

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

against

DONALD EARL QUICK

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE MR. JUSTICE W.B. STEAD
on July 15, 2002, at SIMCOE, Ontario

CHARGES: s.86(1)CC - careless use & storage of firearm
s.117(5)CC - firearms prevention

APPEARANCES:

Miss L. Aicken

Counsel for the Crown

Mr. C. Martin

Counsel for the accused, Mr. Quick

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R E A S O N S F O R J U D G M E N T

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STEAD, J. (Orally):

The accused is charged with one count of careless use of a firearm, contrary to s.86 of the Criminal Code. The facts are not particularly complicated. The accused operates a convenience or variety store known as the Busy Bee, which is located at the intersection of Highways Number 24 and 59 in the Township of Norfolk in this county.

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On the 27th of August of last year at around 3:30 a.m. the accused was in bed at home asleep. His home abuts the variety store and he was awakened by the sound of someone talking. He then heard glass breaking, he got up, retrieved a 12-gauge shotgun which he loaded with number six shot, went out onto his front porch, saw a van parked in front of the store.

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The accused subsequently took a number of photographs to simulate the location of the motor vehicle and its position during the incident. These photographs were entered as exhibits numbers two through seven inclusive.

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The accused while on his porch fired the shotgun into the radiator of the motor vehicle from a distance of 22 to 23 feet. He was not sure if anybody was in the motor vehicle at the time. He indicates he took deliberate aim at the

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radiator. At this point someone exited the store, jumped into the motor vehicle and it began to leave, and the accused again fired the shotgun at the front passenger tire as it was leaving the parking lot. In both cases the accused took deliberate aim at both the radiator and the tire with a view to disabling the motor vehicle until police arrived.

The aforementioned photos show the location of the accused and the motor vehicle when the shots were fired. The motor vehicle was not disabled and departed, and was subsequently located quite some distance away, on fire.

Exhibits one, two, three, four and eight show the damage caused by the accused's second shot at the front passenger tire. Exhibit nine shows the right side and the front of the van, but due to the fire it was impossible to determine what, if any, damage was caused by the accused's first shot to the radiator.

The accused's evidence was that his only intention was to disable the motor vehicle, that he has many years of experience in handling the shotgun he used, and he aimed at and in fact hit exactly what he aimed at. He indicated that no one was in a position to be at risk in the circumstances, due to his ability to aim at and hit exactly what he shot at.

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The shotgun had a full choke bore which has a very tight pattern which allows him to pinpoint his shot. As well he was using number six shot, which is light. From exhibit number three one can see that there was very little penetration in the hubcap by the shot, despite being fired from a distance of only some 22 to 23 feet.

This is the fourth break-in at the accused's establishment since 1994 and he has suffered losses and damage to the windows and loss of property from these burglaries.

On December 30th, 1994, during a similar break-in he took a shot at the tire of a motor vehicle leaving the scene, and was told by Constable Pickering at the time that he was not allowed to do that. The accused was quite open and candid as to what he had done. He told the operator when he called 9-1-1 exactly what he had done and readily admitted to the investigating officer.

The accused and some friends eventually set up a test program using a similar motor vehicle as evidenced by exhibits 15 to 22 inclusive, where Mr. Butts, I think it is, and Stillwell fired the same shotgun with the same ammo at the windshield of the motor vehicle in an attempt to duplicate what they called a worst fact situation if the shotgun originally had been discharged directly at the windshield, which it

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was of course not.

In this situation the windshield was struck but the only thing that penetrated the motor vehicle were a few pellets which just dropped down on the dash and a few glass chips that fell onto the dash. This damage occurred as a result of shots fired directly at the windshield as opposed to shots at the scene which were fired directly into the radiator and at the tire.

It was the intent of the defence to show that there was virtually no penetration of the driver's compartment with shots fired directly at it, and therefore the risk of injury to anyone as a result of an odd stray pellet which might have struck the windshield as a result of the original shot fired at the radiator would be virtually non-existent.

I might add that the motor vehicle was stationary when the accused fired into the radiator, but was moving at an unknown speed when he shot at the tire. Given the distance of travel before which it was shot at as depicted in the photographs, I doubt that it had reached any great speed. As well there was no evidence of any person in the area at the time, or the likelihood that such persons might be in the area at the time of the incident at 3:30 a.m.

Section 86 of the Criminal Code reads as follows

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as it relates to this case: Every person commits an offence who, without lawful excuse, uses a firearm in a careless manner or without reasonable precautions for the safety of other persons.

Counsel for the accused supplied the court with a detailed brief dealing with s.86, including a number of cases which are quite similar to the facts in this case. The standard against which the acts of the accused must be measured is as follows: has the Crown established beyond a reasonable doubt that the action of the accused amounted to a marked departure from the standard of care of a reasonably prudent person in the circumstance of the particular case? The question is has the Crown established beyond a reasonable doubt that there was a danger to anyone as a result of the manner in which the firearm was used by the accused?

The accused is entitled to an acquittal if a reasonable doubt exists that the accused's conduct in the circumstances did not constitute a marked departure from the standard of care, or that reasonable precautions were taken to discharge the duty of care in the circumstances. As well the burden rests on the Crown to establish beyond a reasonable doubt that the accused did not have a lawful excuse for using the firearm.

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The case before the court is for all intents and purposes on all fours with R. v. Thurlow, which is a decision of the Saskatchewan Provincial Court, and R. v. Bowskill, a decision of the Ontario Provincial Court, which were submitted by the defence, where the conduct of the accused in those cases was found not to be careless and the charges were dismissed.

In the case at bar the accused, whose premises were being broken into and who is an experienced marksman, fired two shots from the shotgun using light number six shot at the radiator of the motor vehicle and the tire. It is obvious that he hit what he aimed at. A subsequent simulation of the event established that even if the shot had been fired directly at the windshield there was virtually no danger to the occupants of injury.

There was, in my opinion, even less chance of injury or harm to anyone given the actual placement of the shots. The only intention of the accused was to disable the motor vehicle, and he took care to aim in a location designed to affect that end. There was no evidence that the two shots fired could have hit the individuals involved in the break and enter or any other members of the public.

Upon reviewing all of the facts and the cases submitted, in my respectful view the Crown has

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failed to satisfy the court beyond a reasonable doubt that the accused exhibited a marked departure from the standard of care of a reasonably prudent person in the circumstances, or that there was a danger to anyone as a result of the manner in which the firearm was used by the accused. As well the Crown has failed to establish beyond a reasonable doubt that the accused was without lawful excuse, and the charge will be marked dismissed therefore.

Having said that I want to make it clear that this particular case is fact specific. The fact that the Crown failed to establish the guilt of the accused beyond a reasonable doubt does not distract from what I consider to be a foolish act by the accused. To use a firearm in an attempt to disable a motor vehicle involved in a break and enter, although it may not make out the offence under the Criminal Code, is blatantly foolish.

As the accused indicated, he did not know if the burglars were armed or not. If they had been armed with a firearm the action of the accused might very well have provoked them to retaliate, especially if the accused had been successful in disabling the motor vehicle. The accused might very well have provoked a shootout akin to the OK Coral which could easily have resulted in the serious injury or death to the accused or his wife or the burglars, all over a few dollars in

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merchandise and a broken window.

The advice given by Constable Pickering that the accused could not shoot at a motor vehicle for the purpose of disabling it might not have been absolutely correct, depending on the individual circumstance of the case, but was certainly good advice with respect to the use of common sense. I am sympathetic with the accused's plight as it relates to the burglaries at his business, but in my opinion he would be better served in the future to leave his firearm in the house less a catastrophe occur.

The decision in this case should not in any way be interpreted by members of the public as a sanctioning by this court of the use of firearms in cases of this nature. To do so in my opinion flirts with disaster for the person who uses a weapon, potentially for other innocent members of the public, should anything go awry. At a bare minimum a person may be looking at facing criminal charges if there are reasonable and probable grounds to believe an offence has been committed, and a whopping legal bill to defend the same.

Therefore, my advice is to think twice before you embark on such a course of action, or you might not have the change to live to regret it. That charge is dismissed, sir. The other charge Miss Aicken?

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MISS AICKEN: The other count I believe Your Honour is a firearms hearing?

MR. MARTIN: Yes.

MISS AICKEN: And we will need to fix a date for that.

MR. MARTIN: I would suggest that we use the same evidence and deal with that this morning.

THE COURT: Well you are going to want to call evidence, are you not?

MISS AICKEN: I would like to call evidence in regard to that, Your Honour.

THE COURT: New date?

MISS AICKEN: January the 3rd.

MR. MARTIN: That's probably...

THE COURT: It should likely be heard by someone other than myself, should it not?

MISS AICKEN: I would think it should, Your Honour.

MR. MARTIN: January 3rd will be okay.

THE COURT: Who is here that day?

THE CLERK: You are here that day.

THE COURT: That is not going to work then, or do you have a date when someone else is here?

THE CLERK: Judge Lenz is here on November 25th but only for one hour.

MISS AICKEN: That is insufficient time.

MR. MARTIN: It will take about the same length of time I would think.

MISS AICKEN: I would think we would need five to six hours.

THE COURT: My experience with firearm hearings is they take quite awhile. Is there time on

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January 3rd?

MISS AICKEN: There's ten hours available.

THE CLERK: Yes, there's ten hours.

THE COURT: Well it will be fixed for that date
and you can make arrangements for a switch.

THE CLERK: Okay.

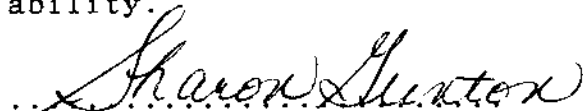
THE COURT: Someone else can come. Firearms
hearing is fixed for hearing the 3rd day of
January, the year 2003, 9:30 a.m. this court.
Set aside six hours.

MISS AICKEN: Six hours.

MR. MARTIN: Thank you, Your Honour.

THE COURT: Thank you.

THIS IS TO CERTIFY that
the foregoing is a true
and accurate transcription
of my recordings, to the
best of my skill and
ability.



Sharon E. Gunton,
Certified Court Reporter.

Transcript Ordered: July 30, 2002

Transcript Completed: July 31, 2002

Ordering Party Notified: August 6, 2002