

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

IAN THOMSON

R E A S O N S F O R D E C I S I O N

BEFORE THE HONOURABLE JUSTICE J.A.T. COLVIN  
on January 3, 2013, at WELLAND, Ontario

APPEARANCES:

R. Mahler

E. Burlew

Counsel for the Crown  
Counsel for Ian Thomson

Reasons for Decision  
Colvin, J.

THURSDAY, JANUARY 3, 2013:

R E A S O N S   F O R   D E C I S I O N

COLVIN, J. (Orally):

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Ian Thompson is charged with two counts of careless storage, involving handguns and ammunition, contrary to Section 86(3) of the *Criminal Code*. The issue is whether regulations 6 and 7 under the *Firearms Act* were complied with. These regulations govern how firearms and ammunition are to be stored.

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It is important, in light of the attention given this case, to make it clear that the issue is not self-defence. It is not about when, or under what circumstances a firearm may be used in defence of a person or property. To use a colloquialism from the United States, it is not about "standing your ground".

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The Crown has indicated the case is about how the two handguns and their ammunition were stored before any attack on Mr. Thomson, or his house.

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The first issue is about the manner in which the two handguns were stored. This involves a question of credibility. Do I accept the evidence of Mr. Thomson, to the effect the two handguns were stored in the safe, or do I reject it and find that the two handguns were stored in the bedroom, ready for use, as the Crown would have it?

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The second issue is about the manner in which the ammunition for the two handguns was stored. In particular, was the ammunition stored as required by Regulations 6(c) for the restricted firearm, and 7(c) for the prohibited firearm? Those regulations require, among other things, that the firearm ... "is not readily accessible to ammunition"... The section then provides for exceptions. The ammunition may be locked in a separate container, whose characteristics are set out in the section. The ammunition may also be stored in a vault that is suitable for the storage of restricted firearms.

On the morning of August 22<sup>nd</sup>, 2010, Mr. Thomson was in his bed. He heard a car go past. He heard it again and thought nothing, though it was unusual.

He then heard a loud "pop". He could see the flickering of flames. Using the times imprinted by the video surveillance cameras he had around his home this can be established as happening at 06:37:00 in the morning. Looking out his windows he could see a man in dark clothing, with a balaclava over his face. He yelled at the man. The man responded by yelling back, calling Mr. Thomson "a fucking goof". The cameras show this happening at 06:37:15.

Mr. Thomson's evidence is that he picked up his phone and tried twice to dial 9-1-1. He was

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unsuccessful. He threw the phone on the bed. He took the key to the gun safe into the next room. There he opened the safe and picked the .38 Snub Nose and ammunition from the safe. He went to the front door loading the weapon as he went.

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As he did this, a fire bomb came through his kitchen window. The cameras show this as being at 06:38:02.

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He went onto the front porch. There he fired three shots. Video camera number one shows this as being at 06:38:07. Camera nine shows it as being 06:38:11 seconds, some four seconds later.

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He then went back into the house. He testified that in his bedroom he reloaded the .38 from the ammunition that was in the night table. He went to the computer room where he took his 9mm from the gun safe and loaded it. He testified that a second clip was also in the gun safe. He put the 9mm, with one clip inserted, on the bed. He put the second clip on the bed beside it.

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He then went to the front porch, with the telephone, and dialed 9-1-1 to report the incident. The .38 was in the waistband of his underwear. He testified that it slipped down to his crotch area, remaining in his underwear.  
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This would have been at 06:39:10.

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5 He went back to the bedroom. There he put the 9mm and the extra magazine in the bedside table. He then got dressed, putting on jeans, shoes and a raincoat. He put the .38 in the pocket of the raincoat.

The weapon used, and the other on the bed were given to the police when they arrived.

10 In an agreed statement of facts, Detective Smart's testimony was that he found, in the nightstand drawer, five RP Special rounds, three Winchester .38 Special rounds, and a loaded magazine for a 9mm Browning. There was also a Winchester box containing 50 centre fire Super X Post .38 Special rounds. According to Mr. Thomson's evidence these had just been brought from the gun safe. It was this ammunition that he used to reload the .38 after firing the three rounds. There was a holster hanging from the head of the bed.

25 Mr. Thomson testified that the 9mm ammunition was not in the bedside table until he took it out of the gun safe with the 9mm firearm. He agreed the .38 calibre ammunition was readily accessible to the bedroom.

30 Mr. Thomson's home is small. It is about 850 square feet. Exhibit 11 shows the bedroom is 11' 4" long. The hall to the computer room, where the gun safe was, is 8' 10" long. The computer

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room is 8' 8" long from the hall. From the hall to the front door is 14' 3". The total distance from the furthest possible point in the bedroom to the front door via the computer room is 43 feet.

Based on the video taken during the incident, the time elapsed from the first fire bomb to the first shot is from 06:37:00 to 06:38:11 to use the times most favourable to the accused. This is one minute, eleven seconds. This must include the time looking out the window, going to the gun safe, unlocking it, getting the gun out of the safe, loading it and going to the front door where the first round was fired. The time between his shooting and being back out on the porch dialing 9-1-1 is one minute. From 06:38:11, to use camera nine, to 06:39:10.

By the video one minute less one second elapses between the firing of the shots and Mr. Thomson coming back outside to extinguish the fire. During this time he also calls 9-1-1.

I give very little weight to the re-enacting of the events that is Exhibit 13. It adds little to what is already apparent from the video of the events. I do not feel Mr. Thomson was trying to give a false picture. Indeed, in my view, he was doing his best. That said, to accurately reflect the times would be next to impossible. The video was done several months after the incident and,

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having said that, he is naturally and obviously trying to prove his point in regards to the timing. In my view the video of the actual incident and Mr. Thomson's *viva voce* testimony are more accurate and preferable.

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Sergeant Brower testified that Mr. Thomson was competent and safe in his handling of the firearms. The Sergeant's opinion was that he seemed very familiar with them. When the Sergeant asked Mr. Thomson why he had the two loaded handguns in the bedside table the answer was, "Because of situations like this I need them".

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Mr. Thomson testified to his long involvement with firearms. It began when he was in the military, and has continued. It has involved teaching firearms safety, and use.

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There is no issue that all the firearms that were in his possession were properly licensed, and apart the ones subject to these charges, properly stored.

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He agreed his words to Sergeant Brower, "Because of incidents like this I need them". This was in response to being asked why the guns were in the bedroom. He denied that he kept the firearms in the bedside table.  
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He testified the .38 ammunition was in the bedside table in his room.

5 He agreed there was animosity between him and his neighbour. He had shot one of this neighbour's roosters when it strayed onto his property. This dispute goes back to at least 2005.

10 Mr. Burlew for Mr. Thomson argues that his client's credibility was not impeached during his lengthy cross-examination. His view is that the Crown has not led evidence to prove that the guns were kept in the night table.

15 In his view there is no requirement for the ammunition to be locked up, either with the gun or on its own. The requirement is that the ammunition not be readily accessible to the firearm.

20 Due diligence applies where the ammunition is stored in a manner that makes it readily available to the gun. He argues that Parliament has not seen fit to legislate or regulate the storage of ammunition, except to say that the firearm shall not be "readily accessible" to the ammunition. To add words to the effect of requiring the ammunition to be under lock and key would be for the courts to legislate. In his view this is what the Crown, by his argument, is seeking.

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5 In Mr. Burlew's view, the defence of "due diligence" applies as the yardstick to measure the efforts of the citizen on meeting the required standards. Obviously here his argument is that his client met the required standards.

10 Mr. Burlew argues that the guns were locked up; they were not simply hidden. This distinguishes this case from the *Smilie* decision.

15 With regard to the ammunition, he argues that the regulation reads, "It is not readily accessible to ammunition" and this refers to the gun vis-a-vis the ammunition. The regulation allows the ammunition to be stored with the gun, presumably thus readily accessible, if it is in a locked receptacle.

20 He argues that the measure should be time. More precisely he argues that it is not the properly licensed owner who should be considered, but the unauthorized person, when considering if the firearm is "readily accessible" to the ammunition. It is the danger represented by the unauthorized, unlicensed person dealing with the firearm that is the target of the section. The aim is keeping the unauthorized person from combining the ammunition and the firearm.

30 He would use, as the measure, the time it would take for this unauthorized person to find the ammunition, and the firearm.

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5 He argues that the defence of due diligence is open to Mr. Thomson. It is made out by the ammunition being in the drawer, thus hidden from the casual observer. By his argument, the separation of rooms, hallways, private as opposed to public spaces in the house, the location of the firearm, the inhabitants of the house, the danger these inhabitants may pose, must all be considered. He argues Mr. Thomson has met these requirements.

Mr. Mahler for the Crown argues two points.

15 The first is credibility. He argues that in considering all the evidence it is not possible for Mr. Thomson to have left the front porch, gone into the gun safe, taken the 9mm and its clips, gone to the bedroom, picked up a phone, reloaded his .38, and returned to the porch as seen in the video that is Exhibit 4.

20 The Crown points out the fact that the ammunition in the bedside table speaks to ready use, which in turn makes storage of the guns in the bedside table more likely.

25 He points out that in cross-examination Mr. Thomson indicated that it would take a minute to accomplish all this. He argues that the re-enactment video does not fit with the theory of the 9mm being in the gun safe.

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5 He argues that the conversation with Sergeant Brower is not ambiguous. It is clear that the guns are kept beside the bed for "situations like this".

10 His second argument turns on the meaning of "readily accessible" in regards to the storage of the ammunition for the two handguns. This is a requirement of Section 6 of the *Storage, Display, Transporting and Handling of Firearms by Individuals Regulations* SOR 98-209 in force on December 1<sup>st</sup>, 1998.

15 His argument is that the ammunition was in the bedside table. It is not stored, locked away as is required by the regulation. By the wording of the regulation, which makes the manner of storage of the ammunition a factor, the firearms are thus not properly stored. The fact of the guns being locked in the vault is beside the question.

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25 In his view, the fact that the gun safe is, at most, 27 feet away from the ammunition makes it readily accessible to the firearms. To be clear, it is not just the fact of being in an unlocked drawer, it is the proximity to the firearms. In a larger home, he concedes, such storage might not be a violation of the regulation. The fact that the ammunition is in the bedside table  
30 speaks to ready use, which in turn makes the storage of the firearms in the bedside table more

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likely. He argues that the storage regulations are a strict liability offence, thus the only defence is to show due diligence in complying with the regulation.

I will deal with the issue of the storage of the two firearms first.

This is an issue of credibility. No one characterizes the placing of the weapons on the bed, where they were when the police came into the bedroom as other than a short interruption in the use of the firearm. The issue is whether they were kept in the bedside table.

In deciding, I must bear in mind the now time honoured formula from *R. v. (D) W.* Simply put, the Crown must prove the case beyond a reasonable doubt. If I am not convinced beyond a reasonable doubt by the Crown's case, I must acquit. If I am convinced beyond a reasonable doubt by the Crown's case, but the evidence led by the defence gives me a reasonable doubt I must acquit. Finally, even if I disbelieve the defence evidence, but on all the evidence I have a reasonable doubt I must acquit.

In deciding this I bear in mind that this is Mr. Thomson's house. He is familiar with it. He is also familiar with the gun safe. He is familiar with the storage of his firearms. No one else lives with him, much less has access to the

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firearms or the safe. He is well aware where the key is to the safe. He is well aware of where the ammunition for his firearms is. He is well aware of the storage of his firearms. He is very familiar with the vault and where each firearm is in the vault. He is also very familiar with the working of his firearms. There is no dispute that he handles his firearms competently and safely.

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The house is very small. The distances he covers are correspondingly small.

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He gave his evidence well. His description of events was plausible. I accept his interpretation of his comments to Sergeant Brower about why the firearms were in the bedside table and on the bed. In the context of the incident of that morning, his interpretation is quite plausible.

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There may well be valid suspicions raised by the tight timing of his movements. It may well be that a person less familiar with the house, and the storage of the firearms, could not achieve what Mr. Thomson testifies to doing in the same time frame. That does not overcome the reasonable doubt raised by Mr. Thomson in his testimony.

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The issue however is what Mr. Thompson did during the short time span. Could he, in the time,

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achieve what he testified to? More accurately, does his evidence leave me with a reasonable doubt as to whether the firearms were stored in the bedside table, as the Crown argues, or properly in the safe? I accept his evidence on that point. In relation to the storage of the firearms themselves I am left with a reasonable doubt.

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The issue of the storage of the ammunition is more difficult.

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This is governed by the regulations made pursuant to the *Firearms Act*. In this case, the relevant regulation is 6(c) which reads as follows:

"An individual may store a restricted firearm only if:

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(c) it is not readily accessible to ammunition, unless the ammunition is stored, together with or separately from the firearm, in

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(i) a container or receptacle that is kept securely locked and that is constructed so that it cannot readily be broken into, or

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(ii) a vault, safe or room that has been specifically constructed or modified for the secure storage of

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restricted firearms and that is kept  
securely locked."

Regulation 7 governs prohibited weapons.

Paragraph (c) of that regulation is identical  
insofar as it governs ammunition.

I agree with the decision in *R. v. Smilie*, [1998]  
B.C.J. No. 2082, that the storage of firearms  
provisions is strict liability. I agree that a  
defence of due diligence is required, once the  
*actus reus* is proved beyond a reasonable doubt.  
This is a "regulatory offence". The decision of  
*Smilie* follows the *Wholesale Travel* decision of  
the Supreme Court of Canada. In my view, it is  
applicable here. This same reasoning was  
followed in the decision of *R. v. Porter* [2007]  
B.C.J. No. 809, albeit with but brief commentary,  
accepting the *Smilie* decision's reasoning. The  
Supreme Court of Canada did not comment when they  
summarily dismissed further appeal in the *Porter*  
case.

While the regulation requires the firearms to be  
locked in a certain manner, the only comment  
about the ammunition is that it is not to be  
"readily accessible" to the firearm, unless  
locked up in the prescribed manner. Accordingly  
it is the firearm that is improperly stored if  
the ammunition is "readily available" to it.

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The issue is whether the Crown has proved the *actus reus* beyond a reasonable doubt. The Crown maintains that he has. The defence maintains that he has not.

The Crown in his argument pointed out that the house is small. Assuming the firearms were properly locked up as the respective sections require, the ammunition must be "readily accessible" because it is not locked up as it might be to comply with the regulation, and is within a few feet of the properly secured firearm.

This might be called the "proximity" argument. During oral argument Crown counsel agreed that in a large house, ammunition left out of any vault or lock-up, such that it is in the open, but far from the firearm, might not be in violation of the regulation. In short, were Mr. Thomson in a large house, with the ammunition at the far end of the house, or possibly in an out building well removed from the gun vault, there would be no violation.

This seems somewhat illogical. Ammunition stored in the dog run, which was firebombed by the assailants, would by this argument be properly stored. This, because it is not in proximity to the firearms. By this example the ammunition would be readily accessible to the assailants. To my mind such storage would also meet the



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requirements of the regulation as they are presently worded.

5 To engage in this proximity reasoning would be for me to usurp the function of Parliament. It is for Parliament to place further restrictions on the storage of ammunition if they so wish. For me to do other than decide the question I am asked, about Mr. Thomson's guilt or innocence, is to go beyond my role as a judge and to engage in legislating.

10 Mr. Burlew points out that the decisions presented during argument deal with the storage of the firearm, rather than just the ammunition, as in the case here. His argument is predicated on how the firearms themselves are properly stored. That his client has to get the key to the vault, open the vault, take out the firearm, load it, all point to the firearm not being readily accessible to the ammunition. He argues that for self-defence the ammunition may be located throughout the house, readily available to the homeowner. I do not accept Mr. Burlew's suggestion that I should somehow factor in a difference between the authorized user, and the unauthorized user, This is to bring in a distinction which is not in the regulations. Whether such a distinction should be created, in my view, is up to Parliament.

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5 The Oxford English Dictionary gives a definition for "readily" as "promptly, in respect of the time of action; quickly, without delay; without difficulty; with ease or facility." As the Scottish usage the Oxford English Dictionary also gives, "as may easily happen; probably".

10 That same dictionary gives definitions for "available" as "capable of producing a desired result; of avail, effectual, efficacious" or, "capable of being employed with advantage or turned to account; hence, capable of being made use of, at one's disposal, within one's reach".

15 In *R. v. Kahn*, [2007] O.J. No. 137 "readily accessible" was considered. The facts of the case are worth noting. *Kahn* was charged with an offence under Section 95 of the *Criminal Code*, possession of a prohibited or restricted firearm without being the holder of a licence. This is a very different charge from the one Mr. Thomson faces here. The facts of that case indicate that police found a .22 calibre firearm in a laundry hamper in the bedroom of Kahn's apartment. A .22 calibre bullet was found in plain view on a dish on the kitchen table. The bedroom and kitchen were in "close proximity".

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30 Section 95 requires the firearm to be possessed "together with readily accessible ammunition".

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My reading of the case is that Justice Then considered the ammunition as being readily accessible to the "would be" user of the firearm, and the firearm. He also considered it being readily accessible to the illegally possessed firearm itself. This is a logical reading of the wording of Section 95.

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Justice Then, then adopted the definition of "readily available" from a civil case, *Floyd and Bowers et al* (1978) 21 O.R. (2<sup>nd</sup>) 204. The court in that case said:

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"In leaving the gun and the ammunition readily available and unattended, the parents made it easily possible for Stephen to disregard their instructions. I consider that this failure to control or prevent easy access to both the gun and the ammunition constitute negligence on the part of the parents."

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In *R. v. Kahn*, Justice Then used the test, "...the bullet could be accessed quickly, without delay and without difficulty".

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The wording of the regulations in this case is different to the charge Justice Then was dealing with. In this case what is required of the person validly in possession, is that the firearm be stored properly and not readily accessible to the ammunition.

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In my view to assess readily available I must look at how "readily" the ammunition and the firearm can be brought together. The section looks at the firearm, and how it is stored. How quickly can it be put with the ammunition? To my mind Parliament wanted firearm users to be deliberate, and considered in accessing firearms and ammunition, particularly restricted and prohibited ones. For this reason it is illegal to store a loaded firearm for example. In this I agree with the Crown's submissions.

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I accept that there was ammunition in the bedroom, suitable for those firearms. There was also ammunition in the kitchen. To use the firearm, to unite it with the ammunition, I find that Mr. Thomson had to take the following steps:

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1. Take the key to the vault from the dresser.
  2. Go the short distance to the vault.
  3. Unlock the vault.
  4. Take out the firearm.
  5. Load the firearm.

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I accept his testimony that he loaded the firearm from the ammunition stored in the vault. It was the closest to him once he had the firearm in his hand. It was readily accessible to the firearm. However, it was stored in the vault in an acceptable manner. There had to be a series of

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considered actions on his part before the firearm could be discharged.

Accordingly I find him not guilty on this charge as on the other one.

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Certification

Form 2

Certificate of Transcript  
Evidence Act, Subsection 5(2)

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I Krystyne Dolan certify that this document is a true and accurate transcription of the recordings of R. v. IAN THOMSON in the Ontario Court of Justice, held at 102 E. Main Street, Welland, Ontario taken from Recording(s) 4521-2-20130103-093113 which is certified in form 1.

Jan 8/13  
Date

Krystyne Dolan  
Signature of Authorized Person

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\*This certification does not apply to the (Rulings, Reasons for Judgment, Reasons for Sentence, Charge) which was/were judicially edited.