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SUPREME COURT OF WESTERN AUSTRALIA — COURT OF CRIMINAL APPEAL

R v VAN DEN BERG

Burt CJ, Smith and Pidgeon JJ

5 October, 17 November 1983

[1984] WAR 162; (1984) 12 A Crim R 113; noted [1984] 58 ALJ 166

CRIMINAL LAW – ROBBERY – ARMED WITH OFFENSIVE WEAPON - PORTION OF A RIFLE BARREL – WHETHER AN OFFENSIVE WEAPON.

HELD: by Burt CJ and Smith J, Pidgeon J, dissenting:
(1) A person carrying a thing which is not a thing which has no common use other than as a weapon, is not shown to be "armed with an offensive weapon" within the meaning of s393 of the *Criminal Code* (WA) unless it is shown that the thing carried was carried with the intention of inflicting bodily harm and was usable for that purpose.

(2) A short section of a barrel of a .22 rifle, which had the appearance of a rifle when a robbery was committed, was not an offensive weapon because it was not carried with the intention of inflicting bodily injury and was not usable for that purpose.
McGarvie J, *obiter*, in *Wilson v Kuhl* [1979] VicRp 34; [1979] VR 315 at 321, not followed.

BURT CJ: *[After setting out the facts, a portion of the evidence given at the trial a part of the transcript of the trial Judge's direction to the jury and the grounds of appeal, His Honour continued]:* ... **[4]** The point taken is not whether the person armed with the thing possessed "an actual present ability to inflict bodily harm" with the thing. The submission made is that the thing not being "a thing that is not in common use for any other purpose than a weapon": *R v Hutchinson* [1784] EngR 185; 168 ER 273; (1784) 1 Leach 339, at p342, cited with approval by Bray CJ in *Considine v Kirkpatrick* [1971] SASR 73, at p74 – cannot be an offensive weapon unless it is intended to be used and capable of being used to inflict bodily injury and so, in the terms of the definition of "weapon" in the *Concise Oxford Dictionary*, "usable as an instrument for inflicting bodily harm". That seems to me to be the essential question.

[5] One should, I think, clear the way for a discussion of that question by saying that an instrument or thing which is not "usable as an instrument" for that purpose – as in this case a short section of the barrel of a .22 rifle – may nevertheless be used to threaten the use of personal violence and in that way to establish that element of the crime called robbery. The appellant relies primarily, if not exclusively, upon the decision of Casey J in *R v Carroll* [1975] 2 NZLR 474, in which it was held that before it could be said that a person in possession of an imitation or toy hand gun was "armed with an offensive weapon", the Crown had to establish beyond reasonable doubt that it was carried by the accused so as to be readily available for use as an instrument to attack and inflict bodily harm". To prove that the intention was "to frighten the tellers into handing over the money" was not enough. That decision is, so far as I know, the only decision which is directly in point. In England it has been held by the Court of Criminal Appeal in *R v Edmonds* [1963] 2 QB 142 at 151; [1963] 2 WLR 715 at p722; [1963] 1 All ER 828, at p 831, that to satisfy the definition of "offensive weapon" to be found in s1(4) of the *Prevention of Crime Act* 1953, the use of a thing to frighten was not enough unless the frightening "be of a kind for which the term 'intimidation' is far more appropriate and of a sort which is capable of producing injury through the operation of shock". That was a decision directly based upon the second limb of the statutory definition of "offensive weapon" it being "any article ... intended by the person having it with him for such use by him", that is to say, for "use causing injury to the person". And even in cases arising under that definition it has subsequently been held **[6]** by the Court of Appeal (Criminal Division) in England that in directing juries under the statute "the use of 'intimidate' should be avoided unless the evidence disclosed .... that the intention of the person having with him the article alleged to have been an offensive weapon, was to cause injury by shock and hence injury to the person". See *R v Rapier* [1980] Crim LR 48; [1979] 70 Cr App R 17 at p20.

The *Criminal Code* contains no definition of the expression "offensive weapon" and hence the English decisions to which I have referred are of little, if any, assistance. The cases, and there are many of them, in which the expression "offensive instrument" or "offensive weapon" are discussed are brought together and considered by the Full Court of the Supreme Court of South Australia in *Considine's case* (above). In no case referred to in those reasons did the question now under consideration arise but the general thrust of all the cases collected there and by Casey J in *R* v *Carroll* (above), as it seems to me, is that if the thing said to be an offensive weapon is not "a thing which is not in common use for any other purpose than a weapon", such as a gun, or a sword, or a cosh or the like, then it must be a thing which when carried, so that the carrier can be said to be "armed" with it, is intended to be used to inflict bodily harm, it being a thing which is usable for that purpose. There is at least one opinion, *obiter*, which is to the contrary. In *Wilson v Kuhl* [1979] VicRp 34; [1979] VR 315, at p321, McGarvie J said:

> "I think that a person found carrying a harmless imitation pistol towards a chemist shop, intending to use it to menace the staff for the purposes of robbery, would be found armed with an offensive weapon."

To accept that **[7]** view seems to me to require one to say that anything at all which, to use a delightful expression now becoming common usage in this area, is intended to be used to achieve "victim management" is an offensive weapon. I cannot accept that. I prefer to accept what I perceive to be the thrust of the decisions and accordingly I would hold that to carry an imitation pistol or, as in this case, a section of a barrel of a .22 rifle, is not to be "armed with an offensive weapon" within the meaning of s393 of the *Criminal Code* and I would so hold because the thing carried was not carried with the intention of inflicting bodily injury and it was not usable for that purpose. I would allow the appeal and substitute a verdict of guilty of robbery as charged but without the pleaded circumstance of aggravation ...
