PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Jacklyn-Smith*, 2013 NSPC 71

Date: 20130822
Docket: 2447618, 2447619, 2447620
Registry: Halifax

Between:

Her Majesty the Queen

v.

Christopher Laurie Jacklyn-Smith

VERDICT

Judge:	The Honourable Judge Del W. Atwood
Heard:	11 December 2012, 24 July 2013, in Halifax, Nova Scotia
Oral decision:	22 August 2013
Written decision:	12 September 2013
Charges:	Assault with a weapon, para. 267(a); assault, para.266(b); breach of form 11.1 undertaking, sub-s. 145(5.1), all under the *Criminal Code*
Counsel:	Rick Woodburn, for the Nova Scotia Public Prosecution Service Peter Nolen, Nova Scotia Legal Aid, for Christopher Laurie Jacklyn-Smith

By the Court:

Preamble

[1] Christopher Laurie Jacklyn-Smith and Patricia Rose Seward lived together as a common-law couple for approximately six years. There existed a level of friction and discord in their relationship; the exact causes for this were not made clear to the court. Ms. Seward wound up being evicted from the apartment she shared with Mr. Jacklyn-Smith in September 2011. In April 2012, Ms. Seward gave a statement to a police investigator alleging that Mr. Jacklyn -Smith had assaulted her with a knife about a year earlier, assaulted her about five months later, and contacted her in violation of a form 11.1 undertaking. Mr. Jacklyn-Smith was arrested and charged with counts of para. 267(a), s. 266, and sub-s. 145(5.1) under the *Criminal Code*. The prosecution proceeded indictably. Mr. Jacklyn elected trial in Provincial Court and pleaded not guilty. I will seek to explain in this judgment why it is I find Mr. Jacklyn-Smith not guilty of these charges.

Evidence for the prosecution

[2] Ms. Seward and Mr. Jacklyn-Smith lived together in an apartment at a complex on Andrew Street in Halifax; Mr. Jacklyn-Smith was in charge of

building maintenance. Ms. Seward and Mr. Jacklyn-Smith slept in separate bedrooms. Their apartment included a room where they kept their computer equipment. The walls in their building were far from soundproof, and it was fairly easy to overhear things going on in adjoining apartments.

[3] Ms. Seward testified about the assault with a weapon. Although she was unable to pin down the exact date of the incident, hospital records–admitted with the consent of defence counsel as Exhibit 2–satisfy me that it must have been 19 April 2011. Ms. Seward told the court that she was preparing a meal at the time. She stated that she began joking with the accused about the sharpness of a knife in the kitchen. She said to Mr. Jacklyn-Smith, "I bet you that knife isn't sharp." Ms. Seward described what she alleged happened next:

> And he goes, "Well, I'll prove it to you", and that's when he took the knife and held the knife to my wrist. And I got scared, grabbed the knife with this hand . . . cut my fingers and then pulled my wrist out of the way, ended up slicing my wrist causing me to get three stitches.

[4] Ms. Seward stated that Mr. Jacklyn-Smith went downstairs and asked his friend, Joseph Pelley, to drive them to the hospital. Ms. Seward stated the accused wanted her to tell hospital staff that she had cut her hand accidentally in falling over a couple of family pets; she said that the accused hovered over her shoulder for much of the time she was at hospital, particularly when she was being asked

how she had gotten cut. Inf point of fact, Ms. Seward told hospital staff that she had injured herself accidentally by falling over a dog and cat; this is borne out in Exhibit No. 2 in the triage notes. Ms. Seward testified that she had told Mr. Pelley the same thing when he drove her to the hospital. Ms. Seward stated she made up the story about injuring herself accidentally as Mr. Jacklyn-Smith "didn't want anyone knowing he actually had the knife to my wrist . . . he didn't want to get in trouble from the police." Hospital staff treated Ms. Seward for minor lacerations to her left hand and a full-thickness laceration to her right forearm.

[5] Ms. Seward described the common assault as having started in the computer room. It was brought out on cross examination that this particular incident occurred toward the summer of 2011. Ms. Seward testified that she was in the computer room using her computer. Mr. Jacklyn-Smith came in and they started to argue. The argument escalated into a vicious attack with Mr. Jacklyn-Smith dragging a screaming Ms. Seward into the bedroom , throwing her on the bed, almost smothering her by holding his hand over her face, and causing bruising around her mouth along with what was likely hematoma inside her mouth. After Mr. Jacklyn-Smith stopped, Ms. Seward left the apartment to walk her dog and compose herself. She told friends who asked about her injuries that she had

slipped; however, she said she had disclosed to a friend–a Ms. Diane Macdonald, who was called as a witness for the prosecution–the whole story.

[6] Ms. Seward stated that she was put out of the apartment on 7 September 2011; she moved into a complex across the street as it was the only other building that would allow pets. It was just prior to being evicted that Ms. Seward discovered digital photographs stored on Mr. Jacklyn-Smith's cell phone of Mr. Jacklyn-Smith and a Ms. Tasha Dunphy posing without clothing. Ms. Seward admitted being angry and upset. She confronted Mr. Jacklyn-Smith. Ms. Seward stated on cross-examination that Mr. Jacklyn-Smith came after her, gave her a black eye and cut her nose. That particular allegation did not form the basis for any of the charges in this trial; however, a charge was laid by HRM police based on that alleged assault; Mr. Jacklyn-Smith was arrested for that charge and placed on a form 11.1 undertaking. It is that particular undertaking he is alleged in this trial to have breached on multiple occasions by having ongoing contact with Ms. Seward after she moved to an apartment complex across the street.

[7] Ms. Seward's friend and next-door neighbour, Diane Macdonald, was called as a witness for the prosecution. She spoke with Ms. Seward almost every day. She remembered her friend talking to her in April 2011 "with her face all bruised, dark, kind of swollen"; she recalled Ms. Seward crying as she described what had

happened. The night before, Ms. Macdonald had heard screaming coming from the adjoining apartment; she knew that this was the location of Ms. Seward's computer room. She was able to hear Ms. Seward hollering to be left alone. She then heard Ms. Seward saying she was leaving to take her dog for a walk.

[8] Ms. Macdonald testified she remembered something that had happened later; she saw Ms. Seward with a bandage on her wrist. She described Ms. Seward as being very, very upset and scared when she recounted how she had gotten hurt.

[9] Ms. Macdonald was evicted from her apartment for keeping dogs, and moved out in March of 2012. Mr. Jacklyn-Smith was the building superintendent at the time she was evicted. Ms. Macdonald gave a statement to police in April of 2012 describing what she knew about Ms. Seward's injuries.

[10] On cross-examination, Ms. Macdonald acknowledged she had not heard any calls for help when she overheard the commotion in Ms. Seward's computer room.

[11] Constable Daniel Roach described his duties arresting Mr. Jacklyn-Smith on 20 April 2012. He described the accused as having been "cooperative". He recalled Mr. Jacklyn-Smith showing him text messages he had received on his cell 'phone threatening to "play dirty" and referring to Mr. Jacklyn-Smith's new girlfriend as a "mutt". I am mindful that Ms. Seward denied sending these texts, and I am unable to make any finding of fact as to authorship or origin. Cst. Roach

got things ready to conduct an audio- and video-recorded interview with Mr. Jacklyn-Smith. He heard Mr. Jacklyn-Smith utter "I'm guilty, I went over and gave her forty dollars." On cross-examination, Cst. Roach confirmed that his only involvement in the collection of evidence was preserving the CD of the recorded interview with Mr. Jacklyn-Smith.

Defence evidence

[12] It was defence counsel who called the police investigator in this case, Constable Mark Chhabra. Given that Cst. Chhabra was the one person principally involved in collecting evidence against Mr. Jacklyn-Smith, and given that he was not called as a witness by the prosecution, I allowed defence counsel to cross-examine him, in accordance with the principles outlined in *R. v. Cook.*[1] Cst. Chhabra described meeting with Ms. Seward at a fast-food eatery on Dutch Village Road on 14 April 2012 after Diane Macdonald had placed a call to police; he acknowledged that her initial account of the knife incident was that it had happened while she and Mr. Jacklyn-Smith were "joking around". Later, when being questioned by the prosecutor, Cst. Chhabra confirmed the details of Ms. Seward's formal statement to police; that formal statement was consistent with Ms. Seward's sworn testimony describing how Mr. Jacklyn-Smith had hurt her. Evidence of a

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[1] [1997] S.C.J. No. 22 at paras. 42-43.

prior consistent statement may be admissible, not as proof of the truth of the contents, but in rebuttal of an allegation of recent fabrication;[2] given the theory of the defence that developed throughout the course of the trial–that Ms. Seward's original account given to Mr. Pelley and at the hospital that her injuries were accidental was the truth, and that her later complaint of a criminal assault was false–I allowed evidence of the prior consistent statement to be admitted for recent-fabrication-rebuttal purposes.

[13] Defence then called an array of witnesses–Mr. Joseph Francis, the accused's supervisor; Mr. Pelley, the friend who drove Ms. Seward and the accused to the hospital; Mr. Lawrence Neil LeBlanc, a frequent guest at Mr. Jacklyn-Smith and Ms. Seward's apartment; and Ms. Tasha Dunphy, Mr. Jacklyn-Smith's current partner, and the person depicted in intimate poses with the accused discovered by Ms. Seward's on the accused's smartphone. By and large, these witnesses were presented to the court to describe what they had noticed of Ms. Seward's physical condition and emotional affect during the time around the alleged assaults. They all felt that she was fine. I found this evidence to be of very limited assistance to the court. Mr. Jacklyn-Smith comes before the court, yes, with the full

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[2] *R. v. Stirling*, 2007 BCCA 4 at paras. 56 and 78; *aff'd*. 2008 SCC 10 at para. 5.

presumption of innocence. Yet, the court is well aware that domestic violence is the sort of crime that often leaves no visible evidence of its infliction. Injuries can be concealed, emotions, suppressed. The fact that untrained, lay observers fail to see anything may mean, indeed, that no crime has been committed; but it might often mean that they failed to observe what lay hidden, simply because they were not alert to it.

[14] Mr. Jacklyn-Smith gave evidence. He denied assaulting Ms. Seward with a knife; instead, he said her injuries were caused accidentally as she had told Mr. Pelley and the staff at the hospital. He denied any sort of assault in the computer room.

Legal principles

[15] It is clear that an accused charged with assault with a weapon, assault, and breach of undertaking may be convicted upon the uncorroborated evidence of a single witness. Furthermore, there is no legal requirement that a victim of spousal or partner abuse report it immediately to police. The court is well aware of those factors of power imbalance and dependency which, if proven, might well account for a victim delaying the reporting of abuse for a very long time or seeking to divert

blame from the abuser.[3] However, in determining a true verdict, a court must consider certain fundamental legal and constitutional principles.

[16] Given that defence called evidence at this trial, I apply the law as set out in *R. v. W. (D.)*[4]: if I believe the evidence called by Mr. Jacklyn-Smith, I must find him not guilty; even if I do not believe the evidence of Mr. Jacklyn-Smith, but that evidence should leave me in a state of reasonable doubt, I must find him not guilty; even if I were not to believe Mr. Jacklyn-Smith, and his evidence not leave me in a state of reasonable doubt, I must still ask myself whether, based on the evidence I do accept, I am satisfied that the prosecution has proven each and every element of the offenses beyond a reasonable doubt, and, if not, I must find Mr. Jacklyn-Smith not guilty.

[17] The *W. (D.)* algorithm is not intended as a form of automated reasoning; the Supreme Court of Canada, itself, made this clear in *R. v. S. (J.H.)*[5] and *R. v. Avetysan*.[6] Even in cases when an accused has called evidence, a trier of fact might

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[3]See, *e.g.*, *R. v. Lavallee,* [1990] S.C.J. No. 36 at para. 54; *R. v. C.V.M.* 2003 NSCA 36 at para. 43; *R. v. Brown* (1992), 73 C.C.C. (3d) 242 at 249 (Alta.C.A.).

[4] [1991] 1 S.C.R. 742 at para. 28.

[5]2008 SCC 30 at para. 13.

[6]2000 SCC 56 at para. 1.

conclude that the prosecution's case has failed to prove beyond a reasonable doubt one or more essential elements of a charged offence, so that an acquittal might logically and legally flow from an analysis of the evidence without the need to analyse extensively any exculpatory evidence offered by an accused. Similarly, a trier of fact might find reasonable doubt to have arisen from a combination of defence and prosecution evidence. Reasonable doubt will arise if a Court cannot decide whom to believe.[7] There are an array of possible analytical permutations which might not fit nicely in the *W. (D)*. framework.[8] What is essential is that the Court keep the following core and constitutional principles of criminal justice in mind:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;

- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;

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[7] *R. v. H.(C.W.)* , (1991), 68 C.C.C. (3d) 146 at p. 155 (B.C.C.A.).

[8] *Supra* note 2 at para. 10.

- a reasonable doubt is not a doubt based upon sympathy or prejudice; rather, it is based upon reason and common sense;

- it is logically connected to the evidence or absence of evidence;

- it does not involve proof to an absolute certainty;

- it is not proof beyond any doubt nor is it an imaginary or frivolous doubt;

- finally, more is required than proof that the accused is probably guilty -- a court which concludes only that the accused is probably guilty must acquit.[9]

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[9]See *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 36.

[18] Mr. Jacklyn-Smith is being tried for three counts set out in one information: one count of assaulting Ms. Seward with a weapon; one count of assaulting Ms. Seward; and one count of contacting Ms. Seward in violation of a Form 11.1 undertaking. All were prosecuted indictably. Although tried jointly, the Court must consider each count independently. The procedural reason for this is that the prosecution did not advance a similar-fact-evidence application, a prerequisite for an expansive treatment of incriminating evidence in multi-count trials.[10] The principled reason for a specific-charge-limited analysis of the evidence is that the Court must not be overwhelmed by the number of charges arrayed against Mr. Jacklyn-Smith. Additionally, the Court must not engage in propensity reasoning; this means, if I were to find Mr. Jacklyn-Smith had committed one or more of the offences of which he stands charged , I should not utilize that finding to draw the inference that Mr. Jacklyn-Smith is a person more likely from his criminal conduct or character to have committed the remaining offences.[11] Certainly, there is much circumstantial evidence that the Court has heard in this trial–evidence of chronology, family history, interpersonal relationships–that is relevant to the entire

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[10] *R. v. F. (T.C.)* 2006 NSCA 42at para. 27.

[11] *Ibid*. at paras. 29 and 31.

sweep of charges before the Court.[12] Furthermore, Ms. Seward is a complainant in all of the cases being tried before me; it is clearly necessary that I consider the whole of her evidence in relation to all of the counts.[13] Finally, I would observe that findings made regarding the credibility of a witness pertaining to one particular count may carry over into credibility findings regarding other counts.[14]

[19] In *R. v. J.C.H.*, the Newfoundland and Labrador Court of Appeal prescribed what I consider to be the highly appropriate sequence of judicial analysis in a criminal case, requiring an initial focus on evidence presented by the prosecution.[15] Rowe J.A. provided an entirely insightful explanation for this approach:

> [13] A trial judge should generally first consider the evidence offered by the Crown in support of the charges especially that of the complainant. That sets out the case that the accused has to meet. Only if there is sufficient strength in that evidence is it necessary to consider the evidence (if any) led by the accused. That sequence accords with the burden of proof resting with the Crown. The danger in considering the evidence of the accused first and determining whether it is worthy of belief before considering the Crown evidence is that it may induce the

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[12] *Ibid*. at para. 45.

[13] *Ibid*.; *R. v. Litchfield*, [1993] 4 S.C.R. 333 at paras. 37-39.

[14] *R. v. MacIntosh* 2011 NSCA 111 at para. 176. *Affirmed on other grounds*, 2013 SCC 23.

[15] 2011 NLCA 8 at paras. 12-14.

> judge to place too great an emphasis on the remaining evidence, i.e. the Crown evidence, without carefully scrutinizing that evidence in the context of the evidence as a whole to determine whether it can support the charges to the standard of proof required. In effect, it creates a tendency for the judge to consider the evidence in an "either/or" way, thereby departing from the required burden of proof. [16]

Analysis

[20] Both of the assaults Mr. Jacklyn-Smith is alleged to have committed were reported to have occurred in an apartment unit he had shared with Ms. Seward; in fact, Mr. Jacklyn-Smith still lives there. There is no evidence of any scene photography or measurement-taking having been done in the course of the investigation carried out by police; this very basic investigative step–accomplished readily through a general warrant–is helpful in spatially orienting a trier of fact, and may be of great assistance in assessing the plausibility or implausibility of witness accounts regarding postures, physical interactions and the like. Nor does there appear to have been anything done to try to locate the knife described by Ms. Seward as having been held against her by Mr. Jacklyn-Smith. Again, real evidence of this nature will often be very helpful in fulfilling the court's fact-finding function. A criminal investigation involves more than merely cataloguing

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[16] *Ibid*.

evidence that happens to fall into the lap of an investigator. It requires a level of digging that does not seem to have been done in this case–at least, I was not presented with evidence of it.

[21] It is true that Ms. Seward was very emphatic in presenting her evidence; she did not shrink away when challenged on cross examination. But this is the sort of metric–measuring credibility and reliability by reference to a confident demeanour–that our Court of Appeal has stated rightly ought to be approached with caution.[17]

[22] When I assess, rather, the content of Ms.Seward's evidence–indeed, the content of the entirety of the case for the prosecution–I am confronted by substantial questions which I am unable to resolve.

First of all, the notion that Ms. Seward would joke about the sharpness of a knife does not strike one as the subject of a typical, lighthearted household conversation.

[23] More fundamentally, why did Ms. Seward make up the account of an accidental injury with the knife? I would note parenthetically at this point that there is nothing inherently implausible in the proposition that Ms. Seward injured herself accidentally. It is well within the common knowledge of a reasonably informed member of the public that one can get hurt accidentally with a sharp edge

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[17] *R. v. P-P (S.H.)*, 2003 NSCA 53 at paras. 28 to 30.

in any number of ways. As I discussed earlier, it is beyond dispute that persons in abusive relationships make seek to conceal or minimize acts of violence committed by their partners. However, apart from what was called in support of the criminal charges now being tried, the evidence presented to the court is not descriptive of that sort of relationship. Ms. Seward made at one point a reference to unspecified violence, but her more detailed accounts referred to Mr. Jacklyn-Smith's habit of "nitpicking": "[I]t was almost like every day he would nitpick, nitpick just to get me going . . . . [H]e would say nasty things just to get me to holler at him." Yes, Mr. Jacklyn-Smith was charged with assaulting Ms. Seward on 7 September 2011; however, that charge was eventually dismissed upon Mr. Jacklyn-Smith entering into a peace bond. And that charge, itself, raises another question: why did Ms. Seward not reveal the knife assault or the computer-room assault during her interaction with authorities on 7 September? Exhibit No. 1 satisfies me that Mr. Jacklyn-Smith was arrested the very day of that alleged assault, and later released on form 11.1 terms of bail. I draw what I consider to be the only reasonable inference to be drawn from those facts: Ms. Seward immediately reported to police that Mr. Jacklyn-Smith had assaulted her on 7 September 2011 and police arrested him straightaway. Why not, under those circumstances, go on and tell police what had happened just a few months earlier in the year?

[24] Ms. Seward said that she told hospital staff that she had cut herself as a result of a trip-and-fall accident as she knew Mr. Jacklyn-Smith did not want to get into trouble with police, and he was hovering nearby in the emergency ward. Mr. Pelley's evidence was that, not long after he had dropped off Mr. Jacklyn-Smith and Ms. Seward at the hospital, he and Mr. Jacklyn-Smith drove off to a pizzeria. Even Ms. Seward acknowledged that Mr. Jacklyn-Smith had left the hospital at one point, as she had to call him to come back and pick her up. It is clearly not the case that Mr. Jacklyn-Smith was maintaining close surveillance of Ms. Seward to ensure she toed the line and stuck to the accident story.

[25] Regardless of Ms. Seward's motives in not telling medical staff immediately that she had been the victim of an assault with a knife, the simple fact is that, by the time she told police over a year later about the knife incident, her injuries had healed and much vital pathological information had been lost. A timely complaint would have allowed detailed macro forensic photography to have been done, which, in turn, would have presented the opportunity for a forensic medical opinion, as is seen frequently in knife-attack trials.[18] So it is that, regardless of Ms. Seward's reasons–and my this I mean reason as logic or reason as motive–for not telling staff at the hospital right away what she claims now had really happened to

[18]See, *e.g.*, *R. v. Vokurka*, 2013 NLCA 51 at para.53.

her on 19 April 2011, vital evidence has been lost. I am ever mindful that reasonable doubt may arise, indeed, from the absence of evidence.[19] This is not a matter of penalizing Ms. Seward or the prosecution. It is simply a matter-of-fact recognition that important evidence was lost for good.

[26] It is true that Diane Macdonald testified that Ms. Seward told her about the assaults. However, although useful as narrative evidence, and admissible as a rebuttal of recent-fabrication arguments advanced by defence, Ms. Macdonald's evidence of what Ms. Seward told her may not be used by the court as proof of the truth of what Ms. Seward said had happened.

[27] Ms. Macdonald's evidence of what she had been told by Ms. Seward was remarkable as she reversed the chronology: she remembered the computer-room assault as having happened first, and that the knife incident followed. The court certainly recognizes that lay witnesses might not recollect events with the same precision as, say, a trained police investigator. However, we are not taking about workaday, routine events: Ms. Seward divulged to Ms. Macdonald the details of two very serious crimes, if her testimony is to be believed. Furthermore, Ms. Macdonald was not called upon to give evidence about things she had been told in

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[19] *R. v. Morin* (1988), 44 C.C.C. (3d) 193 at para. 33 (S.C.C.).

the distant past. It is difficult to understand how Ms. Seward and Ms Macdonald could have gotten the order of events mixed up.

[28] With respect to the charges of assault with a weapon and common assault, the evidence called by the prosecution–particularly the evidence of Ms. Seward–leaves me in a state of substantial and unresolved doubt, and I find Mr. Jacklyn-Smith not guilty of those counts.

[29] I also am faced with substantial questions regarding the breach-of-undertaking charge.

Sub-s. 145(5.1) of the *Criminal Code* provides that:

> (5.1) Every person who, without lawful excuse, the proof of which lies on the person, fails to comply with any condition of an undertaking entered into pursuant to subsection 499(2) or 503(2.1)
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (b) is guilty of an offence punishable on summary conviction.

[30] The statute places the burden of establishing a lawful excuse upon the accused. As this is a defence-onus burden, the standard of proof is on a balance of probabilities only, and an accused is not required to prove the existence of a lawful

excuse beyond a reasonable doubt.[20] But before getting to the point of a lawful-excuse analysis, the court must be satisfied that all of the essential elements of the offence have been made out beyond a reasonable doubt; this includes proof of *mens rea*.[21]

[31] Mr. Jacklyn-Smith admitted to going over to Ms. Seward's apartment building after she had contacted him, through a friend, informing him of the injury to their dog. Mr. Jacklyn-Smith said he went over to Ms. Seward's to give her money, presumably for the dog's veterinary care. I recognize that Ms. Seward testified to other instances when she alleged Mr. Jacklyn-Smith had contacted her; however, because of the credibility issues which weigh down her testimony, I am prepared to find as a fact only that Mr. Jacklyn-Smith went to Ms. Seward's apartment to give her money for the dog after she had contacted him asking for it. The certified copy of the form 11.1 undertaking that was exhibited before me included a condition to "abstain from any communication with or contact with, directly or indirectly Patty Rose Seward except through legal counsel." Significantly, this bail document did not include a condition prohibiting Mr.

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[20] *R. v. Manuel*, [2000] N.S.J. No. 27 at para. 14 (S.C.) .

[21] See, e.g., *R. v. Flores-Rivas*, 2008 BCSC 1595 at paras. 15-16; *R. v. Ludlow,* 1999 BCCA 365 at para. 30.

Jacklyn-Smith from going to Ms. Seward's apartment building; one almost always sees both conditions being imposed, one right after the other. I am satisfied that Mr. Jacklyn-Smith's intent was not to contact or communicate with Ms. Seward–in fact, it was she who had contacted him. His intent was to give her money to get the dog patched up. I do not believe that his intent was to contact or communicate with Ms. Seward.

[32] I distinguish this case from the facts before the Manitoba Court of Appeal in *R. v. Custance.*[22] That is the well known case of the accused admitted to bail upon conditions to live at a specified residence. When the accused arrived there, he found that he was unable to gain entrance, and so he slept in his car in an adjoining parking lot instead. The Manitoba Court of Appeal found the accused to have been labouring under a mistake of law, which would not negative *mens rea*. I underscore the fact that the Court of Appeal placed great weight on the finding of fact made by the trial judge that Mr. Custance had intended to breach from the moment of his release.

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[22]2005 MBCA 23.

[33] This case is very different. The Oxford English Dictionary defines "contact" as "the state or condition of touching, meeting or communicating." It defines "communicate" as "to transmit or pass on by speaking or writing". In this case, it was Ms. Seward who initiated the contact, through a friend. It was she who communicated the need for money. Mr. Jacklyn-Smith only sought to deliver to Ms. Seward the money that she had sought. That no more constitutes "contact" than the case of a parent admitted to bail who seeks to comply with a support obligation. As I am left in a state of reasonable about proof of *mens rea*, I find Mr. Jacklyn-Smith not guilty of the sub-s. 145(5.1) charge.

[34] I am greatly indebted to counsel for the very thorough manner in which this case was prosecuted and defended.

JUDGMENT ACCORDINGLY.

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J.P.C.