

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Roscoe and Freeman, JJ.A.

Cite as: R. v. Lusignan, 1993 NSCA 40

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

SHAWN ALAN LUSIGNAN

Respondent

)
) Kenneth W.F. Fiske, Q.C. and
) William B. Fairbanks, Q.C.
) for the Appellant

)
) Robert McCleave
) for the Respondent

)
)
) Appeal Heard:
) January 22, 1993

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) Judgment Delivered:
) January 22, 1993
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)

THE COURT: Leave to appeal granted, appeal allowed and sentence varied,
per oral reasons for judgment of Roscoe, J.A.; Jones and
Freeman, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

ROSCOE, J.A.:

The Crown appeals the refusal of the Provincial Court Judge to impose a firearms prohibition pursuant to s. 100 of the **Criminal Code** as part of the respondent's sentence on a conviction for assault causing bodily harm.

The respondent is an able seaman in the Canadian Armed Forces. The trial judge accepted the respondent's submission that a firearms prohibition would cause excessive hardship for him in his naval career. Instead, the trial judge imposed a substantial fine and a three year probation order with a condition that the respondent "not carry, possess, handle, ship or store any firearms or ammunition for that full period of three years except under the direction of any officer during the course of your employment with the Armed Forces".

Since this matter was before the Provincial Court, s. 100 of the **Criminal Code** has been amended by the Statutes of Canada 1991, c. 40, s. 12. That section repealed the former s. 100 and replaced it with a new section, which is as follows:

"100. (1) Where an offender is convicted or discharged under section 736 of an indictable offence in the commission of which violence against a person is used, threatened or attempted and for which the offender may be sentenced to imprisonment for ten years or more or of an offence under section 85, the court that sentences the offender shall, subject to subsections (1.1) to (1.3), in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from possessing any firearm or any ammunition or explosive substance for any period of time specified in the order that commences on the day on which the order is made and expires not earlier than

(a) in the case of a first conviction for such an offence, ten years, and

(b) in any other case, life,

after the time of the offender's release from imprisonment after conviction for the offence or, if the offender is not then imprisoned or subject to imprisonment, after the time of the offender's conviction or discharge for that offence.

(1.1) The court is not required to make an order under subsection (1) where the court is satisfied that the offender has established that

(a) it is not desirable in the interests of the safety of the offender or of any other person that the order be made; and

(b) the circumstances are such that it would not be appropriate to make the order.

(1.2) In considering whether the circumstances are such that it would not be appropriate to make an order under subsection (1), the court shall consider

(a) the criminal record of the offender, the nature of the offence and the circumstances surrounding its commission;

(b) whether the offender needs a firearm for the sustenance of the offender or the offender's family; and

(c) whether the order would constitute a virtual prohibition against employment in the only vocation open to the offender.

(1.3) Where the court does not make an order under subsection (1), the court shall give reasons why the order is not being made."

These new sections were proclaimed to come into force on August 1, 1992.

On December 2, 1992, the Supreme Court of Canada upheld the constitutional validity of the former s. 100 in its decision in **R. v. Sawyer**, unreported.

The words of Lamer, C.J., in the brief **Sawyer** decision apply equally to this fact situation:

"Assuming without deciding the availability of constitutional exemptions, we do not feel that this is a proper case where one should be granted."

We are, however, of the view that the respondent is entitled, by virtue of s. 44(e) of the **Interpretation Act**, R.S.C., 1985, c. I-21 and s. 11(i) of the **Charter**, to the benefit of the new provisions.

We find that in this case it is not necessary to order a total prohibition against handling firearms. Considering that no weapon was used in the commission of the offence, that the respondent has no prior criminal record, that as a member of the Armed Forces he may at times be required to handle firearms and that a court ordered restriction could cause him undue hardship in relation to his employment, it is not appropriate in the circumstances to make the prohibition order.

We would, instead of the general prohibition order, order that the respondent be subject to a probation order with the same terms and conditions as that specified by the trial judge, commencing today for a period of two years.

Leave to appeal is granted, appeal allowed and sentence varied.

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J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.