SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Jacquard*, 2019 NSSC 338

Date: 2019 11 28
Docket: CRY 483484
Registry: Yarmouth

Between:

Her Majesty the Queen

v.

Christopher Leo Jacquard

DECISION

Judge: The Honourable Justice Scott C. Norton

Heard: September 25, 26 and 30, 2019, in Yarmouth, Nova Scotia

Decision: November 28, 2019

Counsel: Janice A. Rea for the Crown
Kiel D. N. Mercer for Christopher Leo Jacquard

By the Court (Orally):

[1] During the afternoon of March 18, 2018 Justin Williams was involved in a series of verbal and physical altercations with the accused Christopher Jacquard, culminating in shots being fired by Christopher Jacquard from a rifle into the ceiling area from the first floor of the house. Justin Williams' two motor vehicles were destroyed by fire.

The Charges

[2] The seven charges contained in the Indictment filed on January 9, 2019, against Christopher Leo Jacquard include: Count 1 – attempt to murder Justin Williams while using a firearm, contrary to section 239(1)(a.1) of the **Criminal Code** ("Code"); Count 2 - discharge of a firearm with intent to endanger the life of Justin Williams, contrary to section 244(b) of the Code; Count 3 - careless use of a firearm, contrary to section 86(1) of the Code; Count 4 - unlawful possession of a weapon, for a purpose dangerous to the public peace, contrary to section 88 of the Code; Count 5 - verbally uttering a threat to cause death to Justin Williams, contrary to section 264.1(1) of the Code; Count 6 - committed an assault on Justin Williams, contrary to section 266 of the Code; Count 7 - intentionally causing damage by fire to two motor vehicles, contrary to section 434 of the Code.

[3] At the outset of the trial and with the consent of the accused, the Crown amended Counts 1 and 4 of the Indictment to replace the words ".22 calibre rifle" with the words "one bolt action rifle, make Mossberg, model 817, 17 Hornady Magnum Rimfire rifle with serial number HIF 3031486".

The Presumption of Innocence and Reasonable Doubt

[4] It is not Mr. Jacquard's responsibility to demonstrate, establish, or prove his innocence or to explain away the allegations made against him. He is presumed to be innocent until proven guilty beyond a reasonable doubt. The Crown bears this onus of proof beyond a reasonable doubt throughout the trial and it never shifts. This burden requires the Crown to prove each element of each offence beyond a reasonable doubt (***R. v. Lifchus***, [1997] 3 SCR 320).

[5] In the recent decision of this Court in ***R. v. Baxter***, 2019 NSSC 274, Justice Hunt provided a helpful summary of the instructions from the Supreme Court of Canada and the Nova Scotia Court of Appeal on what is meant by proof beyond a reasonable doubt (para. 12):

> - A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

- Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
- On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
- In short, if based on the evidence before the Court, you are sure that the accused committed the offence you should convict because this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.
- It has to be remembered that the burden of proof never shifts to the defendant. This is irrespective of whether the defendant himself gives evidence or [sic] not.
- In this case the Defendant did testify. This raises particular issues of analysis which the court will address. But whether the defendant testifies or not, at no time does the burden of proof shift to the defendant and the resolution of the case does not turn on the court picking which version of the evidence it prefers or finds more believable.

A Brief Summary of the Evidence

[6] The evidence advanced by the Crown was comprised of witness testimony, including from Justin Williams, forensic evidence, agreed facts, scene photographs and an expert report from Forensic Specialist Heather Janssens of the Firearm and Toolmark Identification Section of the RCMP Forensic Laboratory Services in Ottawa, Ontario.

[7] As is his right, Mr. Jacquard did not testify or call any evidence.

Credibility and Reliability

[8] I am aided by the decision of this Court in ***R. v. Farrar***, 2019 NSSC 46, as to the various factors that a judge should consider when assessing the evidence of witnesses. Justice Warner stated as follows:

> [14] Fact finding requires the court to assess both reliability and credibility. Reliability involves the assessment of the witness's capacity to observe, recall and communicate accurately. Credibility involves the assessment of the witness's believability and truthfulness.
>
> [15] In assessing the reliability and credibility of each witness's evidence, I have considered these factors:
>
> a) honesty;
>
> b) interest (but not status);
>
> c) accuracy and completeness of observations;
>
> d) circumstances of the observations;
>
> e) memory;
>
> f) availability of other sources of information;
>
> g) inherent reasonableness of the testimony;
>
> h) internal consistency, including consistency with other evidence; and,
>
> i) demeanour but with caution.
>
> [16] Demeanor was the central issue in the Supreme Court of Canada decision in *R. v. NS*, 2012 SCC 72. All three reasons from the court described the role of demeanor in the assessment of a witness's evidence - the majority at paras 21 to 28, 41, 42 and 48; the concurring reasons at paras 64 and 77; and Justice Abella at paras 91, 98 to 108. The majority recognized that demeanor was not the most important of the factors that go into accurate credibility assessment (at para 27). There appeared to be agreement that determining credibility is not based on one single factor, but on the application of common sense to all the evidence which can be tested in a particular case, as espoused in *Faryna v. Chorney*, [1952] 2 DLR 354 (BCCA) at paras 9 to 11.
>
> [17] The actual words used and demeanor - the "visible or audible form of self-expression manifested by a witness", together constitute the communication in court. At least as important, and most often more important, is the evidence of other reliable information - in this case, the medical evidence respecting the complainant's injuries; the photographs of the accused's injuries; the consistencies

> or inconsistencies between the accused's cautioned video statement of December 30, 2016 and his trial evidence; and the inherent reasonableness of the testimony.
>
> [18] I am not required to believe or rely upon a witness' evidence in its entirety. As the trier of fact, I may believe or rely upon none, part, or all a witness's evidence and attach different weight to different parts of it.
>
> [19] There is no magic formula for deciding what and how much to believe or rely upon, except the standard instruction judges give juries to use their common sense.

[9] To make my decision, I have considered all the evidence presented during the trial. I have chosen how much or how little I believed and relied upon each witness. I will make more specific references to these issues in the course of my decision.

Agreed Statement of Facts

[10] By written agreement dated and signed by the accused, his counsel, and Crown counsel on September 25, 2019, the accused agreed to and admitted the following facts pursuant to section 655 of the Code as being proven for the purpose of the trial without the need to call evidence:

1. On March 18, 2008 police were investigating report of shots being fired at Justin Williams inside a house at 7664 Highway 308 in Quinan, Nova Scotia. Members of the RCMP New Minas Forensic Identification Section attended the residence and seized three bullet fragments, that were subsequently marked as PE-3, PE-4 and PE-7.
2. On March 22, 2018 Constable Kershaw, a member of the RCMP seized a Mossberg, 17 calibre, model 817, Hornady Magnum Rimfire, bearing serial number HIF3031486, from the vehicle of Jason Glen Muise. The firearm seized by Constable Kershaw is the same firearm

that was used to shoot at Justin Williams on March 18, 2018 and was subsequently marked as PE-12.

3. On May 9, 2018 Cst. Fernandez sent PE-3, PE-4, PE-7 and PE-12 to the Firearm and Toolmark Identification Section of the RCMP Forensic Laboratory Services in Ottawa, Ontario, where they were examined by Forensic Specialist Heather Janssens. Ms. Janssens' expertise in the area of Firearms and Toolmark Identification is admitted. Ms. Janssens completed an analysis to determine the mechanical condition and legal classification of the rifle, PE-12. Ms. Janssens also conducted an analysis to determine if the bullet fragments PE-3, PE-4 and PE-7 were fired from the rifle PE-12.

4. Ms. Janssens completed a report in relation to PE-3, PE-4, PE-7 and PE-12. A copy of her report is attached as Appendix 1 to this Agreed Statement of Facts. The report of Ms. Janssens is also admitted for the truth of its contents.

5. On September 26, 2018 PE-3, PE-4, PE-7 and PE-12 were returned by the RCMP Forensic Laboratory Services to Sergeant Wentzell at the New Minas RCMP detachment.

6. Continuity of PE-3, PE-4, PE-7 and PE-12 is admitted.

[11] The expert report of Heather Janssens was attached to the Agreed Statement of Facts.

Events of March 18, 2018

[12] On March 18, 2018 Justin Williams was residing at a house located at 7664 Hwy 308 in East Quinan, Nova Scotia (the "Williams' house"). He had moved into the house in the late fall of 2017 at the invitation of his friend Jamie Muise. Williams occupied the upstairs of the home, comprised of a bedroom, spare room and living room. Muise used a bedroom downstairs off the kitchen. The only

bathroom was on the main level at the foot of the stairs. A plywood hatch was constructed on the second floor that could be lowered to close off the staircase opening. The hatch was held in the open position by a two by six board. A wooden railing protected the perimeter of the stair opening.

[13] Muise was asleep in his bedroom on the ground floor of the house when he was awakened by Jacquard sometime during the afternoon. Jacquard had knocked on the kitchen door and was let into the house by Williams who then returned to his upstairs area in the house. Williams noted that Jacquard was carrying a "Rock Star" branded beverage which Williams understood was an energy drink containing vodka.

[14] Muise had expressed concern to Jacquard earlier that day that he thought Williams may have sold Muise's puppy, which had gone missing from the house. When Jacquard woke Muise, he was saying that Williams had to be evicted from the house. Muise admitted to drinking 8 or 9 beer earlier that day and said he was asleep for only an hour or two when Jacquard woke him up. He says he told Jacquard he would deal with Williams himself about the puppy.

[15] Jacquard then went upstairs and began yelling at Williams to pack up his stuff and get out. Hearing this caused Muise to follow Jacquard up the stairs. By the time he got upstairs Jacquard and Williams were physically wrestling, with

Jacquard appearing to Muise to be trying to drag Williams toward the stairs. Muise observed Jacquard trying to grab Williams by the arms and shoulders and Williams was pushing Jacquard away.

[16] After a short period of time Jacquard appeared to tire from the wrestling and Muise and Jacquard left the house and drove in Jacquard's motor vehicle to the house of Jason Glen Muise. They were only there a short time before Jacquard left. Muise stayed at Jason Glen's house for a further period of time and then walked back to William's house.

[17] Jason Morris, a friend of Jacquard for more than 20 years, spent the morning hours of Sunday at a friend's home. He acknowledged consuming a quart of alcohol starting at 10:30 that morning. He was home asleep when he was awakened by Jacquard standing at his bedroom door hollering that he wanted to get Williams out and wanted to have Morris' gun. Morris says that the gun was in his closet and he retrieved it and gave it to Jacquard. Devon Jeddry was the 17-year-old son of a female friend of Morris. He was at the Morris house when Jacquard arrived. Jeddry and Morris went with Jacquard in his vehicle to Williams' house. After being referred to his RCMP statement to refresh his memory, Morris stated that Jacquard had said to him, when asking for the gun, that he "wanted to kill a nigger".

[18] Morris testified that the gun was not loaded when he gave it to Jacquard. Morris says he only had 2 bullets and they were taken along. It is not clear from the evidence at what point Morris gave the bullets to Jacquard: before they left Morris' house; during the drive; or after they arrived at Williams' house.

[19] The rifle was sitting between the two front seats of Jacquard's vehicle as they drove to Williams' house. They arrived at Williams' house and entered. Jacquard began yelling for Williams to come downstairs. Jacquard was at the foot of the stairs. Morris could hear Williams moving around upstairs.

[20] Morris saw Jacquard load the rifle with a bullet after they arrived at Williams' house. He described the manner of loading a bullet into the bolt action rifle. Only one bullet could be loaded at a time.

[21] I am satisfied by the evidence that after Jacquard returned to Williams' house the following events occurred:

1. Williams closed the hatch and stood on it while straddling the upstairs railing to prevent Jacquard from coming upstairs;

2. Jacquard fired a shot into the ceiling close to the bottom of the stairs (marked with identification label "A" in the RCMP photographs);

3. Jacquard fired a shot through the hatch (marked with identification label "B" in the RCMP photographs); and

4. Jacquard gained access through the hatch and began wrestling with Williams over the rifle (which was unloaded at the time).

[22] Williams says that a third shot was fired through the ceiling of the first floor. I find that the evidence falls short of proof that there was a third shot.

[23] I find that the evidence falls short of proof that either bullet grazed or injured Williams as he believes. There was no evidence of blood on his clothes or at the scene. Although Williams was examined at a hospital, no medical records were offered to establish any such injury. According to the RCMP forensic officer, Williams refused to allow the RCMP to photograph the areas of his body that he says were grazed or burned by the bullets.

[24] Jacquard left the house with Jeddry and Morris. Jacquard told Muise as he was leaving that he was going to get some gas and burn Williams' cars. Morris testified that he, Jacquard and Jeddry drove in Jacquard's car to the trailer that Jacquard was staying in. Jacquard exited the vehicle and returned. Jacquard then drove them all back to the Williams' house. Jacquard told Morris he was going to burn Williams' cars. Williams watched from the upstairs window and observed

Jacquard pour a liquid from a red gas jug onto the two cars owned by Williams and ignited the liquid. The cars were burned completely according to the RCMP photographs and testimony.

Intoxication

[25] The Crown spent some time in summation anticipating that the Defence was going to advance a defence of intoxication. In response, the Defence advised the Court that it was not relying on a defence of intoxication in and of itself but that the accused's consumption of alcohol is but one factor to consider in assessing the actions of the accused.

Count 1 - Attempted Murder

[26] Jacquard is charged "That he on or about the 18th day of March, 2018, at or near East Quinan, Nova Scotia, did attempt to murder Justin Michael Williams while using a firearm, by discharging one bolt action rifle, make Mossberg, model 817, 17 Hornady Magnum Rimfire, serial number HIF 3031486, at Justin Michael Williams, contrary to Section 239(1)(a.1) of the Criminal Code".

[27] The relevant provision of the Code provides:

> Every person who attempts by any means to commit murder is guilty of an indictable offence and liable

…

> (*a*.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; …

[28] As Justice Hunt noted in ***Baxter***, *supra*, a number of judgments have made the point that it can be more difficult to prove attempted murder than to prove murder. This is because the charge requires the Crown to prove, as the mental element of the offence, the specific intent by the accused to kill someone. ***R. v. Ancio***, [1984] 1 SCR 225; ***R. v. Marshall*** (1986), 25 CCC (3d) 151 (NSCA).

[29] In this case the Crown must prove beyond a reasonable doubt that Christopher Jacquard intended to kill Justin Williams.

[30] There is no direct evidence of a specific intent on the part of Christopher Jacquard to kill Justin Williams. "Accordingly, the finding of a specific intent to kill must be drawn, if it can be, from the circumstantial evidence. When dealing with a circumstantial evidence case, the trier of fact must be satisfied that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty" (***R. v. Wielgosz***, 2018 ONCJ 666, at para. 48).

[31] The Crown points to the following evidence in support of drawing such an inference:

- Jacquard was angry with Justin Williams about his alleged theft of the puppy.

- Jacquard repeatedly called Justin Williams "nigger".

- Jacquard went to Morris and asked for his gun and, according to Morris, said "I want to go kill a nigger". On this point Morris was asked in cross examination how sure he was of this statement and he replied, "pretty sure". He also acknowledged that at the preliminary inquiry he said this statement was not made. Morris could not explain why he now was "pretty sure" that it was made. I am not satisfied that this statement has been sufficiently proved.

- Williams said that when they were trying to get up past the hatch "they were all" talking about murdering him. His evidence did not establish that he clearly heard the accused make this statement.

- Jacquard discharged the rifle when he knew that Williams was on the other side of the hatch.

[32] Jacquard argues that the Crown has failed to prove the required specific intent beyond a reasonable doubt. He refers to the decision of the Ontario Court of Appeal in ***R. v. Boone***, 2019 ONCA 652, where the court stated, at para 57:

> … The *mens rea* required for attempted murder is not satisfied by recklessness as to the consequence. A person who anticipates that his acts may, or probably will, lead to the victim's death is not guilty of attempted murder unless killing the victim was his purpose…

[33] Jacquard says that the evidence is equally consistent with him wanting to scare Williams and to persuade him to leave the premises. He says this is evidenced by the observations of Muise and Morris that he was physically trying to drag Williams downstairs; that he never pointed the rifle directly at Williams; and that he never directly threatened to shoot or kill Williams.

[34] The accused argues that his actions may have been reckless but that does not satisfy the specific intent requirements of the Code.

[35] My analysis has reached the same conclusion as many of the cases dealing with this charge. The intent to kill Williams is one reasonable inference from the evidence. However, it is not the only reasonable inference. It is equally reasonable to infer that the accused wanted to hurt Williams, but not kill him; or that he wanted to scare Williams to encourage him to leave the premises.

[36] Accordingly, I find that the Crown has failed to prove that the accused intended to kill Justin Williams and as such I find the accused not guilty of the charge of attempted murder.

Count 2 - Discharge of a Firearm with Intent

[37] This Count reads that Jacquard "on or about the 18th day of March 2018, at or near East Quinan, Nova Scotia, with intent to endanger the life of Justin Michael Williams did discharge a firearm at Justin Michael Williams contrary to section 244(b) of the Criminal Code".

[38] There is no Section 244(b) of the *Criminal Code*. It is apparent to me that this is a typographical error. It was not raised by counsel during the trial. The evidence comports with a charge under section 244(1). The Indictment otherwise fully and adequately sets out the offence (section 581(5)). The accused was not misled or prejudiced by this error. Pursuant to Section 601(3) of the *Criminal Code* I am ordering the amendment of Count Two of the Indictment to reference Section 244(1) of the Criminal Code.

[39] Section 244 (1) of the Code states:

> Every person commits an offence who discharges a firearm at a person with intent to wound, maim or disfigure, to endanger the life of or to prevent the arrest or detention of any person - whether or not that person is the one at whom the firearm is discharged.

[40] This is also a specific intent offence and in the present case the Crown must prove beyond a reasonable doubt:

1. That the accused intentionally discharged a firearm;

2. That the accused intentionally discharged the firearm at Justin Williams; and

3. That the accused had the specific intent to endanger the life of Justin Williams.

[41] It is noteworthy that no bodily harm needs to be caused for the offence to be complete.

[42] The forensic and testimony evidence clearly established the first element and it was not seriously challenged by Jacquard.

[43] I am not satisfied from the evidence that the Crown has proven that the accused intentionally discharged the firearm at Williams. The evidence establishes that the accused knew that Williams was on the second floor above him when he shot through the hatch and when he shot through the ceiling. However, there was no evidence that the accused ever pointed the rifle directly at Williams and no evidence that at the time of the discharge of the rifle Williams was in the direct line of fire. The evidence is equally consistent with the inference that Jacquard intended only to fire the two shots at the ceiling and hatch, not at Williams, in an effort to scare Williams.

[44] As to this point and as to the third element of the offence, the specific intent to endanger life, I refer to the decision in ***R. v. Foti***, [2002] M.J. No. 383:

> 24 The *mens rea* in this offence, as opposed to that of aggravated assault, is one of specific intent: *Colburne*, at p. 249, and *R. v. Martin*, [1947] 1 W.W.R. 721 (Alta. T.D.), at 725. It is not sufficient to have an intention to threaten, scare or frighten someone, nor is it sufficient to objectively foresee that there is a risk of harm. According to the case law, the accused must have an actual intention to wound: *R. v. MacDonald* (1944), 82 C.C.C. 47 (Sask. C.A.); *R. v. Connop* (1949), 94 C.C.C. 349 (Ont. C.A.); and *R. v. Cashman* (1951), 13 C.R. 45 (Ont. Co. Ct.).
>
> 25 In determining whether an accused has formed the requisite intention to wound, the trier of fact will often have to infer such an intention from circumstantial evidence. In doing so, it is acceptable for the trier of fact to consider that a person generally intends the natural consequences of his actions: *Cashman*, at pp. 51-52.
>
> 26 Having said that, however, the evidence against the accused must not only be consistent with the fact that the accused shot at the victim with the intent to wound but must also be inconsistent with any other rational conclusion. If the evidence against the accused is equally consistent with the inference that the accused fired the shot not at the victim, but into the ground or the air in an effort to scare the victim, then the accused should get the benefit of the doubt: *MacDonald*, at p. 51, and *Cashman*, at p. 52.
>
> (Emphasis added)

See also ***R. v. Phillips***, [2009] O.J. No. 400, at para 74.

[45] As stated above, in my analysis of the attempted murder charge, I find that there are other reasonable inferences as to the intent of the accused based on the evidence or lack of evidence before the court. Accordingly, I am left with a reasonable doubt as to the intent of the accused.

[46] I find the accused not guilty on this count.

Section 244.2 - Included Offence?

[47] The Crown submits that section 244.2(1)(a) or (b) is an included offence in a charge under section 244(1). The accused disagrees. I agree with the accused that 244.2(1)(a) is not an included offence as he was not charged with discharging a firearm into or at a "place". This would introduce an additional element to the offence for which he was not given reasonable notice by the charge.

[48] Whether 244.2(1)(b) is an included offence requires further analysis.

[49] Section 662 of the Code provides:

> (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted
>
> (a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or
>
> (b) of an attempt to commit an offence so included.

[50] Section 244(1) of the Code states:

> Every person commits an offence who discharges a firearm at a person with intent to wound, maim or disfigure, to endanger the life of or to prevent the arrest or detention of any person - whether or not that person is the one at whom the firearm is discharged.

[51] The Indictment, as amended by my order above, alleges that the accused "on or about the 18th day of March, 2018, at or near East Quinan, Nova Scotia, with

intent to endanger the life of Justin Michael Williams, did discharge a firearm at Justin Michael Williams contrary to section 244(1) of the Criminal Code".

[52] Section 244.2(1)(b) of the Code provides:

> 244.2(1) Every person commits an offence
>
> …
>
> (b) who intentionally discharges a firearm while being reckless as to the life or safety of another person.

[53] As to subsection (b), the accused argues that the element of "being reckless" is not an element of the charge in the Indictment and so cannot be an included offence.

[54] The legal authorities establish that there are two complimentary notions or principles to determine if an offence is "included". In ***R. v. Simpson*** (1981), 58 C.C.C. (2d) 122, 1981 CarswellOnt 40 the Ontario Court of Appeal said:

> 25 The decisions interpreting the meaning of "an included offence" under the present s. 589(1)(a) [now s. 662] and its predecessors reflect two complementary notions or principles. First, an "included offence" is part of the main offence. The offence charged, either as described in the enactment creating the offence, or as charged in the count, must contain the essential elements of the offence said to be included: see *Fergusson v. R.*, [1962] S.C.R. 229, 36 C.R. 271, 132 C.C.C. 112; R. v. Ovcaric (1973), 22 C.R.N.S. 26, 11 C.C.C. (2d) 565 at 568 (Ont. C.A.); *Juneau v. R.* (1971), 16 C.R.N.S. 268 at 270 (Que. C.A.); *R. v. Kay*, [1958] O.W.N. 478 (C.A.); *R. v. Carey*, [1973] 2 W.W.R. 267, 10 C.C.C. (2d) 330 at 333 (Man. C.A.).
>
> 26 In *Fergusson v. R.*, *supra*, Taschereau J. (as he then was), delivering the judgment of the Supreme Court of Canada, said at p. 233:

> The count must therefore include but not necessarily mention the commission of another offence, but the latter must be a lesser offence than the offence charged. The expression "lesser offence" is a "part of an offence" which is charged, and it must necessarily include some elements of the "major offence" but be lacking in some of the essentials, without which the major offence would be incomplete. (*R. v. Louie Yee*, 24 Alta. L.R. 16, [1929] 1 W.W.R. 882, 51 C.C.C. 405, [1929] 2 D.L.R. 452 (C.A.).
>
> 27 The second operative principle governing the meaning of an "included offence" is that the offence charged, either as described in the enactment creating the offence or as charged in the count, must be sufficient to inform the accused of the included offences which he must meet. It will be observed that s-s. (3) (in so far as it empowers the jury on a charge of murder to convict of infanticide), and s-ss. (4) and (5) of s. 589 empower the jury or the Court, as the case may be, in the circumstances mentioned, to convict the accused of certain offences which are not "included offences" within s. 589(1)(a). Where an offence is declared by the statute to be an included offence, the accused is, of course, put on notice that he must meet it.

[55] E. G. Ewaschuck, *Criminal Pleadings & Practice in Canada* (2nd ed. 1988), contains the following summary of the law related to included offences (16:5050):

> An offence is "included" if its elements are embraced in the offence charged (as described in the enactment creating it or as worded in the count) *or* if it is expressly stated to be an included offence in the *Criminal Code* itself. A "strict interpretation" of s. 662 of the *Criminal Code* is linked to the requirement of fair notice of legal jeopardy with the result that what is not "necessarily included" is excluded as an "included offence".
>
> > *R. v. R. (G.)* (2005), 2005 CarswellQue 5108, 198 C.C.C. (3d) 161 (S.C.C.), at paras. 25-26
> >
> > An "included offence" is part of the offence charged in the sense that the offence charged, being generally the "greater offence", must contain the essential elements of the offence said to be included. Furthermore, the "description of the offence" as set out in the enactment creating it, or in the "wording of the offence", must generally be sufficient to *inform* the accused of the "included offence" which he must meet. The issue to be determined is whether the offence as charged may be committed "without committing the so-called 'included offence'". In this sense, the offence charges, the so-called "greater offence", must *necessarily* include the commission of the lesser and included offence, subject to "statutory exception".

> *R. v. Beyo* (2000), 2000 CarswellOnt 838, 144 C.C.C. (3d) 15 (Ont. C.A.), at paras. 29 and 30
>
> If the Crown can establish some, but not all, of the facts described in the indictment or set out in the statutory definition of the offence, and such "partial proof" satisfies the constituent elements "of a lesser and included offence", the result is *not* an acquittal but a conviction on the included offence. In this sense, an included offence is one that is made out of bits of the offence charged.
>
> *R. v. R. (G.)* (2005), 2005 CarswellQue 5108, 198 C.C.C. (3d) 161 (S.C.C.), at para. 11
>
> In the end, if the particular offence is *not* "statutorily or necessarily included" in the greater offence, it is necessarily excluded.
>
> *R. v. Comeau* (2008), 2008 CarswellNB 368, 80 W.C.B. (2d) 850, 2008 NBCA 60, at para. 26
>
> (Emphasis added)

[56] Put conversely, an offence is not included if the offence charged can be committed without committing this other offence. In ***R. v. R. (G.)*** (2005), 198 C.C.C. (3d) 161, 2005 SCC 45 (S.C.C.), Binnie J. said, for the majority:

> 30 In terms of the need for fair notice, "included" offences in the first category can be ascertained from the *Criminal Code* itself: see, e.g., *R. v. Wilmot* (1940), [1941] S.C.R. 53 (S.C.C.). Cases in the second category also meet the test of fair notice because "an indictment charging an offence also charges all offences which as a matter of law are necessarily committed in the commission of the principal offence as described in the enactment creating it" (*Harmer and Miller*, at p. 19; emphasis added). See also: *R. v. Quinton*, [1947] S.C.R. 234 (S.C.C.), at p. 240; R. E. Salhany, *Canadian Criminal Procedure* (6th ed. (loose-leaf)), at para. 6.4650; *R. v. Lucas* (1987), 34 C.C.C. (3d) 28 (Que. C.A.); *R. v. Lépine* (1992), [1993] R.J.Q. 88 (Que. C.A.).
>
> 31 With respect to the second category, it may be said that "[i]f the whole offence charged can be committed without committing another offence, that other offence is <u>not</u> included" (P. J. Gloin, "Included Offences" (1961-62), 4 *Crim. L.Q.* 160, at p. 160; emphasis added). This proposition was endorsed by the Manitoba Court of Appeal in *R. v. Carey* (1972), 10 C.C.C. (2d) 330 (Man. C.A.), at p. 334, *per* Freedman C.J.M.; by the Ontario Court of Appeal in *Simpson (No. 2)*, at p. 139, *per* Martin J.A., and by the Quebec Court of Appeal in *Colburne*, at p. 243, to which Proulx J.A. added:

> [TRANSLATION] For my part, I would add that an offence would be included where the essential elements of this offence are part of the offence charged. [Emphasis in original.]
>
> Clearly the offence of incest can be committed without committing sexual assault or sexual interference.

[57] Neither the Crown nor the accused could find a single authority previously determining the issue of whether section 244.2(1)(b) is an included offence in a charge under section 244(1). The accused submits that this lack of authority supports the conclusion that it is not an included offence.

[58] The following table shows a comparison of the elements of the offences:

244(1)	**244.2(1)(b)**
Discharging a firearm	Discharging a firearm
At a person	
With intent to endanger the life of that person	Being reckless as to the life or safety of another person

[59] While section 244(1) requires specific intent to endanger the life of the person, section 244.2(1)(b) is a general intent offence that requires the accused to be reckless as to the life or safety of another person. Applying the authorities above, it appears clear to me that a person who is guilty of the offence under section 244(1) has also committed the included offence of section 244.2(1)(b). However, where the evidence does not establish a specific intent to endanger life

(as I have found here), the included offence of being reckless as to the life or safety of another person can be made out on the evidence.

[60] I am satisfied that the language of the relevant sections of the Code and the language of the Indictment was sufficient to alert the accused to the included offence. I find that an accused being charged with intent to endanger the life of a person by discharging a firearm would be informed that a possible included offence is the intentional discharge of a firearm being reckless as to the life or safety of another person.

[61] I turn now to an examination of the evidence on a charge under section 244.2(1)(b).

[62] The forensic and testimonial evidence clearly established that the accused intentionally discharged the rifle on two occasions into the ceiling and hatch. The accused has admitted the rifle was a firearm as defined by the Code.

[63] Common sense dictates that discharging a firearm in such a manner is reckless by any definition of that term. Reckless means careless of the consequences, heedless, or lacking prudence or caution: ***R. v. Dickson***, 2006 BCCA 490.

[64] The accused knew that Williams was present on the floor above where the rifle was aimed when it was discharged into the ceiling and hatch. In doing so he was careless of the consequence of the bullets hitting Williams directly or by ricochet or Williams being injured by shrapnel.

[65] I find that the Crown has established beyond any reasonable doubt that the accused is guilty of the included offence under 244.2(1)(b).

Count 3 - Careless Use of a Firearm

[66] This Count reads that the accused "on or about the 18th day of March 2018, at or near East Quinan, Nova Scotia, did, without lawful excuse, use a firearm in a careless manner contrary to Section 86(1) of the Criminal Code".

[67] The Code section states:

> 86. (1) Every person commits an offence who, without lawful excuse, uses, carries, handles, ships, transports or stores a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any ammunition or prohibited ammunition in a careless manner or without reasonable precautions for the safety of other persons.

[68] The Crown has proven beyond a reasonable doubt the following required elements of the offence:

1. That the accused used a firearm;

2. That the use was in a careless manner; and

3. That the accused did not have a lawful excuse for his use of the firearm.

[69] The forensic and testimony evidence clearly established the accused discharged a rifle, which the accused has admitted was a firearm.

[70] The circumstances satisfy me that the discharge was done carelessly. The accused did not exercise a reasonable standard of care in discharging the firearm. The accused knew that Williams was present on the floor above him when he fired two shots into the ceiling from the floor below. This showed a marked departure from the standard of care that a reasonable and prudent person would exercise in the same circumstances.

[71] The accused did not have any lawful excuse for discharging the firearm and made no argument in this respect.

[72] I find the accused guilty of this offence.

Count Four - Dangerous Carry

[73] This Count reads that the accused "on or about the 18th day of March, 2018, at or near East Quinan, Nova Scotia, did carry a weapon, to wit a one bolt action rifle, make Mossberg, model 817, 17 Hornady Magnum Rimfire, serial number

HIF 3031486, for a purpose dangerous to the public peace contrary to section 88 of the Criminal Code".

[74] This section of the Code states:

> 88. (1) Every person commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence.

[75] The Crown must prove the following elements of this offence beyond a reasonable doubt:

1. That the accused possessed a weapon;

2. That the accused knew that what he possessed was a weapon;

3. That the accused had the weapon for a purpose dangerous to the public peace.

[76] “Weapon” is defined in Section 2 of the Code:

> "weapon" means any thing used, designed to be used or intended for use
>
> (a) in causing death or injury to any person, or
>
> (b) for the purpose of threatening or intimidating any person
>
> and, without restricting the generality of the foregoing, includes a firearm and, for the purposes of sections 88, 267 and 272, any thing used, designed to be used or intended for use in binding or tying up a person against their will;

[77] A firearm will always fall within the definition of weapon. It is not necessary to prove that the accused used it or intended to use it for causing death or

injury or for a purpose of threatening or intimidation: ***R. v. Felawka***, 1993 CarswellBC 1270, [1993] 4 S.C.R. 199, 85 C.C.C. (3d) 248.

[78] In ***R. v. Kerr***, 2004 SCC 44, the Supreme Court of Canada held that the correct approach to applying this provision is the hybrid subjective-objective test. By this approach, the trier of fact must first determine what was the accused person's purpose; this is a subjective determination. The trier of fact must then determine whether that purpose was in all the circumstances dangerous to the public peace; this is an objective determination. At para 27:

> … Thus, the question under the first stage of the purpose analysis is what object (or objects) did the accused person know would probably flow from his possession, whether he desired it (or them) or not. Of course, understood in this way, a person may have more than one purpose. Since the provision reads "a purpose", the Crown is entitled to rely on any of the accused person's purposes.

[79] It is clear from the evidence that the accused intended that the rifle would at the least intimidate or scare Williams. That is a purpose that in all the circumstances is dangerous to the public peace. The use of the rifle was premeditated. The accused left the Williams' house and went to see Morris to obtain the rifle. At the time the accused intentionally discharged the rifle, the purpose was subjectively and objectively dangerous to the public peace.

[80] I am satisfied that the Crown has proved the necessary elements of this charge beyond a reasonable doubt and find the accused guilty.

Count Five - Threat

[81] This Count reads that the accused "on or about the 18th day of March 2018, at or near East Quinan, Nova Scotia, did verbally utter a threat to Justin Michael Williams to cause death to Justin Michael Williams contrary to Section 264.1(1) of the Criminal Code".

[82] This section of the Code states:

> 264.1 (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat
>
> (a) to cause death or bodily harm to any person;
>
> (b) to burn, destroy or damage real or personal property; or
>
> (c) to kill, poison or injure an animal or bird that is the property of any person.

[83] The Crown must prove the following elements of the offence beyond a reasonable doubt:

1. That the accused made a threat;
2. That the threat was to cause death to Justin Michael Williams; and
3. That the accused made the threat knowingly.

[84] Williams says that the accused stated to Muise in his presence that he was going to "get my gun and kill this fucking nigger". Williams says that after they returned to the house "all of them" were below the closed hatch and "they" were saying they were going to kill him. He did not testify that he heard the accused specifically make the threat. Muise and Morris testified that they did not hear any threats (see also paragraph 31 above).

[85] Upon my review of the testimony of the witnesses present at the relevant time I am left with a reasonable doubt as to whether there was a threat to cause death made by the accused.

[86] I find the accused not guilty of this count.

Count Six - Assault

[87] This Count reads that the accused "on or about the 18th day of March 2018, at or near East Quinan, Nova Scotia, did commit an assault on Justin Michael Williams contrary to Section 266 of the Criminal Code".

[88] Section 266 of the Code defines assault:

> 266. Every one who commits an assault is guilty of
>
> (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
>
> (b) an offence punishable on summary conviction.

[89] The Crown is required to prove beyond a reasonable doubt:

1. That the accused intentionally applied force to Williams;

2. That Williams did not consent to the force that the accused applied; and

3. That the accused knew that Williams did not consent to the force that he intentionally applied.

[90] The evidence of Williams, Morris and Muise clearly established that the accused applied force to Williams on two occasions. The first application of force was when the accused first approached Williams and asked him to pack up his things and vacate the house. A wrestling match ensued where both Williams and Muise describe the accused trying to physically force Williams down the stairs without Williams' consent. The second occasion was after the accused returned to the house with the rifle and Williams and the accused were wrestling again and the accused was throwing punches at Williams. The testimony of Williams clearly established that he did not consent to the force being applied to him.

[91] I am satisfied on the evidence that the Crown has proved the elements of this offence beyond a reasonable doubt.

[92] I find the accused guilty.

Count Seven - Arson Causing Property Damage

[93] This Count reads that the accused "on or about the 18th day of March 2018, at or near East Quinan, Nova Scotia, did intentionally cause damage by fire to two motor vehicles, the properties of Justin Michael Williams contrary to Section 434 of the Criminal Code".

[94] That section of the Code states:

> 434. Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[95] The Crown must prove each of the following elements beyond a reasonable doubt:

1. That the accused caused damage to property by fire or explosion;

2. That the accused caused the damage intentionally or recklessly; and

3. That the accused was not the only person who owned the property.

[96] When Jacquard left the house after discharging the rifle, he drove with Morris to a trailer and retrieved an item that he placed in the trunk of the vehicle he

was driving. He then drove back to the Williams' house and told Morris he was going to burn Williams' cars. Jacquard got out of the car. He returned shortly after and drove away. Morris testified he could see the flames coming from the two vehicles in the yard as they drove away.

[97] The evidence establishes beyond a reasonable doubt that Jacquard poured a liquid onto the two vehicles that were parked outside the house, lit the liquid and the two vehicles were completely destroyed by fire. Williams' testimony identified the two vehicles as belonging to him and him alone. It is reasonable to infer that the liquid was gasoline or other flammable liquid stored in a red gas can. The evidence establishes that Jacquard advised Williams that he was going to burn his cars.

[98] I am satisfied that the evidence establishes beyond a reasonable doubt that the accused committed the offence of arson as charged.

[99] I find the accused guilty of this count.

[100] I will discuss with counsel the application of the **Kienapple** principle to my decision.

Norton J.