

PROVINCIAL COURT (CRIMINAL DIVISION)

HER MAJESTY THE QUEEN

against

PETER TRNKOCZY

J U D G M E N T O N M O T I O N

BEFORE HIS HONOUR JUDGE D. Scott
on November 26th, 1984, AT TORONTO.

APPEARANCES

Counsel for the Crown
Counsel for the accused

E.A. McDermott, Esq.
C. Martin, Esq.

TORONTO, Ontario
Old City Hall
Courtroom #42

MR. McDERMOTT: Peter Trnkoczy.

MR. MARTIN: I appear for Mr. Trnkoczy.

THE COURT: Today seems to be the day for dealing with matters that have been either written submissions or materials supplied by Counsel and the Crown. These lists of authorities which I gather from the printing is a result of this new computerized research system.

MR. MARTIN: Yes, I gather the material from the library.

THE COURT: The accused is charged that on or about the 15th day of May, 1984, at Metropolitan Toronto et cetera, did without lawful excuse, stole firearms, to wit: a twenty-two calibre rifle, a four ten calibre, it should be gauge, surely, anyway four ten shot gun and a thirty thirty calibre rifle in a careless manner, contrary to the Criminal Code. The Section of course that is involved is Section 84, sub (2).

Everyone who without lawful excuse, uses et cetera, et cetera, and included stores, any firearm or ammunition in a careless manner without reasonable precautions and safety of other persons is guilty, et cetera.

None of the evidence as to the firearms, their presence in the possession of the accused, either in his apartment or in his van or the ammunition that was found, as to whether the ammunition fit the various firearms to which it was adapted, none of that is in dispute.

All Exhibits went in with no contest and therefore it is quite clear that on that day in question, the accused did have in his apartment the four ten, the shot gun, with some ammunition for it and also the twenty-two calibre rifle with some ammunition that he had in the van the thirty thirty calibre rifle, thirty thirty calibre Winchester unloaded.

5 Exhibit five was some ammunition for that rifle, if I call. I don't have it specifically. Exhibit five was ammunition that fits that rifle.

10 So all of that - I have no contest on any of that. What is, of course, in contest is whether the way in which he had kept these firearms and ammunition and that's just an offence under 84, sub (2), in other words whether he had them stored in a care-

15 The four ten gauge shot gun was in a somewhat different - It was stored in a basically different manner on the evidence from the twenty-two calibre rifle and the thirty thirty calibre rifle, in that it was open in plain view in the bedroom of the apartment, leaning against the wall as I recall, near the bed and it did have a shell in the breach which the accused removed before allowing the police officer to handle the firearm and there were two more shells which fit that shot gun, which were taped to the barrel of the gun.

20 The evidence was the accused had had that gun - Well he said he had had it for the purpose of safety. The evidence was that he had particularly had that shot gun there in that room, in that condition, that is loaded, with more ammunition taped to the breach, while his wife was alive. His wife had unfortunately died just some couple of months, as I recall, before the case came to court and his wife was deceased at the time of
25 the charge being laid. The 15th of May - I'm sorry, the charge was laid on the 28th of May, but at the alleged time of the offence, the 15th of May, his wife was already deceased at that time but had not been deceased for long and he had particularly kept the shot gun in the bedroom in that condition, in that position, so
30 that his wife might have protection in the event of burglars or any other emergency that might arise at the apartment, in the

absence of the accused.

5 He testified he had tried on several occasions to
instruct his wife on the proper use of that firearm, particularly
how to load it and she never did, in his view in any event, she
never did or even could remember. I don't think she said she
never could learn, but she never could remember how to load it.
10 That is what he said, never could remember how to put ammunition
into that gun.

15 So, it wasn't clear exactly what use is to be made
of the ammunition taped to the barrel once the round in the breach
had been fired. However, that was the situation that existed
while his wife was alive and prior to the 15th of May, 1984, she
had, as I say, unfortunately died and so he was living alone at
the time in question, the date in question.

20 There was considerable evidence as to who had
access to his apartment. Briefly it amounted to this, that he
had placed additional locks on all doors to the apartment to which
the superintendent did not have - Sorry, the superintendent had
a key to one of the additional locks he put on the front door,
but he had also equipped the front door with one of these burglar
chains, but the type that has a key lock on it. The superintendent
did not have a key for that lock. If the superintendent came in
the absence of the accused for any purpose to the apartment,
25 emergency or for any purpose, he would not be able to gain access
without breaking or cutting that burglar chain.

30 I got into this particularly because of the four
ten gauge shot gun and the way in which it was stored, open in plain
view in the bedroom. In the evidence I heard, I was of the opinion
at the time and I still am and I'm satisfied of the fact that if
this charge had been laid during the life time of the accused's
wife, that the accused would be guilty insofar as the four ten gauge

shot gun is concerned. I'm not in any doubt of that.

5 It seems to me that faced with the situation where his wife was unable apparently, perhaps unwilling, I don't know, but certainly unable as far as the accused knew, to grasp the fundamentals of the handling of that shot gun, even to the point where she could remember how to load it and to leave a loaded shot gun there for the purpose that it be used by the wife in the event of an emergency, constitutes carelessness in the storage of that firearm.

10 But, that of course is not the situation which obtained on the 15th of May. At that time the accused, who obviously on the evidence is a man of some knowledge concerning firearms, some familiarity with them, in fact he is in business manufacturing a loading device of some sort, which has to do with firearms and this is the person occupying the apartment on the 15th of May. This is the person charged. He was the only person occupying the apartment.

15 The firearms were stored, one of them being a shot gun. He was living alone and had even taken steps, whether or not he was in breach of his lease, and it was suggested to him at the time might well be, but that's neither here nor there as far as this case is concerned. In any event he had taken steps even to exclude the superintendent from the premises in his absence. That's a different matter, of course, from the situation that obtained during the life time of his wife, with respect to this charge.

20 It was suggested by Crown Counsel, during the course of the trial and the accused was questioned along this line by the Crown Counsel and by the Court. It was obviously a matter which was canvassed at some length.

25 The whole subject of the vulnerability of the
30

5 apartment and the van for that matter, dealing with the apartment
for the moment, vulnerability of the apartment to access by
unauthorized persons, burglars to put it bluntly, people who are
breaking and entering. There was a suggestion - I believe there
was evidence from one of the police officers, the apartment was
10 situated in a high crime area, as it was described, many break-ins
in this area. Indeed the accused had recognized this by in fact
installing these extra locks.

There was discussion as to how effective those
locks might be, how difficult it is to exclude burglars despite
locking devices and so on and so on.

15 Of course, in connection with the argument that if
an accused person leaves for example weapons loaded, as opposed
to leaving them unloaded with let us say the ammunition locked in
a separate container which is not the case here. The ammunition
box is unlocked or if the accused had left weapons without special
locks on the triggers and there's no evidence that that was done
20 to any of these firearms and therefore the suggestion whether the
accused was being careless. Having in mind the possibility or
even certain areas of probability that people might break into the
premises and one of the things they would be looking for in
particular, according to the police evidence, and I have no reason
to disbelieve it, would be weapons and the potential danger that
25 that constitutes.

I can appreciate all of that argument but, I am not
persuaded that Parliament in enacting Section 84, sub (2) or (d)
in amending Section 84, sub (2), fairly recently, to move from the
word dangerous to the word careless.

30 This is the point that was relied upon by Crown
Counsel in this case. The standard of care has been deliberately
lower, but on which if the accused fails, of course would be criminal

conduct under that Section.

5 I am not persuaded that Parliament has by that action placed a high degree of care upon a person to ensure when the person stores a firearm in their own dwelling house, that they must take extensive precautions not only against the normal hazards which might apply, such as for example if the premises was occupied by children, or if it has access, if it's accessible by children in 10 the normal course of events. I can think immediately of a person who may not have children of his own, but who may have young children or close relatives who comes to visit, all this type of thing.

15 I am not satisfied that Parliament intended in Section 84, to place a high standard of care upon persons storing a firearm in their own dwelling house and that's subject to any of those hazards in the normal course of events. I should say in the normal, unlawful course of events.

20 But, to go beyond that and require the person to take a high standard of care in their own dwelling house against the exigencies that unlawful break-ins would occur. I realize that that would be Parliament's mind to a certain extent and a person would certainly not be entitled to store firearms in a manner which would invite a burglar to break in and avail himself or herself of that weapon.

25 It's simply I'm not persuaded that that Section could be interpreted to mean that Parliament has gone so far as to make a person storing any firearm almost an insurer against crime. If that's what Parliament is intending, then Parliament had better indicate it very clearly. It will be assumed, certainly by this Court and if that is Parliament's intention then I actually 30 think that Parliament would be much better advised to turn their attention to some meaningful change in the law to discourage the

break and enter actors in the first place.

5 I suppose there is always a tendency in our society to keep more and more research than recreation upon the basically law abiding person and obviously that's the kind of person who is going to strive to obey the law. It gets to the point where the law abiding can hardly move for restrictions, all of which are
10 ignored by the criminal anyways. There is no restriction put on the criminals. There's no meaningful deterrent for those engaged in crime, but those who don't are so restricted in their daily lives they can get to the point they can hardly move.

Now, that of course is an extreme situation I'm outlining, but that seems to becoming a tendency in our society.
15 I don't think Parliament has gone that far in its amendment of Section 84 (2) with the use of the word careless, when it was at one time dangerous.

So, it's a matter in the present case as I said of the manner in which the accused stored these weapons and the ammunition. First of all, in a dwelling house, having in mind
20 the normal, foreseeable risks that he should expect to exist with respect to that dwelling house.

I am not persuaded that he should take any extreme additional precautions against the situation that some unlawful person would break into his dwelling house.

He is entitled to protection from that kind of thing.
25 He is entitled to assume that society, with its laws, will prevent people from breaking into his dwelling house. Now, if society was not willing to take any steps to do that, then I am not prepared to say that society can attack other ways. I can simply say well, if a person can be broken into we'll put responsibility
30 extra on him in case somebody breaks in. That's a tendency which perhaps seems as if it's an easy solution to a lot of problems and

5 not a proper one in my view and I am not going to apply it in this case, unless there was some indication here that the accused were careless as to a possible break-in. I would not apply that principle.

10 Here we have evidence that the accused, recognizant of the possibility of break-in and had taken steps, positive steps to try and combat by installing extra locks whether or not it would necessarily be effective it is in the context of this case, not as important as the fact that the accused obviously thought of this problem and tried to do something about it.

15 I am not satisfied, as I say, in the new situation that existed on the 15th of May, with his wife being deceased, that his conduct, with respect to the firearms in the house, falls below the standard required under Section 84, sub (2).

20 Now what about the van. Again we are told that the van, which was locked, the evidence was that the van was locked. The evidence was somebody, unequivocal on the matter of whether the firearm was readily visible.

25 At the conclusion of the trial I was somewhat - I wasn't satisfied that it had been proven that that gun was in plain sight. It seemed to me there was evidence from one of the police officers that if somebody looked in the window they could see it, but it seems they didn't look in the window, something to that effect. It wasn't clearly demonstrated, in any event, that that gun was in plain view in the van. In any event there was no doubt the van was locked. The rifle wasn't laid out, although there was some ammunition present in the van in a different location and again the accused thought he needed it for safety.

30 It was pointed out by someone during the course of the argument that there's nothing unusual about people going hunting and carrying firearms and ammunition in the vans. It was alleged

5 that this van was parked in an underground garage of this apartment and that it is a high risk area again for break-ins into motor vehicles.

10 It wasn't - I don't believe the Crown actually went so far as to say that in view of that it would be impossible for a person to have a firearm in a locked vehicle belonging to that person without breaching 84, sub (2) that it applies to the break-ins to vehicles. I don't believe the Crown went that far. There seems to be a tendency to go in that direction. I'm not saying my remarks apply in each respect to a dwelling house.

15 It simply amount to this, we are living in a society which is becoming increasingly burdened with certainly certain types of crimes. I'm not saying that all crimes are on the increase, but break and enter into dwelling houses and breaking into vehicles, parked vehicles, are two crimes which are certainly on the entry, very much so. It's an epidemic and it's a very bad situation.

20 But, with respect to both dwelling house and vehicles, I repeat it is not, in my view, a substitute for the enactment of laws and the enforcement of laws which will provide a meaningful deterrent for persons who are committing those crimes. It is not a substitute for that, to attempt to increase and increase and increase the duty of care upon normally law abiding citizens to compensate for an increase in crime by others in society. That's the tendency and in a sense a very easy solution, not in my view to be encouraged by the Court certainly unless and until there is some meaningful effort to attack the situation where it should first be attacked, namely at the end where the criminal is breaking into the houses and vehicles.

30 We'll have to get to the point some day where there will have to be laws passed that forbid anyone from having a

5 firearm anywhere that some criminal is going to get ahold of, maybe we'll come to that. We're not at that point yet.

I have carefully studied all these cases Mr. Martin has provided and I am only going to mention two of them by name. There are several here and they were gone into very carefully by Mr. Martin in his argument. I mention particularly Regina versus Derkosh, D-E-R-K-O-S-H. That's a decision of the Alberta Court of Appeal, Volume 52, C.C.C., 2nd Series, page 252 and then there was the last case relied upon in the Defence list of authorities and that is Regina versus Harvey, it's an unreported decision of my brother Judge Purvis. It's either June or January 17th, '84.

15 MR. MARTIN: It was January, Your Honour, January 17th, 1984.

20 THE COURT: This is in a case where an accused left a loaded shot gun in a locked apartment. I had this writing deciphered at one point. The accused knew the apartment would be shown to prospective tenants and asked the superintendent not to show it unless he was there because of the firearm in it and that was found not to be careless storage.

25 Here we have surely the equivalent of that, if not even perhaps, not executed in perhaps the proper manner or maybe even if I hinted perhaps not in a manner conforming to the police, I don't know. I don't know, but the accused took the step of excluding the superintendent by a lock without any consultation with the superintendent and I suppose one can imagine all kinds of scenarios. Suppose if a pipe had burst and the superintendent had to come in to repair the pipe and he was accompanied by his little niece who runs around and gets ahold of a shot gun and shoots herself and so on.

30 As Mr. Martin indicated and I agree, we can always pose these scenarios but must surely at some point get to the point

5 where it's remote enough that it's not really in the foreseeable
ambit of risk and I agree that that is so in that case. It's
a matter of course of course to the Court and to Counsel for sure,
but again it's not a matter the legislation can necessarily
encompass and it isn't encompassed by 84, sub (2).

10 Returning to the Harvey case, the accused was the
only person living in the apartment. There we have a parallel
with the present case. Another superintendent who didn't get the
message when the tenant did come in. In any event it was held
the tenant, the accused tenant had taken reasonable precautions.

15 Now it isn't indicated and I don't have the benefit
of a copy of the unreported reasons. I have Counsel's notes on
the Harvey case, which he made from his research, but it may be
that in the Harvey reasons, if they've ever been reported since,
I guess not, but perhaps my brother Purvis made special reference,
particularly reference to Derkosh, I don't know.

20 But, certainly out of all the authorities which are
cited here, Derkosh is, I'd say, right at the, sort of the touch
tone or the reference point. This Court has to form a decision
on this particular area of the law. We have good authority with
the Alberta Court of Appeal, strong authority. I will just
quote briefly from it.

25 Mr. Justice Hadad (PH), wrote the decision of the
Court, page 254, at the bottom. Says:-

30 "The duty is imposed on the
possessor of firearms and
ammunition to ensure he is
not carrying them in the
manner which it causes
them to be stored, having
regard to all the circumstances.

5 In positive words there is a
duty to take due care as these
are potentially dangerous
articles and a measure of
safety is necessary."

And then at page 255, the first full paragraph:-

10 "Without pretending to exhaust examples
of a lack of due care, I would
suggest that where the manner
of storing has the appearances
of irresponsibility or has been
15 faultlessly selected, or projects
an attitude on the part of an
accused of simply not caring.
and the failure to exercise
due care to be said to have been
20 established."

20 In this present case, the only firearm which, in
my view, approaches closely to a situation where it might come
within, where it might involve a falling below the standard of care
in 84, (2) is the shot gun in the bedroom.

25 I have already said the view that I have would have
had if the wife were alive, the wife of the accused were alive.
I consider on the situation that was in existence. The accused
had taken reasonable precautions with respect to that weapon.

 it goes without saying then, a rifle in the bedroom
closet, the twenty-two and the thirty thirty in the van, were in
my view stored with, under all the circumstances, reasonable degree
of care.

30 The Information is therefore dismissed.

MR. MARTIN: Thank you. I'm grateful for Your

Honour's careful analysis of the law in this case.

5 THE COURT: Well Mr. Martin, I must say again I
got very well the impression that your client is a little bit
blase about firearms and certainly what he did, in order protect
his wife when she wasn't able to learn how to use that weapon,
would certainly have resulted in a conviction if that had been
10 the facts. I'm rather surprised that you would take that chance,
considering his overall knowledge of firearms, but hopefully this
case will sort of get him to rethink the whole question.

MR. MARTIN: I'm sure he will. I'm particularly
grateful to Your Honour for going into the problem of the obliga-
tion of the citizen as opposed to the other points.

15 THE COURT: You could see during this case just how
definite that was. You have to take more and more and more care
because one might be broken into and I think I made it quite clear,
it seems to me there must be limits put on that. It's an
unfortunate situation. There's no doubt in my mind a lot of
20 people are broken into and firearms are stolen. It's a very
dangerous situation, but I can't - I don't think Parliament has
yet tried to solve it through 84, by almost making firearms owners
surer against crime. I don't think they've gone that far.

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

30 L. AIKEN
OFFICIAL COURT REPORTER