

ORIGINAL

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

VS

FREDERICK ALLEN AVERY

Transcript of the Proceedings of a Trial held before
His Honour Judge R. M. Bourassa, sitting at Yellowknife
in the Northwest Territories, on Tuesday, October 15th,
A.D., 1985.

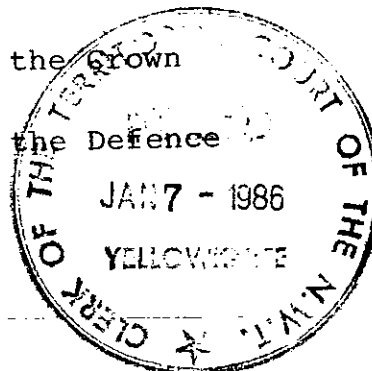
APPEARANCES:

MS. L. WALL:

Counsel for the Crown

MS. V. FOLDATS:

Counsel for the Defence



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Rifle

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1 THE CLERK: Frederick Allen Avery.

2 MR. FOLDATS: I believe, Your Honour, there are four charges
3 before the court on which not guilty pleas have been entered
4 and the matters are set for trial. The Defence is prepared
5 to proceed on all four matters.

6 THE COURT: Which matter do you wish to proceed with
7 first, Miss Wall?

8 MS. WALL: Your Honour, I can advise the court at this
9 time that the Crown will not be offering any evidence
10 on the Section 234 matter, the Section 666 matter and
11 the Section 294 matter. We will be proceeding to trial
12 only on the Section 98 matter.

13 THE COURT: Go ahead and call your case.

14 MS. WALL: Your Honour, I have a certified copy of
15 a firearms prohibition order made by yourself in this
16 court against the accused which I would like to enter
17 into evidence. I will just show it to my friend so he
18 can review it.

19 THE COURT: Any objection, Mr. Foldats?

20 MR. FOLDATS: No, sir.

21 THE COURT: Exhibit 1.

22 EXHIBIT 1: Copy of Firearms Prohibition Order.

23 MS. WALL: Your Honour, the Crown's first witness is
24 Joseph Bourque.

25 MR. BOURQUE: I don't believe in the Bible.

26 THE COURT: You can affirm then. She will put the
27 affirmation to you.

1 JOE BOURQUE, Affirmed.

2 THE COURT: Go ahead, Miss Wall.

3 EXAMINATION-IN CHIEF BY MS. WALL:

4 Q. Mr. Bourque, do you live in Yellowknife in the Northwest
5 Territories?

6 A. Yes, I do.

7 Q. And what do you do for a living?

8 A. I work for Back Bay Welders as a welder.

9 Q. And do you know someone called Fred Avery?

10 A. Yes, I do.

11 Q. Would you look around the courtroom and tell the court
12 if you see that person here today?

13 A. Yes, he is here.

14 Q. Would you please point him out?

15 A. (Witness points).

16 THE COURT: Identifies the accused.

17 MS. WALL:

18 Q. Were you living in Yellowknife on August the 6th of this
19 year?

20 A. Yes, I was.

21 Q. Did you see Fred Avery around that time?

22 A. Yes, I did.

23 Q. Under what circumstances did you see him? Where were
24 you?

25 A. At the Swap Shop.

26 Q. And what were you doing there?

27 A. I just stopped in.

1 Q. And where did you first see Mr. Avery?

2 A. In the Swap Shop.

3 Q. Did you have any conversation with him?

4 A. Yes, I did.

5 Q. Did you know him before that day?

6 A. Yes, I did.

7 Q. How did you know him?

8 A. I worked with him.

9 Q. When was that?

10 A. Probably seven or eight years ago.

11 Q. What kind of work did you do with him then?

12 A. Plumbing.

13 Q. And when you saw him in the Swap Shop, what did you talk
14 about?

15 A. I asked him if he still had a minny 14 for sale.

16 Q. What did you mean by a minny 14?

17 A. A 22 caliber Ruger.

18 Q. Would you tell us what kind of object that is?

19 A. It is a semi automatic rifle.

20 Q. And did he answer you?

21 A. Yes, he did.

22 Q. What did he say?

23 A. He said he did.

24 Q. So did you have any further conversation?

25 A. We set up price and then we went and picked the gun up.

26 Q. What was the price to be?

27 A. Three hundred dollars.

1 Q. Do you have any other similar guns yourself?

2 A. Yes, I do.

3 Q. How much did you pay for them?

4 A. Five hundred and fifty dollars.

5 Q. So where did you go?

6 A. We went to a house in Frame Lake South to pick the gun
7 up, and I brought him back to the Swap Shop.

8 Q. How did you go to Frame Lake South?

9 A. In my truck.

10 Q. And when you got to the house what happened?

11 A. He went in and got it, and I brought him back to his vehicle

12 Q. What did he get?

13 A. The gun.

14 Q. Did you see him with it?

15 A. Yes, I did.

16 Q. What did he do with it?

17 A. He stuck it in my truck.

18 Q. What did you do then?

19 A. I brought him back to the Swap Shop where his truck was.

20 Q. And what did you do then?

21 A. Then I brought the gun to the barracks, or the police
22 detachment.

23 Q. Was there any reason why you did that?

24 A. My F.A.C. permit was expired so I took the gun and the
25 permit there to get the permit up to date and to make
26 sure the gun was okay.

27 Q. When did you take it in?

1 A. Well, immediately after the transaction.

2 Q. And did you leave the gun there or did you keep it?

3 A. No, I kept it.

4 Q. Do you have the gun now?

5 A. No, I don't.

6 Q. Do you know who has it?

7 A. Yes, the R.C.M.P. have.

8 Q. When did they get it, do you know?

9 A. Last Saturday evening.

10 Q. What circumstances did they get it in?

11 A. Well, they just came and said it was a stolen rifle.

12 Q. Did you give it to them?

13 A. Yes, I did.

14 Q. Would you recognize that gun if you saw it again?

15 A. Yes, I would.

16 Q. Is there any special reason you would recognize it?

17 A. There has been a stamp on the stock. Where the stamp
18 came off it took some of the varnish off.

19 Q. What kind of stamp do you mean?

20 A. I don't know. There was a sticker.

21 Q. Mr. Bourque, I am going to show you a firearm. I would
22 like you to look at it and tell the court if you have
23 ever seen it before?

24 A. Yes, I have. There is the mark there.

25 THE COURT: Exhibit 2?

26 MS. WALL: Yes, Your Honour, I would ask that that
27 be made an exhibit.

1 EXHIBIT 2: Rifle.

2 MS. WALL:

3 Q. Where did you last see this?

4 A. In my house Saturday evening.

5 Q. Is this the gun you were telling the court about before?

6 A. Yes, it is.

7 MS. WALL: Thank you, Mr. Bourque. I have no more
8 questions. This gentleman may have some to ask you.

9 CROSS-EXAMINATION BY MR. FOLDATS:

10 Q. Mr. Bourque, when Mr. Avery sold the rifle to you, do
11 you remember whether or not he called it his rifle?

12 A. Yes, he did.

13 Q. As well do you recall seeing that rifle prior to the sale?

14 A. Yes, I did.

15 Q. And approximately how long ago was that?

16 A. It would have been two or three years. I am not sure.

17 Q. And would that have been in Mr. Avery's possession at
18 that time?

19 A. Yes.

20 MR. FOLDATS: I have no further questions.

21 THE COURT: Thank you, Mr. Bourque. That's all. You
22 are free to go or you can stay if you wish. Any further
23 evidence, Miss Wall?

24 MS. WALL: Your Honour, I will call Corporal Tanner.

25 EDWARD VICTOR TANNER, Sworn.

26 EXAMINATION-IN-CHIEF BY MS. WALL:

27 Q. Corporal Tanner, I understand you are a member of the

1 Royal Canadian Mounted Police stationed in Yellowknife;
2 is that correct?

3 A. That is correct.

4 Q. And were you stationed here this last Saturday?

5 A. Yes, I was.

6 Q. And do you know Mr. Joseph Bourque?

7 A. Yes, I do.

8 Q. Did you see him on that day?

9 A. Yes, I did.

10 Q. Under what circumstances?

11 A. I was doing an investigation which Mr. Bourque was involved,
12 and I went to see him to see if he had a weapon that I
13 had received information that he bought from a Mr. Avery,
14 and I went around to take a statement from him and seize
15 the weapon if he had it.

16 Q. And did you see a weapon when you were there?

17 A. Yes, I did.

18 Q. If you saw that weapon again could you recognize it or
19 identify it?

20 A. Yes, it is the same weapon that Mr. Bourque just identified.

21 Q. Perhaps I will just ask you to take a close look at it.

22 A. Yes, this is the weapon that I seized from Mr. Bourque
23 along with the carrying case.

24 Q. Corporal, had you seen that weapon before last Saturday?

25 A. No, I had not.

26 MS. WALL: Thank you. I have no further questions.

27 THE COURT: Mr. Foldats?

1 MR. FOLDATS: No questions, Your Honour.

2 THE COURT: Thank you, Corporal. Miss Wall?

3 MS. WALL: There is no further evidence for the Crown,
4 Your Honour.

5 THE COURT: Does the Defence wish to call evidence?

6 MR. FOLDATS: No, Your Honour.

7 THE COURT: Your submissions, Miss Wall?

8 MS. WALL: Your Honour has heard evidence that the
9 accused who has been identified was seen in the possession
10 of a firearm on or about the date in question. The order
11 has been admitted. It is my understanding that the Defence
12 has admitted that it applies to the accused. I would
13 submit that proof of those two elements is sufficient
14 to found the charge. The rifle was described, I would
15 submit by the witness Mr. Bourque. The accused was under
16 an order at the time. I would submit the case has been
17 made out.

18 THE COURT: Mr. Foldats?

19 MR. FOLDATS: Thank you, Your Honour. I would ask the
20 court to refer to Section 98(13) of the Criminal Code
21 where it states:

22 "An order made pursuant to subsection (1), (2),
23 (6) or (7) shall specify therein a reasonable
24 period of time within which the person against
25 whom the order is made may surrender to a police
26 officer or a firearms officer or otherwise
27 lawfully dispose of any firearm"...lawfully
possessed by him prior to the making of the
order, and subsection (12) does not apply to
him during such period of time."

In my submission the order before the court does not so

1 specify a reasonable period of time, and therefore, cannot
2 support a conviction. I would refer the court to the
3 only case which I am aware of dealing with that subsection
4 which is the case of The Queen v. Mac Callum annotated
5 at page 87 of Martin's Criminal Code. In my submission
6 Section 98(13) is a mandatory section, and it has not
7 been fulfilled. Therefore, the order cannot support a
8 conviction.

9 THE COURT: Have you got a copy of the case?

10 MR. FOLDATS: Yes, I do, Your Honour. It is not much
11 more helpful than the annotation.

12 THE COURT: Does the case refer to the period to surrender
13 custody of firearms or does it refer to a period after
14 that?

15 MR. FOLDATS: The case of MacCallum states that where
16 there is no clause in the order stating that, there should
17 be two months within which to get rid of firearms. It
18 doesn't say that specifically, but that is the meaning
19 of the case.

20 THE COURT: Well, have you got a copy?

21 MR. FOLDATS: Yes, Your Honour. It is the only copy I
22 have. The important part for the court is on the second
23 page. There are three issues in the trial, and the second
24 page towards the end deals with this issue.

25 THE COURT: Well, in the absence of any transcript at
26 the time as to whether or not time was given which would--
27 that is to say, I don't know if the written order is the

1 complete prohibition that was requested at the time or
2 if it is just a portion of the order, and absent that,
3 the accused will have to be acquitted.

4 MR. FOLDATS: Thank you, Your Honour.

5 MS. WALL: Your Honour, I would like to make submissions
6 on this. Is the court prepared to hear me?

7 THE COURT: I'm sorry.

8 MS. WALL: Your Honour, I would submit that on a fair
9 reading of the section, it can be construed that the intent
10 of the legislature in ordering that a period of time be
11 given was to protect an accused from prosecution for
12 having a firearm in his possession very shortly after
13 an order had been made for him. Otherwise, technically
14 he could be prosecuted if having a firearm in his possession
15 immediately after being found guilty and having an order
16 made against him.

17 Your Honour, I would submit it wasn't intended by
18 the legislature to apply in a situation such as we have
19 here where an accused was in possession of a firearm months
20 after the order was made. The order was made in March,
21 I believe--excuse me, it was made in June. The accused
22 was in possession of the firearm in August.

23 THE COURT: I think Mr. Foldats' argument is that it
24 shall provide a reasonable time to dispose of the firearms
25 and the order that you have filed does not say anything
26 about having a reasonable time to surrender firearms.
27 I take it his argument is that there is a mandatory provision

1 of the Code that is absent in the order. Therefore, the
2 order is defective.

3 MS. WALL: But, Your Honour, I would submit that my
4 friend is asking the court to take a further leap and
5 say that the order is of no force and effect because it
6 does not contain the mandatory provision. I would submit
7 it doesn't necessarily follow. If you give effect to
8 my friend's submissions, that would be in effect to gut
9 the order, and I would submit that is not what the legislature
10 intended.

11 THE COURT: Surely it is not gutting an order. It is
12 giving force to the law as it is provided for in the Code.

13 MS. WALL: Well, Your Honour, the Code doesn't provide
14 a penalty or an outcome. It doesn't say what shall happen
15 if that provision isn't followed, and therefore, I would
16 suggest it is open to Your Honour not to simply find that
17 the order has no effect.

18 THE COURT: It doesn't provide as to what is going to
19 happen if an accused isn't warned after a preliminary
20 inquiry, but the result is clear. The committal is invalid.

21 MS. WALL: Your Honour, I would submit that the two
22 instances aren't really similar.

23 THE COURT: Well, they are similar in that neither provide
24 for what is going to happen if the order is defective.
25 How else do I read: "Shall specify therein a reasonable
26 time within which the person against whom the order is
27 made may surrender to a police officer..." etc., etc.

1 How else can I interpret that but it is mandatory.

2 MS. WALL: I agree, Your Honour, that the word "shall"
3 imports that it is mandatory. I am simply arguing that
4 it is not a necessary consequence that the order as a
5 whole should fall--

6 THE COURT: I am not saying the whole order is falling.
7 The most I can do--I can't make that kind of declaration.
8 The most I can do is what was done in MacCallum--

9 MS. WALL: Your Honour, I haven't seen a copy of the
10 case.

11 THE COURT: --and simply acquit him on the basis that
12 the order is defective and can't support a conviction.
13 That is not to say that the whole order is invalid.

14 MS. WALL: Well, Your Honour, I would submit that the
15 only way that an accused who has been ordered not to
16 possess firearms can be obliged not to possess them in
17 a situation like this then would be if the Crown went
18 back to the court and asked for a new order, and the court
19 is now functus. It has heard the case and it has decided
20 the issue.

21 THE COURT: That is what Appeal Courts are for.

22 MS. WALL: I have no further submissions, Your Honour.

23 THE COURT: It is clear that Mr. Avery was in possession
24 of a firearm. I have no question about that whatsoever.
25 It is also clear that on the 20th of March, 1985, he was
26 prohibited from possessing such firearms for a period
27 of five years, and it is also abundantly clear in the

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order that was drafted and filed at that time contained no provision pursuant to Section 98(13) providing a reasonable time to surrender the firearms that he may have had. The order then is defective, in view of the mandatory provisions.

I am well conscious of the position taken by some courts with respect to technicalities, but I don't believe that we can look at this matter as a minor "technicality". Section 98(13) is very clear..."It shall specify". If the order does not so specify, it is defective and cannot support a conviction.

MR. FOLDATS: Thank you, Your Honour. With respect to the other three charges on which the Crown offered no evidence?


THE COURT: They have all been dismissed.

MR. FOLDATS: Thank you.

THE COURT: Thank you, Counsel.

(AT WHICH TIME THESE PROCEEDINGS WERE CONCLUDED.)

Certified a correct transcript,


Laurie Ann Young
Court Reporter