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SUPREME COURT OF THE NORTHERN TERRITORY

DIXON v SEEARS

Muirhead ACJ

2, 28 September 1982 — [1982] 16 NTR 20; (1982) 63 FLR 36

CRIMINAL LAW – ARMED WITH OFFENSIVE WEAPON – FORMATION OF INTENT.

S., a police constable, saw D., knife in hand, chasing a woman. When asked what he was doing, D. said that he was going to cut his wife. He was charged in that being armed with an offensive weapon and being required to give reason for being so armed, he did not assign a valid and satisfactory reason. He was convicted. On appeal—

HELD: Appeal dismissed.
There was no reason on the facts why the magistrate should have been called upon to consider how the knife came into D's possession or as to what was D's intention when it did so. The evidence linked possession of the knife with an aggressive and unlawful purpose for which no valid or satisfactory explanation had been given.

MUIRHEAD ACJ: *[After setting out the facts, referred to s56(1) of the* Police and Police Offences Ordinance *1923 (NT) His Honour continued]:* It is common ground that he was carrying a Bowie knife in his hand. Such a knife has a well recognized meaning, e.g.: "A heavy sheath-knife having a long single edged blade" (*The Macquarie Dictionary* – 1981). One must take judicial notice of the fact that such a knife may have many uses, especially, I suppose, to an Aboriginal man whose life is largely spent in a bush environment. Carried under certain circumstances it may readily be described as an offensive weapon. The fact is that the appellant was pursuing his wife armed with this formidable weapon. It seems but common sense to say that in such circumstances he was rightly convicted.

But the defence submission was based on English decisions, the most important perhaps being *R v Jura* (1954) 1 QB 503; (1954) 1 All ER 696. That was a decision of the Court of Criminal Appeal which quashed the conviction of one who hired a rifle at a shooting gallery, used it in a normal way and then in rage fired at his companion. He was charged under the *Prevention of Crime Act*, legislation designed to impose preventative justice and which was entitled: "An Act to prohibit the carrying of offensive weapons in a public place without lawful authority or reasonable excuse." The definition of "offensive weapon" is the same as that found in the Territory legislation. Lord Goddard in delivering the judgment of the court stated:

> "The appellant was not carrying this rifle without lawful excuse because he was at a shooting gallery where for the payment of a few pence people can amuse themselves by firing at a target. He was carrying the rifle for that purpose, so he had an obvious excuse for carrying it. It was his use of the rifle which was unlawful, and for which he might have been convicted of a felony. If a person having a rifle in his hand for a lawful purpose suddenly uses the rifle for an unlawful purpose the *Offences against the Person Act* 1861, provides appropriate punishment. The Act of 1953 is meant to deal with a person who goes out with an offensive weapon, it may be a 'cosh' or a knife, without any reasonable excuse. If the judge's direction were right it would mean that anybody in possession of a shotgun going to a shooting party who used the gun for an unlawful purpose would be guilty of an offence under this Act. He would be guilty of an offence under the *Offences against the Person Act* 1861. In my opinion, there is no evidence that the appellant was carrying the weapon without reasonable excuse."

Bray CJ in considering this authority in *Considine v Kirkpatrick* (1971) SASR 73 stated, at 77:

> "When the Court of Criminal Appeal said that he was not carrying it without lawful excuse, they must have construed 'carrying' as referring to the time when he first took it up and they must have held that the subsequent change of intention, which must have preceded the firing at the woman, was irrelevant."

Chamberlain J, who with Zelling J, constituted the majority in *Considine v Kirkpatrick*, *supra*, (at 82) took another view:

> "To pursue his Lordship's example of a man carrying his gun to a shooting party, I do not think that it could be seriously suggested that if on the way it was decided to abandon the shoot and use the gun to hold up a bank, the gun was not from that stage being carried as an offensive weapon without lawful excuse. If the *dictum* can be taken to have this meaning, then with great deference I do not think it should be accepted by this court as laying down the law applicable in this State."

In *Ohlson v Hylton* [1975] 2 All ER 490; (1975) 1 WLR 724, the Divisional Court of the Queens Bench Division considered the case of a carpenter who following an altercation with another deliberately used one of his working tools, a hammer, to strike his protagonist. He was charged, *inter alia*, with having an offensive weapon with him, in a public place. Lord Widgery in dealing with the question of the time an intention was formed in relation to its user emphasized several things:-

> (1) The offence of carrying an offensive weapon is not committed when a person arms himself for instant attack.
>
> (2) The offence is committed only by a man possessed of a weapon who forms the intention to use it "before an occasion to use actual violence has arisen". It is not the use, but the carrying with intent to use which constitutes the offence.
>
> (3) It is not necessary for the prosecution to prove the relevant intent was formed from the moment when the defendant set out. An innocent carrying can be converted into a unlawful carrying when the defendant is proved to have formed a guilty intent.

McGarvie J applied this principle in *Wilson v Kuhl; Ryan v Kuhl* [1979] VicRp 34; (1979) VR 315, when considering s6(1)(e) of the Victorian *Vagrancy Act* which provided that a person "found armed with an offensive weapon" shall be guilty of an offence unless giving a valid and satisfactory account for being so armed. In that case his Honour dealt thoroughly with the authorities and he expressed preference for the reasons enunciated by Bray CJ in *Considine v Kirkpatrick*, *supra*. The South Australian section was different.

In the present case I was urged to pay regard to the many uses to which the Bowie knife can be put, i.e. that it was not offensive *per se*. It was submitted that the appellant had embarked upon a criminal act of violence, i.e. chasing his wife with a knife and that he should have been charged with a more appropriate offence, e.g. assault. Were it not for the line of English authorities the history of which is briefly traced by Bray CJ in *Considine v Kirkpatrick*, and which he considers gained impetus by reason of the enactment of the *Prevention of Crime Act*, the argument put to me would not be tenable.

I share with respect the concern mentioned by Chamberlain J in *Considine's case* especially as in this Territory the carrying of knives is far too prevalent. People affected by liquor are likely to resort to knives, broken bottles and the like when a fight may suddenly erupt. It is as a matter of policy important that the utility of this section should be preserved. It is one thing to submit that it should be used cautiously and sparingly, that in the event of a threatened assault with a weapon it is inappropriate. But so often, as every magistrate in this Territory well knows, it is most difficult to find how drunken brawls erupt, and who was the original aggressor.

The section has or should have great value to the community as it enables the police to act before violence erupts and I view with disquiet the proposition that before a charge for "being found armed" can be proved (where the weapon may have several uses) there is an onus on the prosecution to prove (in circumstances such as these) that the original carrying of the weapon was lawful, that the defendant had a change of mind and formed the intention to injure and that he was apprehended before the occasion of violence arose.

However, in the present case those policy matters do not intrude as the facts proved speak for themselves. There can be no doubt that when seen by the police the defendant was carrying the exposed knife in his hand before he used it. Clearly he was then "armed with it". It was available to him for immediate use as a weapon: see *Rowe v Conti; Threlfall v Panzera* [1958] VicRp 87; (1958) VR 547; (1958) ALR 1038 and *Haggarty v Palmer* (1974) 5 ALR 53. Obviously it was an offensive

weapon – the appellant had the intention of using it upon his wife – and he was pursuing her with this in mind. The present Chief Justice of this court observed in *Haggarty v Palmer*, *supra*, at 55 "the purpose of causing injury does not have to be shown as the only purpose, providing it is a purpose".

There was no reason on these facts why the magistrate should have been called upon to consider how the knife came into the appellant's possession or as to what was the appellant's intention when it did so. He had no evidence of this. The evidence linked possession of the knife with an aggressive and unlawful purpose. Finally the only conclusion the magistrate could reach was that the appellant's explanation was neither valid nor satisfactory. Factually this case bears no resemblance to those decisions where the courts are required to examine original user or intent in reaching a conclusion as to whether the weapon should be categorized as offensive. The fact that the appellant may properly have been charged with another offence is, in my view, in these particular circumstances, beside the point. I consider the appellant was properly convicted. The appeal is dismissed. I will hear the parties as to costs.
