

IN THE ONTARIO COURT (PROVINCIAL DIVISION)

CENTRAL EAST REGION

HER MAJESTY THE QUEEN

against

STEPHEN L. BOWSKILL

REASONS FOR JUDGMENT

BEFORE HIS HONOUR PROVINCIAL COURT JUDGE J. D. BARK,
at Brighton, Ontario on September 28, 1994

CHARGE: CCC 86(2), CCC 86(3)

APPEARANCES:

COUNSEL FOR THE CROWN

MR. DAVID THOMPSON

COUNSEL FOR ACCUSED

MR. CALVIN MARTIN

REASONS FOR JUDGMENT

JUDGE J. D. BARK, ONTARIO COURT JUDGE

Stephen Bowskill is charged that on or about the 17th day of February in the year 1994 at the Town of Colborne in the said County of Northumberland without lawful excuse use a firearm to wit: a revolver in careless manner contrary to section 86(2) of the Criminal Code of Canada.

further

Stephen L. Bowskill of Colborne, Ontario, on or about the 18th day of February 1994 did store a firearm in a manner contrary to Regulations made pursuant to Section 116(1)(g) of the Criminal Code, namely Section 4(1) of the Storage, Display, Handling and Transportation of Certain Firearms Regulations, contrary to Section 86(3) of the Criminal Code of Canada.

The facts are, other than referred to, not really in dispute. Between 3:00 a.m. and 4:00 a.m. on February 17th Stephen Bowskill was occupying his apartment on the second floor above his

pharmacy on the north east corner of King and Percy Streets in downtown Colborne when he was awakened by a loud 'thud' possibly coming from his pharmacy below. As the pharmacy had been broken into some seven times before he suspected the worst, dressed and armed himself with a loaded 6 shot 38/40 revolver. He descended the stairs exiting the building from the most northerly door on the west side of Percy Street, then proceeded southerly along the west wall of the building then easterly along the front of the store as depicted in Exhibit 2(A). He didn't see anything suspicious but as he started to retrace his steps along the front of the pharmacy the alarm activated. This alarm apparently has a one minute delay. He then noticed the westerly of the two entrance doors to the pharmacy had been jimmed. He entered the store through this door and moved some distance into the pharmacy. Two people stood up behind the dispensary, which (the dispensary) is situated across the north side of the pharmacy, divided from the rest of the pharmacy by a counter. The dispensary can be exited at the east side only, to the south into the pharmacy proper and to the north through a door into a store room. A door leads from the storeroom through the north wall to a lane running across the north side of the building as shown on Exhibit 2(E).

The two intruders stood up facing Bowskill from behind the dispensary. He yelled at them to stop, they put their hands in the air, one had a crowbar. Rather than stop they shuffled sideways to the exit and rather than come towards him they backed through the door into the storeroom. Bowskill's evidence is that although the revolver was visible he at all times held it at his side. Bowskill was aware that the outside door from this storeroom was secured by three separate sliding bolts and also that the exit was blocked by boxes and other debris so he did not follow but left the store through the door he had entered, proceeded around the building proceeding north on Percy Street to cut them off as they exited. He was just in time to see the passenger come from the lane and jump in the passenger seat of the van, he did not see the driver at this time.

Bowskill advanced to within 15-20 feet of the rear right wheel on the getaway van as shown on Exhibit 2(E) then stopped, deliberately cocked (by pulling back the hammer with his right thumb, holding the pistol in two hands) aimed and fired at the right rear tire. He then repeated this process as the van was about to move. He said he knew he hit the tire as he heard the thud and

there was no sound of a ricochet. He advised the court that he is familiar with firearms and knew the capabilities of both the revolver and himself. He told the court that once the vehicle started to move he did not fire again although he still had four shots remaining. Bowskill then got into his vehicle and attempted to follow the van without success, while doing this he called 911 and reported the occurrence on his cellular phone.

There was only one eye witness to part of this burglary, one Gary Connolly who lives on the ground floor of the apartment on the southwest corner of King and Division Streets overlooking the pharmacy. He was up looking out his window and witnessed the van park, two people get out, pry the front door open and enter the pharmacy. He had to leave his vantage point to telephone first the operator (with no success) and then "911" to report the break in. He estimated this took from three to five minutes. On his return to the window he saw the two run from the alley into the van. He then saw Bowskill standing right beside and a little behind the van. He did not see Bowskill fire any shots but thought the shots which were fired were from the van at Bowskill.

Mr. Connolly is to be commended for his actions that night in calling the police. However from my observations of him I must be somewhat suspicious of his capacity to observe and accurately report what he saw as compared to what he imagined he saw. From listening to the tape and hearing his evidence I would not give his evidence the weight I would be inclined to give most independent witnesses.

There are some discrepancies between Mr. Bowskill's evidence at trial and his statement given the day after the incident. When confronted with the statement he is adamant that his evidence from the witness box is accurate if it conflicts with the statement. He explains this in part by saying that he didn't write the statement however he did glance over it, not reading it as carefully as he should have. He did initial every page and then signed it--maybe this makes a good case for having someone who obviously has the ability to--write his own statement. Two of the discrepancies deal with distance, in neither case was other than a 'guesstimate' given to the court and in both cases Mr. Bowskill was certain where he was standing. He is adamant that he was standing in front of the door as marked in Exhibit E when he fired both shots and less important that he was more than two to three paces into the store when the intruders first stood up

behind the counter. The other main discrepancy was whether he had hit the tire or not. The statement leaves Bowskill in some doubt while his evidence leaves no room for doubt that he hit the tire. He claims that he told the police that when they found the van the right rear tire would be severely damaged. One can appreciate a degree of self doubt when the van sped off up the road, this is a natural reaction. The fact is one bullet was found in the badly mangled tire and in all likelihood the second bullet found it's mark. The intruders, although apprehended, were not called to give evidence.

What conclusion can be drawn from this evidence?

(1) The police, although called by Connolly at the earliest possible moment, likely before the alarm activated, were unable to respond in time to intervene in this break in. Mr. Bowskill has had his pharmacy broken into seven times before. On four occasions he was present and in all those cases the intruders were apprehended, in the four occasions when he was not present they have not been. He believes, and it appears to be a well founded belief, that police response time is at least 30 minutes, so there would be little chance of police intervention when this offence was in progress.

(2) Bowskill confronted the two intruders in his pharmacy and although armed he did not attempt to shoot at or near, them as they fled but kept the gun at his side.

(3) He did not fire at the fleeing passenger as he was getting into the van.

(4) He approached to within 15-20 feet of the right rear of the van, stopped, cocked the revolver, held the revolver in two hands and fired at the right rear tire, he then repeated the procedure and fired a second shot at the same tire. He only fired two shots although he had four more in the revolver because he said the vehicle started to move. Mr. Bowskill professes to be skilled in the use of small arms and likely is as skilled and has had as much practice with small arms of this type as most police officers. The officers who gave evidence all expressed clearly their ability to hit this tire in similar circumstances.

Bowskill stated the purpose in firing at the tire was to delay and impede the getaway and escape of these two intruders. He was

asked why he didn't take the licence number and he answered that there wasn't one. One look at Exhibit 3(B) and you can sympathize with his answer.

Mr. Finn Neilsen who is a recognized expert in firearms and ammunition employed by the Centre of Forensic Sciences was called by the Crown. He test fired this revolver which he describes as a 38/40 calibre, firing a heavy, low velocity projectile which he would not expect to exit from a tire, but to hit, penetrate and stop. If the projectile missed the tire and hit the pavement he would expect it to hug the pavement likely tumbling end over end, definitely stopping at any obstructions such as a kerb or in a short distance in any event.

In other words the chances of a ricochet doing any damage was very remote. However, a shot could easily have penetrated the skin of this van and because of the short barrel any slight change in aim could drastically alter the direction of the projectile.

What must be established to make out a case of liability in respect of the offence charged? Three judgments from the Supreme Court of Canada have for the time being at least settled this question. R. v. Finlay, (1993), 83 C.C.C. (3d) 513, R. v. Gosset (1993), 83 C.C.C.(3d) 494 and R. v. Creighton (1993), 83 C.C.C. (3d) 346.

I conclude these three cases stand for the proposition that this court must decide whether the Prosecutor has proven beyond a reasonable doubt that the conduct of the accused constituted a marked departure from the standard of care expected of a reasonably prudent person in the circumstances.

It must always be kept in mind that Bowskill who is an honest, law abiding, small business man was awakened by the break in. From bitter experience he has learned that he and others like him cannot expect much help from the police in this type of a situation. Their response time being conservatively estimated to be about 30 minutes he had to make a decision whether to hide under the bed or investigate. This type of rip off is often the difference between profit and loss to small businesses, insurance rates go up and it becomes very difficult to carry on business under these circumstances, even if you can obtain insurance. Very expensive alarms systems are necessary but of little value

without action. If no one else knows this the criminals do, namely that snatch and grab break and enters in rural areas are profitable with little risk of police intervention. Small business persons are therefore compelled to act or risk insolvency. If this truism can be accepted then does it not make sense that you have only yourself to rely on for your own protection? We can couch the issue in any terms we like but this is the underlying issue before court today. Residential homes are in the same position.

Section 494(1) anyone may arrest without a warrant

- (a) a person whom he finds committing an indictable offence; or
 - (b) a person, who on reasonable grounds he believes
 - (i) has committed a criminal offence, and
 - (ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.
- (2) Any one who is
- (a) the owner or a person in lawful possession of property, or
 - (b) a person authorized by the owner or by a person in lawful possession of property, may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.

Section 25(1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person, is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.
- (3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

These two sections give a citizen the right to act when he or she find someone committing an indictable offence and are in pursuit, with a right to arrest and a right to use as much force as is necessary to effect the arrest provided that the force is not intended or is not likely to cause death or grievous bodily harm.

From the evidence before me, the possibility of any person being killed or injured by Mr. Bowskill's actions were so remote as to be virtually non-existent. This is 4:00 a.m. on a cold February night, no cars or people are about or are expected to be about in the immediate vicinity or in any area where the projectile from Mr. Bowskill's revolver could or would do damage. The exception to this could be the driver and the passenger in the van. However, the evidence satisfies me that this possibility was also very remote.

Most of the cases which were presented by the Crown may not be too helpful in the light of the S. C. C. decisions but do shed some light in past treatment of this section.

R. v. Richardson (1983), C.C.C. (3d) 309:

Accused were suspected of having stolen from the victim. The victim followed the accused home and was trespassing on accused property but never attempted to enter accused house. The accused had identified the victim before he picked up his shotgun, loaded it and fired two shots close to victim. This case decided on excessive force issue using a subjective test and found the accused guilty as charged.

It is interesting to compare Richardson to the case at bar. If Bowskill had followed the intruders to their home entering onto their property only to be shot at by the intruders, then the reason for conviction becomes ridiculously clear.

R.v. Atkinson 53 NFLD and PEI 150

PEI Supreme Court--Accused charged with careless use of a firearm for firing a .22 rifle on the beach at a target with proper back drop but the firing was close to a clam digger. The accused knowledgeable in use of firearms and little or no possibility of a ricochet or of a bullet causing any danger. But again using a subjective test the Crown had not proved beyond a reasonable doubt that the accused intended to act without care

and was acquitted.

R.v. Budgell and Boone(1985), 61, NFLD and PEI 181

Careless use of firearm--Fisherman fired three shots from 303 rifle at three people attempting to steal from nets of accused, the accused recognized and could identify the perpetrators, shots hit five to fifteen feet from their boat. He was found guilty, conviction was upheld on appeal although the appeal judge made the comment that there was sufficient evidence for a trial judge to convict even though this court might have decided it differently.

R. v. Zimmer, 60 C.C.C. (2d) 190:

The accused fired some 10-15 feet over the head of victim intending to scare away the victim who was shooting birds on accused property and the court was satisfied that this represented careless use of a firearm and again that is hard to criticize.

It should be pointed out that Bowskill did not know the identity of the intruders and was not firing in general direction of intruders for sole purpose of scaring them away.

Did Bowskill's conduct constitute a marked departure from the standard of care expected of a reasonably prudent person in the circumstances?

Bowskill suspected his business was being robbed, dressed and took a loaded handgun to investigate. He entered the store, gun at his side. Even when the intruders appeared with a crowbar I accept his evidence that the gun remained in view but at his side. When the two intruders did the unexpected and retreated through the storeroom door rather than do as commanded, to come forward, he made no attempt to use his firearm (one would speculate what his position would be at that stage if he had). He confronted one as he fled the back alley into the van, no suggestion of using the gun at this stage. He stopped, cocked, aimed and fired twice at the rear tire of the van likely connecting with both shots. His intention was to stop or impede the intruders whom he did not know from escaping by disabling the vehicle by flattening a tire.

Reviewing the facts and cases referred to plus many others, in my respectful view, the crown has failed to satisfy the court beyond a reasonable doubt that Bowskill exhibited a marked departure from the standard of care of a reasonable prudent person in the circumstances and the charge will be dismissed.

There is still a second count:

Stephen Bowskill is charged that on or about the 18th day of February 1994, in the Village of Colborne, in the said County of Northumberland, did store a firearm in a manner contrary to the Regulations and I will not repeat the charge past that.

A person may store a non-restricted firearm only if the non-restricted firearm (and this covers the shotgun we are going to hear about)

(a) is unloaded

(b) is rendered inoperable by a secure locking device or by the removal of the bolt or the bolt carrier, or

2. is stored in a container receptacle or room that is kept securely locked and that is constructed so that it cannot readily be broken open.

The police returned to Mr. Bowskill's pharmacy on the 18th of February at approximately 4:00 p.m. to further their investigation from the night before and also to request that Bowskill surrender any firearm he might have until the investigation was completed. Bowskill, somewhat to the officers surprise, when asked about firearms went behind the dispensary and reappeared with a double barrelled twelve gauge shot gun, opened the breach and removed two B. B. shot sized shells from the gun and dismantled it before handing it over to the officers.

He was charged with improper storage. There is no question that the shotgun was operative, it was loaded and the issue is a simple one and straight forward -- was the shotgun stored. Bowskill in his defence gave evidence that earlier that day he had talked to an O.P.P. officer who told him that three suspects had been arrested for the break in the night before and two had been detained with one being released, that they were well known to the police for their criminal behaviour and were known to have

connections with biker gangs and were to be considered dangerous. Bowskill, concerned for his safety, called a friend who was storing a shotgun owned by Bowskill and was asked if he would bring the shotgun to the pharmacy which he did around 2:00 p.m.

Bowskill took the shotgun, loaded it and leaned it against the wall at the north west corner of the dispensary, out of sight and in a private area not accessible to the public.

Bowskill said that he had the gun for protection and to defend himself and most emphatically stated that the gun was not stored there. He was not happy giving up his gun making the comment to the police "When you fellows go off duty I'm working". Was this gun stored as contemplated by the Act and Regulations? Stored is not defined in either the Criminal Code or the Regulations. I went to the dictionaries:

Webster's Third Edition, New International Dictionary defines 'store' in our context:

"To leave or deposit in a store, warehouse or other place for keeping, preservation or disposal, something that is stored or kept for future use."

The Random House Dictionary, Second Edition, Unabridged:

To supply or stock with something as for future use. To deposit in a storehouse, warehouse or other place for keeping.

Butterworth's Words and Phrases Legally Defined, Volume Five page 120:

"Store or keep" and I paraphrased this to a degree and I hope accurately

"These are common English words with no very precise or exact signification. They have a somewhat kindred meaning and cover very much the same ground and seem to import a notion of warehousing or depositing for safe custody or keeping."

All denote a notion of future use in warehousing as opposed to immediate or present use.

Although this is a regulatory offence the consequences of a

breach still attract criminal consequences. Any ambiguity found in the Act or Regulations must be interpreted in favour of the accused. The Crown must prove beyond a reasonable doubt that the accused is guilty as charged.

Bowskill told the court why the shotgun was there and that he did not store the gun at the pharmacy and I have no reason to disbelieve him. A fair reading of the dictionary meaning of the word 'store' used in this context would lead any reasonably prudent person to the same conclusion and the charge will be dismissed.

May I just say this to you sir, I think it is necessary although not part of my judgment. You know as well as I do the climate that is attached to firearms in our society today, rightly or wrongly, the position that has been taken by many members of our society and I think you are going to have to carry yourself accordingly and don't use this judgment as any excuse for indiscriminate use of your firearms. I say that with some hesitation but it is your future that I am thinking of, not my own. Thank you.

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPTION OF MY RECORDINGS TO THE BEST OF MY SKILL AND ABILITY.

Barb Harren - Certified Court Reporter

CERTIFIED TRANSCRIPT ONLY WHEN SIGNED IN BLUE INK