

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Jacquard (Re), 2009 NSSC 333

**Date:** 20091106

**Docket:** CRH 290083

**Registry:** Halifax

**IN THE MATTER OF:**

The Application of Clayton Otis Jacquard  
made pursuant to section 745.6 of the **Criminal Code of Canada**

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DECISION

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**Judge:** The Honourable Justice Kevin Coady

**Written  
Submissions:** September 9<sup>th</sup> and October 2<sup>nd</sup>, 2009

**Written Decision:** November 6, 2009

**Counsel:** Robert M. Gregan, for the applicant  
Darrell Carmichael, for the crown  
Mark Heerema, for the crown

**By the Court:**

[1] On the night of December 17, 1992 in Yarmouth, Nova Scotia, Clayton Otis Jacquard shot his former step-father, Sandy Hurlburt, twice from close range. The shooting took place in the kitchen of the apartment which was shared by Mr. Hurlburt and his common-law partner, Barbara Wilkinson. Ms. Wilkinson was asleep in the bedroom. After Mr. Jacquard shot Mr. Hurlburt, he approached the bedroom, stood in the doorway, and shot Ms. Wilkinson twice as she lay in bed. Mr. Jacquard fled the apartment. Mr. Hurlburt died from his wounds. Ms. Wilkinson survived but suffered serious injuries.

[2] On April 25, 1994 a jury convicted Mr. Jacquard of the first degree murder of Sandy Hurlburt. The jury also convicted him of the attempted murder of Barbara Wilkinson. Mr. Jacquard was given a life sentence for the murder without eligibility for parole for 25 years. He was given a 5 year sentence for the attempted murder. By operation of law, these sentences are served concurrently.

[3] Mr. Jacquard has been incarcerated for 17 years. He has applied pursuant to section 745.6 of the **Criminal Code of Canada** to have his period of ineligibility reduced.

[4] The Crown has conceded that Mr. Jacquard has met the threshold inquiry under section 745.61 of the **Criminal Code**. The parties have decided to create an agreed statement of facts for the period preceding conviction and sentence. The following submission was provided to the Court with a draft agreed statement of facts:

The parties have agreed that the contents of this document are factually true; however, the parties cannot agree as to whether the passages that are highlighted in yellow can properly be placed before the judge/jury in this matter.

[5] The Applicant argues that the agreed statement of facts should make no mention of the shooting of Ms. Wilkinson or of that conviction and sentence. The Crown argues that these facts should be included. The narrow issue before this Court may be stated as follows:

Is the attempted murder of Ms. Barbara Wilkinson information which the jury ought to consider in making its decision?

[6] Section 745.63(1) of the **Criminal Code** sets forth the criteria that a jury shall consider on this application:

745.63(1) The jury empanelled under subsection 745.61(5) to hear the application shall consider the following criteria and determine whether the applicant's number of years of imprisonment without eligibility for parole ought to be reduced:

- (a) the character of the applicant;
- (b) the applicant's conduct while serving the sentence;
- (c) the nature of the offence for which the applicant was convicted;
- (d) any information provided by a victim at the time of the imposition of the sentence or at the time of the hearing under this section; and
- (e) any other matters that the judge considers relevant in the circumstances.

[7] The Applicant makes the following submissions in favour of exclusion:

- There is no provision in s.745.6 which allows the Court to consider any other offences in determining parole eligibility.
- Section 745.63(1)(b) discusses the Applicant's conduct while serving "the sentence" as opposed to "sentences".
- Section 745.63(1)(c) discusses the nature of "the offence" for which the appellant was convicted, as opposed to offences.
- Section 745.6 should be interpreted strictly which would prohibit the Court from considering any offence other than murder.
- Section 745.63 does not contemplate Ms. Wilkinson giving evidence as a victim of attempted murder, only the murder of Mr. Hurlburt.

- The attempted murder charge may distract the jury from its duty which is to determine whether or not he is to be granted parole for the sentence for which he is serving life.

- The sentence for attempted murder has been fully served and, as such, parole does not come into play.

- The attempted murder evidence, if introduced to the jury, amounts to similar fact evidence. It is highly prejudicial, lacks probative value and runs the risk of inflaming the jury.

[8] The Crown argues for the admission of the attempted murder evidence in the agreed statement of facts. The following is taken from their brief at page 3:

It is the respectful position of the Crown that the jury must consider the attempted murder of Ms. Wilkinson if they are to properly exercise their responsibility under section 745.63(1) of the Criminal Code. If the information is withheld, the jury will be left with an incomplete and inaccurate picture as to: the (a) the character of Mr. Jacquard; (b) the nature of the offence; and (c) the impact upon the victim.

[9] The Crown argues that the character of the offender is not a divisible concept. In other words it was the same Mr. Jacquard who killed Sandy Hurlburt and injured Barbara Wilkinson. Both offences occurred at the same time and at the same location. If the shooting of Ms. Wilkinson is excised from the agreed statement of facts, such would be a distortion of Mr. Jacquard's character at the time. After all, the criminal record of any Applicant is permissible in these

applications. I see no reason why the attempted murder should be treated any differently.

[10] It should not be forgotten that this inquiry is not a trial. The onus is on the offender and the statute dictates that character is a principle consideration.

Criminal convictions, or lack thereof, is intrinsically an element of character.

[11] I doubt that Mr. Jacquard's present character will be substantially affected by the inclusion of the attempted murder evidence. While the facts of the offences will be relevant, this is primarily a forward looking inquiry. Mr. Jacquard's character development since conviction will be more probative. This is evidenced by the Crown's admission that Mr. Jacquard has met the threshold inquiry pursuant to section 745.61 of the **Criminal Code**.

[12] The Crown further argues for admission of this evidence under the "nature of the offence" criteria. They submit that both shootings form a continuous transaction and are not divisible. *R. v. Heyden*, [1997] O.J. No. 5487 (Gen.Div.) is advanced as authority that all the circumstances surrounding the murder of Sandy Hurlburt must be adduced. The following appears at page 10:

Before I close, I wish to add a further comment in relation to the admissibility of Vanderheyden's involvement in the various counselling allegations. In addition to the reasons I have already given, it has become patently clear to me that these matters are "inextricably interwoven" with the evidence related to the Kneeshaw homicide. It would be, in my opinion, a tactical impossibility to segregate one from the other. It must be remembered that much of the evidence on the homicide, including the intercepted conversations, were developed while he was detained on the various counselling charges. The comments on one cannot be sensibly isolated from comments on the other. It is somewhat like trying to talk only about the murder of Lee Harvey Oswald without being able to refer to the assassination of President Kennedy.

[13] I agree that leaving the attempted murder evidence out would leave the jury with the impression that Mr. Jacquard only shot and killed Sandy Hurlburt. That would be a grave distortion of the nature of the offence.

[14] *R. v. Corbett*, [1988] S.C.J. No. 40 addressed leaving juries with an inaccurate version of the facts at page 14:

We should regard with grave suspicion arguments which assert that depriving the jury of all relevant information is preferable to giving them everything, with a careful explanation as to any limitations on the use to which they may put that information. So long as the jury is given a clear instruction as to how it may and how it may not use evidence of prior convictions put to an accused on cross-examination, it can be argued that the risk of improper use is outweighed by the much more serious risk of error should the jury be forced to decide the issue in the dark.

[15] The Crown also argues for admission pursuant to section 745.63(1)(d) which states that the jury shall consider “any information provided by a victim at the time of the imposition of the sentence or at the time of the hearing under this section”. The Crown rightfully points out that these proceedings have evolved from when judges determined the relevance and admissibility of victim impact statements to the present, where victims have a right to provide “any information” to the jury.

[16] Ms. Wilkinson was a victim twice over. However, both victimizations arose from the same criminal transaction. She must be allowed to testify about losing her spouse and the injuries she sustained at the hands of Mr. Jacquard.

[17] I have considered the Applicants submissions respecting interpretation of the statute. The caselaw advanced does not support those interpretations. The Applicants focus on singular versus plural amounts to nothing more than semantics. I have no concern that this evidence will distract the jury from their task.

[18] In light of the above conclusions, the attempted murder evidence will form part of the agreed statement of facts.

J.