't take that case any further than that.

I think it's quite clear that a person doesn't cease to be a member of the public simply because they're on private property. I think that - and, of course, this is the course here, is that these persons were on private property. Mrs Haines, of course, was a part owner of the property, Mr Deveraux was there as an invitee, but in my view I'm still of the mind that those persons and, indeed, the two children were members of the public qua the accused.

It seems to me that the element of 'in public' really addresses this issue that what's occurring must be in the view of the public and, again, I return to my observation that the public, the term 'public' encompasses members of the public.

My view of this matter is also reinforced by the fact that on Mr Izod's evidence he didn't really know who these persons were and at that stage, of course, they were persons not known to him. It's only when he comes upon them at a closer distance that he begins to think that the female is Mrs Haines and it's only at a closer distance that he comes to the realisation that he knows Mr Deveraux from some previous encounter, but the salient fact is that the time that he is proceeding on the Haines' property, moving in the direction of those two vehicles, at that time those persons could be anybody and they certainly weren't known to him.

So that circumstance, in my view, lends further colour to the public character of the defendant's conduct. Also, I note that Mrs Izod was of a similar view. She did observe two persons in the bush but those persons weren't familiar to her and, in fact, the fact that those persons had not acknowledged her presence and didn't wave back at her suggested to her that these were persons not known to her. So, again, I considered those circumstances lend colour to the public character of the defendant's conduct.

One observation I make at this stage is quite tellingly, so far as the defence case is, is that Mrs Izod sees these people in the bush but Mr Izod says that he couldn't see anybody and he only saw people when he came upon them at a closer distance. Mrs Izod also, quite tellingly, says that she told Mr Izod about these people in the bush. I consider that she's telling the truth about that. I do not consider Mr Izod as telling the truth when he says he didn't see these people until he came upon them.

So I am of the view that the 'in public' element of the offence has been satisfied beyond reasonable doubt. I should have also said that the something occurs in public view when a person might reasonably expect his conduct to be viewed by another. Now, the only authority that I've been able to find for that proposition is an American case, it's not binding, it's probably not entirely persuasive, but I think it's useful. It's a case of *US v Graham*(?) and the reference, I believe, is No 01-0227 Criminal Appeals No 99-0630.

In this particular case, I think that Mr Izod reasonably expected his conduct would be viewed by another because he suspected that there were people on the Haines' property, indeed, as just a few moments ago I said I think he knew that they were there because of what Mrs Izod had told him. So I think in terms of the reasonable expectation test, I think again the 'in public' element is made out.

The 'go armed' aspect, as I understand it, the defence rely heavily upon the fact that the gun was pointed to the ground and not being pointed at the persons on the Haines' property. The aspect of 'go armed', of course, has been addressed in a number of cases including the case of *Parmbuk v McMaster*(?) and, in my view, the fact that the gun was pointed at the ground really does not detract from the element of going armed.

I accept that the concept of 'going' doesn't actually require actual movement and it really refers to the manner of going, but in this particular case there is evidence of actual movement. The defendant is proceeding from point A and is moving toward point B, that is the position of the two vehicles and in close proximity to those vehicles are the two persons. So although it's not essential to prove actual movement, I think where there is evidence of that it really goes towards satisfying the element of 'go armed'.

The other thing is that one can't lose sight of the fact that there's the element of 'armed' and, of course, that's juxtaposed with the concept of 'going', and I don't believe that the fact that the gun was pointed to the ground in any way detracts from proof of the element. The fact is that the defendant was carrying an object, a weapon which was available and capable of causing fear. That's the opinion I've reached.

Now that seems to be consistent with my recollection of the cases that deal with carrying and possessing offensive weapons. Although those cases haven't been put before me, it is my recollection that the meaning of 'armed' in that context means having something available and capable of causing fear or terror.

Certainly, the firearm was available for that purpose and capable of doing that. Firearms have a inherently distinctive quality about them. They are, by their very nature, objects which do inspire fear, because of their real capability to cause harm. They are objects that are capable of firing projectiles and I have no doubt in my mind that the element of 'armed' was clearly satisfied in this case.

The fact that the firearm wasn't loaded is neither here nor there. Certainly so far as the people on the Haines' property were concerned, they didn't know that, and I think that the fact that the firearm was not loaded is immaterial. I also consider that the very circumstances of this case also support the finding that the defendant was going armed so as to cause fear.

Now, one of the contentious points in this case was whether or not one requires actual evidence of causing fear and, in my view, the state of the law doesn't require actual evidence of that element, that is 'causing fear to a person of reasonable firmness and courage'. In my view, it's a question of looking at the circumstances of the case, what I've already said about the firearm, it's inherent character.

See, in this particular case I'm satisfied that Mrs Haines and Mr Deveraux did see the defendant approaching them. Despite the submissions made by the defence, I'm satisfied that they saw he had a firearm in his possession and, in my view, having witnessed a person walking towards them with a firearm, albeit pointed to the ground, in my view, those circumstances do speak volumes. They clearly, in my view, satisfy the element of 'causing fear to a person of reasonable firmness and courage'.

But, in any event, there is some evidence from Mrs Haines and Mr Deveraux as to the effect that this incident had on them, the effect of Mr Izod approaching them with the firearm. I fully accept, however, that the evidence given by Mrs Haines and Mr Deveraux was predicated on the firearm being pointed at them. So it's important to consider their evidence in that context.

However, I am still of the view that their state of mind would have at least been in part inspired by the very fact that a firearm was being carried. So I'm not in a situation where I can fully discount their evidence about their state of mind when they saw the defendant approaching.

I must say that Mrs Haines' evidence really was marred by a number of aspects which I think probably well and truly affect her credibility. However, as I say, it's not essential in this case to have actual evidence of fear. It's a matter for the court to assess the objective circumstances of the case and I'm satisfied at the end of the day that that element 'causing fear' has been made out.

Mr Deveraux, his credibility was assailed from the point of view that he'd spoken to Mrs Haines after she'd given her evidence. I don't really think, at the end of the day, that really plays heavily upon my view about his state of mind at the time. In terms of what he said about his state of mind I think he was perhaps understating the way he felt at the time but, significantly, he expressed nervousness about the

situation and I totally agree with that. If I was in the same position I would have been feeling nervous also. And he also had a concern for the safety of the two children.

So, in my view, that particular aspect of his evidence, I think, holds true. He certainly didn't seek to tailor his evidence to corroborate Mrs Haines, because her evidence about her state of mind was a lot more graphic than what Mr Deveraux's evidence was.

I also have taken into account the emotional state of Mrs Haines and I think that that is somebody everybody agrees on. I think it's probably fair to say that she had lost control. She was screaming and yelling and I don't think anybody in this case disagreed with that. So there's common ground about her state of mind at the time.

I consider that on the evidence before me her behaviour was bordering on the hysterical and was somewhat irrational and I think that one can infer from that that state of mind was engendered by Mr Izod approaching with a firearm.

So, there you are, I think that there is, in addition to the objective circumstances, there's evidence which goes to that final element of the offence.

The final element is 'without lawful occasion'. I've already addressed that aspect in my earlier reasons for decision.

In this case it's my view that the defendant must seek to rely upon the provisions of s32 of the Criminal Code and just for the sake of completeness, that provides:

The person who does, makes or causes an act, omission or event, under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for it to any greater extent than if the real state of things had been such as he believed to exist.

I consider that s32 is available in this particular case. The element of 'without lawful occasion' really refers to a state of affairs or things and in my view 32 does have application to that particular element of the offence.

Of course, the defendant carries an evidential burden in relation to s32. It might be recalled that in my earlier reasons I had suggested that even in relation to the element of 'without lawful occasion' a defendant carried a burden, either evidential or tactical, and then it's up to the prosecution to prove beyond reasonable doubt that what was done was without lawful occasion. However, it's quite clear that in this case where the defendant must seek to rely upon 32, there's actually no doubt that he carries an evidential burden in relation to that excuse.

The defence case is this, that on the day in question the defendant had an honest and reasonable mistake that the persons on the Haines' property were poachers or persons otherwise up to no good. Also, it's part of the defence case that the defendant considered that he had a good and lawful reason to enter the Haines' property with a firearm in order to defend himself and his wife and/or to defend his

property or the property of the Haines. I think that that fairly sums up the defence case.

In terms of that, I have to consider whether or not the evidential burden was discharged. Mr Izod, in my view, was not an impressive witness in the witness box. I must say that I found it very difficult to understand what was going through his mind when he proceeded onto the Haines' property and moved in the direction of those two vehicles.

I do understand that he thought they were poachers and persons up to no good, but in terms of what was running through his mind, in my view, he gave a labyrinth of contradictory statements, some of which to my mind didn't make any sense. The first thing is he says that he feared for himself and his wife. Then, almost in the same breath, he says that he was going over there to calm things down, and then, almost at the same time, he says he was going over there to establish who he was and all of these things were mixed in a hotchpotch of attempted explanations as to what was motivating his actions, and I think that that really does pose a very substantial problem for the defence in this case.

This is not a case where the defendant is able to give a clear and straightforward explanation as to what he was being motivated by. There is this collection of explanations which are inconsistent. But can I get back to the real premise of the defence case, and that is that Mr Izod believed that there were people on the Haines' property engaged in unlawful activities.

The defendant relies upon the circumstance of the helicopter which is flying up and down their property. The first thing I say is that it strikes me as a bit strange that if people are up to illegal conduct that they really want to draw attention to themselves. One way of drawing attention to yourself is to be flying up and down in a helicopter. Helicopters are noisy conveyances and they certainly do draw attention to themselves. So that's the first things that really troubles me about this case.

The second thing is that, contrary to what Mr Izod says, I believe that he did see those people on the property at an earlier time. I'm satisfied that his wife told him about those two people in the bush, but surely - and I just find this really difficult to accept - surely he must have had a real inkling that these people could, in some way, be either the Haines or one of the Haines or persons who were connected with the Haines. I find it absolutely astounding that that is something that wasn't present in his mind at the time and yet he wants the court to accept that he had an honest belief that these people were poachers.

I know he relies upon the pet meat vehicles, but you see - and the helicopter, which I've already dealt with - but they in my view are just some of the considerations in this case that should have been operating upon his mind.

The one thing that I think that causes me real problems with his suggestion that he honestly and reasonably believed that there were people engaged in unlawful conduct on the Haines' property, is the fact that when he comes upon Mrs Haines,

Mr Deveraux and the two children, when the penny drops, when he realises that the female might be Mrs Haines, when he realises that he knows Mr Deveraux from somewhere, he doesn't seek to explain away his conduct.

For heaven's sake, if you made a mistake of that magnitude - and I must say that I think that's a fair way of describing it - then in my view a normal person would simply say, 'Look, I'm very sorry, you know, I thought that you were poachers, I thought that you were stealing cattle. I'm dreadfully sorry. I've made a big mistake,' and you really then calm the situation down and that's one of the things that Mr Izod says that he was keen to do. But his behaviour at that time is totally inconsistent with that.

He has more than one occasion to explain away his conduct. It's not only at the time he comes upon them, but it's again when he has to stop his vehicle and talks to Mrs Haines through the window of his vehicle he has a second occasion to explain away his conduct. Surprisingly, he doesn't do that, but what he does do is that he's fairly quick to raise with her the question who glued up the lock. He's not worried about the mistake he's made. That's irrelevant on the evidence before me. It doesn't appear to have been a major concern to him. He's more concerned about who glued up the lock to his gate.

Now, what does he do after this incident. He hasn't explained away his conduct to the victims in this matter, but he seeks to explain away his conduct to a police officer. He goes off to the police station and then he attempts to explain away his conduct. Well, I can understand that. It seems to me that in those circumstances a person may well be concerned about the way they've behaved on the day in question and what they're trying to do is to try and serve their case by going to a police officer documenting their version of what happened that day.

But what does he do when he goes to the police station? He lies. He lies to the police officer about what he was carrying that day. He says he was carrying an axe handle when in fact it's clear that he was carrying a shot gun.

In my view, at the end of the day, I really can't accept that he had an honest belief that these people were poachers or otherwise engaged in unlawful conduct. But even if he did have an honest belief, in my view, the prosecution have satisfied me beyond reasonable doubt that any such belief was unreasonable in all the circumstances, and on the basis the defence is excluded beyond reasonable doubt.

However, I go even further in this matter, and that is along these lines, that even if - and I'm not of this opinion - but even if it was open on the evidence that he had an honest and reasonable mistake of fact about what was happening on the Haines' property, there is a further issue of whether what he did was with lawful occasion.

He first of all says that he was defending himself and his wife because he had grave fears for their safety. Now, in my view, self-defence hasn't been made out on the evidence. What has been made out is what is commonly relied upon in cases involving carrying an offensive or dangerous weapon, and that is where a person

says, 'Well, I was carrying it for the purposes of self-defence, not because there was an immediate occasion to defend oneself but just in case it becomes necessary for me to defend myself.'

Now, I must say that in this particular case the circumstances, I think, are very analogous to that. You see, at this point in time, even on Mr Izod's evidence there's no immediate threat to their safety. He doesn't see people with high powered rifles. He thinks that they might have them, but he doesn't see that. There's nobody threatening him with high powered rifles. He's simply going across there, as he say, 'to calm things down.'

And that's the other aspect is that that is entirely inconsistent with somebody going to defend themselves. I find it impossible to accept that taking a firearm, in those circumstances, is going to have a calming effect. Absolutely not. Quite the contrary. It's really inviting trouble. Absolutely. And I just can't for one moment accept that Mr Izod honestly believed that would calm the situation down.

He says he was also going across there to establish who he was, with a firearm. You can establish who you are without taking a firearm to the scene and, again, I just have real difficulties with that.

But the major difficulty is that I don't believe that there's a possibility that he honestly believed that what he was doing was necessary for the purpose of self-defence because the immediate threat wasn't there. He may well have been taking the firearm in case, in case he was threatened, but in my view this offence doesn't countenance that sort of defence. It has to be a more immediate threat in order for that defence to be fairly raised.

And I think the same applies to defence of property, although there don't appear to be any authorities on it, I would have thought that the law in relation to self-defence by analogy is equally applicable to defence of one's property.

So, at the end of the day, even if the court considered a possibility that he'd made an honest and reasonable mistake about what those people were up to, there are those further insurmountable difficulties in the defence case and they do relate to whether or not the defendant honestly and reasonably believed that it was necessary to defend himself and/or his property. In my view, even at that further level, if he got that far, which I say you can't, the prosecution have negated the defence beyond a reasonable doubt.

For all of those reasons I find the defendant guilty of the offence.