Citation: ***R. v. Carlos*** Date: 20010705
2001 YKCA 6 Docket: CA00YU441
Registry: Whitehorse

COURT OF APPEAL FOR THE YUKON TERRITORY

BETWEEN:

REGINA

PLAINTIFF
(APPELLANT)

AND:

ALLEN MICHAEL CARLOS

DEFENDANT
(RESPONDENT)

Before: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Mackenzie
The Honourable Madam Justice Proudfoot

David A. McWhinnie Counsel for the Crown/Appellant

Richard Fritze Counsel for the Respondent

Place and Date of Hearing: Whitehorse, Yukon
May 29, 2001

Place and Date of Judgment: Vancouver, British Columbia
July 5, 2001

Written Reasons by:
The Honourable Madam Justice Proudfoot

Concurred in by:
The Honourable Mr. Justice Mackenzie

Dissenting Reasons by:
The Honourable Madam Justice Ryan (Page 12, Paragraph 22)

Reasons for Judgment of the Honourable Madam Justice Proudfoot:

[1] This is an appeal by the Crown of acquittals entered by a Territorial Court judge on 2 November 2000. The respondent was charged with three counts. The counts read as follows:

> COUNT #1: On or about the 15th day of February, 2000, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that: he did without lawful excuse store a prohibited firearm and ammunition, to wit: a loaded Ruger Revolver, in a careless manner, contrary to Section 86(1) of the Criminal Code.
>
> COUNT #2: On or about the 15th day of February, 2000, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that: he did without lawful excuse, store a firearm, to wit: a loaded restricted firearm, thereby contravening regulation 6(a) of the Storage, Display, Transportation and Handling of Firearms by Individuals Regulations, contrary to Section 86(2) of the Criminal Code.
>
> COUNT #3: On or about the 15th day of February, 2000, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that: he did without lawful excuse, store a firearm, to wit: a loaded prohibited firearm, thereby contravening regulation 7(a) of the Storage, Display, Transportation and Handling of Firearms by Individuals Regulations, contrary to Section 86(2) of the Criminal Code.

Facts

[2] On 15 February 2000, the RCMP searched the residence of the respondent at 275 Alsek Road, Whitehorse, Yukon. They arrived at the premises at approximately 10:19 a.m. with a

warrant to search. The search was made in connection with an application for a prohibition order pursuant to s. 111 of the ***Criminal Code***. The warrant had been issued on 14 February 2000. The seeking of the prohibition order (a matter that is still pending) arose as a result of threatening comments the respondent allegedly made to some government officials.

[3] At approximately 8:40 a.m. on 15 February 2000, the RCMP telephoned the respondent and arranged for an 11:00 a.m. meeting with him at a local donut shop (Tim Horton's). The meeting was to concern the RCMP's investigation of the respondent's alleged threatening behaviour. Tim Horton's was chosen as the venue because the respondent was reluctant to meet at Whitehorse RCMP headquarters. Approximately two weeks earlier, the respondent had attended at said headquarters and felt "uncomfortable" and "stressed" by the questioning he underwent there.

[4] The meeting at Tim Horton's never took place, interrupted as it was by the search. The search yielded three loaded handguns, all of which were seized by the RCMP. The handguns – a .357 Magnum Ruger revolver, a .22 calibre revolver, and a .44 Super Black Hawk Ruger revolver – are either "prohibited" or "restricted" weapons as defined in the ***Code***. In addition

to the guns being seized, the respondent was charged with the three counts quoted above.

[5] Count 1 involves s. 86(1) of the ***Criminal Code***, while counts 2 and 3 involve s. 86(2) of the ***Code***. Subsections 86(1) and (2) read as follows:

> **86.** (1) Every person commits an offence who, without lawful excuse, uses, carries, handles, ships, transports or stores a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any ammunition or prohibited ammunition in a careless manner or without reasonable precautions for the safety of other persons.
>
> (2) Every person commits an offence who contravenes a regulation made under paragraph 117(*h*) of the *Firearms Act* respecting the storage, handling, transportation, shipping, display, advertising and mail-order sales of firearms and restricted weapons.

[6] The gun involved in count 1, a .357 Magnum, was found behind a stereo cabinet on the upper floor of the house. It was wrapped in a rag and held within a plastic bag. It was, as I mentioned above, loaded with no trigger lock. The guns involved in counts 2 and 3 were found in a locked gun safe on the lower floor of the house. These two handguns were also loaded and had no trigger locks.

[7] At trial, the respondent testified that before the RCMP called at 8:40 a.m. that morning, he had taken the three guns out of the safe to clean, to inspect, and to admire them. At

some point, apparently early on, he loaded all three guns. He testified that he did so in order to check the guns for corrosion. Later, he took the .357 Magnum upstairs to check documentation. I say no more about the propriety of inspecting firearms using live ammunition and carrying a loaded firearm up stairs to check documentation, other than that it is unnecessary, dangerous and incredibly stupid. In any event, the respondent further testified that he had intended to unload them and properly store them in the safe before leaving for his meeting with the RCMP.

[8] The respondent's wife, and his son, who was sleeping after having worked a night shift, were home that morning. The police arrival, he said, caught him unawares, and he did not have the time to unload the guns or do anything other than place the two guns located downstairs into the safe, and then place the one (the .357 Magnum) on the upper floor of the house behind a stereo cabinet in his living room.

The Decision Below

[9] The Territorial Court judge correctly stated what the Crown had to prove in order to obtain convictions on all three counts: (i) they were firearms; (ii) the firearms were classified as restricted or prohibited weapons; (iii) the firearms were loaded; and (iv) the firearms were stored. With

respect to count 1, there was the added element that "careless" storage had to be proved.

[10] In dismissing the charges, the trial judge summarized her findings as follows:

> I accept that he loaded his firearms as he was cleaning and inspecting them that morning and that he panicked when the RCMP arrived. I accept that the location of the firearm in the living room was a very ill-planned hiding spot. I accept that Mr. Carlos had no intention to store the two firearms in the safe, loaded, as they were found but had planned to unload all of the guns and replace them into the safe had not the RCMP arrived unexpectedly.
>
> All three firearms were found within the Carlos residence, in close proximity to the areas of the house where Mr. Carlos was using them. Mr. Carlos never left the house that morning. The police called around 8:40 AM and arrived around 10:19 AM. The guns therefore had been loaded and left in that condition for no more than several hours.
>
> All of those circumstances, which I accept to be the factual background in this case, do not in my view amount to storage of the firearms in question.

Discussion

[11] On appeal, the Crown argues that the Territorial Court judge made all the correct findings of fact, but erred in applying the facts to the law.

[12] The Crown sets out the issues in the following fashion:

1. Considering the facts found, and the evidence accepted by her, the Learned Trial Judge erred

> in law in finding that the circumstances did not amount to "storage" within the meaning of section 86 of the ***Criminal Code***.
>
> 2. The Learned Trial Judge erred in law in concluding that the Respondent's hiding of the firearm referred to in Count 1 (an offence alleged contrary to s. 86(1)of the ***Criminal Code***), did not amount to 'storage' within the meaning of section 86 of the ***Criminal Code***.
>
> 3. The Learned Trial Judge erred in law in applying the intention of the Respondent to later unload the firearms in question to her consideration of whether the firearms referred to in Counts 2 and 3, (offences alleged contrary to sections 86(2) of the ***Criminal Code***), were stored contrary to the applicable Regulation(s).
>
> 4. The Learned Trial Judge erred in law in applying the duration of time the firearms had been left loaded to her consideration of whether they had been 'stored' within the meaning of section 86 of the ***Criminal Code***.

Needless to say the respondent does not agree with the Crown's position.

[13] The trial judge found that the respondent panicked when his wife told him that the RCMP were coming to the door. The respondent was vigorously cross-examined on this point. I reproduce the following passage from the transcript, which supports that finding:

> Q So you have to put back the things that you'd taken out earlier; is that what you decided to do?

A In a frantic sort of effort and not really thinking clearly and in a rush. I just kind of figured, well, maybe they're better in there than out there, even though they're not really properly stored.

Q So you put the rifle back or the –

A There was only two rifles out there, it'd take a second, and then I just threw these other ones on that shelf and then it's just a matter of closing the safe and spinning the dial. And then I thought, holy crow, there's one up there, so I booted it up the stairs and they weren't even at the door yet; and I don't know, again, in sort of a storage manner, I guess you behave that way when you're under stress, and didn't know where to store the darn thing, so I stuck it in behind that stereo component.

Q Can you tell us why you would do that, sir?

A Like I said, I was quite under a lot of pressure, maybe not thinking the way I should have. . . .

. . . . .

Q I could conceive, for example, that going downstairs and opening the safe under stress might be difficult and time consuming and you might want to secure the thing. Putting it in a lockable file cabinet might be a response that – did you think about it? Could you have –

A I guess probably not without even thinking or unconsciously thinking that that would be the most obvious place they would look, but that's a really silly thought because, you know, if they wanted to, they can look anywhere. I guess I felt that that was a more tricky place to put it.

Q You thought what was a more tricky place to put it?

A Behind that component,

Q In the sense of –

A They wouldn’t think –

Q -- they are less likely to find it?

A They may not look there. And again, that wasn’t very clear thinking.

[14] In essence, the case turns on whether the respondent’s “panicked” actions taken immediately before the police entered his home amounted to “storage” of these firearms. The meaning of the word “stores”, which is not defined in the ***Criminal Code***, is therefore crucial to the disposition of this matter.

[15] The Territorial Court judge applied the following dictionary definition to the word store – *to reserve, put away or set aside for future use*. She further found that the definition of “stores” contains no temporal parameters. I will return to that latter finding below, but I accept that the plain meaning of “stores” as applied by the trial judge is the correct meaning to apply to the word in this context.

[16] In that light, I agree with the trial judge’s Reasons. The respondent would not have placed the firearms where they were discovered if the RCMP had not arrived unexpectedly. The law does not require that firearms be continuously stored. Guns may be handled within limits prescribed by law.

[17] I pause here to note that had the respondent been charged with careless handling of these three firearms, it is likely that the Crown would have been successful at trial. However, he was not so charged. He was charged with “careless” storage and storage “contrary to the ***Firearms Act Regulations***”. The Crown has failed to establish that the guns were “stored”.

[18] As I stated above, the trial judge found that the concept of “storage” has no temporal parameters. I agree with that finding in the sense that a conviction can follow from short term “storage”. I wish to note that the intention of the accused makes all the difference in “short time” cases such as the one at bar.

[19] On this point, let me first say that it is axiomatic that the longer a gun is not used, shipped, handled etc., the easier it should be for the Crown to prove that a gun is “stored”. If a gun has very recently been “put aside”, like in this case, the intention of the accused in doing so will decide the matter. If the trial judge finds that the accused only did so because the police were at his or her door and he or she did not have time to properly store them, there should be an acquittal. However, if an accused did not know the police were arriving, and had just placed the guns as they were placed in this case because he was done handling them for

a time, then clearly one or more of the offences under s. 86 of the ***Code*** would be made out.

[20] I would also like to mention that a conviction for careless storage may also have been entered in this case if the Crown proved that the gun located upstairs was left unattended for a sufficient period of time that one could say the respondent “put it aside for future use”. The respondent could not have been both upstairs and downstairs that morning, and the evidence indicates he spent more time downstairs. However, the evidence on this point was insufficient to support a conviction.

[21] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Madam Justice Proudfoot"

I AGREE:

"The Honourable Mr. Justice Mackenzie"

Reasons for Judgment of the Honourable Madam Justice Ryan:

INTRODUCTION

[22] I have had the opportunity to read the reasons for judgment in draft of Madam Justice Proudfoot in this appeal. I respectfully disagree with her conclusions. In my view the respondent was either using the firearms in question or, had stored them. There is no middle ground. I am of the view that it cannot be said that the respondent was using the firearms or that his use of them was temporarily interrupted when he allowed the police into his home. For the reasons which follow I am of the view that the findings of fact made by the trial judge in the case at bar constitute the *actus reus* of storing within the meaning of ss. 86(1) and (2) of the ***Criminal Code***. I would set aside the acquittals in this case and enter convictions on all three counts.

OVERVIEW

[23] Allen Michael Carlos was charged with offences relating to three handguns that were found in his home by police. One of the handguns was found hidden behind a stereo. It was loaded, with no trigger lock, and had been wrapped in a rag and put into a plastic bag. Count 1 on the Information charged Mr. Carlos with careless storage of a prohibited

firearm and ammunition contrary to s. 86(1) of the ***Criminal Code*** (the "***Code***").

[24] The other two handguns were found in a locked safe in the basement. They were loaded, with no trigger lock. Counts 2 and 3 on the Information charged Mr. Carlos of storage of one restricted and one prohibited firearm in a manner contrary to the ***Storage, Display, Transportation and Handling of Firearms by Individuals Regulations***, SOR/98-209, contrary to s. 86(2) of the ***Code***.

[25] The learned Territorial Court judge acquitted Mr. Carlos on the grounds that the *actus reus* of the offence had not been proved by the Crown. The judge accepted the submission that the handguns were not "stored" within the meaning of s. 86 of the ***Code***.

THE APPLICABLE LAW

a. Section 86(1) – careless storage of a firearm

[26] Section 86(1) of the ***Code*** makes it an offence to store a firearm, without lawful excuse, "in a careless manner or without reasonable precautions for the safety of other persons."

[27] In ***R. v. Finlay***, [1993] 3 S.C.R. 103, the Supreme Court of Canada considered the offence created by s. 86(2) (now s. 86(1))of the ***Code*** relating to careless storage of firearms. The wording of that section of the ***Code*** has been amended since ***Finlay*** was decided, however, the substantive elements of the offence remain the same. Lamer C.J.C., for the majority, set out the elements of the offence as follows (at p. 114):

> Section 86(2) of the *Code* requires the Crown to establish that an accused used, carried, handled, shipped or stored a firearm, but did so "in a careless manner or without reasonable precautions for the safety of other persons." The fault requirement of the provision is, therefore, to be assessed objectively, which, following this Court's holding in *R. v. Hundal*, [1993] 1 S.C.R. 867, at p. 883, consists of conduct that is a marked departure from the standard of care of a reasonable person in the circumstances.

[28] Assuming that the item in question is a "firearm", the *actus reus* of the offence is the "storage" of the firearm, and the *mens rea* is a marked departure from the standard of care of a reasonably prudent person in the circumstances.

[29] The word "stores" has no special legal meaning. It is an ordinary word that must take its meaning from the context in which it is used. In ***Thomson v. Equity Fire Insurance Company***, [1910] A.C. 592 (Ont. P.C.), Lord Macnaghten

considered the concept of storage in the context of insurance law (at p. 596):

> What is the meaning of the words "stored or kept" in collocation and in the connection in which they are found? They are common English words with no very precise or exact signification. . . . It is difficult, if not impossible to give an accurate definition of the meaning, but if one take a concrete case it is not very difficult to say whether a particular thing is "stored or kept" within the meaning of that condition.

[30] Similarly, in the criminal law context the concept of what constitutes "storage" of a firearm must be given a reasonable meaning given the circumstances of the case and the nature of the mischief that s. 86 of the ***Code*** is intended to address.

[31] In ***R. v. Joe*** (1996), 192 A.R. 99, at para. 26, Demetrick P.C.J. identified two factors that would indicate a firearm has been stored:

> (i) deliberate (i.e., intentional) placement of a firearm or ammunition at some location done by a person conjoined with
>
> (ii) an intention that the object remain there inactive, untouched, and out of the person's prompt control for a lengthy period of time.

[32] Similarly, in ***R. v. Bickford***, [2000] A.J. No. 525 (Q.L.), 2000 ABPC 60, after referring to the principles from ***Joe*** set out above, Lamoureux P.C.J. concluded at para. 26:

> [T]he foregoing case law together with the simple definition of the word 'store' as it appears in standard dictionary definitions requires the Crown to establish a warehousing of the firearm for future use as opposed to an intention to effect immediate and present use of a firearm.

[33] In my view, establishing the *actus reus* of the offence is a more straightforward exercise than is indicated by the analysis set out in ***Joe*** and in ***Bickford***. A firearm has been "stored" when it has been put aside and the accused is not making any immediate or present use of it. There is no need to establish that the firearm has been put aside for a "lengthy period." Such a requirement is ambiguous, and does not provide any guidance as to when "use" has ended and "storage" has begun.

[34] When an accused is charged with careless storage of a firearm under s. 86(1), the *actus reus* is established by proof that the firearm was not in immediate or present use by the accused. Whether the accused is guilty of the offence will therefore largely depend on proof by the Crown of the applicable *mens rea*. As set out in ***Finlay***, *supra*, this requires proof of conduct by the accused that shows a marked departure from the standard of care that would be exercised by a reasonably prudent person in the circumstances. As stated by Lamer C.J.C. at p. 117:

> If a reasonable doubt exists either that the conduct in question did not constitute a marked departure from that standard of care, or that reasonable precautions were taken to discharge the duty of care in the circumstances, a verdict of acquittal must follow.

b. Section 86(2) – storage of a firearm in a manner that contravenes the *Storage, Display, Transportation and Handling of Firearms by Individuals Regulations*

[35] Counts 2 and 3 of the Information charged Mr. Carlos with offences under s. 86(2) of the ***Code***, that is, storage of firearms in a manner that contravened the applicable regulations. As is the case with an offence under s. 86(1) of the ***Code***, the *actus reus* of this offence, "storage" of the firearm, will be established by proof that the firearm had been put aside by the accused and the accused was not making any immediate or present use of it. With respect to the question of what constitutes the applicable *mens rea* for offences under s. 86(2) of the ***Code***, the British Columbia Court of Appeal addressed that issue directly in ***R. v. Smillie*** (1998), 129 C.C.C. (3d) 414, as follows (at paras. 20-21):

> The standard by which the manner of storage is measured must be objectively determined by reference to the regulations. This language does not import any level of subjective intention. An examination of the language of the section and the purpose of the provision leads to the conclusion that this element of the offence consists of an objective rather than subjective test.

> The offence is established once the Crown has proved to the requisite standard that the accused stored firearms in a manner contrary to the requirements of the regulations. For purposes of this appeal the important point is that the Crown does not need to prove that the accused was negligent *per se*, the Crown need prove only a failure to abide by the standard prescribed by the regulations. With respect to the mental element the accused may defend the charge by raising a reasonable doubt with respect to a mistake of fact or by raising a doubt that he or she was duly diligent in his efforts to comply with the regulation in question. The offence is therefore one of strict liability.

The Court continued, at para. 23:

> I agree . . . that evidence that the accused rendered the weapons inoperable in some way not provided by the regulations is not a defence to the charge. But I do not agree that the element of storing requires full *mens rea*. I do not think it is possible to separate the act of storing from the manner of storing. To use the language of s. 86(3) [now s. 86(2)] – "stores . . . in a manner contrary to a regulation" is one element, not two. This does not mean that it is not open to the accused to defend the charge on the basis that he did not know that what he was storing was a gun, or that in the process of storing the gun he had a heart attack, or any other defence which goes to voluntariness. Such defences are always open as they address the *actus reus* rather than the *mens rea* of the offence.

ANALYSIS

[36] The learned Territorial Court judge made the following findings of fact with respect to Mr. Carlos's evidence (at p. 7):

> I accept that he loaded his firearms as he was cleaning and inspecting them that morning and that he panicked when the RCMP arrived. I accept that the location of the firearm in the living room was a very ill-planned hiding spot. I accept that Mr. Carlos had no intention to store the two firearms in the safe, loaded, as they were found, but had planned to unload all of the guns and replace them into the safe had not the RCMP arrived unexpectedly.
>
> All three firearms were found within the Carlos residence, in close proximity to the areas of the house where Mr. Carlos was using them. Mr. Carlos never left the house that morning. The police called around 8:40 AM and arrived around 10:19 AM. The guns therefore had been loaded and left in that condition for no more than several hours.
>
> All of those circumstances, which I accept to be the factual background in this case, do not in my view amount to storage of the firearms in question.
>
> The Crown therefore has not proven beyond a reasonable doubt one of the essential elements, namely that any of the loaded firearms was stored at the relevant time.

[37] I will not comment on whether it was reasonable to accept Mr. Carlos's story that he loaded his handguns in the process of "cleaning and inspecting" them. However, leaving that aside, whether Mr. Carlos intended to store his firearms for a lengthy period does not establish whether he did in fact store them for the purposes of s. 86 of the ***Code***.

[38] Mr. Carlos had clearly stopped using his firearms and had put them away before he answered the door to the police. He ended whatever "use" he was making of them when he learned the

police had arrived. This is not a case where Mr. Carlos could say that he was temporarily interrupted while using his firearms. The learned trial judge found that Mr. Carlos was attempting to hide the three handguns from the police. In my view, "hiding" firearms amounts to the same thing as "storing" firearms in the context of s. 86 of the ***Code***. The *actus reus* on all three counts has therefore been established.

[39] The real questions, which were not addressed by the trial judge, are whether the mental element of the offences had been made out, and whether Mr. Carlos had any defence going to that element that could be raised in answer to the charges.

[40] With respect to the charge of careless storage contrary to s. 86(1) of the ***Code***, the Crown was required to prove that the conduct of Mr. Carlos, storing a loaded firearm without a trigger lock behind a stereo in a home where children were present, constituted conduct that showed a marked departure from the standard of care exercised by a reasonably prudent person in the circumstances. In his defence, Mr. Carlos was entitled to raise any evidence that showed he had taken reasonable precautions in attempting to discharge the required duty of care in the circumstances.

[41] Putting aside everything else, the fact that Mr. Carlos did not even unload the handgun before he put it behind the

stereo is proof enough that his conduct was a marked departure from even the most minimal standard of care. This should not be taken to imply that Mr. Carlos's actions met the standard of care in other respects. As for the claim that he was caught by surprise when the RCMP arrived, by his own admission Mr. Carlos had time to put the two guns he was using in the basement back into the safe and lock it. He also had time to go upstairs to his study at the opposite end of the house, collect the third gun, which he said he left there earlier that morning wrapped in a rag and in a plastic bag, and hide it behind a stereo cabinet in the living room. It seems unreasonable that, during even this relatively short period of time, a person of Mr. Carlos's experience with handguns would not be able to at least unload them in the time he took to hide them. In these circumstances, I would set aside the acquittal and enter a conviction on count 1.

[42] With respect to the two charges of storage of firearms contrary to the applicable regulations, Mr. Carlos was required to provide some evidence that he was duly diligent in his attempts to comply with the regulations. Again, the fact that Mr. Carlos did not unload either of the two handguns before locking them in the safe shows that he did not make even the most superficial attempt to comply with the

regulations, which expressly provide that firearms must be unloaded when they are stored. That being the case, I would set aside the acquittals and enter convictions on counts 2 and 3.

"The Honourable Madam Justice Ryan"

July 5, 2001

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