

Citation: *R. v. Smith*, 2008 YKTC 24

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Docket: T.C.05-00745A
Registry: Whitehorse
Heard: Haines Junction

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Foisy

REGINA

v.

MOREY ALLAN SMITH

Appearances:
Ludovic Gouaillier
Malcolm Campbell

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] FOISY T.C.J. (Oral): It has been a very interesting case, to say the least. I am prepared to give judgment now. On the issue of credibility, first of all, let me say that I accept everything that the corporal said at face value. I have no problems with his evidence.

[2] With respect to the accused, Mr. Smith, this evidence is difficult to assess. Perhaps being out on the land in the bush for a long period of time makes a person a little eccentric. I think I would use that word; Mr. Smith came across as an eccentric person. Now, there are some parts of his evidence which I do not accept. This whole

business about the corporal wetting his pants is nonsense to me. I have no trouble discarding that evidence.

[3] On the other hand, as we tell jurors when we instruct them on the law, fact-finders can accept all of, none of, or part of the evidence of a witness. So I have to ask myself, on the part of the evidence as it relates to Mr. Smith's habits and whether he was going to go for a hike with his dogs, in terms of what he thought was a cougar, at least a cat, earlier in the night, the wolves which have disturbed the dogs, there is evidence coming from both sides that yes, there are cougars known to be in the area, although perhaps not actually sighted. Yes, there are wolves. They are well known and they are around. So this was not a figment of Mr. Smith's imagination. I accept his evidence.

[4] He was preparing for a walk and he had taken the guns out and prepared them in order to defend himself and/or his dogs. This was something that he did everyday. He felt reassured with the weapons. If you are going to do that, I suppose it makes sense that you bring a weapon along. I have to say that on that area of the testimony, I have a doubt as to whether or not he is telling the truth, and of course the doubt has to go in his favour.

[5] Now, whether or not he took the gun out, loaded it and left it out there intentionally in order to scare the corporal, firstly, I do not accept that as being his intention, and nor do I hear from the evidence of the corporal that he was afraid, that he was scared. He might have said something like "What's this"; and I think those were his words or something akin to that. Certainly nothing to show that a corporal would be

afraid of a gun sitting there when the owner is nowhere near it. He is closer to it than the owner. He is the one who picks it up. So I discard that. I do not think that that is the case.

[6] Now, getting into the law. Was it stored? The *Carlos* case, [2002] S.C.J. No. 36, is interesting because it has a little bit of a twist to it. A person has laid down a gun, he sees the police approaching, and because he is afraid of what may happen, he tries to hide it from the police. I think the Supreme Court was backed into a situation where to decide otherwise would have been somewhat silly, if I can use the word. While the gun has to be in present or in imminent use, and the word imminent, I think, is the one that applies here, is something that is a matter of fact. It depends on the findings of the Court. The Court has to interpret the facts to determine: Was the gun in present use? No, it was not. It was there; it was not being used. Was it in imminent use? We have the evidence, which is not contradicted, of the accused, which says, "Yes, I was going out for my walk with my dogs. The call of nature came. I sat down there; the gun was within reach, and went to the bathroom. My intention was to take it and to go out for a walk." At that time, within a few minutes the corporal arrives and everything unfolds from there.

[7] *Carlos*, the Court says there are circumstances where a short interruption in the user handling a firearm would still constitute use or handling rather than storage. I think I would be hard pressed to say, reasonably, that I have a gun. I am going to use it, it is loaded, I have to go the bathroom and I set it down while I go the bathroom. That is not the kind of short interruption the Court is talking about in *Carlos*.

[8] So with some hesitation, I find that, in this case, there was no storage as that has been defined by the courts. The use was not present but it was imminent and it was the kind of short interruption that the Supreme Court of Canada was talking about in *Carlos*.

[9] Accordingly, I have to find this accused not guilty of both counts because storage is an essential averment in both counts.

[10] So thank you both, counsel, for a very interesting and hard-fought case. As short as it was, I think it was interesting and I certainly think that the corporal had every reason, looking at it from his point of view, bringing this case forward before the Court.

[11] MR. CAMPBELL: Your Honour, just with respect to the items seized. I would make an application for his licence and his guns and ammunition and trigger locks and so forth to be returned to him pursuant to s. 490. He has made a request, which I will put on the record; although I recognize the Court -- at least I do not think the Court can make this order, but he has asked that the police deliver the weapons to him so that he does not have to get his carrying -- transfer permits to get them from the police station to his place. If the police do return the weapons, to have Constable Corbett rather than Corporal MacKellar.

[12] THE COURT: Well, I am not sure that I have the authority to make that kind of an order. I can order that everything seized be returned to the accused, but it seems to me that I cannot force the police to bring it over there.

[13] MR. CAMPBELL: That is true. We would be content with the order to return.

[14] THE COURT: Mr. Gouaillier?

[15] MR. GOUAILLIER: No, certainly. Since there was an acquittal, it is an appropriate order. We would only ask the Court to make it subject to the usual requirement of the expiration of an appeal.

[16] THE COURT: Yes. Everything that I order is subject is to 30 days.

[17] MR. GOUAILLIER: Thirty days.

[18] THE COURT: So after the expiration of the period of appeal, if there is no appeal filed, these items will be returned to the accused. He will have to attend at the police station to pick them up. To carry his revolver back to his house, he will have to have the necessary authority to do that. If, of course, there is an appeal, then it will be pending the outcome of the appeal.

FOISY T.C.J.