

**ONTARIO COURT OF JUSTICE
GENERAL DIVISION)**

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

PIERRE YIK TSUI the accused

Heard before the HONOURABLE MR. JUSTICE JARVIS, without a jury, on July 27, 1998, at 361 University Ave., Toronto.

REASONS FOR JUDGMENT

A P P E A R A N C E S:

Mr. A. Pilla	for the Crown
Mr. C. Martin	for the accused

July 27, 1998

THE HONOURABLE JUSTICE JARVIS' REASONS FOR JUDGMENT:

THE COURT: Mr. Tsui stands charge with ten counts of firearms offenses. There is little dispute regarding the factual basis of most of these counts. Before dealing with each count specifically, I will sort out the background facts as I find them to be.

Pierre Tsui is a native of Hong Kong. He is 44 years old. He came to Canada in July 1972. After some schooling here, he began a successful career as a salesman. In 1975, he married his wife Isabelle, They had two sons, the younger of whom, Jeremy, was 7 years old on December 10, 1996 when the police raid which gave rise to these charges took place.

By December 1992, Mr. Tsui was able to establish his own business wholesaling used cars and seems to have prospered. In the meantime, he developed an interest in collecting guns which began in 1981. His interest was mainly in the historical aspect of firearms and ammunition although he did belong to gun clubs and did some shooting there.

By the time of the events giving rise to these charges, he was visiting gun shows most Sundays. These were located in most parts of the province. Typically, he would take a selection of arms, ammunition and military artifacts to these shows to sell or barter. At the shows, he was also on the look out for firearms and ammunition which would enhance his

collection which by 1996 comprised 700 to 800 firearms, 400 of which were registered as restricted weapons. He denied ever obtaining, possessing, trading or selling any illegal or restricted arms. To facilitate the legal requirements for the safe storage of firearms, Mr. Tsui had two secure vaults constructed in his basement in which he stored his collection of guns and ammunition separately. At the time that these charges arose, he was living at 2 Wall Street in Unionville with his wife and two sons and his in-laws. None of the other occupants of the house testified at the trial.

The investigation of Mr. Tsui had its genesis in the arrest of David Broome who had attempted to sell illegally certain firearms to Detective Greg Martin who was operating under cover at the time. Through Mr. Broome, Detective Martin met Mr. Tsui.

As a result of this and other information, the police obtained a search warrant for Mr. Tsui's home. Much of that search was videotaped and the nature of Mr. Tsui's home including the security system, the manner of storage of firearms and what was found and where during the search is reflected in that videotape which was entered into evidence and for that reason the fruits of the search are largely beyond dispute.

At the outset, I was advised of the following concessions made by the defence:

1. The firearms found at 2 Wall Street during the search on December 10, 1996 were firearms as defined by Section 84(1) of the Criminal Code.
2. The ammunition found that day at that address conformed to the definition of a firearm in the Criminal Code.
3. The identity of Mr. Tsui was not in issue.
4. The court's geographical jurisdiction was not in issue.
5. There was no issue as to the continuity of the seized weapons while in police custody.
6. Mr. Tsui agreed that he lived at 2 Wall Street, Unionville.
7. There was no issue as to the admissibility of certain wiretap information.

I will now turn to the counts and will deal with them in chronological order as far as possible.

Counts 7 and 8 - Ishipore Rifle

There is no dispute that Mr. Tsui possessed the gun nor that he sold it to Mr. Broome as alleged. The dispute is in whether it was fully automatic at the time of the sale. It is

suggested on Mr. Tsui's behalf that the gun was altered by one Frank Giermonte who possessed the gun on consignment from Mr. Tsui or that the gun was altered by Mr. Broome after he acquired it and before he was arrested by Detective Martin.

It was agreed by the Crown that this particular firearm had been manufactured as a semi-automatic weapon. It follows that its modification to a fully automatic weapon occurred after it left the factory in Ishipore, India.

The forensic evidence failed to establish the likely date of the conversion.

Mr. David Broome testified. He is participant in the witness identification program having made an extensive statement to the police upon his arrest implicating Mr. Tsui and others. I know nothing of the circumstances of the other allegations by Mr. Broome.

I must also be careful to consider the evidence on each count separately and bear in mind the onus on the Crown to prove the guilt of the accused on each count beyond a reasonable doubt.

Mr. Broome had developed an interest in firearms and was a collector. By 1984, he had developed an interest in fully automatic rifles and machine guns. He had met Pierre Tsui at the gun shows and at gun shops. At some point in 1994, he expressed interest in fully automatic firearms to Mr. Tsui. Mr. Broome knew that possession of such weapons was illegal. He said that Mr. Tsui told him that he had such weapons. Mr. Broome by then had a Firearms Acquisition Certificate and often had a table at gun shows at which to sell, buy or barter guns. At some point before December 1994, Mr. Tsui told Mr. Broome that he had a functioning machine gun and a deactivated weapon for his consideration and told Mr. Broome to go to a gun shop called Spartic Arms after hours one evening. The precise details of that meeting are in dispute but it is clear and I find it established beyond a reasonable doubt that the Ishipore changed hands that night and that it was sold by Mr. Tsui to Mr. Broome.

As to whether the gun was fully automatic at that point, it was Mr. Broome's evidence that Frank Giermonte and/or Mr. Tsui demonstrated its automatic function without ammunition that night. It is clear that the Ishipore was fully automatic at the time of Mr. Broome's arrest as it was the evidence of Detective Martin, which I accept, that the weapon was so functioning when demonstrated to him by Mr. Broome at a gun club earlier in the day.

Detective Martin had been introduced to Mr. Broome by a third party. He had discussed with Mr. Broome the possibility of purchasing Mr. Broome's entire inventory of firearms for \$6,000 in early February 1995.

Detective Martin said that by pre-arrangement he had met Mr. Broome on February 23,

1995 at the Burlington Rifle Club. There he fired three guns. One of the them was the Ishipore and at that time it was fully automatic. After they left the club Detective Martin signalled to the surveillance officers who were with him and Mr. Broome was arrested. Later a search warrant was executed at Mr. Broome's residence and a number of firearms and firearms related documents were seized. The firearms and documents were retained by the police. Mr. Broome's Firearms Acquisition Certificate was never returned.

At the time of Mr. Broome's arrest, Detective Martin was the officer in charge of an ongoing investigation into the illegal sale of fully automatic firearms. At that time, the investigation was focusing on Frank Giermonte and Spartic Arms and Detective Martin's initial notes indicate that Mr. Broome told him that he bought the Ishipore from Frank Giermonte and that it was "fully automatic when he bought it from Frank and Frank knew it." The notes also record "I fired it at the range. He bought it from Spartic Arms."

Mr. Broome was nervous and upset when arrested particularly when he realized that Detective Martin was a police officer. He offered to assist the police almost immediately.

Before Mr. Broome was arrested, the police knew nothing of Mr. Tsui nor of a number of other individuals implicated by Mr. Broome in apparently illegal firearms activity. Mr. Broome eventually pleaded guilty to two firearms offenses in June 1995 before Mr. Justice Salem and received a suspended sentence and a number of other charges were withdrawn. Mr. Broome was an enthusiastic participant in the investigation from the beginning and his cooperation continued before and after his convictions. Part of his role was to introduce undercover officers to suspects and he did so here by introducing a Detective Robinson to Mr. Tsui.

Mr. Broome's information was that he had purchased the Ishipore in a fully automatic state from Mr. Tsui. The investigators hoped to purchase other fully automatic arms from Mr. Tsui.

In cross-examination, Detective Martin agreed that the wiretaps used to investigate Mr. Tsui were inconclusive and that the search warrant of December 10, 1996 netted no illegal firearms. There were over 400 restricted weapons in Mr. Tsui's house and all were properly registered. Detective Martin was impressed by Mr. Tsui's efforts to create a safe storage area.

The charges relating to the Ishipore rifle essentially amount to a credibility battle between Mr. Broome and Mr. Tsui. It was Mr. Tsui's evidence at trial that the Ishipore rifle was semi-automatic and had not been converted by him to fully automatic mode. The rifle was sold to Mr. Broome in that condition and Mr. Broome must have altered to make it fully automatic. Mr. Broome admitted that he had the knowledge to have made such a conversion although he had never done so. He was faced in cross-examination with his evidence at the preliminary hearing in which he had identified Mr. Giermonte as the person who

demonstrated the Ishipore to him at Spartic Arms in its fully automatic mode. He said that he was confused at the preliminary hearing and that he had not had a chance to review his earlier statements to the police. He said that he had identified Mr. Tsui as the person who had demonstrated the gun to him and that he preferred his earlier statement to the police. He said that at the trial he had no clear recollection of who had demonstrated the weapon to him.

Mr. Tsui said that he had been contacted by Mr. Broome who knew that he had the Ishipore and a deactivated Lithgow firearm on consignment at Spartic Arms. He agreed that a meeting had taken place at Spartic Arms but he denied that the Ishipore was demonstrated as fully automatic because it simply was not fully automatic when it was in his possession. He agreed to sell the Lithgow and the Ishipore to Mr. Broome and took the Ishipore home with him and gave Mr. Broome the papers to fill out. He knew that the Ishipore would have to be presented for inspection to facilitate the transfer to Mr. Broome. He cooperated in that process. He knew nothing of the Ishipore being rendered fully automatic.

There is no doubt of course that the Ishipore was fully automatic when Mr. Broome was arrested. The issue as to its state when sold by Mr. Tsui is a difficult one. I find it implausible, however, that a person in Mr. Tsui's situation would have been prepared to attempt to slip an illegally altered semi-automatic weapon past the authorities to facilitate a transaction which does not appear to have involved a great deal of money. I am mindful of Mr. Broome's circumstances when he told the police of Mr. Tsui's involvement. He was under arrest and had been caught "red handed" in possession of a fully automatic weapon by a police officer. His circumstances were such that he had everything to gain by prevaricating and I suspect that he did so. I am further affected by the discrepancies in his evidence at the preliminary hearing and the discrepancy with the original information recorded by Detective Martin. While Mr. Broome's evidence regarding the Ishipore may very well be true, I am left in a state of doubt by the surrounding circumstances. I must say that I was unimpressed by Mr. Broome's evidence in general. I found him to be a cold and calculating person. He struck me as someone who would do anything to protect his own interests. Some of his evidence had the ring of truth and some was consistent with that of Detectives Martin and Robinson. I found the latter officers to be straight forward and reliable. Neither attempted to over reach and both were fair in responding to questions in cross-examination.

The essential issue regarding the Ishipore was its status as of the date upon which it was acquired by Mr. Broome. The evidence that I have heard leaves me in a reasonable doubt as to whether it was fully automatic at the time it was sold to Mr. Broome by Mr. Tsui and for that reason I must acquit him of counts 7 and 8.

Counts I and 2 - March 1, 1995

Mr. Tsui stands charged that on March 1, 1995 he possessed and sold a prohibited weapon namely an MG34 machine gun. This offence was investigated with the assistance of Detective Constable William Robinson. He was introduced to Mr. Broome by Detective Martin. Detective Robinson was operating under cover when introduced to Mr. Tsui by Mr. Broome on March 5, 1995. At trial and at the time of his contact with Mr. Tsui, Detective Robinson effected long hair and a rough exterior suggesting possible involvement as a biker.

Detective Robinson had been told of Mr. Tsui by Mr. Broome who said that Mr. Tsui had a receiver or machine gun for sale. Detective Robinson and Mr. Broome attended Mr. Tsui's place of business at 780 Ellesmere Road on March 1, 1995. When they arrived, Detective Robinson purchased the receiver for an MG34 machine gun from Mr. Tsui for \$200.00. He did not have a Firearms Acquisition Certificate. Neither he nor Mr. Broome were asked for one. Detective Robinson said that he was in the market for a sten gun. Mr. Tsui indicated he had some guns on consignment with Frank Giermonte who had been arrested and charged with firearms offenses. Mr. Tsui was not sure whether he could get back his gun which had been seized at Spartic Arms. The MG34 was examined by Mr. Michael Clark who testified for the Crown. He is with the Centre for Forensic Sciences and is a firearms expert. He said the weapon constituted the basic part which accepted the bolt assembly and barrel and trigger guard and trigger. With these parts it could be a fully functional machine gun. All of these components are intended to be field stripped and are easily assembled without tools. This rifle is not difficult to assemble if the parts are available. It is a support weapon for infantry from WWII with fire power of 1200 rounds per minute and is capable of semi or fully automatic use when assembled. This MG34 receiver is a firearm as defined by the Criminal Code and is a prohibited weapon based on its design and unaltered status.

Mr. Tsui in his evidence agreed that he sold the item to Detective Robinson and/or Mr. Broome. He said that neither of them told him that they were buying the item for any illegal purpose. He said that he was asked by Detective Robinson if he had any parts and had replied that he had an M34 receiver. He denied that either had asked him how the receiver might be made fully automatic.

The Crown submitted that Parliament intended to extend the definition of firearm when they enacted the current definition of that term. Firearm "means any... and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm." In the case of Regina v. Covin and Covin (1983), 8 C.C.C. (3d) 240 (S.C.C.), the Supreme Court of Canada in the decision of Chief Justice Lamer considered this section as follows:

"It is apparent that the section extends the definition of "firearm" to include anything that has the potential of becoming a firearm through adaptation. The section goes on to extend that category to include "frames and receivers", and by reason thereof the section when read literally (at least in its English version) includes these frames and receivers irrespective of their adaptability."

Chief Justice Lamer then goes on to consider the French version of the section:

"The French version is not without its own difficulties, but, as I said, I believe the central idea is more easily perceived and frames and receivers must eventually meet the test of adaptability to become dangerous weapons ... In my view, the acceptable amount of adaptation and the time required therefore for something to still remain within the definition is dependant upon the nature of the offence where the definition is involved. The purpose of each section should be identified and the amount, nature and the time span for adaptation determined so as to support Parliament's endeavour when enacting that given section."

See also Regina v. Hasselwander (1993), 81 C.C.C. (3d) 471 another decision of the Supreme Court of Canada and in particular the decision of Mr. Justice Cory at pp. 482 and 483.

In the present case, it was the evidence of Mr. Clark that the gun assembly was designed for assembly in the field and that given the availability of parts it could easily be done. There was no evidence before me directly as to the availability for parts except some evidence on the part of Mr. Broome that he had been told by Mr. Tsui that the parts were available at gun shows and at a named dealer. It is argued on behalf of the Crown that the use of the words "whether or not" in the definition of "prohibited weapon" must be taken to indicate an intention of the part of Parliament to broaden the definition of prohibited weapon. In this connection, he cites the decision of the Ontario Court of Appeal in Regina v. Barnes (1996), 27 O.R. (3d) 626. In that decision, Mr. Justice Goodman said on behalf of the court at p. 12:

"By virtue of the 1992 amendment to section 84(1) the definition of "prohibited weapon" was extended to cover a firearm capable of or assembled support Parliament's endeavour when enacting that given section."

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"By virtue of the 1992 amendment to section 84(1) the definition of "prohibited weapon" was extended to cover a firearm capable of or assembled or designed or manufactured with the capacity of firing projectiles in rapid succession during one pressure of the trigger, whether or not it had been altered to fire only one projectile with one such pressure. The effect of this amendment was to include in the definition of "prohibited weapon" automatic firearms which had been properly altered and would not have been deemed to be a "prohibited weapon" in the definition as to read prior to August 1, 1992 .. there can be no doubt that Parliament, by this amendment, was continuing to accomplish its purpose of more effectively protecting the public from the dangers involved in the possession of automatic firearms."

It is clear from the reading of the Barnes decision that there was "uncontested evidence at the forfeiture hearing... that each arm was capable of being converted to a fully automatic by use of hand tools and without replacement of any part and that the conversion could be accomplished in about 10 minutes."

In the present case, there was no direct evidence as to the availability of the parts necessary to assemble the M34 to a fully automatic status. It was Mr. Broome's evidence that he and been told by Mr. Tsui that such parts were available. I have indicated my difficulty with Mr. Broome's evidence and the absence of positive evidence as to the availability of parts and in these circumstances I am unable to conclude that the M34 was a firearm in the sense that it was readily

adaptable to becoming a prohibited weapon.

Without some evidence as to the availability of parts, such a finding is not possible and I note that in the cases referred to me by the Crown the facts generally were that the parts required to complete the weapon were "readily available". I was also referred to a decision of the Canadian International Trade Tribunal in the case of Special Munitions Limited v. The Deputy Minister of National Revenue. In that decision, the Tribunal in determining whether or not the reconversion of a firearm to an automatic weapon can be accomplished, states that:

"It is not determinative whether replacement parts are actually available nor is it determined whether such weapons are brought into the country by a person knowledgeable about weapons or otherwise. Regardless of the availability of replacement parts ... the Tribunal would have found on the facts that the firearms in issue were prohibited weapons because of the ease of their reconversion."

I do not consider myself bound by this decision and reiterate my finding that the ready availability of the necessary parts to convert this item to a fully automatic weapon have not been proved and I therefore find Mr. Tsui not guilty of counts 1 and 2.

Counts 3 and 4 -Failure to Produce Firearms Acquisition Certificates

The evidence regarding these charges is relatively simple. On January 4, 1996, Mr. Tsui sold to Detective Robinson in his under cover capacity two firearms which were semi automatic and therefore restricted firearms. On January 4, the firearm was an M14 semi automatic rifle and on February 27, it was a Norinko SKS firearm. On neither occasion did he ask either Mr. Broome or Detective Robinson to produce their Firearms Acquisition Certificate. It was said by Mr. Tsui in his evidence that he thought that he was selling the firearms to both Detective Robinson and Mr. Broome. I am satisfied beyond a reasonable doubt that in both cases, Detective Robinson was the obvious purchaser of the firearms in question. He paid the money and took possession of the arms. The fact is that neither Mr. Broome nor Detective Robinson had Firearms Acquisition Certificates.

It is argued on Mr. Tsui's behalf that the offence created by section 97 is not made out where the purchaser is a peace officer. He recited the provisions of section 98 of the Criminal Code which provides as follows:

"98(1) Notwithstanding sections 95 to 97, ... (b) a peace officer ... is not guilty of an offence under this Act by reason only that the person... acquires possession in any manner of any weapon... in the course or duties or employment of that person."

It was further argued on Mr. Tsui's behalf that since a peace officer is not guilty of the offence in acquiring a firearm in the course of his duties that persons who transfer weapons to peace officers similarly are not guilty of an offence. I am not swayed by this argument. Police officers must have the ability to operate under cover and in so doing to commit acts which might otherwise be crimes. Simply, codifying this immunity in section 98(1) of the Criminal Code does not alter the nature of the transaction itself. I am satisfied beyond a reasonable doubt that what took place was that the two firearms in question were sold to a customer who did not have and did not produce nor was asked to produce a Firearms Acquisition Certificate. The offence is therefore made out and the

accused, Mr. Tsui, is hereby found guilty of counts 3 and 4.

Counts 5 and 6 - Large Capacity Magazine Cartridges

Mr. Tsui is charged that on October 20, 1996 he possessed and sold to Detective Robinson a quantity of large capacity Bren cartridges contrary to the Criminal Code and its regulations. It is not disputed by the defence that the item sold offended the provisions of the Code but rather that Mr. Tsui did so in ignorance and without knowing that he might thereby be committing an offence.

The facts are briefly stated as follows. On October 16, 1996, Detective Robinson was at a gun show in Brantford with Mr. Broome. They were standing at a table looking at ammunition magazine for an automatic Bren gun with 30 round capacity. Mr. Tsui came up and said to them that the magazine was over priced and that he knew what they wanted and they did not have to buy it there. Two weeks later, on October 20, 1996, Mr. Broome and Detective Robinson attended a gun show at Jane St. and Highway 7. There they separated and Detective Robinson encountered Mr. Tsui who said "Billy, I have the stuff in the truck for you". Eventually, Detective Robinson met Mr. Tsui in the parking lot at a blue Chrysler van. Mr. Tsui opened the driver's door reached in a lifted out a green metal box. Detective Robinson looked in the box. It contained 12 magazines each containing 30 bullets for a Bren gun. Detective Robinson paid to Mr. Tsui the \$150 he requested and Detective Robinson took the ammunition away. No paper evidence of the terms of this transaction changed hands nor was a receipt issued. Detective Robinson did not say to Mr. Tsui that he was a police officer.

Mr. Tsui testified that he had encountered Detective Robinson at the Brantford show looking at Bren magazines. He asked him what he was looking for and Detective Robinson told him 8mm. Bren ammunition. Mr. Tsui told him that the magazines he was looking at were not the ones he needed and that he would pick up some for him. Two weeks later at a show in Toronto, Mr. Tsui knew someone who had brought in a steel green box with appropriate Bren ammunition. He bought it from him without opening the box and paid \$150. He later saw Detective Robinson and said that he would charge him the same \$150. Detective Robinson did not open the box in front of him and walked away. Mr. Tsui said that he never looked into the box and did not know if the magazines were illegal or if they had been properly blocked so as to be legal. He had never been asked by Detective Robinson or Mr. Broome for illegal magazines. He said that it never occurred to him that he had purchased prohibited magazines for Detective Robinson and had sold them to him.

I do not accept Mr. Tsui's evidence. It simply defies belief. At its best, it can be termed "willful blindness". He was a very experienced gun collector and dealer and clearly knew that the magazines he sold were illegal. To sell ammunition without satisfying himself of its legality was to invite disaster.

Willful Blindness

There was evidence indicating that it might be difficult to detect an unaltered Bren magazine and therefore hard to know that it was illegal. In view of the fact that Mr. Tsui's evidence was that he had not even opened the box, any such difficulty in detecting alteration is of no assistance to him.

The possession and sale of the magazines were clearly illegal pursuant to sections 90, 95 and 84(f) and the regulations passed thereunder. The doctrine of "willful blindness" has been considered by the Supreme Court of Canada in Regina v. Sansregret (1985), 18 C.C.C. (3d) 223 at p.223. Stated alternatively, the principle arises when one should make enquiries to satisfy himself of the legality of whatever conduct is in question, but instead, one turns a blind eye.

I accept the evidence of Detective Robinson without question. I reject the evidence of Mr. Tsui with respect to the Bren magazines and I consider it established beyond a reasonable doubt that he knowingly sold the illegal Bren magazines to Detective Robinson and/or was guilty of willful blindness in so doing. For these reasons, I find him guilty of counts 5 and 6.

Counts 9, 10 and 11 - Search of 2 Wall Street of December 10, 1996

Mr. Tsui stands charged with having stored a quantity of rifles and having stored a quantity of cartridges in contravention of section 86(2) of the Criminal Code. Section 86(2) makes it an offence to "without lawful excuse, use, carry, handle, ship or store any firearm or ammunition in a careless manner or without reasonable precautions for the safety of other persons". The accused further stands charged that on December 10, 1996 he stored firearms in a manner contrary to regulation 116(l)(g) contrary to section 86(3) of the Criminal Code. The applicable portion of regulation 116(l)(g) is section 6 which provides as follows:

"A person may store a restricted firearm only if the restricted firearm

(a) is unloaded;

(b) is

(i) rendered inoperable by a secure locking device and is stored in a container, receptacle or room that is kept securely locked and that is constructed so that it cannot totally be broken open, or

(ii) stored in a vault or safe or a room that has been specifically constructed or modified for the secure storage of restricted firearms; and

(iii) is not stored with cartridges, unless the cartridges are stored in a container or receptacle described in (b)(i) or in a vault or safe referred to in (b)(ii).

On December 10, 1996, the police executed a search warrant at the Tsui residence at 2 Wall Street. Mr. Tsui was not at home. The officers were granted entry by Mr. Tsui's mother-in-law who was given a copy of the warrant. Several of the officers who participated in the search testified. Much of what they saw was recorded on a videotape which forms part of the evidence.

Mr. Tsui had a large collection of firearms and ammunition which were generally kept separate in two basement rooms with steel doors and heavy locks. The number of weapons was large. Among the weapons were a number of restricted weapons which were within the secure rooms and properly registered with the authorities. The basement rooms were locked when the police arrived and were unlocked by Ms. Alves, Mr. Tsui's mother-in-law.

The search also disclosed the existence of firearms, i.e. rifles, in a box at the foot of the stairs in the front hall leading to the upstairs of the house with a box of military or "hardball" ammunition beside it. No evidence was led that the ammunition found with the rifles matched the rifles.

Ms. Alves was observed by one of the officers to subtly close a hall closet which, when later opened, was found to contain several long guns including shotguns and an antique weapon.

The officers also found an office with its door open which opened off the hallway. This room was discovered to contain a rifle and a quantity of ammunition in various containers including open and closed cardboard boxes, open plastic containers and bowls.

The main floor office or den had a normal household lock as did the hall closet. The closet had been opened by Ms. Alves with a key at an officer's request.

The house also had an electronic security system with several "panic" buttons. None of the windows was barred or covered with steel mesh. The evidence was not clear as to whether the other doors to the house were locked or unlocked.

At the time of the search, the elderly in laws of the Tsui's were in the house.

Mr. Tsui indicated that the ammunition was in the hall because he was in the process of sorting a large amount of ammunition he had acquired at a sale. The rifles and ammunition in the hallway had been left there when he returned from a gun show on the weekend. As I have indicated, Ms. Alves obviously had access to keys to the hall closet and to the secure rooms in the basement and to that extent access to those rooms was possible to an intruder prepared to force her to open the rooms.

It was submitted on behalf of Mr. Tsui that the temporary placing of guns and ammunition outside of the secure rooms was not "storage" within the meaning of the regulations. I do not accept that submission. The high standard of care imposed on the possessor of these dangerous objects cannot be lessened by virtue of the failure to observe that standard. From the moment of Mr. Tsui's acquisition of the firearms and ammunition found by the police in the front hall, hall closet and the front den, he was obligated by law to obey the strictures of section 6 of regulation 116(l)(g). The situation depicted on the videotape and observed by the officers is a clear violation of the standards imposed and to argue that at the moment of discovery these items were not "stored" is circular and self-serving.

As to the standard and requirement of the owner of firearms to store them safely see Regina v. Blanchard (1994), 103 C.C.C. (3d) 360, a decision of the Yukon Territory Court of Manson D.J.TC.

I consider the storage of the firearms and ammunition outside of the secure rooms to have been a marked departure from what might have been expected of a gun dealer with an extensive collection of guns in an area where break-ins are not unknown. I am particularly concerned that the existence of such a collection might be a beacon to the underworld were it known that the key to the rooms was available on the premises and was "guarded" by two elderly people. Several guns were not protected by trigger guards and the boxed firearms at the foot of the stairs in the hall were juxtaposed with military ammunition which is clearly contrary to the regulations. While

it may seem harsh to impose the criminal standard in this case, the possible consequences for such carelessness are extremely serious to the community at large and to the family of Mr. Tsui. I am satisfied beyond a reasonable doubt that the accused did not meet the standards of care imposed upon him by these sections of the Criminal Code and the regulations thereto and I find the accused guilty of counts 9, 10 and 11.

July 30, 1998

JARVIS, J.:

I'm giving my ruling in the applications made on Monday. The reasons are as follows:

The applicant, having been found guilty of several counts in an indictment, brings this application questioning the constitutional validity of s. 86 (3) of the Criminal Code, R.S.C. 1985, C-46, as it relates to s. 4 of the storage, display and handling and transportation of certain firearms regulations made under paragraph 116.1 (g) and questioning the validity of s. 84 (i) in so far as it provides that a "prohibited" weapon means a large capacity magazine proscribed to it by regulation as it relates to s. 90 (i) and s. 90 3.2 of the Criminal Code.

In this application it is said that these offences are contrary to provisions of s. 7 of the Canadian Charter of Rights and Freedoms in that they are not in accordance with the principles of fundamental justice. First I turn to the challenge with respect to s.s 86.3 and 116.1 (g). It is uttered on behalf of Mr. Tsui that Parliament, in enacting s. 86.3 of the Criminal Code and the regulations pursuant to s. 116 (i) has created an absolute liability offence for which a term of imprisonment is possible. He relies upon Reference Re Section 94(2) of the Motor Vehicle Act (1985), 23 C.C.C. (3d) 289, a decision of the Supreme Court of Canada in which it was held that the provisions in that case were absolute liability offences that should be struck down in that the provisions also involved the possibility of imprisonment as a penalty to the accused. The court in that case found that the section violated the accused's right to liberty under s. 7 of the Charter of Rights and Freedoms which protects the rights not to be deprived of one's life, liberty and security of the person when that is in breach of the principles of fundamental justice.

The defence also raises the case of R. v. Smillie, (1998] B.C.J. No. 2082, a decision of the Supreme Court of British Columbia in which the same sections of the code as in the present application and the regulations were declared unconstitutional. The Crown responds that this offence is not an absolute liability offence and cites the decision of Mr. Justice Murphy in R. v. Johnston, [1996] O.J. No. 1018. In his decision, Mr. Justice Murphy dismissed an application to declare the same provisions unconstitutional. In doing so, he considered the decision of the Supreme Court of Canada in the above case and also the decision of the court in Wholesale Travel Group Inc. v. The Queen, (1991), 67 C.C.C. (3d) 193. The latter case dealt with a regulatory offence. Mr. Justice Murphy recites and follows the comments of Mr. Justice Cory regarding regulatory offences and their important role in enforcing standards of reasonable care in activities affecting the public welfare. Mr. Justice Murphy finds these sections

are regulatory and do not constitute absolute liability offences. He finds that the onus is on the Crown to prove beyond a reasonable doubt that the accused knowingly stored the firearms in question and thereafter that the criteria set out in the regulations were not followed by the accused. Both aspects must be proved beyond a reasonable doubt. Mr. Justice Murphy concludes:

"The government has proscribed in s. 4 (1) of the said regulation, a standard of care for storage and the failure to meet that standard of care carries with it the degree of fault that is referred to by Mr. Justice Cory in *R. v. Wholesale Travel Group Inc.* sufficient to meet the requirements of s. 7 of the Charter. There is a requirement fault which is defined."

I choose to follow the decision of Mr. Justice Murphy in *R. v. Johnston*. His reasoning is in accordance with the authorities and in my view correct and preferable to the decision reached in *R. v. Smillie*. I therefore dismiss the application to have these particular sections declared unconstitutional. I find that no s. 7 breach has been established.

I now turn to s.s 84(1), 90 (1) and 90 (3.2). The defendant argues that Parliament in enacting these sections has created an offence with an illusory defence in that the saving provisions of s. 90 must mean that in certain circumstances possession of these weapons is justifiable and not "dangerous". The saving provisions of s. 90 authorize the Attorney-General of our Province to permit the use of these weapons in competitions. It is argued on behalf of the defence that this right demonstrates that the use of such weapons in competitions is not dangerous and that by the AttorneyGeneral's failure to so permit the use, the accused has been deprived of a defence that would otherwise be available to him.

There was no suggestion that the evidence at trial established that the accused possessed the magazines for the purpose of any competition or that the minister's permission would have provided an actual defence even if the minister had decided to act. The fact is that no such action has ever been taken by the Attorney-General of Ontario. There is no constitutional or legislated right to possess prohibited weapons nor is there any obligation on Parliament to create a defence to the possession of them. S. 90, ss. 3.2 (a) provides a possible defence depending upon the circumstances and in particular, depending upon the Attorney-General of Ontario choosing to act in the manner allowed. This section, without any enactment by the Attorney-General, represents the law which is being impugned. The saving provision simply provides an optional means whereby possession of such weapons might be lawful in certain circumstances. Without action on behalf of the Province, no such defence or admission arises. The failure of the Attorney-General to act does not create an illusory defence. Parliament has acted in a responsible manner in proscribing possession of these weapons with some discretion granted to the Provincial Attorneys General.

The appellant relied on *Morgentaler v. The Queen*, (1988), 37 C.C.C. (3d) 449, decision of the Supreme Court of Canada, on the issue of illusory defences. In my view, the legislation considered in that case established procedures which were not universally available and this situation gave rise to the court's consideration of illusory defences. I consider *Morgentaler* to be entirely distinguishable and to be of no assistance to the applicant in the present case.

I therefore dismiss this portion of the application.

I now turn to entrapment. I have reviewed the factual basis of this matter in my reasons for judgment. The evidence of the dealings involving the police and Mr. Tsui was straightforward. The police had evidence following the arrest of Mr. Broome and his lengthy statements upon which they acted, investigating Mr. Tsui and others. Mr. Broome benefited by his co-operation with the police. The charges against him were disposed of in a favourable manner. He has been provided with a new identity and a new geographical residence because of what is said to be a danger to him by reason of his activities for the police. There is no doubt that the police gained access to Mr. Tsui through Mr. Broome's involvement. The police initially were investigating the sale of prohibited weapons. In deciding to investigate Mr. Tsui, the police had been told by Mr. Broome that he had purchased a deactivated rifle and fully automatic rifle from Mr. Tsui. The police hoped to purchase other fully automatic rifles from Mr. Tsui.

The accused relies upon *Mack v. The Queen*, (1988), 44 C.C.C. (3d) 513, a decision of the Supreme Court of Canada and in particular at page 559 where Chief Justice Lamer stated that the defence of entrapment is available when:

"(a) the authorities provided a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry;

(b) although having such a reasonable suspicion or acting in the course of bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence."

The authorities need only be acting in one of the two categories in *Mack*. The applicant has the onus of proof and must show on the balance of probabilities that the behaviour of the authorities meets either of these categories. The evidence of the police in the present case was that they were acting on information provided by Mr. Broome who had attempted to sell them illegal weapons and who was found in possession of such weapons, both at the time of his arrest and when a search warrant was executed at his home. Mr. Broome recounted to the investigating officers that he had purchased some of these weapons from Mr. Tsui, and in particular had purchased a fully automatic Ishopore from him.

Any information received by the investigating officers from any source before they decided to attempt to purchase arms from Mr. Tsui is relevant. I consider that the police had a reasonable suspicion that Mr. Tsui was involved in ongoing criminal activity before they offered him an opportunity to commit the criminal offence.

The case of *Mack and Barnes v. The Queen* (1991), 63 C.C.C. (3d) 1, another decision of the Supreme Court of Canada, both established that random virtue testing occurs when the officer presents his or her target with an opportunity to commit an offence without reasonable suspicion that the target is already engaged in the particular activity. In *Mack*, Chief Justice Lamer said at 567 and 568:

... the claim of entrapment is a very serious allegation against the state. The state must be given substantial room to develop techniques which assist it in his fight against crime in society. It is only when the police and their agents engage in a conduct which offends basic values of the community that the doctrine of entrapment can apply. To place a lighter onus on the accused

would have the result of unnecessarily hampering the state action against crime."

The court in Mack relied upon R. v. Jewitt, [1985] 2 S.C.R. 128 to further state that the defence of entrapment should only be allowed in the "clearest of cases" when the accused has "demonstrated that the strategy used by the police goes beyond the limits" and that "Judicial condemnation of the prosecution would by definition offend the community standard".

I do not find this case to be the "clearest of cases". I do not find that Detective Robinson's activities would by definition offend the "community standard". While it would be preferable that officers always have reasonable and probable grounds to suspect that a target is engaged in criminal activity before presenting the target with an opportunity to engage in criminal activity, such a standard is not required by law. What the law does require of the police is a reasonable suspicion, a standard that is much lower than that of reasonable grounds. Dealing in illegal arms is a very difficult crime to detect and a very dangerous and difficult crime to investigate. It requires officers going undercover and providing targets with opportunities to commit offences.

It was clear on the evidence that Mr. Tsui cooperated fully when Detective Robinson requested arms and that Mr. Tsui sold the arms to him willingly and without any unduly exploitative behaviour on the part of the police. The burden of proof of entrapment is on Mr. Tsui on the balance of probabilities. The evidence before me falls far short of establishing entrapment.

For these reasons, I dismiss this application. I should add that there is no possible relief afforded by the theory of entrapment to the convictions which I will characterize as the storage convictions. Those are my reasons.

THURSDAY, JULY 30, 1998

ORAL REASONS FOR SENTENCE

THE COURT: Mr. Tsui, you have been convicted of offences which demonstrate your complete disregard for the provisions of the Criminal Code regarding firearms and their storage.

The evidence discloses you possess a large number of firearms, and a predisposition to deal with those firearms without regard to the legal requirements. I am particularly concerned that you did not observe the formalities of demanding a firearms registration certificate from Constable Robinson, who, from his appearance and his interest in automatic firearms, should have made you very concerned about the type of person you were dealing with, the legality of his proposal, and the danger to the public in assisting such a person acquire these dangerous weapons.

I also am concerned that you provided illegal ammunition magazines for use in what was essentially a machine gun, either knowing that the magazines were illegal or being wilfully blind as to their legality, and thereby committing an offence.

You have also demonstrated a disregard for the safety of your family by storing the firearms and ammunition in an unsafe, illegal way, and left your home in charge of your elderly in-laws, who might well have been unable to take adequate steps to alert the authorities should a concerted attempt to rob your home of these dangerous weapons have been made.

I am sure that it is apparent to you by now that I abhor the careless handling of firearms and, in particular, their sale and distribution without regard to the duties imposed upon persons by the Criminal Code.

In these circumstances, I am tempted to impose a substantial term of imprisonment on you. I am confident that many judges would sentence you to a substantial period of incarceration in the circumstances. I must, however, remember what has been established by the evidence and avoid my strong suspicion that your activities go far beyond what has been proved in court.

I must, however, be also mindful of your many years in this country. You are a successful businessman and, by all accounts, a good father and husband. There is no indication that you have otherwise been involved in criminal activity. Your good character has been attested to by two respectable and honest members of the community.

The applicable principles of sentencing in this case are general and specific deterrence, and the denunciation of your conduct.

Taking all these factors into consideration, my sentence is as follows:

- (1) I suspend the passing of sentence.**
- (2) I impose a term of probation of three years. I invite counsel's submissions as to the appropriate terms to be included.**
- (3) You are sentenced to perform 150 hours of community service.**
- (4) You are prohibited from possessing firearms for a period of five years, pursuant to the provisions of s. 100 of the Criminal Code of Canada, subject to what follows.**
- (5) You are hereby ordered to sell or otherwise dispose of all firearms seized by the police at your residence at number 2 Wall Street, Unionville, on December 10, 1996, under the supervision of your probation officer, who will be charged with the responsibility of ensuring that all laws in connection therewith are obeyed. Release of any or all of the guns seized by the police to a secure facility for the purpose of their sale at the direction of your probation officer is hereby authorized. You will be entitled to net proceeds of any sale. The sale must be conducted within two years of today. Any such firearms not disposed of or sold by then will be forfeited to the Crown.**

It is my hope and expectation that this case will serve as a warning to those in the arms collecting community that the risks of disobeying the terms of the law in dealing with firearms

of this nature in an illegal fashion will be dealt with harshly by the courts.

That is my sentence.

MR. PILLA: Thank you, Your Honour.

MR. MARTIN: Thank you, Your Honour.

THE COURT: Suggestions regarding the terms of probation?

MR. MARTIN: I don't think that I can add anything other than the general terms of probation, because Your Honour has dealt with the firearms issue in other areas, and has dealt with community service as well. So I don't - in my submission, there is nothing additional apart from the general terms of probation that probably should apply.

THE COURT: Thank you, Mr. Martin. Mr. Pilla?

MR. PILLA: I suppose the only thing I can think of is, you've heard a lot about Mr. Tsui's activities surrounding gun shows. If he were forbidden from attending those sorts of shows, it would serve somewhat as a punitive measure.

THE COURT: I think I agree with that, with the term of a five-year prohibition. Do you have anything to say about that, Mr. Martin?

MR. MARTIN: Well, if Your Honour doesn't think that the prohibition covers the gun shows, then that would be ...

THE COURT: I am not certain that it does, so I will make such an specific order. Anything else, Mr. Pilla?

MR. PILLA: Nothing further, Your Honour. Thank you.