

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Robinson*, 2020 NSPC 56

**Date:** 2020-12-08

**Docket:** 8476481, 8476482, 8476483  
8476484, 8476485, 8476486

**Registry:** Halifax

**Between:**

HER MAJESTY THE QUEEN

v.

JAMES JOSEPH ROBINSON

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**DECISION TRIAL**

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**Judge:** The Honourable Judge Elizabeth Buckle

**Heard:** October 30, November 2, 3, 4, 5, 9, 2020 in Halifax, Nova Scotia

**Decision:** December 8, 2020

**Charges:** Section 239 *Criminal Code* x 2  
Section 88 (1) *Criminal Code*  
Section 267(a) *Criminal Code* x 2  
Section 145(4)(a) *Criminal Code*

**Counsel:** Kim McOnie, Adam McCulley for the Crown  
Alex MacKillop for the Defence

## **By the Court:**

### **Introduction**

[1] James Robinson has been charged with attempted murder by stabbing of Gerry Robinson and Wayne Robinson, assault with a weapon of each of them, possession of a weapon (a knife) for a dangerous purpose and breach of Undertaking. The charges relate to an altercation involving James Robinson and his two brothers, Wayne and Gerry, on June 5, 2020. To reduce confusion, I will refer to all three by their first names in this decision. I mean no disrespect by that.

[2] There is no dispute that the three men were in a physical altercation. The Defence does not dispute that during the altercation, James had a knife, that he stabbed Wayne and Gerry, and, at the time, he was on an Undertaking to have no contact with Wayne.

[3] The Crown concedes that the charge of attempted murder has not been proven with respect to Gerry but seeks a conviction for aggravated assault which, given the way the charge was particularized, is an available included offence.

[4] The real issues are whether the Crown has proven that James intended to kill Wayne when he stabbed him and whether he was acting in self-defence when he stabbed Wayne and/or Gerry.

### **General Principles**

[5] There are general principles that apply to every criminal trial. James is presumed to be innocent of these charges. The Crown bears the burden of proving each and every element of the offences beyond a reasonable doubt. Proof beyond a reasonable doubt is a high standard. It is more than suspicion of guilt or probable guilt. It is not proof to an absolute certainty but falls much closer to absolute certainty than to proof on a balance of probabilities. It is not proof beyond any doubt nor is it an imaginary or frivolous doubt. It is based on reason and common sense, and not on sympathy or prejudice. (*R. v. Starr*, [2000] S.C.J. No. 40; and, *R. v. Lifchus*, [1997] 3 S.C.R. 320.).

[6] The charges can be proven through direct or circumstantial evidence. Here, the Crown relies in part on circumstantial evidence, especially to help prove what was in James' mind at the time of the altercation. Proof of what was in his mind is

relevant to whether he had the requisite intent for the attempted murder charge and to my assessment of self-defence. The burden on the Crown in a circumstantial case is to prove beyond a reasonable doubt that guilt is the only reasonable inference to be drawn from the evidence (*R. v. Griffen*, [2009] S.C.J. No. 28, at para. 34). There is no burden on the defence to persuade me that there are other more reasonable or even equally reasonable inferences. A reasonable doubt may be logically based on a lack of evidence (*R. v. Vilaroman*, 2016 SCC 33, at para. 36). The question is “whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty” (*Vilaroman*, at para. 38). If so, then the accused must be acquitted.

[7] The credibility and/or reliability of the witnesses will be important to my analysis. I am entitled to accept all, some or none of the testimony of any witness. James did not testify. That is his right. However, the Crown introduced his out of court statement to police. As such, that statement is part of the evidence that I must consider in the trial and is available to support guilt or a reasonable doubt.

[8] In light of the presumption of innocence and the requirement that the Crown prove the case beyond a reasonable doubt, it is important to keep in mind that a criminal trial is not about simply choosing whether I prefer the evidence of one or all of the Crown witnesses or that of the accused. Doing that would undermine the presumption of innocence.

[9] I must consider James’ evidence within the context of the other evidence. Where his evidence is inconsistent with guilt, if I believe it or find that it raises a reasonable doubt, I must acquit. Even if I reject his evidence, I have to examine the remaining evidence that I do accept and only convict if the Crown has proven guilt beyond a reasonable doubt (*W.(D.)*, [1991] 1 S.C.R. 742; and, *R. v. Dinardo*, 2008 SCC 24).

## **Facts**

### Overview

[10] The accused, James (AKA Jimmy) Robinson, and the two complainants, Wayne and Gerry, are brothers. Wayne and their mother reside in separate units in an apartment building at the corner of Charles and Gottingen streets in Halifax. There is a history of conflict and animosity between James and his two brothers.

[11] On June 5<sup>th</sup>, 2020, in the morning, there was an altercation between Wayne and James outside the apartment building. Wayne called the police, James was arrested and released on an Undertaking including a condition prohibiting contact with Wayne (Exhibit 6). Any substantive charges resulting from that incident are not before me. Police believed there was evidence in the men's mother's apartment, so Cst. Fallon Clarke remained in the apartment to secure it while police obtained a search warrant. Later that day Wayne again saw James in the area. He reported this to Cst. Clarke who was still in his mother's apartment. She contacted Cst. Zach Withrow and Cst. Ash Lewis who had arrested James that morning. They started to drive toward the residence. Before they got there, Gerry arrived and parked across the street. Wayne went down to see Gerry who was in his vehicle with Raydell Farrell and another man. James returned. Words were exchanged between James and Wayne. Then they got into a physical altercation during which James stabbed Wayne. Gerry intervened and James stabbed him too.

[12] Cst. Clarke heard and saw some of what transpired from the window of the apartment which was on the third floor of the building overlooking Charles street. She ran down the stairs and arrived after the altercation was over. Mr. Farrell also heard and saw some of the altercation from his position in Gerry's vehicle. Mr. Farrell testified, but was not a co-operative Crown witness. Attempts to refresh his memory from his statement were not successful. I concluded his memory loss was feigned and the Crown was permitted to cross-examine him. He maintained his lack of memory and, following a successful *Bradshaw* application, his statement to police was admitted under the principled exception to the hearsay rule (Exhibit 8). The Crown did not call the other man who was in Gerry's vehicle during the altercation.

[13] Cst. Withrow and Cst. Lewis arrived at or near the end of the altercation so witnessed part of it. Sgt. Chris Thomas also attended, arriving after the altercation was over but while Wayne, James and Gerry were still on scene. Cst. Trish Kennedy, from the forensic identification section, photographed the scene and the accused and collected physical evidence. Her photographs were entered into evidence (Exhibits 1, 2, 3, & 4).

[14] James was arrested and gave a video-taped statement to D/Cst. Anthony McGrath. That statement and a transcript prepared from it were admitted into evidence on consent (Exhibit 5 & 5a).

[15] Dr. James Ellsmere was qualified as an expert capable of providing opinion evidence in areas relating to the management of trauma patients, general surgery,

and diagnosis treatment and prognosis of injuries. His Affidavit relating to the injuries suffered by Gerry and Wayne was admitted on consent and he did not testify (Exhibit 7). That evidence establishes that both Wayne and Gerry were stabbed in the abdomen.

### Detailed Review of Facts

[16] In addressing the details, I will focus on those areas that impact the issues I have to decide.

[17] Wayne testified that for about six years, James has been harassing him; privately and publicly calling him a “rat” and threatening to kill him. He said this continued when he saw James on June 5<sup>th</sup>, 2020. In the morning, Wayne was outside his apartment building waiting for his brother Gerry to come to give him some money and they had planned to go together to work. Then James showed up. According to Wayne, James became enraged when his scooter broke. He then started yelling at Wayne, calling him a rat and saying he was going to kill him. James then pulled out a knife and chased Wayne to the middle of the road. Wayne described the knife as a buck knife. While chasing Wayne, James was yelling, “I’m going to fucking kill you, you fucking rat”. Wayne said he stopped and yelled which caused James to pause. Then someone arrived who James wanted to talk to, so he left and went into the building with that person. A short while later, James was yelling at Wayne from the window of their mother’s apartment. Wayne then went to the lobby of a nearby building and called 911.

[18] Gerry confirmed that he had planned to take Wayne to work with him that day and went to get him around 8 or 9 a.m. He said Wayne was upset, he stayed for about 5 minutes and Wayne did not go to work with him.

[19] In his statement, James spoke briefly about needing clothing and going to his mother’s apartment to get some but doesn’t say whether that was in the morning or later, closer to the time of the altercation. He did not refer to any significant altercation with Wayne in the morning. He reported only that Wayne was sitting on the steps and they exchanged words.

[20] At approximately 9:20 a.m., Cst. Ash Lewis and Cst. Zach Withrow were dispatched to Wayne’s complaint. Cst. Lewis saw James approaching on the street and arrested him. James was taken to the police station and at approximately 11:30 a.m. was released on an Undertaking with conditions, including a condition

prohibiting him from having contact with Wayne. Cst. Withrow identified the Undertaking (Exhibit 6) which he testified was signed by James who also initialled each condition to signify he understood.

[21] Because police believed the knife that James was alleged to have had was in his mother's apartment, Cst. Fallon Clarke was assigned to stay in the apartment to secure it until a search warrant was prepared and issued. She was still there in the late afternoon.

[22] Wayne testified that later in the day he was again waiting outside for Gerry who was going to bring him money. He saw James with a couple of friends. They were circling the block and James was again yelling at him; repeatedly threatening to kill him and calling him a rat. Wayne had his phone with him so turned on the recording function in the hope of capturing what James was saying. He then went up to his mother's apartment to play the recording for the police officer. She told him to wait a minute while she made a call. However, at that point, Gerry called to say he was waiting downstairs, so Wayne went downstairs to see Gerry.

[23] Cst. Clarke testified that around 4:45 p.m., Wayne knocked on the door to his mother's apartment. He didn't come in but told her Jimmy was outside and he had a recording of Jimmy threatening him. She listened to the recording and testified she did not recall hearing any direct threats. She heard James saying, "you fucking rat . . . you sold me out". She said the tone of voice was aggressive. She knew James had been arrested and believed he would have been on conditions to stay away from Wayne and the residence, so she contacted the arresting officers to confirm and asked them to come and arrest James for breaching.

[24] Unfortunately, the recording was not available to be played in court. Wayne testified that he believed he lost the recording when he answered the call from Gerry without having first saved it.

[25] Wayne testified that when Gerry called, he went down and got into Gerry's vehicle to get money. While he was in the vehicle, Jimmy and another guy came near the truck and Jimmy was yelling "you're a rat" and "I'm going to kill you" repeatedly. Wayne testified that he got the money from Gerry and went across to the driveway to the underground garage and the path to the front door of the building, intending to go inside. At that point, he turned and said to Jimmy, "what, you don't love me". Wayne denied saying anything to Jimmy before that and testified that he didn't yell anything else to Jimmy.

[26] While this was happening, Cst. Clarke was still in the apartment. She testified that her attention was drawn to the window because she heard someone yelling, “you fucking rat”. When she looked out, she saw Wayne and Gerry standing together near the entrance to the parking garage and Jimmy with two other people, one of whom she thought was female, about 20 feet down Charles Street. Wayne was yelling at Jimmy and Jimmy was yelling at Wayne. She could not make out or couldn’t recall what Wayne was saying, but heard Jimmy continue to yell, “you fucking rat”. She did not at any point hear Jimmy yell any direct threats or more specifically, a threat to kill Wayne.

[27] Gerry confirmed that after work, he went to take some money to Wayne. Wayne came down to get the money and was in his truck for a short time. As Wayne was getting out, Jimmy walked by the truck with two males and a female. They were calling Wayne “a rat” and “a piece of shit”. He did not hear anyone threaten to kill Wayne. Gerry testified that Wayne got out and started shouting at the group. He recalled Wayne and the group shouting back and forth but could not recall what anyone was saying at that point.

[28] Raydell Farrell was also in the vehicle. He confirmed that he, Gerry and another man they worked with went to the apartment so Gerry could pay Wayne. In his statement to police, he said that while Wayne was in the car, three guys and a girl walked by and were “talking shit”. They continued past the car and went to the corner.

[29] James, in his statement to police, also confirmed he was walking down the street when Wayne was in Gerry’s car. He was not specifically asked how many people were with him, but he referred to “a buddy”. He said that “Wayne jumped out . . . and started to say something . . . fuck you or something like that” and he responded with something like, “you know who you’re talking to? I will hurt you right now. I don’t care if Gerry’s in the car or not.”.

[30] Wayne testified that when he said “what, you don’t love me” to Jimmy, Jimmy and his two buddies were near the stop sign at the corner of Gottingen and Charles streets. They ran at him. He said Jimmy had a knife in his hand as he ran at him from the corner. Then, the two guys who were with Jimmy restrained Wayne by holding his arms out and Jimmy stabbed him. He acknowledged that he had given two statements to police shortly after the incident and did not tell them that his arms had been held when he was stabbed. He did not disclose this until he met with Crown counsel to prepare for trial. Wayne testified that he was in pain and “high” from

pain medication when he gave his statements to police. D/Cst. McGrath testified that he interviewed Wayne twice. The first time was on June 5<sup>th</sup> at the emergency department. He said that was a very short interview as Wayne was under the influence of medication. The second interview was the next day. He said Wayne's demeanour was much better. He was clear and answered questions concisely.

[31] Wayne could not describe the knife used by Jimmy, but said it was not the same knife Jimmy had in the morning. He described the stabbing as a "jig" which he said was prison slang for quick jabs in rapid succession. He acknowledged he was only stabbed once, but said he believed Jimmy's intent was to stab him again. He said the stab motion was coming toward his heart, but he managed to twist his upper body, so the blade entered lower on his right side.

[32] Gerry testified that Wayne was in the middle of the street when he saw Jimmy and the males "charge" the middle of the street. He said they "rushed" toward Wayne and he saw them get into an altercation with Wayne. He testified that when they charged, Wayne was shouting and had his phone in his hand with his hand in the air. He saw the two males who were with Jimmy standing behind Wayne but could not see whether they were holding him or just standing. He saw Jimmy take one swing at Wayne. He did not see anything in Jimmy's hand when he swung and did not realize Wayne had been stabbed until he saw blood. When Jimmy swung at Wayne, Gerry got out of his truck and went to help Wayne. He grabbed Jimmy from behind and pinned him with his hand toward the ground. Gerry was leaning over Jimmy, holding him, when Jimmy stabbed Gerry in his left abdomen. Gerry testified that he thought Jimmy was trying to stab Wayne again and when he grabbed him, he turned and stabbed him instead. Gerry did not initially realize he'd been stabbed until Wayne said so. Gerry saw the knife in Jimmy's hand. It had a double-sided blade, about 4" long. Once he saw he'd been stabbed, he started beating Jimmy. He said he punched and kicked him wherever he could. He continued until he was pulled off by police and then he believed he passed out.

[33] Mr. Farrell's description of the altercation in his statement is brief. He said, "three guys jumped Wayne and Gerry jumped in to help Wayne and the guy stabbed them both". Later, he said, "When Wayne got out they came back up and the three guys rushed him.... Gerry got out cause they stabbed Wayne. They stabbed Gerry too". He said the guy with the knife was the man who'd been arrested by police. The evidence of police confirms this was James. In his statement, he said Wayne did nothing to provoke them. In court, he testified that he did not see much and



remembered little. In cross-examination, he agreed that he heard Gerry say he'd been stabbed when the police grabbed him and that people were yelling stuff. He confirmed he hadn't seen anything and agreed that his statement may have included information based on what he'd heard others say rather than what he'd seen.

[34] James described the incident in his statement. He was asked what happened after the initial verbal exchange between him and Wayne. He said "I lost it. I lost it. Then Gerry is ... there ... him and his friend. They jumped me.... But I stabbed the shit out of them.... I hope they fucking die". He was asked which one he stabbed and said, "both of them". He was asked about the injuries to his face and said that was his brother Gerry.

[35] He also said, "... he sat there and laughed out the door, ha, ha, ha,. Think its funny . . . I don't think I'll do life . . . I don't think he's going to die but, you know, you can't treat people like that". Given the context, it appears he was referring to Wayne.

[36] D/Cst. McGrath then asked more specific questions, "you said you stabbed him though. Can we go back to that for a second?". James responded, speaking about Wayne, "I don't know if I stabbed him or ... I just ... the heat of the emotion . . . the heat of the emotion he was fucking ... I got something for you. I got something for you ... and I said, what you got for me? .... And he pulled out a knife ... and I pulled [one out?] ... and I stabbed him". He said he didn't remember where he stabbed him and repeated that he'd "lost it". Then he said that Gerry had tried to beat him up and he stabbed him too. He was asked if he remembered where he'd stabbed Gerry and said "no.... hopefully its just ... just heart . . . to tell you the truth. Fucking goof".

[37] He was then asked about his buddy who was with him. He said he had nothing to do with it, "but when he seen what was going to be taking place . . . and he had a knife . . . my buddy circled him . . . said, put that fucking knife down . . . and he's like ... and he was trying to wave it at him . . so then that's when I jumped in ... and I ran right up to him. I fucking said, 'here, you put that knife down or I'm stabbing you' . . . so he didn't put it down . . . he tried to intimidate people, right. I don't play that shit".

[38] D/Cst. McGrath asked him about his relationship with his brothers and mother. He provided information about the source of the problems between him and Wayne and Gerry and said he hates Wayne's guts.

[39] Near the end of the interview, D/Cst. McGrath asked if anyone else was involved with him and his brothers, “did anybody come ... along on their side to help them out?”. He responded, “well, on my side .. because he was waving up ... he was waving a knife around ...and Gerry was in his truck ... and when I walked down the street I was with my buddy ... and I looked over at them and I just smirked. And Wayne jumped out the vehicle and he said, ‘oh, yeah, you’re a fucking mutt. You’re a mutt’... I said ‘I’m a mutt, am I?’ and then he pulled a knife and my ... buddy come over ... and .. he’s..”. D/Cst. McGrath asked “and you had a knife too?”. James responded, “no. I didn’t have a knife ... I didn’t have a knife. I took ... I did have a knife. Actually ... I took a knife from him... my buddy ... because he was trying to wave it off him. I said ‘listen... give it to me. I’ll fucking take care of it.’”.

[40] Wayne testified that after he was stabbed, he blacked out and when he woke, he was laying in the driveway of the apartment’s underground garage and Gerry and Jimmy were both laying on the ground nearby. He saw one of the people with Jimmy, an individual he recognized, start to pick up the knife. He testified that he saw Jimmy start to get up and so grabbed on to him, holding him with his legs and arms until police came.

[41] Cst. Withrow and Cst. Lewis both testified that when they arrived, Jimmy and Gerry were together in the street, still involved in a physical altercation. Gerry also confirmed that he was pulled off Jimmy by police who then handcuffed Jimmy.

[42] In his statement, Mr. Farrell said that the two guys, meaning the ones who had been with Jimmy, took the knife and ran up the street.

[43] Wayne testified that when police put Jimmy in handcuffs, they knelt him nearby and Jimmy said to Wayne, “I told you I was going to get you”. He agreed that when Jimmy said this, police were arresting and putting the handcuffs on Jimmy so were very close. Sgt. Thomas was nearby. He recalled that Wayne was yelling after Jimmy was arrested, but that if Jimmy had said anything, he couldn’t remember it. Neither Cst. Lewis nor Cst. Withrow recalled Jimmy saying anything to Wayne after he was arrested. Cst. Withrow said that if Jimmy had said anything, he would most likely have heard since he was nearby. Cst. Clarke was also nearby, helping Gerry. She also did not hear Jimmy say anything to Wayne.

[44] The only knife found at the scene was a boxcutter style knife that Wayne identified as his drywall cutter (Exhibit 1, photos 13 & 25). It was located by police

on the sidewalk near the entrance to the apartment's parking garage. Its blade was not extended, and no blood was found on it. Wayne acknowledged he had this knife in his pocket during the altercation but denied that he'd taken it out. He said it was in his pocket because he had planned to go to work with Gerry that day. He testified he didn't know how it got out of his pocket but thought it might have come out during the scuffle with Jimmy.

[45] Dr. Ellsmere's evidence was that Wayne sustained a stab wound to the upper quadrant area of his abdomen which included a small laceration of his liver. He required surgery. Gerry also sustained a stab wound to the upper quadrant of his abdomen and required surgery.

### **Legal Framework**

[46] There are four different charges, each with its own elements.

#### Attempted Murder

[47] The offence of attempted murder under s. 239 says simply that, "Every person who attempts by any means to commit murder is guilty of an indictable offence". It relies on the general attempt provision in s. 24 which says that to prove an attempt, the Crown must prove the intent to commit the offence in question and that the accused took some step for the purpose of carrying out the intention that goes beyond mere acts of preparation. The offence in question here is "murder", so the Crown must prove a specific subjective intent to cause the death of the victim. In other words, the Crown must prove the accused's purpose was to kill; recklessness of the consequences or knowledge that death may or probably will result from his actions is not enough (*R. v. Boone*, 2019 ONCA 652).

[48] In this case, the Crown particularized the charge as attempt to kill by stabbing and wounding. As such, that must be proven. It also means that the offence of "aggravated assault" under s. 268(1) is an available included offence if I conclude the more serious charge of attempted murder is not proven. The Defence concedes that the injuries caused to Wayne and Gerry would be sufficient to constitute wounding for purpose of that offence.

#### Assault with a Weapon

[49] James is charged under s. 267(a) that in assaulting Gerry and Wayne, he used or threatened to use a weapon, specifically a knife. The Defence did not contest and the facts support that, subject to self-defence, the elements of this offence have been made out: James intentionally applied force to Wayne and Gerry causing injury; in the course of doing so he used a knife; and, in this context, the knife was a weapon as defined in the *Criminal Code*.

### Possession of a Weapon for a Dangerous Purpose

[50] James is also charged with possession of a weapon for a dangerous purpose, contrary to s. 88(1) of the *Criminal Code*. That provision makes it an offence to possess a weapon for a purpose dangerous to the public peace or for the purpose of committing an offence.

[51] This charge relates to the knife that was used in the stabbing. There is no doubt that the knife is a weapon and it was used for a dangerous purpose. However, the use of the knife in a manner dangerous to the public peace does not constitute the offence. The Crown must also prove that James possessed the knife for that purpose. The relevant time period for assessing his purpose in possessing the weapon is the time which preceded the use of the weapon, albeit including the instant in time immediately preceding its use. Of course, the formation of the unlawful purpose may be inferred from the circumstances in which the knife was used (*R. v. Proverbs* (1983), 9 C.C.C. (3d) 249 (Ont. C.A.), at 251; and *R. v. Budhoo*, 2015 ONCA 912, at paras. 72 – 73).

### Self-Defence

[52] Self-defence is an available defence for attempted murder, the included offence of aggravated assault and the charges of assault with a weapon. It is also relevant to the charge of possession of a weapon for a dangerous purpose in that where a person arms himself for the purpose of self-defence, the unlawful purpose has not been proven.

[53] The legal test for self-defence is contained in s. 34. It provides a defence to a person who uses force if:

1. The person believed on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;

2. The act that constitutes the offence is committed for the purpose of defending or protecting themselves from that use or threat of force; and,
3. The act committed is reasonable in the circumstances.

[54] The section goes on to say that in determining whether the act committed is reasonable in the circumstances, the Court shall consider the relevant circumstances of the person, the other parties and the act and lists factors that would be relevant to that analysis. I will discuss the specific factors when I apply the defence to the specific facts.

[55] Where there is an air of reality to self-defence, the Crown must disprove it beyond a reasonable doubt.

[56] The Crown concedes there is an air of reality to the defence with respect to Gerry, but not Wayne. To determine whether self-defence has an air of reality I would have to consider the “totality of the evidence” and assume “the evidence relied on by the accused is true”. If, based on that evidence, “a properly instructed jury acting reasonably, could acquit” the accused on the basis of that defence, the defence has an air of reality and the Crown must disprove it beyond a reasonable doubt (*R. v. Cinous* (2002), 162 C.C.C. (3d) 129 (S.C.C.) at para. 39).

[57] In a judge-alone trial, the air of reality assessment is not as crucial a step in the analysis.

#### Fail to Comply with an Undertaking

[58] James is also charged with failure to comply with an Undertaking by communicating with Wayne. The Defence did not concede that this offence had been proven, however, there is no serious contest. I am persuaded beyond a reasonable doubt that: at the time specified in the Information, James Robinson was subject to a valid Undertaking (Exhibit 6 and testimony of Cst. Withrow); he knew he was prohibited from communicating with Wayne Robinson (Exhibit 6 and testimony of Cst. Withrow); and, he failed to comply with the Undertaking by intentionally communicating with Wayne Robinson (statement of James Robinson, Exhibit 5; and, testimony of Wayne Robinson, Raydell Farrell, Gerry Robinson and Cst. Fallon Clarke). No lawful excuse has been put forward. So, James Robinson will be found guilty of Count 6 in the Information - Breach of Undertaking, contrary to s. 145(4)(a).

## **Analysis and Findings**

[59] The Crown argues that the direct and circumstantial evidence proves beyond a reasonable doubt that James intended to kill Wayne and stabbed him with that purpose. They rely on: James' pre-existing animosity toward Wayne; Wayne's evidence that James repeatedly threatened to kill him; the circumstances of the altercation, including evidence that James and his friends rushed Wayne, Wayne's testimony that his arms were held when he was stabbed, and evidence that Wayne was unarmed; and, finally James' comments to D/Cst. McGrath, including that he told his buddy he would "take care of it" and that he hoped Wayne died.

[60] The Defence disputes much of this evidence and argues that the evidence I should accept relating to the circumstances of the altercation and James comments are equally or more consistent with non-lethal intent and self-defence.

[61] Not surprisingly, not all witnesses reported the events in the same way. That can be because the witness intentionally wants to deceive the court, but not always. Honest witnesses can recall things differently for a variety of reasons. In this case, the events unfolded quickly, witnesses had different vantage points, were focussed on different things, and some only saw parts of the events.

[62] Much of James' statement is inculpatory. The Crown argues that I should reject as incredible the portions of his statement that support self-defence or lack of intent to kill. The Crown argues that James gave three different versions of events and in the later versions, James was adding details to try to help himself, but those details are contradicted by other witnesses and should be rejected.

[63] In assessing James' evidence, I do have to keep in mind that because he didn't testify, his evidence has not been tested in cross-examination in the way that the Crown's evidence has been tested.

[64] The interview with James was conducted at about 9:00 p.m. on the day of the incident. It is clear from the video, photographs and the evidence of witnesses that James had been beaten up. There are significant visible injuries to his face and Gerry testified that he had kicked him repeatedly, so I infer he probably had other non-visible injuries. He said he was tired and that is consistent with his demeanour. He spoke quietly for the most part, but at times he became upset or angry and detoured into topics not directly related to the incident. He was generally respectful to D/Cst. McGrath, appeared to understand all of his questions and answered them.

[65] I will address the contradictory and corroborative testimony later, but I do not agree with the Crown's characterization of James' statement as including different versions. For the most part, I would characterise the statement as incremental disclosure rather than contradictory versions. James initially provided a very bare-bones narrative of what happened and then, when prompted by specific questions, provided more information. The initial narrative about the incident occupies only about 12 lines in the transcript (p. 9). Then, after discussing other things, the officer brought him back to the incident and he responded with more detail, including some of the words Wayne had used and information that Wayne had pulled out a knife (p. 12). Then, he again discussed other things until the officer asked questions about the "buddy" he'd been with (p.15). James refused to name his buddy, said he had nothing to do with it and then briefly described his buddy's role in the incident (p. 15 – 16). James again discussed other things before finally being asked by the officer whether anyone else had been involved helping "them" (meaning Gerry and Wayne). James then summarized the sequence and when specifically questioned about whether he'd had a knife, he explained that he had gotten the knife from his buddy (pp. 23 – 24).

[66] In general, I conclude that I cannot reject James' statement as incredible or unreliable. I agree that James did not initially volunteer a detailed recitation of the event. That is not surprising for someone in his position and is not indicative of deceit. James was also clearly reluctant to talk about his buddy's role in the events. That is also not surprising and not indicative of general deceit. The details that were provided later are not inconsistent with his initial description of events and were provided in response to questions. Finally, there are factors that support his credibility. He did not seem to exaggerate the actions of others and definitely did not downplay his own actions. Without any pressure from D/Cst. McGrath he admitted that he'd stabbed both Wayne and Gerry and, when the officer asked if anyone had intervened to help the others, James did not take the opportunity to improve his situation by saying that someone had. Instead, he again explained what Wayne and Gerry had done and talked about what his buddy had done. Much of what he said, both about the incident and other matters, would have been contrary to his interests.

[67] All the police witnesses appeared to give their evidence in a fair, dispassionate and careful manner. In general, I accept their recollections as truthful and accurate.

[68] Gerry was initially a reluctant witness. However, after taking a break to review his statement, he was more forthcoming. In general, I found him to be a credible witness. He did not volunteer extra information but seemed to answer questions to the best of his recollection. He has historically taken care of Wayne and is clearly protective of him. He also has historic animosity toward James which has been understandably heightened since this event. However, I did not get the sense that his feelings toward them significantly impacted his evidence.

[69] Mr. Farrell's statement was brief and adds little to the evidence. I concluded that he lied under oath when he said he had no memory of the events. As such his credibility is suspect and his evidence has to be treated with caution.

[70] I have significant concerns about both the credibility and the reliability of Wayne's evidence. He clearly has significant animosity toward James. He took every opportunity to say something negative about him. For example, his description of James' relationship with their mother was clearly intended to cast him in a negative light and perhaps even to provoke him. Similarly, in my view, he went out of his way to characterize James as a drug dealer.

[71] Wayne was also reluctant to acknowledge his own bad behaviour. He minimized his criminal record and was less than forthcoming about whether he was taking money for working for Gerry while collecting disability. Neither the record nor working under the table would have had much of an impact on my view of his credibility, but the way he responded to questions about these things is more significant.

[72] Finally, Wayne's testimony about some important things was contradicted or uncorroborated in circumstances where one would expect corroboration. For example,

- Wayne's testimony that he had not yelled anything at James other than saying "What you don't love me" was contradicted by Gerry and to some extent by Cst. Clarke. Gerry testified Wayne was shouting at James when he got out of the car. Cst. Clarke also testified that she heard Wayne shouting back at James. In his statement to police, Mr. Farrell was asked whether Wayne had done anything to provoke the attack and said, "no". He wasn't specifically asked if Wayne had said anything. However, to the extent that his evidence conflicts with Gerry's, I accept Gerry's;



- Wayne’s testimony that James said “I told you I’d get you” when he was being arrested was essentially contradicted by the three police officers who were present. Sgt. Thomas, Cst. Lewis and Cst. Withrow were all close enough to have heard this and did not note it. I am confident that if a suspect had said “I told you I was going to get you” to a victim of a stabbing, one or all of these three officers would take note and recall;
- Wayne’s rather detailed recollection that, after the stabbing, he restrained Jimmy until police arrived was contradicted by Cst. Clarke, Cst. Withrow, Cst. Lewis and Gerry. This may not have been the result of an intention to deceive, but rather a faulty memory; and,
- Wayne’s testimony that James threatened to kill him shortly before and during the altercation is essentially contradicted by Gerry and Cst. Clarke. Cst. Clarke heard Jimmy call him a rat, both on the recording and through the window, but did not recall hearing any threats. There is no reason why she would have heard the comments about him being a rat and not heard threats and I am confident that if she had heard James threatening Wayne, she would have taken note and recalled it. Similarly, Gerry heard Jimmy calling Wayne a rat when Wayne was getting out of the car but did not hear any threat to kill him.

[73] Some of the disputed evidence is significant to the issues I have to decide: whether James threatened to kill Wayne; whether Wayne was armed; whether he was “rushed” by James and his friends; and, whether his arms were held when he was stabbed.

[74] There is no doubt that James had a strong animosity toward Wayne. In his statement, he said he hated his guts and hoped he died. This existed before the day in question and was, no doubt, aggravated that day when Wayne called the police and James was arrested as a result. James returned to the area after that arrest. I accept that he had motive to do him harm and returned to the area with friends. I also accept that both prior to and on the day of the incident, he was harassing and trying to intimidate Wayne by repeatedly calling him a rat.

[75] However, I do not accept that James threatened to kill Wayne on June 5<sup>th</sup> or over the previous six years. As I said, Wayne’s evidence about threats immediately before and during the altercation is essentially contradicted by Cst. Clarke and Gerry. Given that and my general concerns about Wayne’s credibility, I cannot rely on his

uncorroborated testimony that James threatened to kill him on the morning of June 5<sup>th</sup> or the previous years.

[76] I'll next turn to the circumstances around the stabbing.

[77] There is some dispute about the events immediately preceding the stabbing. James' account is not detailed and is somewhat disjointed, so the narrative has to be put together from his answers to various questions. He said that as he was walking down the street, Wayne jumped out and said something, and there was an exchange of words. Wayne pulled out a knife, James' buddy was circling him telling him to put the knife down and Wayne was waving it at him. Then, James ran up to Wayne and got a knife from his buddy. He told Wayne to put the knife down. Wayne didn't, so James stabbed him. James does not address where he and his buddy were in relation to Wayne at the beginning and does not specifically address whether there were other people with them.

[78] I accept Wayne's testimony that James and his friends were near the stop sign at the corner of Gottingen and Charles street when they started running toward him. Gerry and Mr. Farrell corroborate his testimony that Jimmy was moving quickly toward Wayne. I also accept Wayne's testimony that James was with two friends when he ran toward him. Gerry and Mr. Farrell both corroborate that James was with two males and a female, but the female was not involved.

[79] At the time Cst. Clarke looked out the window, she saw two people she believed to be Wayne and Gerry standing together and saw James with two people, a male and a female, about 20 feet away. She said the three approached Wayne and Gerry. They were not running but were walking purposefully.

[80] Cst. Clarke's testimony that Wayne and Gerry were together when approached by James is contradicted by Wayne, Gerry, Mr. Farrell and James who all confirm that Gerry remained in the vehicle until the altercation between James and Wayne began. I believe Cst. Clarke was mistaken in believing she saw Gerry with Wayne. She had a good vantage point to observe the number of people and their movements but did not have a good vantage point to identify individuals. In my view, she was correct in her recollection that Wayne was standing with another person. I believe that by the time she looked out the window in response to the shouting, the events had already started to unfold. James and his friends had already run up from the corner where they'd been at the start of the events and Jimmy's buddy was already near Wayne, circling him. She mistook him for Gerry.

[81] I do not accept Wayne's testimony that Jimmy had the knife out as he came at him from down the street. Gerry saw James running at Wayne and testified he did not see the knife until later. Cst. Clarke testified that she could see Jimmy's hand out because he was pointing at Wayne but did not see anything in it. Of course, from her distance, she may not have been able to see a knife if one had been present. In his statement, when asked about the details, James said he got the knife from his buddy after they were near Wayne. I accept that evidence. It is consistent with the evidence of Cst. Clarke and Gerry and accords with the events of the morning. In the morning, James had a buck knife which was not in his possession when he was arrested in the morning and police believed it had been left in his mother's apartment. Given that, it makes sense that he did not have his own knife in the afternoon.

[82] I accept James' evidence, in his statement, that Wayne pulled out a knife and waved it around. Wayne acknowledged that the box cutter style knife found at the scene was his but denied he'd taken it out of his pocket during the altercation. He testified that it must have fallen out during the altercation. Gerry testified that the only item he saw in Wayne's hands during the altercation was a phone. The Crown argues that I should reject James' statement when he says that Wayne had a knife because it is contradicted by Gerry's testimony and because it comes late in his statement. As I said, in general, I find that Gerry was a credible and reliable witness. However, on this point I believe he is mistaken. He said Wayne was holding up a phone. Given the size and style of knife, Gerry could easily have mistaken it for a phone. Wayne said nothing about holding a phone up during the incident. He was cross-examined about having a knife in his hand. One would think that if he had been holding up a phone, he would have mentioned it at that time. No phone was found at the scene. In all the circumstances, it is far more plausible that what Wayne was holding was his box-cutter, that he dropped it during the altercation and it was later found at the scene.

[83] I do not accept Wayne's testimony that he was restrained when James stabbed him. I say that because of my general concerns about his credibility but also specific concerns with this evidence. It was not corroborated by any other witnesses and is somewhat inconsistent with Gerry's testimony about what he observed. Gerry testified that when Jimmy swung at Wayne, the two males were standing behind Wayne. He testified he didn't know if they were holding Wayne or just standing. However, he said that Wayne had one of his hands up in the air. That is inconsistent with Wayne's assertion that each of his arms was held out when he was stabbed. Finally, I believe that if this significant thing had happened, Wayne would have told

police during his second interview. In light of D/Cst. McGrath's evidence that Wayne appeared clear-headed when he interviewed him the second time, I do not accept Wayne's explanation that he failed to tell the officer that his arms were held because of the influence of medication.

[84] Wayne was stabbed once in the abdomen. Wayne's testimony was that James was aiming for his heart. However, I cannot conclude that he was. I cannot rely on Wayne's testimony to support an inference that James targeted his heart. Given my general concerns with Wayne's credibility, the reliability of some of his recollections and the significant animus he demonstrated toward James, it is a real possibility that he honestly but mistakenly recalls it that way or is not telling the truth. James said he could not recall where he stabbed Wayne and was not asked what he was aiming at. When describing the event, James told the officer he had "lost it", "stabbed the shit out of them" and referred to the "heat of the emotion". Given that evidence about his emotional state, which I accept, it is doubtful that he was aiming at all when he stabbed Wayne.

[85] The stabbing action described by Wayne and Gerry was a quick jab. Both testified they thought James' intent was to stab Wayne a second time. Gerry thought the jab that got him was meant for Wayne. Gerry wasn't asked why he believed that, so I cannot assess the reliability of his belief. However, given James' description of his emotional state at the time, I accept that James would have stabbed Wayne again if Gerry had not intervened.

[86] In his statement, James was not asked what his ultimate intent or purpose was, but he made some comments that touch on that issue. When he took the knife from his buddy, he said "give it to me. I'll fucking take care of it". He perceived Wayne as trying to intimidate people with the knife and said "I don't play that shit". I agree with the Crown that one possible inference from these comments is that James had formulated an intent to "take care of it" by killing Wayne. However, that lethal intent is not the only rational interpretation. It could have simply meant that he intended to use the knife to intimidate Wayne into dropping his weapon or to use it to forcibly disarm or disable Wayne.

[87] James also said things that suggest the stabbing was spontaneous. He repeatedly said he'd "lost it". Of course, it is the intent or purpose at the moment of the action that is relevant. Attempted murder can be spontaneous and premeditation or planning is not necessary. However, the relevant spontaneity of the action is a relevant consideration to determine his purpose.

[88] James also said that he hoped Wayne and Gerry would die. One possible interpretation of these statements is that his intent had been to kill Wayne and he hoped he had been successful. However, that is not the only reasonable interpretation of the comments. His interview contains many similarly dramatic statements that may be more a reflection of James' emotional state than his true feelings. Even if he genuinely hoped, after the fact, that they would die, that is not necessarily indicative of his purpose at the time of the stabbing.

[89] In all the circumstances, I am not satisfied beyond a reasonable doubt that he intended to kill Wayne when he stabbed him. I accept he hated Wayne, that he was angry because Wayne had called the police, that he went back to the area to at least harass and intimidate him and perhaps to do him harm, that part way through the altercation he armed himself with the possible intent of doing harm to Wayne, that he was in a rage when he stabbed him, that he stabbed him in the abdomen, that he would have stabbed him a second time if Gerry hadn't stopped him and that he might have genuinely hoped, after the fact, that he had killed him.

[90] However, I am not satisfied that the only rational inference from all the facts I have found is that he was trying to kill him.

### Self-Defence

[91] The next issue I will address is whether James was acting in self-defence when he stabbed Wayne and Gerry. As I said, the Crown argues that there is no air of reality to that defence with respect to Wayne. I disagree, but rather than go through the analysis twice, I will simply examine whether the Crown has disproven the defence, first with respect to Wayne and then Gerry.

[92] The first question is whether James believed on reasonable grounds that Wayne was using or threatening force against him or another person. I accept that at some point in the interaction, Wayne took the box cutter style knife out of his pocket and was waving it around. James' buddy was circling him when he did that. James said that Wayne was trying to intimidate people with the knife. In my view, it is probable that Wayne took the knife out to defend himself given that James and the others had run at him and James' buddy was circling him. However, it is possible that James believed Wayne was a threat to his buddy and, given that Wayne had a knife, I cannot say that is entirely unreasonable. Therefore, the Crown has not disproven the first requirement – that James reasonably believed Wayne was a threat to himself or another.

[93] The next question is whether the stabbing was committed for the purpose of defending James or his buddy from that threat of force. According to James' statement, James ran over, told his buddy he would "take care of it", took his buddy's knife, told Wayne to put the knife down and when he didn't, he stabbed him. There is no evidence that Wayne moved toward James or his buddy and James' comments in his statement are more consistent with rage and loss of control over his emotions than fear. I recognize that the Crown bears the burden of disproving this requirement. Having regard to all the circumstances, in my view, the Crown has proven beyond a reasonable doubt that James did not stab Wayne for the purpose of defending himself or his buddy.

[94] If I am wrong in that conclusion and required to go on to examine whether the act was reasonable in the circumstances, I would say that the Crown has proven beyond a reasonable doubt that it was not. A person defending himself is not expected to "weigh to a nicety the exact measure of necessary defensive action or the consequences of such action" (*R. v. Baxter*, (1975) 27 CCC(2d) 96 (ONCA), at p. 111). Courts have to be tolerant when assessing whether defensive force is reasonable. I accept that Wayne had a weapon. However, when the boxcutter was found by police, the blade was retracted. I do not believe he had an opportunity to retract it during the altercation, so I conclude it was retracted during the altercation. I recognize it is possible that James did not see that in the heat of the moment. Wayne was in close proximity to James but was not moving toward him, so the threat was not imminent. James and his friends outnumbered Wayne. There were other means available to respond to the potential use of force by Wayne. They could have backed away or allowed Wayne an avenue to leave. James and his friends ran toward Wayne, resulting in him taking a defensive stance and arming himself. There was nothing about that situation or any evidence of any history between them that would cause James to believe Wayne was a violent person who would attack him. Stabbing Wayne, in all the circumstances, was a disproportionate response to any possible threat posed by Wayne.

[95] As such, I am satisfied beyond a reasonable doubt that the Crown has disproven self-defence with respect to the stabbing of Wayne.

[96] The next issue is whether the Crown has disproven self-defence with respect to James' stabbing of Gerry.

[97] Based on the evidence I accept, Wayne had a knife and James initiated a physical altercation with him. During that altercation, Gerry grabbed James from

behind and James stabbed him. As such, Gerry was using force against James, so the first requirement of self-defence is met.

[98] The next question is whether the stabbing was committed for the purpose of defending himself against that force. Gerry testified that he thought James was actually trying to stab Wayne again when he stabbed him. As I said before, I cannot assess the reliability of that belief given the lack of context. In his statement, James said, “Then Gerry is ... there . . . him and his friend. They jumped me.... But I stabbed the shit out of them....”. Later he said, “And Gerry tried to beat me up. ... And I stabbed him too”. Given that context, I believe James stabbed Gerry for the purpose of defending himself against force, so the second requirement has not been disproven.

[99] That brings me to the final requirement, which is whether the force used was reasonable in all the circumstances. James was grabbed from behind while he was involved in a physical altercation with Wayne. James knew that Gerry was in the vehicle and that other people were with him. The evidence establishes that Gerry, alone, grabbed James. However, given James’ statement, I accept that he believed that more than one person had jumped him. James immediately stabbed Gerry. Gerry had no weapon, however, there is no evidence to suggest that James knew that. I have no evidence of any history of violence between James and Gerry. Based on the evidence, it is clear that Gerry is physically capable; he was able to successfully disarm James and beat him quite badly. Given that they are brothers, it is likely James knew that. An important part of the context here is that the events unfolded quickly. Gerry grabbed James from behind and he immediately stabbed him. This was not a situation where James had an opportunity to pause to assess the situation or engage in subtle reflection. I accept that from James’ perspective this was a dangerous and stressful situation, albeit of his own making. I cannot hold James to a standard of perfection in assessing whether the amount of force used was reasonable. In all the circumstances, I am not persuaded beyond a reasonable doubt that the force he used was unreasonable. As such, I have a reasonable doubt about the question of self-defence with respect to the charges involving Gerry.

[100] I also have to consider the charge of possession of a weapon for a dangerous purpose. I have rejected the defence of self-defence with respect to Wayne. As I said previously, it is possible that when James first took the knife from his buddy, he intended to use the knife for some defensive purpose. However, I am persuaded beyond a reasonable doubt that, prior to stabbing Wayne, his purpose in possessing

the knife changed and ceased to be defensive. At that time, he possessed the weapon for a dangerous purpose or for the purpose of committing an offence.

[101] Therefore, with respect to the charges in the Information, I find James Robinson:

- Count 1 - not guilty of attempted murder of Wayne Robinson, but guilty of the included offence of aggravated assault, contrary to s. 268(1);
- Count 2 - not guilty of attempted murder of Gerry Robinson
- Count 3 - guilty of possession of a weapon, to wit a knife, for a purpose dangerous to the public peace, contrary to s. 88(1)
- Count 4 - guilty of assault with a weapon of Wayne Robinson, contrary to s. 267(a), however, given the principles in *Kienapple*, that charge will be stayed in light of the conviction for aggravated assault;
- Count 5 - not guilty of assault with a weapon of Gerry Robinson, contrary to s. 267(a); and
- Count 6 - guilty of failing to comply with an Undertaking by communicating with Wayne Robinson, contrary to s. 145(4)(a).

Elizabeth Buckle, JPC.