

Case Name:

R. v. [REDACTED]

**Between
Her Majesty the Queen, and**

[REDACTED]

[2016] O.J. No. 5819

SC File No. 16-3219

Ontario Superior Court of Justice
Toronto, Ontario

K.B. Corrick J.

Heard: October 27, 2016.

Oral judgment: October 27, 2016.

(14 paras.)

Counsel:

K. Stratos, Counsel for the Crown.

A. Stastny, Counsel for [REDACTED]

REASONS FOR JUDGMENT

1 K.B. CORRICK J. (orally):-- Mr. [REDACTED] was arraigned before me on three charges. Possession of a firearm while knowingly not being a holder of a licence. Two, possession of a firearm while being prohibited to do so by a Section 110 order. And three, possession of a loaded prohibited firearm. He pleaded guilty to the first two charges and had a trial before me on the third.

2 The sole issue for my determination is whether the Crown has proven beyond a reasonable doubt that Mr. [REDACTED] knew that the gun that he has admitted possessing was loaded.

3 The evidence for the Crown consisted of a number of photographs, a video of the scene taken by the onboard camera in the police cruiser, an agreed statement of facts and the testimony of [REDACTED]. Mr. [REDACTED] called no evidence.

4 Many of the facts in this case are not in dispute. Some of them are the subject of the agreed statement of facts. On May 29th, 2015 at around 11:00 a.m., Mr. [REDACTED] was a passenger in the front seat of a 2002 Saturn, owned and driven by his friend, [REDACTED]. A third man, [REDACTED], was a passenger in the back seat. As Mr. [REDACTED] was preparing to make a left-hand turn from eastbound Eglinton Avenue on to Markham Road, an unknown car approached and shot numerous bullets into the passenger side of the Saturn. Mr. [REDACTED] and Mr. [REDACTED] were struck and wounded. The Saturn proceeded northbound on Markham Road a short distance and then stopped. Mr. [REDACTED] and Mr. [REDACTED] waved down a police car, which was proceeding southbound on Markham Road. As the police car approached the Saturn, Mr. [REDACTED] attempted to dispose of a .38 calibre handgun by throwing it. The firearm was located by police officers on the road several feet away from the Saturn. It was loaded with six bullets. A blue bandana was tied around the firearm under the hammer and across part of the cylinder.

5 Mr. [REDACTED] testified. Parts of his evidence were inconsistent with an audio recorded statement that he had given police on May 31st, 2015, while he was in the hospital recovering from surgery. I permitted the Crown to cross-examine Mr. [REDACTED] on his statement pursuant to s. 9(2) of the *Canada Evidence Act*. Other parts of Mr. [REDACTED] evidence were uncontradicted by other evidence or by his prior statement. He testified that he had purchased the firearm three weeks previously for his own protection. He loaded the firearm and tied the bandana around it to act as a safety and prevent accidental firing. Mr. [REDACTED] had nothing to do with him acquiring the firearm.

6 Mr. [REDACTED] evidence about the location of the gun in the car on May 29th and Mr. [REDACTED] knowledge about the presence of the gun in the car, differed from what he had told police on May 31st. At trial, he testified that he hid the firearm in the centre console underneath the cup-holder so that it was not visible to the occupants of the car. He testified that neither Mr. [REDACTED] nor Mr. [REDACTED] knew that there was a gun in the car. He told police, however, that he stored the firearm between the centre console and the front passenger seat and that Mr. [REDACTED] and Mr. [REDACTED] knew that it was there.

7 At trial, Mr. [REDACTED] testified that after he was shot he ripped the cover off the centre console, thrust the firearm into Mr. [REDACTED] hand and told him to throw it away. When asked by the police on May 31st whether he told Mr. [REDACTED] to throw the gun or whether Mr. [REDACTED] had the foresight to do it himself, Mr. [REDACTED] replied that, "He grabbed and got rid of it."

8 Possession of a loaded prohibited firearm contrary to Section 95 of the *Criminal Code* requires proof of subjective *mens rea*. The Crown must prove beyond a reasonable doubt that Mr. [REDACTED] knew that the firearm was loaded or that he had a reason to suspect that it was loaded and deliberately declined to inquire whether it was loaded, preferring instead to remain ignorant.

9 In my view, there is no evidence to support either proposition.

10 Counsel agree that the court cannot rely on Mr. [REDACTED] evidence where it conflicted with his statement to the police. I agree that it was not credible. Without it, what evidence is there? Mr. [REDACTED] was a passenger in a car owned and driven by Mr. [REDACTED]. Following a drive-by shooting in which he and Mr. [REDACTED] were wounded, he waved down a passing police cruiser. As the police car approached he attempted to dispose of a gun that was owned by Mr. [REDACTED] by throwing it. The gun had a blue bandana tied around it. It was loaded. It landed on Markham Road.

11 There is no evidence about where the gun was located in the car. There is no evidence about when Mr. [REDACTED] learned that there was a gun in the car. There is no direct evidence that Mr. [REDACTED] knew the gun was loaded.

12 Mr. Stratos asked the court to find that what Mr. [REDACTED] told the police on May 31st was the truth -- that Mr. [REDACTED] knew the gun was in the car and attempted to dispose of it as the police approached. Mr. [REDACTED] submitted that Mr. [REDACTED] denials about whether Mr. [REDACTED] knew about the presence of the gun were an attempt to protect Mr. [REDACTED] and served to enhance the likelihood that what Mr. [REDACTED] told the police were the truth. He further submitted that it was reasonable to infer that Mr. [REDACTED] had told Mr. [REDACTED] about the gun because they had been good friends for six or seven years. Finally, he submitted it would have been obvious to Mr. [REDACTED] that the gun was loaded because of the way the bandana was wrapped around it. Mr. [REDACTED] must have known it was loaded or was willfully blind to that fact.

13 Whether Mr. [REDACTED] statement to the police is true or not does not assist me in determining whether Mr. [REDACTED] knew the gun was loaded. Mr. [REDACTED] statement is not evidence. It simply served to discredit Mr. [REDACTED].

14 The inferences that Mr. Stratos asks me to draw require an enormous amount of speculation. Findings of guilt in criminal matters cannot be founded on speculation. They must be based on evidence, and in my view that evidence is not present in this case and I find Mr. [REDACTED] not guilty of count #five.