

**ONTARIO COURT OF JUSTICE**

**HER MAJESTY THE QUEEN**

**v.**

**GIUSEPPE NARDI**

**J U D G M E N T**

**BEFORE THE HONOURABLE JUSTICE L . FELDMAN**

**On Monday, January 10th, 2000, at Toronto**

**CHARGES: Careless Use and Storage Firearm (3 Counts)**

**APPEARANCES:**

**Counsel for the Crown:**

**P. Leishman. Esq.**

**Counsel for the Accused:**

**C. Martin, Q.C.**

**THE COURT: Giuseppe NARDI is charged with two counts of careless storage of ammunition and one count of careless storage of firearms. He entered pleas of not guilty.**

**The Crown alleges that the accused was in breach of Code s.86.2 when police found ammunition on the floor of the van he was driving, some of which was in plain view.**

**In addition, there were alleged further breaches when the police, in searching Mr. NARDI's bedroom, discovered two rifles and a gun magazine inside a locker with its key in the padlock, as well as ammunition in an unlocked upper portion of that same locker which, itself, was relatively light, unattached and easily moved.**

**Mr. P. Leishman, for the Crown, submits that if the storage cabinet is found to have been unlocked, or when locked with its key in the padlock, then the guns would have been stored carelessly, or without reasonable precautions for the safety of others.**

**The defence position is that the ammunition in the van breached no regulation and that, in addition, the evidence establishes that the brother of the accused had, prior to the police search of the home, entered it and checked on the location of the shotgun and rifle in an effort to cooperate with the police, leaving the key to the locker, which he had obtained from his brother, in the padlock. In short, Mr. Martin, for the accused, submits that while the storage there was less than ideal, it did not fall below the requisite standard.**

**Following upon review of all the evidence, including an assessment of the credibility of the witnesses, the court must make findings of fact upon which it will determine whether or not the Crown has met its burden of proving beyond a reasonable doubt that the facts found with regard to "storage" represent a "marked departure from the standard of care of a reasonably prudent person in the circumstances": see R v. Findley (1993) ,83 C.C.C. (3d)**

513, (S.C.C.). It is to be noted that there is no positive onus on the defence to demonstrate the exercise of due diligence with regard to storage.

The Crown called four witnesses in support of its case, one of whom was called in reply.

The defence called Mr. NARDI and four witnesses, three of whom I permitted to be called in response to the reply evidence. Had I failed to do so, it would have had the effect of allowing the Crown to split its case. Police Constable Ron Bob was one of the officers investigating Mr. NARDI on the morning of October 4, 1998, when the accused then was stopped for having no licence plates. The officer looked in through the driver's window and observed a number of boxes of shotgun shells on the floor, for the most part, under the seat. However, one box was fully, and another partially, in plain view. He found a total of six such boxes. Also present was Police Constable James Craig, who did not notice the boxes until they were pointed out by Police Constable Bob. He saw one box of .22 calibre shells with no top. Constable Bob conceded it possible that were the van to go over a bump or curb, or be subject to hard braking, some of the boxes, despite their weight, could slide out from under the driver's seat.

Police Constable Bob later drove Mr. NARDI to his home in order to conduct a consent search for weapons. At that time, he saw a male person come out of the house. The accused told that person he was allowing the police to take his guns. This man led the police inside, where Police Constable Bob was the first officer to enter the accused's bedroom on the second floor. He noted that the bedroom door was open, inside of which was a white locker standing against the wall. The locker had a padlock with a key in it. Although told not to, the other male opened the locker. The officer could not say if, at that time, the cabinet was locked. Inside the locker were a shotgun and rifle, a number of trigger locks and a magazine. Police constable Bob observed that the firearms had their bolts in place, no trigger guards, and were ready to fire. In his view, the locker could be easily broken into.

Mr. NARDI asked the unnamed male to take the scope off one of the rifles, which he began to do. Police Constable Bob took it from him and placed it on the bed. The accused then picked up a magazine from the locker and began to unload the rounds. The officer took it from him. In the circumstances, I view the actions by these two men, however inappropriate, as an effort to cooperate with the police. I pause to note that upon consideration of all the evidence, I find beyond a reasonable doubt that the other unnamed man was the accused's brother, John NARDI, about which I will have more to say later.

Police Constable James was the last officer into the bedroom. He observed two firearms on the bed, but was unable to say either who took them out of the locker, or when. He observed that the metal locker was not attached to the wall and had a separate top wooden section containing ammunition. Both portions of the locker were unlocked. The officer felt this locker could be easily picked up and carried away, even with the firearms and other parts inside.

The police seized a 12-gauge Breccia shotgun with two-barrel extensions, a .308 calibre Browning rifle, cases for the guns, 106 rounds for the .308 calibre and 145 rounds for the 12-gauge.

Police Constable James emptied the locker, picked it up and removed it. Both officers, whom I found to be credible, believed the accused, both with regard to the storage of the ammunition and firearms, to be in contravention of the Criminal Code and statutory Gun Regulations.

Giuseppe NARDI testified on his own behalf. He was 35 years of age at the time of these events and had always lived with his parents, who are retired. He has owned his own autobody shop for nine years. He is the only one in the family with hobbies, including fishing and hunting. He has taken the F.A.C. course. He purchased the firearms, which are the subject of this prosecution. He said that he, at all times, kept them in his bedroom in a locked metal cabinet for which only he and his mother had keys.

The accused has an unrelated and somewhat dated criminal record.

On October 4th, Mr. NARDI took his van to attend a family mass at church. He gave evidence that the ammunition found in the van by the police had been there under his seat for a few days since his return from a hunting trip. He said he uses his tow truck for work, that the van had been in the driveway since then and that he had forgotten about the shells. He believes it possible that when he drove up on a curb that morning to get some coffee before attending mass, some of the boxes slid out from under the seat.

After his arrest, he told the police about his two guns, and consented to a search of his home, because he felt he had nothing to hide. This followed a short period of time during which he was reluctant to allow his guns to be seized, as he felt he had done nothing wrong and was concerned he would not get them back.

With regard to the evidence of Constable Bob that the key was in the padlock of his bedroom locker, Mr. NARDI insists he never does that, but rather, leaves the cabinet locked at all times. He said his mother keeps all the keys used in the house, including one for his gun cabinet. He testified that the house is always locked and that no one else in his family touches his guns, or goes into the cabinet.

Shortly after his arrest and release, he purchased a new storage cabinet with two locks, and bolted it to the door in order to ensure compliance with his legal obligations.

Mr. NARDI testified that when he arrived home with the police, he saw his family outside. This included his brother, who was on the veranda at that time and who went into the house soon after. He told his brother to give his guns to the police. Shortly thereafter, the accused, accompanied by four officers, was taken inside. When he went upstairs, two officers were already in his bedroom.

**John NARDI is the accused's younger brother and has worked with him at the body shop for eight years. He testified that on October 4th, the accused was to meet them at Church, but did not show up. When he later arrived home from the mass, it was surrounded by police cars and he was told that his brother was under arrest, which upset him. He said he went inside and when he came back out, the police told him they were getting a search warrant for the rifles. He indicated that he then went inside again, told his parents, asked his mother for the key to his brother's locker, and used it to open it up to see if the guns were there. He said he took out the guns and left the key in the padlock, which was hanging from the locker. He gave evidence that he had not known before where the key was. He was the one who got the key, because his mother was in bed with a broken leg. He insisted that up to this point no one had refused him entry. When he went out again, his brother had arrived. The police said they wanted to take everything. He went inside to get a box for them, but was searched before he went in.**

**John NARDI testified that had he a motive other than to cooperate with the police, he would have made sure everything was locked up. He also said that he recognized Police constable Jeff Taylor (Who had been brought into the courtroom by the Crown during his testimony.) as the officer to whom he had spoken at the back of the house that day.**

**At the close of the defence case, I permitted the Crown to call Police Constable Taylor in reply. This officer testified that he arrived at the NARDI home at 11:55 a.m. with instructions to secure the premises pending the arrival of a search warrant, and to not let any person in or out, prior to that event. He gave evidence that the family arrived at 12:43, at which point he told them of the arrest. He recalls speaking to someone who was irate at being prevented from entering the home. He said he refused entry to at least two others and insisted he would have arrested anyone who tried to go in. He has no notes in relation to his refusing entry to these persons, including the angry family member. The officer went on later in his evidence to say that he ensured the accused's brother and father did not enter the home and warned them about an obstruct police charge if they tried to go in. He said he was always in front of the house, his partner remaining at the side.**

**Standing alone, I found the evidence of Police constable Taylor both in substance and demeanor, credible.**

**As noted earlier, I allowed the defence to call evidence in response to the reply testimony. Angela DiPinto, Mr. Nardi's sister, testified she went to the mass with her brother, father and two daughters, her mother remaining in bed as a result of a broken leg. When they returned home, a police officer told them of her brother's arrest, which left them in shock. She recalls her father and brother John being upset while outside. She said she got a key from one of them and went in with her two daughters to check on her mother. She recalls that shortly after that, John and her father came in. Ms, DiPinto said that the police did not keep them out of the house, and insists she would not have gone in if prohibited.**

**Antonio NARDI, the accused's father, confirmed much of his daughter's evidence. He**

testified that John went into the house, and a few minutes after that, Angela came in with about four officers. He never saw the subject firearms prior to that day, and knows that his wife had a key to the locker in his son's bedroom,

John Real has been a neighbour and acquaintance of the NARDI family for about 19 years. He testified that he was outside, washing his car on the morning of October 4th, and was aware of two police cars across the street from the NARDI home. He observed the family arrive, and some officers going over to talk to them for a few minutes, after which the family went inside, he believes, followed by the police, although of this, he is uncertain. He recalls other officers arriving within about 15 minutes and entering the home. Shortly after that, he recalls the accused arriving with additional officers. He saw the police take some guns out of the house.

Crown counsel correctly submits that if I accept the evidence of Police Constable Taylor that none of the Nardis entered the home after he arrived, and that Police Constable Bob was the first person to enter the accused's bedroom, then I must conclude that either the locker with the guns was unlocked, or it was locked with the key in the padlock, a situation which could be viewed as falling below the standard described in *R. v. Findley*, supra.

While there are a number of minor, mostly temporal discrepancies in the evidence of the defence witnesses, only one of whom, the neighbour John Real, may be considered to have a degree of testimonial independence, I do not find any of the defence witnesses to have been substantially shaken in cross-examination.

With regard to Mr. NARDI's angry outburst in court, I consider that to be more the reaction of an unsophisticated, immature man, ignorant of police responsibilities with regard to public safety, than a reflection on his believability.

In addition, the discrepancies mentioned above do not detract from the other evidentiary support of John NARDI's testimony that he entered the home for at least a short period of time prior to any of the police officers. On this issue, I rely particularly on the evidence of Mr. Real and Police Constable Bob, and not on the evidence of Police Constable Taylor.

From this finding I conclude that John Nardi's explanation with regard to the state in which the locker was found is one which might reasonably be true. This, in turn, lends support to the accused's evidence that prior to his arrest, the firearms and magazines were locked up with any key retained by himself, or his mother, and not readily accessible. I am prepared to so find.

The policy behind the storage legislation was referred to in *R. v. Derkosh* (1979), 52 C.C.C.(2 d) 252. In that case, the Alberta Court of Appeal spoke of the duty on the possessor to ensure he is not careless in the manner in which he causes his firearms to be stored, having regard to all the circumstances. It found a duty to take due care, because these are potentially dangerous articles and a measure of safety is necessary. It is a duty to

take care that must not fall below the standard of "marked departure".

I consider, as well, s.4.(1) of the relevant Gun Regulation which reads as follows:

"A person may store a non-restricted firearm only if the non-restricted firearm:

(a) is unloaded;

(b) is

(i) rendered inoperable by the secure locking device, or the removal of the bolt or bolt carrier, or

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

(c) is not stored with cartridges, unless the cartridges are stored in a container or receptacle described in sub-paragraph (b) (ii)."

While the regulations are a helpful guide, the authorities indicate that they do not represent a minimum standard for careless storage: see *R. v. Gludeau* (1994), 25 W.C.B.(2 d)330. In fact, the regulations cannot be regarded as proscribing a standard of care which would need to be taken in order not to be in violation of Code s. 86.2. See *R. v. Baldwin Unreported* (1996), O.C.J.

With the ammunition in the accused's bedroom stored in a separate addition to a cabinet in which firearms ready to be fired were contained in the locked portion, the storage standard here was less than ideal and, perhaps, not even up to the regulatory standard. Nonetheless, I am not satisfied beyond a reasonable doubt that the facts demonstrate a manner of storage that is careless, or without reasonable precautions for the safety of others that falls below the standard contemplated in *Findley*, supra. Accordingly, counts two and three are dismissed.

There is little dispute with regard to the facts concerning count one, with regard to the ammunition found in the van. I am satisfied that at least one box of uncovered shells was in plain view through the driver's window, on the floor of the vehicle. I find, as well, that Mr. NARDI was negligent in leaving the ammunition under the seat in the van, but that, he had neither the intention of leaving it there indefinitely, nor in plain view. There is no regulation prohibiting the carrying of ammunition in a vehicle where no firearm is present. My colleague Knazan J., in *R. v. Morton*, unreported January 23, 1998, O.C.J., a case involving police discovery of ammunition in two glove compartments in a motor vehicle, found ammunition not to be inherently dangerous, in itself. He concluded that any danger to someone who might enter the car to be too remote; it would require the person, upon entry, both finding the ammunition and being in possession of, or having access to a firearm of that calibre.

In *R. v. Candelaria*, unreported June 9, 1998, O.C.J., my colleague Lane J., was of the view that casual storage of ammunition does not amount to careless storage, where there is no ready access to guns of that calibre.

**Mr. NARDI's negligent conduct in relation to the ammunition in his van reflects a degree of thoughtlessness, but not to the extent that, in my view, falls below the Findley standard. Count one is, as well, dismissed.**

**I would like to thank counsel for their effort and able assistance.**

**MR. MARTIN: Thank you, Your Honour.**

**MR. P. LEISHMAN: Thank you very much, Your Honour.**

**THE COURT: You are free to go, Mr. NARDI.**

**This is to certify that the foregoing is a true and accurate transcript of my recordings to the best of my ability and skill.**

**C. Peters  
OFFICIAL COURT REPORTER**