SUPREME COURT OF NOVA SCOTIA
Citation: *R.v. Breau*, 2019 NSSC 181

Date: 20190515
Docket: CRH 479647
Registry: Halifax

Between:

Her Majesty the Queen
v.
Justin David Breau

Decision

Judge:	The Honourable Justice Christa M. Brothers
Heard:	March 1, 2019, in Halifax, Nova Scotia
Final Written Submissions:	Crown: March 26, 2019 Defence April 8, 2019
Oral Decision: **Written Release:**	May 15, 2019, in Halifax, Nova Scotia June 4, 2019
Counsel:	Christian Girouard, for the Plaintiff James Giacomantonio, for the Defendant

Overview

[1] Justin David Breau is charged that he on or about February 25, 2017, at or near Halifax, unlawfully had cocaine in this possession for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"). Cocaine is a listed substance in Schedule I of the *CDSA*.

Background

[2] The accused was arrested on February 25, 2017, for being intoxicated in a public place, specifically the parking lot of Dooley's, a bar on Kempt Road. The accused was searched. The accused conceded identity and abandoned a *Charter* challenge in relation to the search of his person.

[3] The accused admitted that he was in possession of 28 "dime bags" of cocaine, totalling 23 grams of cocaine in a repressed state. The accused said he possessed the drug (albeit a large quantity) for his own personal use. The accused also had $405.00 in cash. No cell phone, no scales, no scoresheet or other paraphernalia were found on the accused's person.

Issue

[4] The issue is whether the Crown has proven beyond a reasonable doubt that the accused was in possession of cocaine for the purpose of trafficking.

Framework

[5] This case comes down to whether the evidence establishes the accused's guilt beyond a reasonable doubt. This requires an assessment of the credibility and reliability of the evidence.

Presumption of Innocence and Burden of Proof

[6] The most important principle in this matter, as it is in all criminal cases, is the presumption of innocence that stays with the accused throughout (*R. v. Starr*, 2000 SCC 40, and *R. v. Lifchus*, [1997] 3 SCR 320). The presumption of innocence continues unless the Crown, based on the evidence, proves beyond a reasonable doubt that the accused is guilty of the offence as charged or an included offence.

[7] There is absolutely no burden on the accused to prove his innocence. The accused does not have to prove anything, and this never changes. The Crown must prove each element of the offence beyond a reasonable doubt.

[8] Reasonable doubt is based on reason and common sense arising from the evidence or absence of evidence. Reasonable doubt is closer to absolute certainty than to a probability. Thinking the accused is probably guilty or likely guilty is not enough. A reasonable doubt is not an imaginary or frivolous doubt, or a doubt based on sympathy for or prejudice against those involved in the proceeding. A reasonable doubt is a doubt based on common sense and reason.

[9] The Crown led evidence concerning the quantity of drugs found on the accused including the packaging and street value. The accused testified in his defence. In this case, the accused's denial puts credibility at the heart of the matter.

[10] I am guided by the decision of the Supreme Court of Canada in *R. v. W. (D.)*, [1991] 1 S.C.R. 742. Here the instruction in considering evidence in such cases is:

1. If the evidence of the accused is believed, he must be acquitted;
2. If the evidence of the accused is not believed, but the evidence still raises or leaves a reasonable doubt, he must be acquitted; and,
3. Even if the evidence of the accused does not raise a reasonable doubt, he must be acquitted if a reasonable doubt is raised by other evidence that is accepted. In order to convict, the evidence that the court does accept must prove his guilt beyond a reasonable doubt.

[11] The Crown's case rests on the testimony of officers who were engaged in the arrest of the accused, as well as officers testifying to the drug trade.

[12] This decision hinges on the credibility and reliability of the accused's evidence as well as upon the Crown's evidence, including circumstantial evidence I can consider and the inferences the Crown says I can draw in this matter. It is not a matter of who I believe, but of whether, based on all the evidence or absence of evidence, the Crown has proved its case beyond a reasonable doubt. It is not, however, a credibility contest.

[13] I must not apply the standard of proof beyond a reasonable doubt piecemeal to the individual items or categories of evidence. I apply it to the final evaluation of whether guilt is proven (*R. v. Ménard*, [1998] 2 S.C.R. 109).

[14] I have considered the totality of the evidence. I recognize I need not believe or disbelieve all of a witness's testimony. I can believe none, part, or all of any of the evidence. (*Re. Novak Estate,* 2008 NSSC 283).

Evidence
Constable Jordan Sheppard

[15] The first Crown witness was Constable Jordan Sheppard. He had been an officer since October 2008. He was dispatched to 3129 Kempt Road – Dooley's – on February 25, 2017, to investigate a liquor offence complaint.

[16] Cst. Sheppard responded to a complaint or report of a verbally abusive and intoxicated male. Upon arrival, he observed the accused pacing back and forth in the parking lot, appearing highly agitated. The accused was alternating between screaming and acting agitated and being apologetic. Cst. Sheppard smelled alcohol on the accused, who also had glossy eyes, slurred speech and white, hardened, thickened saliva around his mouth and tongue.

[17] Constable Amirault, who was with Cst. Sheppard, placed the accused under arrest. Cst. Sheppard and Cst. Amirault searched the accused. Cst. Sheppard found white stones, believed to be cocaine, in individual marked bags in the accused's pants pocket. In addition, in the accused's pants pocket was $405.00.

[18] On cross-examination, Cst. Sheppard opined that the accused was high on cocaine, as his behavior was consistent with someone who had consumed cocaine. In addition, he opined the accused had consumed alcohol.

[19] When arrested, the accused told the Constables he wanted a cab called so he could be taken to the Stardust Motel on the Bedford Highway.

[20] Constable Sheppard testified that no cellphone was found on the accused. He said he also found no scoresheet on the accused (a list of debts owed to a dealer and debts they owe to others). The only items found on the accused's person were cocaine and cash.

Constable Phil Apa

[21] Cst. Phil Apa is an RCMP officer assigned to the Halifax Integrated Guns and Gangs unit. He graduated in 2008 and has had several postings throughout his career. He transferred the cocaine seized from the accused from a locker to the drug vault in Burnside. He processed the exhibit, weighing it and sending it on to Health

Canada on February 27, 2017. Health Canada reported that the substances seized were a combination of cocaine, caffeine, and benzocaine. Cst. Apa weighed the substance in each bag. The weight per bag ranged from .7 of a gram to 1.5 grams. In total, there were 23 grams in the 28 bags. The cocaine was powdered cocaine, not crack cocaine. Cst. Apa also processed and logged the money seized.

Corporal Mirko Markovic

[22] The third and final witness for the Crown was Corporal Mirko Markovic, who has been employed with the RCMP for 12 years. After a *voir dire,* and subsequently with the consent of the Defence, I accepted and rule he should be qualified by the court as follows.

> As an expert in the trafficking of cocaine, and capable and qualified to give opinion evidence on the following aspects of the drug trade:
>
> (a) pricing,
>
> (b) storing and packaging,
>
> (c) methodology of purchase and sales;
>
> (d) payment methods; and,
>
> (e) usage amounts.

[23] Corporal Markovic has been qualified as a drug expert on twelve prior occasions. He has eight years of experience in drug and gang investigations. Corporal Markovic detailed his experience with undercover operations, search warrants, handling drug exhibits, and confidential informants.

[24] Corporal Markovic provided a brief overview of the cocaine trade, tracing the trade from the plant in South America, to the street level dealer, and finally the user. Cpl. Markovic testified about the appearance, types, and availability of cocaine, and about where it can be purchased. At the street level, he testified users can purchase cocaine in half-gram to one gram bags, but can also buy larger amounts. However, the most common is the half to one-gram weight.

[25] Cpl Markovic opined that a buyer who purchases in bulk does so to reduce cost and increase quality. Buyers seeking to purchase an ounce expect to receive less than an ounce or 28 grams. The average cost for an ounce of cocaine is approximately $1,800 - $2,000. Corporal Markovic testified that it would not be possible to obtain a reduced price for an ounce, if the cocaine was already cut and pre-packaged into individualized baggies, as the cocaine seized from the accused

was. The expert testimony was that the work by the seller to weigh and package would not be followed by a bulk deal or discount provided to the purchaser. It would be a waste of the seller's time and would cut into the profits.

[26] Corporal Markovic testified that traffickers package cocaine in small dime bags and pre-measure baggies to facilitate sales. Users have no reason to subdivide their purchase into small bags.

[27] The usage amounts were testified to. Corporal Markovic testified that the typical amount bought is a gram, which can be subdivided into 8-12 lines of cocaine. If a user is on a binge, the use could possibly be two to three grams.

[28] Corporal Markovic further testified that the lack of a scale would not be relevant to his opinion if the product was already weighed and subdivided, ready for sale.

[29] Corporal Markovic described the user who also sells. He described those who sell to fund their own habit.

[30] Corporal Markovic also testified that it was unusual for a purchaser to buy more product than what one would use, because cocaine is highly addictive, and users typically buy what they need at the time. Corporal Markovic also opined it would be a poor decision to buy an ounce broken into small baggies because the quality would be lower and the quantity would be less.

[31] Corporal Markovic testified about the practice of vouching. That is, traffickers do not usually sell to people they do not know, but require someone to vouch for or recommend a new purchaser even when purchasing the smallest amount, in order to ensure that the seller can trust the new purchaser to pay for the product and not go to the police. He testified that he had never heard of a person approaching a dealer without being vouched for and purchasing an ounce of cocaine. In addition, he testified that in his experience a user would not normally buy 28 bags of cocaine. He also opined that a personal user would not carry that much into a bar, unless intending to sell. In his experience, Corporal Markovic had never known a person to purchase this much product without a voucher. Ultimately, he testified that there was an "outside chance" that someone could and would purchase this much cocaine without a voucher.

[32] On cross-examination, Corporal Markovic noted that his original opinion in this case, that the accused had possession of cocaine for the purpose of trafficking was based on his understanding that the drug was crack cocaine. He later learned it

was actually cocaine in a repressed state. He testified this fact did not change his opinion.

[33] Corporal Markovic accepted that crack is typically more expensive than cocaine. His opinion was that 23 grams of cocaine would cost approximately $1500.00. He further opined that cocaine could possibly be sold for less than $1,500.00, but typically not.

[34] Corporal Markovic testified to the availability of cocaine in bars, clubs, sports arenas, bus stations, and malls. He said a typical street level dealer would be expected to have the type and quantity of drug found on the accused.

[35] Corporal Markovic also described how areas are divided up among street level dealers. He testified that traffickers sell in certain areas and violence is used to enforce areas or turf. If others sell drugs in pre-claimed areas there is a risk for violence.

[36] On cross-examination, Cpl. Markovic was asked to agree that his opinion was that what was found on the accused, and the circumstances, were consistent with trafficking, not that it was trafficking. He agreed with this statement.

[37] He stated the following factors support his opinion:

1. The packaging, individual baggies and quantity;
2. The $405.00 in cash, primarily in $20.00 bills; and,
3. The environment where the accused was arrested – a bar.

[38] Corporal Markovic acknowledged there was no scoresheet found on the accused. That is, there was no evidence of debts being tracked. He opined that a scoresheet would not usually be used at the gram level of sale and purchase, as a dealer would not usually provide product with cash to be given later at that level of use. That is, street level traffickers do not usually have scoresheets.

[39] Corporal Markovic focused largely on the amount of cocaine, and said he had not known someone to purchase an ounce of cocaine for personal use. But, he did concede that it was neither unreasonable nor impossible. He also conceded that he was aware of other experts who had opined that a quantity of 23-28 grams of cocaine alone was not enough to give an opinion that this is evidence of possession for the purpose of trafficking.

[40] Corporal Markovic also agreed that the factor that made it most consistent with possession for the purpose of trafficking, or street level dealing, was the packaging – 28 separate baggies.

[41] Corporal Markovic's opinion was that normally a dealer would use a cell phone to communicate but it was not unheard of for a street level dealer not to use a cell phone. He did not place much weight on the fact that the accused was not in possession of a cell phone at the time of arrest.

[42] Corporal Markovic also testified to giving an opinion that possession of seven grams was not possession for the purpose of trafficking. He testified that it was possible there could be a scenario where he could give an opinion of personal use in relation to an amount higher than seven grams. For example, he said if a person was going on a month-long hunting trip they might purchase an ounce of cocaine. He also stated that a person with the means to purchase in bulk may do so to obtain better quality, more accurate weight, or to only transact one purchase, so there is less chance of being arrested. However, he noted this is still atypical.

[43] Ultimately, Corporal Markovic agreed that it was possible for a person to purchase 23 grams of cocaine for personal use. He conceded that it was possible a drug user who came into money could purchase such a quantity for personal use. He also agreed that it was possible a person would ask to purchase all product that a street dealer had, and that dealer could for a variety of reasons decide to sell the amount.

[44] The Corporal agreed that he had never known a person to come to a province – for the first time – and sell when new to an area. He agreed this would potentially be dangerous. He further opined it was extremely unlikely that a street level dealer would sell all of their product to an unknown purchaser.

[45] Importantly, Corporal Markovic agreed that if he knew the accused had in fact received a settlement and come into money, and this was his first day in Halifax, this could weaken his opinion, as these would be factors he would have to consider. He agreed it could be possible the amount purchased was for the accused's personal use, but maintained that it is atypical to meet a dealer for the first time and purchase that amount. He said it was highly unlikely but could not say this absolutely would not have happened.

[46] Lastly and importantly, with this new set of circumstances put forward, that is an accused who had come into funds, and was new to an area, Corporal Markovic

said he was less certain of his opinion that the accused had possession of cocaine for the purpose of trafficking. He testified that the circumstances were still consistent with possession for the purpose of trafficking, but accepted that it was possible that this was not the case.

Defence Witnesses

[47] The Defence called two witnesses.

[48] The accused testified in his own defence. He is 35 years old and resides in Saint John, New Brunswick. He is currently unemployed. As of February 25, 2017, the accused was living at his mother's home after being in a serious car accident and recovering from injuries. He was engaged in physio for six-to-eight months. He was unable to work during this time.

[49] The accused noted that he had previous criminal convictions including, assaults, obstruction, thefts, and a break and enter.

[50] The accused testified that he received a settlement from a motor vehicle accident claim. He received a cheque for $7,837.50 on February 14, 2017. He made plans to travel to Nova Scotia to visit friends. He placed the settlement funds in his mother's account, from which she could only withdraw $1000 a day. The accused finally convinced his mother to transfer the remaining settlement funds into his friend, Abdul's account, so that he could get access to all of the remaining funds.

[51] The accused testified that while he was off work, injured from the motor vehicle accident, he started using alcohol and drugs, including daily use of cocaine.

[52] The accused testified that the settlement of $7,837.50, was a lot of money to him at the time given his circumstances. He travelled to Halifax, Nova Scotia with a friend who drives taxi, and several other friends. There were seven people in total travelling to Halifax. He paid his friend $500.00 to drive them and did not know when they would be returning. He wanted to party while he was in town, and buy sneakers.

[53] The accused testified that he brought four or five grams of cocaine with him and shared some of it with the others on the way to Halifax.

[54] Several in the group began drinking around 9:00 am or 10:00 am. They arrived in Halifax between 3:00 to 4:00 pm that day. The accused described being sleep-deprived. He wanted to go to the Casino later that day. He went to the Halifax

Shopping Centre with two of the women who travelled with him. He went to buy sneakers and a ball cap. He testified that he takes a size 14 in sneakers which is difficult to find in Saint John.

[55] The accused also testified he was looking to purchase more cocaine. He was down to his last 1.5 to 2 grams. He walked around the Halifax Shopping Centre and approached a man who he thought looked like he might know where he could buy cocaine. He introduced himself and they discussed a purchase. The accused testified that the man was standing at the entrance and "looked kind of shady". The man told the accused to follow him to the parking lot, where the man showed him the pre-bagged product in a car. The accused said he inquired how much it would cost to purchase it all. He wanted to buy it all. He knew the product was repressed but did not know anyone in Halifax, so he decided to buy it.

[56] The accused acknowledged that this transaction was risky and he could have been robbed, but he asked for only a gram or two at first. This is when he says he saw the quantity in the car and asked the man how much for all of the product. He was told $1600.00. He paid about $1500.00. He testified that he did not care that it was not the best quality. He received 28 baggies of product. He tasted it and could tell it was cocaine. He testified that his friends did not know he purchased cocaine. His friend Abdul who drove them to Halifax, did not know he was consuming cocaine, as the accused was hiding it.

[57] The accused testified that he returned to the home where his friend Abdul was. They all drank and went to the Casino. They did not stay long as one of the women he was travelling with did not have identification. He then went with his friends to what he describes as a cheap hotel. He booked two rooms at the Stardust Motel on the Bedford Highway.

[58] The accused said they left the hotel and went to Dooley's on Kempt Road to play the VLT machines. He said he left his clothes, but took the cocaine not knowing when he would be back. He testified that he was not there for long and was getting tired. He asked the women he was travelling with for the keys to the hotel. He got into an argument with one of the staff at Dooley's. He left the bar and went to the parking lot. He said he was having a smoke when the police arrived. He asked the police to call a cab for him and they refused. He was placed under arrest. He was searched, and the police found the cocaine and money. He noted he had won $150 at the machines at Dooley's.

[59] On cross-examination, the accused admitted that one of his female travelling companions, Aileen, held onto the cocaine while they were at Dooley's. He said she held it for him for 10-15 minutes. He did not tell anyone else he had the drugs. After 10 to 15 minutes, he decided to return to the hotel, as he was tired and had been drinking and been up for a few days. He got the cocaine back from Aileen and left the bar. He testified that he expected to get the cocaine back from Aileen and she was holding it for him in her purse.

[60] The accused was asked what his plan was for the ounce of cocaine when he was arrested. He said he did not have a plan, but that he wanted it. He said he had no agreement with anyone else that some of the cocaine would be theirs. He testified emphatically that the cocaine was his. He maintained that if he did not buy more at the Halifax Shopping Centre, he would have been out of the cocaine within an hour or two.

[61] The accused denied selling cocaine. He said he knew no one to sell it to and did not have a cell phone on him. He asked, rhetorically, "why would I sell something? I'd probably get shot".

[62] As to why he would buy so much cocaine at once, the accused testified:

1. He was in Halifax to party;
2. He had the means to purchase cocaine;
3. It was cheaper in bulk; and,
4. He did not know how long he would be staying in Halifax.

[63] On cross-examination, the Crown pursued the question of how the accused could maintain a daily cocaine habit when he could not work due to a motor vehicle accident that had occurred in June 2016. The accused said he lived living rent-free with his mother and used his money from social assistance for his drug habit.

Suzanne Lynn Breau

[64] The accused's mother, Suzanne Lynn Breau, testified. She lives in Saint John, New Brunswick. She testified that her son had received a settlement for the injuries he suffered in an accident, and, having no bank account, asked her to hold the settlement funds in her account. She testified she frequently gave her son her bank card. She said the settlement funds were "burning a hole in his pocket" and he was having her take out $1,000 a day from the account. She testified that he used the last withdrawal to travel to Halifax, "on a whim" with a friend. She said he was up for

days partying before the trip. She said she transferred the remaining money, $2,700.09, by e-transfer to the accused's friend Abdul on February 25, 2017. She confirmed that the reason he asked for the rest of the money was to travel to Halifax.

Legislation

[65] Section 5(2) of the *CDSA* makes it an offence of possession for the purpose of trafficking a substance included in, *inter alia*, Schedule I. This offence is simple possession with an added mental element of intending to or intention to traffic. "Traffic" is defined as follows:

> ***traffic*** means, in respect of a substance included in any of the Schedules I to V,
>
> (a) to sell, administer, give, transfer, transport, send or deliver the substance,
>
> (b) to sell an authorization to obtain substance, or
>
> (c) to offer to do anything mentioned in paragraph (a) or (b),
>
> otherwise than under authority of the regulations. *(traffic)*

[66] It is without dispute that the term "traffic" covers a vast amount of ways a controlled substance can move between people. The definition includes to give or deliver.

[67] It is conceded that at the time of arrest, the accused was in possession of cocaine. The question is whether the Crown has proven beyond a reasonable doubt that the accused had possession of cocaine for the purpose of trafficking. What was the purpose of his possession? Has the Crown proven beyond a reasonable doubt that the accused had the purpose to traffic cocaine?

Crown Position

[68] The Crown argues that the evidence establishes beyond a reasonable doubt that the accused had possession of cocaine for the purpose of trafficking. The Crown points to an admission by the accused during cross-examination, when he said that he gave the dime bags of cocaine to his friend in Dooley's for safekeeping. The Crown also points to his sharing of the cocaine while travelling to Halifax. However, the main focus of the Crown's argument related to the holding of the cocaine by his friend in Dooley's. The Crown notes the following aspects of the circumstances, which allegedly support the finding that the cocaine was not for personal use but was to be sold:

1. The cash on the accused's person at the time of the arrest;
2. The 28 dime bags of cocaine weighing 23 grams;
3. The accused not intending to be in Halifax for long – not for a month;
4. The dealer/supplier was located in Saint John NB; and,
5. The transaction with a stranger at the mall.

[69] The Crown argues that because the accused admitted to handing over 28 dime bags of cocaine to Aileen at the bar, this is sufficient to establish that the possession was for the purpose of trafficking. In addition, the accused had shared the drugs in his possession, which the Crown says also is evidence of the "purpose" to traffic the drug.

[70] The Crown relies on several cases for its argument as to why these circumstances make out the purpose of trafficking. The Crown concedes that trafficking (s. 5(1) *CDSA*) is not an included offence of possession for the purpose of trafficking (s. 5(2) *CDSA*). Therefore, the admission by the accused that he trafficked does not result in a conviction, since he was not charged under s. 5(1). The Crown argues, however, that the admission should be considered as evidence of his purpose, and should result in a conviction on the s. 5(2) offence as charged.

[71] The accused has admitted that he trafficked cocaine during the day prior to the arrest. It is clear the definition of "traffic" is wide and covers various ways a controlled substance can move between people. (*R. v. MacDonald*, 2014 BCSC 2406, and *R. v. Greyeyes,* [1997] 2 S.C.R. 825.

[72] The Crown argues that because the accused trafficked the cocaine earlier in the day, this is evidence that the accused had the specific *mens rea* required for possession for the purpose of trafficking.

[73] The Crown concedes that the case is a circumstantial one. The Crown relies on *R. v. Villaroman*, 2016 SCC 33, and says the court needs to determine whether personal use, as testified to by the accused, is a plausible alternative theory in the face of the Crown's evidence. I keep in mind the instruction in *R. v. Tetreault*, 2017 ABQB 344, affirmed 2018 ABCA 397, that I must consider the whole of the Crown's case.

[74] The Crown relies on *R. v. Blackmore*, 2017 BCSC 1288, for the proposition that it need only prove an offence occurred during the time frame contained in the indictment.

Defence Position

[75] The Defence says many issues arise from the Crown's position. Up until the accused's cross-examination, the Crown's case was based solely on the items found on the accused's person and the inferences to be drawn based on the expert evidence. The bags, the subdivided cocaine, and the cash found on the accused were all items that the Crown said, taken together resulted in the inescapable conclusion that the accused had possession of the cocaine for the purpose of trafficking. Then, after the accused candidly admitted on cross-examination that he gave the cocaine to Aileen for holding for 10 to 15 minutes, the Crown argued this admission should result in his conviction. The Defence submits this offends the single transaction rule in s. 581 of the *Criminal Code*; the accused's right to a fair trial; and his right against self-incrimination.

[76] While the Defence admits that the accused trafficked cocaine on the day in question, he is not charged with this offence.

[77] The central issue is the purpose for which the accused possessed the cocaine. The Defence submits this should be viewed as of the moment of arrest. While prior acts can assist in my analysis of present intention it is not necessarily determinative.

[78] The Defence concedes that the transfer of drugs is trafficking and that the mere giving for safekeeping constitutes trafficking (*R. v. Lauze*, (1980), 60 C.C.C. (2d) 469 (Que. C.A.)). The Defence argues that the Crown has not proven that at the moment of arrest, the accused possessed cocaine for the purpose of trafficking. In other words, the accused did not hold the cocaine at that time for the purpose of selling it, transferring it or to deliver it or give it another.

Analysis

[79] I will first address the analysis prescribed by *R. v. W.(D.), supra*. I listened to the evidence of the accused. I appreciate the Crown's argument concerning his criminal convictions. Despite that, I found the accused to be a credible and reliable witness. He was honest about matters throughout. He testified about his addiction, his personal use habits, and his conduct on the day in question. He admitted to purchasing drugs, to sharing those drugs during the trip to Halifax, and then to giving the drug, *albeit* for safekeeping, to Aileen. He gave these admissions without hesitation. He testified about the settlement funds, and recovering those funds from his mother. She confirmed the money was "burning a hole in his pocket" and she confirmed he went to Halifax. In considering his evidence, his criminal record, his

demeanor on the stand (and I note I must be cautious of weighing demeanor, but I am permitted to consider it (*R. v. W.H.*, 2013 SCC 22)) and his interest in the matter, I accept his testimony. The accused testified in a straightforward manner, readily, without hesitation, making admissions. His explanation, while characterized as implausible by the Crown, when taken into account in conjunction with the concessions of the Crown expert, is not implausible.

[80] There are no inconsistencies pointed out by the Crown that affected my assessment of the accused's evidence. The Crown argued that his usage amounts and lack of employment suggest that he fell in the user-trafficker model. However, he lived with his mother and used social assistance for his habit. His mother also testified that she gave him money. While the Crown argued that he gave improbable testimony, it was the expert's concessions on cross-examination that resulted in the accused's testimony not being improbable, as the Crown would argue.

[81] I accept that the accused purchased drugs in a large quantity. I accept his evidence that this was because he did not know how long he would be in Halifax, he had cash available, and he was in Halifax to party and take drugs. I accept his evidence, despite the evidence of the Crown's witnesses about the common use habits of addicts, the risk of buying in this manner, the fact that bulk purchases are done for better quality and lower price, and are not packaged in the way the accused's drugs were found, in a number of dime bags. I accept his evidence because of his consistency, his ready admissions, and the fact the Crown's expert candidly acknowledged that his account, while unusual, was not implausible.

[82] The Crown's expert, Corporal Markovich, agreed that if he had known that the accused had come into money, and that the purchase was made on his first day in Halifax, this could weaken his opinion that the drugs were possessed for the purpose of trafficking. He agreed that it was possible that the amount purchased was for the accused's personal use, but said it was atypical to meet a dealer for the first time and purchase that amount. But he could not say this absolutely would not have happened.

[83] Lastly and importantly, with this new set of circumstances put forward, the Crown expert said he was less certain it was trafficking. He testified that the circumstances were still consistent with trafficking, but accepted that it was possible that it was not trafficking. This further adds to the credibility of the accused's evidence.

[84] I agree with the Defence that the purpose for which a person possesses something changes over time. What was the accused's purpose? I accept his testimony that the purpose of his possession of cocaine was for his personal use.

[85] I agree with the Defence position that the single transaction rule matters. If I were to convict the accused because he admitted to giving the cocaine to Aileen, this would raise a fair trial concern for the accused. He has the right to know the case he must meet. Furthermore, and importantly, merely because he gave the drugs to Aileen does not prove the intent behind his possession of it. In fact, the most recent action of the accused was to take back the cocaine from Aileen. He retrieved it from her when he decided to leave the bar. This action does not support an intention to share or give, but to possess it himself. That was a more recent act by the accused, closer to the time of arrest, that indicated a mental state not to share, give, or trade the drug, but to keep it himself.

[86] Can the evidence of prior trafficking support an inference of a present intention to possess for the purpose of trafficking? It is circumstantial evidence to be considered in assessing the accused's present intention for the cocaine, for personal use or for trafficking. In accepting the accused's evidence, and considering all of the evidence, I find that the accused did not have a present intention to share, give, transfer, or traffic the cocaine found in his possession. His purpose of having the drugs was to use them himself. That was his purpose. I have accepted his evidence on this point. That was what he intended to do with the cocaine. Giving the cocaine to someone else was technically trafficking. It does not change the fact that his purpose was to use all of the cocaine himself. He did not possess it for the purpose of giving it to Aileen or anyone else. His purpose remained for personal use.

[87] He gave the cocaine to Aileen because he had it with him in the bar, but he did not have it with him due to an intention to give them to her or for the purpose of giving it to her or to anyone else.

Conclusion

[88] Consequently, I find the accused not guilty of the charge under s. 5(2) of the *CDSA.*

[89] Section 4(1) of the *CDSA* provides:

> Possession of substance

> 4 (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

[90] I find the accused guilty of the admitted offence contrary to s. 4(1) of the *CDSA* – that is, simple possession.

Brothers, J.