**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

Cite as: R. v. Sparks, 2006 NSPC 45

**Date:** 20061002
**Docket:** 1547677
1547678
1547679
**Registry:** Halifax

Her Majesty the Queen

v.

Aaron Sparks, Devon Wright, Germaine Beals

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| **Judge:** | The Honourable Judge Castor H. Williams |
| **Heard:** | June 5, 6, 7, 8, 9, 12, 14, 15, 16,<br>August 8, 9, 10, 11, 30, September 1, 7<br>in Halifax, Nova Scotia |
| **Oral Decision:** | October 2, 2006 |
| **Counsel:** | Robert Fetterly and Jean Whalen for the Crown<br>B.A. Jones counsel for Aaron Sparks<br>Perry Borden, counsel for Devon Wright<br>Kelly Serbu, counsel for Germaine Beals |

**By the Court:**

[1] After a night of celebrating a notable academic achievement, Christopher Clark, his brother and others arrived unplanned at the apartment of B.J. Beauvais, an acquaintance of the evening. Clark, who earlier in the evening, was exhibiting signs of intoxication and, as a result, was argumentative with his friends, on arrival, continued to be disputative with persons present. However, to avoid any confrontation or unpleasant incidents, his brother was encouraging him to leave the premises. Beauvais also wanted them to leave so she called her sister, Shauna Munn, who lived in an upstairs apartment, for assistance.

[2] When Munn came to the apartment, she was accompanied by Blaine Albert Thompson whom Clark looked at with hostile disdain. Because of Clarke's demeanour and feeling threatened by him and his companions, Thompson made a phone call to a person or persons known to him and requested that they come to the apartment to help him as potentially there could be a problem.

[3] Meanwhile, Clark's brother, anticipating a disturbance ushered him out of the building into the backyard where, in apparent frustration, Clark struck and kicked a fence. About the same time, a group of approximately six black youths, who appeared to have arrived in response to Thompson's telephone call, streamed into the building's hallway enquiring of the source of the problem.

[4] Upon learning that Clark was the problem and that he was now outside, the group, en masse, and as if of one mind, streamed out of the building into the backyard where they located him near the fence. Hearing Clark screaming, his brother rushed outside and saw the group of youths lined up behind him and disputing with him. Fearing that this could result in a melee Clark's brother attempted to get him to leave but Clark pushed him away.

[5] The youths approached and surrounded Clark. However, before they did so or simultaneously, someone threw an object that struck him in the head and he bent forward and plummeted to the ground. Thereupon, or just

before he fell, all members of the group, in some degree, participated in striking, stomping and kicking him as hard as they could.

[6] During the affray, someone within the group discharged a firearm. Clark died as a result of a gunshot wound to his head. Nonetheless, after an investigation, the police have charged the accused persons, Aaron Mandel Sparks, Devon Terell Wright and Germaine Lemar Beals, with aggravated assault by wounding, maiming, disfiguring or endangering Clark's life. In any event, the accused persons deny being present at the crime scene and deny any involvement in the alleged crime. This case is therefore a consideration of the issues of identity, credibility of witnesses and the liability, if any, of parties to an offence.

**Summary of the Relevant Evidence**

[7] Christopher Clark was the member of a group of his relatives that went downtown Halifax to celebrate him passing his GED. He and members of his group smoked marijuana and drank beers. However, as time passed, Clark became intoxicated and, as a result, was argumentative with some of his

companions. Eventually, the group ended up at the home of B.J. Beauvais, at 15 Catherine Street in Dartmouth where Clark continued to be argumentative with persons present. Beauvais was an acquaintance whom they had met only that evening.

[8] Also on a night of drinking alcoholic beverages and consuming illicit drugs was another group of celebrants that included Blaine Albert Thompson and his new acquaintance of the evening, Shauna Munn, who is also Beauvais' sister. This group went to 16 Catherine Street where other persons were present and a party was in progress. However, Munn accompanied by Thompson left this venue to go to her apartment across the road at 15 Catherine Street.

[9] Meanwhile at 15 Catherine Street, Clark continued to be disputatious with his companions and Beauvais who, in no uncertain words, wanted him and his companions to leave her basement apartment. When in her apartment that is located on the upper floor, Munn overheard the noise coming from her sister's apartment and also her sister calling her for

assistance. She went to Beauvais' apartment and, on her request, Thompson accompanied her.

[10] When Thompson and Munn entered Beauvais' apartment, Clark and Munn got into a shouting exchange. Clark would not leave and he viewed Thompson's presence with hostile disdain. Believing that Clark and his companions presented a physical threat, Thompson used Beauvais' telephone to call a number that was associated with persons over at 16 Catherine Street and requested that they come over to 15 Catherine Street to help him as there could be a problem.

[11] Because of Thompson's telephone call and fearing that there could be a disturbance, Clark's brother ushered him out of the apartment into the backyard while advising Thompson that it was not necessary for him to make the call. Nonetheless, a group of approximately six or seven black youths, including persons known to Thompson as Dwight, D-Bow, Sparky and Sal showed up, in apparent response to his call for assistance, and streamed into the apartment building. Upon learning that Clark was the problem and that

he was outside the building, all of the youths who arrived, then swarmed out into the backyard where they located Clark beside a fence.

[12] Hearing Clark screaming unintelligibly, his brother ran outside and saw the youths lined up behind Clark and were disputing with him. His brother approached and tried to pull him away but Clark pushed him aside and stared down the youths. The youths closed in, surrounded and attacked Clark. Someone struck him forcibly in the head with an object and he fell forward to the ground. Thereupon, or just before he fell, they all commenced to kick, punched and stomped on him as hard as they could. As a result, Clark sustained multiple bruises and other pre-mortem injuries that the parties admitted amounted to an aggravated assault.

**Relevant Expert Opinion Evidence**

[13] In the light of the Admissions, the opinion of the medical examiner was relevant and material to confirm that Clark sustained injuries, the causation of which were consistent with the observed physical activities of his assailants. Significantly, although Clarke died of a gunshot wound to the head there were

other serious pre-mortem injuries. Furthermore, the medical examiner confirmed that these injuries amounted to wounding him and endangering his life.

**Theories**

[14] The Crown's theory, as I understand it, was that the accused persons acted together either as principals or as aiders and abettors in committing the offence as charged. To this end it was relying on the provisions of the ***Criminal Code***, s.21 (1) and (2).

[15] On the other hand, counsels for the accused persons essentially presented that the accused persons were not present at the crime scene or if they were present, they did not participate in the attack on Clark as alleged, or at all. Furthermore, in varying degrees counsels also vigorously assailed the credibility and reliability of the two main Crown witnesses, Blaine Albert Thompson and Shawn Johnson, arising from these witnesses conduct of consuming alcoholic beverages and illicit drugs, memory problems and the circumstances surrounding their disclosure of the event to police authorities.

Counsels submitted that Thompson's and Johnson's testimonies were inconsistent, self-serving and erroneous and thus of no probative value on the critical issues of the identities of the accused persons and their participation in the offence as charged.

**Issues**

[16] Consequently, a careful consideration of the total evidence leads me to conclude that identification of the parties to the offence charged was the paramount issue. Moreover, in light of Exhibit 26A, the *"Admissions Pursuant to Section 655 Criminal Code,"* para. 10, where the accused persons admitted that, "Christopher Clark received injuries that amounted to an aggravated assault during the incident that occurred behind 15 Catherine Street in Dartmouth, Nova Scotia on 19 March 2005," when stripped to its basic, this case is a consideration of the issues of identity, the credibility of witnesses and the legal liability, if any, of the accused persons for the offence as charged.

[17] In short: Were the accused persons present at the crime scene? If so, did any or all of them participate in the act of wounding, maiming, disfiguring or endangering the life of Daniel Christopher Clark by;

(a) either as a principal or as an aider or abettor, or

(b) acted with a common intent to assault him and to assist each other in doing so and, in the course of the assault, one or more of them by kicking, punching and stomping on him, wounded, maimed, disfigured or endangered his life that each of them knew or ought to have known would be a probable consequence of participating in the assault.

**Findings of Facts and Analysis**

***1. Identification***

[18] Despite the many histrionic moments of the trial the real issues, in my opinion, are as I have determined. To that end, I bear in mind that a criminal

trial is not a credibility contest and that I must consider all the evidence and apply the principle of reasonable doubt not only to the issue of credibility of the relevant witnesses but also to the facts in issue.

[19] Also on the point, in assessing a witness's testimony, is the following extract from the decision of O'Halloran J.A., in ***Faryna v. Chorny***, [1952] 2 D.L.R. 354 (B.C.C.A.), at p.357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth.

[20] Additionally, in assessing reliability and trustworthiness, I recall the words of Estey J., in ***R.v. White***, [1947] S.C.J. No.10, [1947] S.C.R. 268:

> Eminent judges have from time to time indicated certain guides that have been of the greatest assistance, but so far as I have been able to find there has never been an effort made to indicate all the possible factors that might enter into the determination. It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biassed, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.

[21] In further addition, as this Court opined in ***R.v. Killen***, [2005] N.S.J. No.41, 2005 NSPC 4 at paras. 19 and 20:

> 19 ...that in accepting the testimony of any witness, because credit is presumed, the truthfulness of the witness is also presumed. However, that presumption can be displaced and, in my view, can easily be refuted by evidence that raises a reasonable doubt about the witness's truthfulness particularly if that witness is never rehabilitated by belief or supportive evidence as explained in R. v. Vetrovec [1982] 1 S.C.R. 811 and R. v. W.(D.) [1991] 1 S.C.R. 742. If credit is displaced and it is not restored, the witness's testimony becomes unreliable and untrustworthy and, in my view, it would have little or no probative value in deciding the facts in issue. See also R. v. O.J.M [1998] N.S.J. No.362 at para. 35.
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> 20 Second, there is always a common sense approach to the assessment of witnesses and the weighing of their testimonies with the total evidence as was underscored by O'Halloran J.A., in Faryna v. Chorny [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357, and by Cory J., in W.(D.) at p. 747. In short, even if a witness is not disbelieved but remains discredited, reasonably, I could still refuse not to rely upon his or her testimony especially if, in

> my view, "it is not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" in the set of circumstances disclosed by the total evidence and material to the facts in issue.

[22] Further, as was put by Saunders J.A., in ***R.v. D.D.S.***, [2006] N.S.J. No.103 at para. 77:

> Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence, but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

[23] Here, in my opinion, on the critical issue of identity, the credibility and reliability of the testimonies of two key witnesses, Blaine Albert Thompson and Shawn Johnson, were central in proving the identities of the culpable parties despite the fact that their demeanor and tone were agonistic toward the

Crown, and, at first blush, their truthfulness was, at times, held in suspicion.

[24] They both averred to and suggested that, on their first contact with police authorities, there were psychological pressures for them to give information. The police confronted and told them that they would be charged with murder but eventually did not. As a result, but without any independent supportive medical or other evidence, they both attested that this caused them not only mental distress but that it also caused them to fabricate their initial statements that detailed the events and the persons on the night in question. Consequently, at trial, they now disavow and deny the veracity of their initial detailed accounts.

[25] However, I not think that I am prohibited, as a matter of law, without resorting to expert testimony, from drawing a non-adverse inference concerning their credibility based upon their present demeanour. Thus, the relevancy of their testimonies considering the averred set of circumstances and in the proper context, I think that their states of mind would have been focused on giving details as only they would know rather than on giving an

acceptable story. See: ***R.v. Marquard*** (1993), 85 C.C.C. (3d) 193, at pp. 228-9.

[26] Therefore, in my opinion, despite their apparent facile inconsistencies and not too subtle feigned denials, when I considered and examined their extremely protracted versions of the event with their admitted capability and ability to observe what occurred and to recognize persons present; their partiality toward the accused persons based upon communal ties; and their hostility toward the Crown, (the ***Canada Evidence Act***, s. 9 (2), ***KGB*** and ***FJU*** applications were made), a careful analysis of their testimonies revealed strands of critical evidence of identity such as who attended at 15 Catherine Street and other facts.

[27] Significantly, those critical connecting evidential facts concerning identity that they now have an aversion to adopt, in my view, were supported positively by other more reliable witnesses who had no opportunity of collusion and who were not affected by the same asserted stressors. Moreover, these other witnesses testified that the general facts were not otherwise than as sworn to by Thompson and Johnson but, more specifically,

the relevant and material facts were more consistent with what they now were suggesting did not exist at the time of the event in question.

[28] Thus, when I examined and weighed each of their versions of events and tested it with the total evidence for its consistency and harmony with the probabilities which a practical and informed person would readily recognize as reasonable in the circumstances, the slivered strands of evidence that the Crown extracted from them, when woven together, were capable of inducing in me a rational belief that at a point in time, even during these proceedings, Thompson and Johnson indeed were probably telling the truth as they recalled the events and persons. I so find.

[29] Furthermore, I think that in their state of mind, as they put it, when confronted with allegations of murder, their inconsistencies would address only their credibility and, in the context of the total evidence, my overall assessment leads me to conclude that in all likelihood their recollections of events were not too incredible or unreliable as to rob their testimonies of their potential probative value. ***R.v. Starr*** (2000), 147 C.C.C. (3d) 449 (S.C.C.). See also, ***R.v. Bennett*** (2003), 179 C.C.C. (3d) 244 (Ont. C.A.). I so find.

[30] Besides, when I evaluated and weighed their testimonies and considering my observations and impressions of them as they testified and in the light of the total evidence, it strengthened my belief that their testimonies were not all untrustworthy or unreliable and that independently supportive aspects could be relied upon as probably true and materially factual. See: ***R.v***. ***W(D)*** (1991) 63 C.C.C. (3d) 397 (S.C.C.), [1991] 1 S.C.R. 742, ***R.v. Vetrovec,*** [1982] 1 S.C.R. 811, (1982) 67 C.C.C. (3d) 1 (S.C.C.), ***R.v. B(G)***, [1990] 2 S.C.R. 3, ***R.v. Howe,*** [2001] N.S.J. No. 536, 2001 NSPC 35. I so find.

[31] Consequently, in my opinion, Thompson's testimony and to a lesser degree Johnson's, was critical in determining the identification of the culpable parties. Essentially, Thompson stated that he made a telephone call but cannot recall to whom or what number he dialed. However, in the "Admissions" Exhibit 26A, he did call the number 902-222-1882 which "he believed to be associated with the guys over at 16 Catherine Street."

[32] Thus, in my view, in the set of circumstances as presented, it is reasonable and rational to conclude and for me to find, as it is in harmony with

the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable, that Thompson knew the person or persons who would respond to his call for help and that the call was made to someone whom he knew was at 16 Catherine Street. I so find.

[33] First, I think that this view was reinforced when I considered his testimony that earlier in the evening he was also at 16 Catherine Street before he went with Munn over to 15 Catherine Street. When at 16 Catherine Street he remembered that there were other people present but did not recall who they were. On the other hand, Johnson recollected that a party was ongoing at 16 Catherine Street and many persons were there but, he did not know specifically whether the accused persons were present. Furthermore, Munn recollected being at 16 Catherine Street with Thompson. She also remembered seeing Johnson and other black males, whom she cannot identify. Thus, I accept and find that there was a party over at 16 Catherine Street that was attended by many persons including, at one point in time, Munn, Thompson, Johnson and other black males.

[34] Second, I accept and find that when Clark was being contentious in Beauvais' apartment, Thompson may have felt some concern for his own, Beauvais or Munn's physical safety as also present with Clark were his brother and two male cousins. Beauvais wanted Clark and his companions to leave. Even so, Clark, under the influence of alcohol, was being difficult. Thus, in that context, Thompson's reported words when he spoke on the telephone: "You guys have to come. I need back up. There is a problem. Meet me out back" or words of similar effect, indicated that he knew whom he called, with whom he was speaking and the reason for his call. I so find.

[35] Third, Johnson's testimony was that when he was outside 16 Catherine Street, he saw persons, whom he could not readily identify, running across the road from 16 Catherine Street to 15 Catherine Street. He also, out of curiosity, went across the road to that address. Thus, I conclude and find that persons did leave 16 Catherine Street, in a hurry, to go to 15 Catherine Street. Thompson's testimony was that Dwight, D-Bow, Sparky and Sal showed up at 15 Catherine Street. I so find.

[36] Therefore, considering all the above noted facts it is further reasonable to conclude and I do conclude and find as it is in harmony with the preponderance of the probabilities that an informed person would readily accept as reasonable in the set of circumstances, as presented, that Thompson was aware of and knew who were at the party at 16 Catherine Street as the content and tenor of his call indicated that he might face some threat to his person and that he needed their assistance, just in case. His call also suggested that he could rely upon a response from them to come to his assistance in a perceived danger. Thus, a rational inference is that if he could rely upon them for help in a potentially problematic situation he must know them. It is therefore on that basis that I conclude and find that he did know the telephone number and the name or names of the person or persons whom he called.

[37] During the course of this trial, the Crown made several ***Canada Evidence Act***, s. 9(2) and ***KGB*** applications with respect to Thompson's and Johnson's testimonies. However, notwithstanding my misgivings concerning their testimonies I nonetheless concluded that on account of their denials of earlier statements and that given their in court explanations it was

an issue of the impeachment of credibility rather than the admittance of the earlier out of court statements for their truth. ***R.v. Lake***, [1982] N.S.J. No.453 (N.S.C.A.). Likewise, as it was a straight denial of the truthfulness of some but not all of their prior out of court statements, with reasons, in terms of the present hearing, in my opinion, the criterion of threshold reliability could not be met.

[38] I say so because first, in my opinion, testimony given at a prior proceeding, if offered for its truth, is hearsay. With respect to this present proceeding, the earlier testimony is an out of court statement and, in any event, I did not have the opportunity to observe and assess the witness as he then testified.

[39] Second, it seems to me that under the common law rules, which were never addressed by counsels, only where issues and parties are substantially the same in the prior proceeding, as at present, and the accused persons had an adequate opportunity to cross-examine the witness at the prior hearing would the prior testimony be an exception to the hearsay rule. Here, Preliminary Inquiry hearing transcripts were referred to but at no time was it

established that it was the Preliminary Inquiry hearing of these accused persons on the offence charged or a similar offence. Additionally, in my view, the testimony referred to did not meet the criteria set out in the ***Criminal Code***, s.715. See also: ***R.v. Backhouse*** (2005), 194 C.C.C. (3d) 1 (Ont. C.A.).

[40] Third, I refer to the ***FJU*** application. In terms of the present hearing, in my opinion, there were no two or more prior strikingly similar statements relating to the event made by any of the accused or other witnesses and the recanting witness' statement to establish threshold reliability. See: ***R.v. Khelawon***, [2005] O.J. No. 723 (Ont.C.A.). Further, in my opinion, there was nothing for comparison as to the uniqueness and striking similarity of statements by any of the accused and the recanting witness, or the absence of an opportunity for collusion. See: ***R.v. F.J.U.*** (1995), 101 C.C.C. (3d) 97, affirmed, 90 C.C.C. (3d) 541.

[41] All the same, I think, that notwithstanding their inconsistencies and at times, what I found to be, the unreasonableness of their testimonies, there were parts that were supported by other eyewitnesses. Consequently, I am

entitled to accept all of their testimonies, some of it or none of it. ***R.v. W(D),*** [1991] 1 S.C.R. 742 at 747. Additionally, in my opinion, where there is a sufficient degree of reliability, based upon an assessment of the total evidence, I am entitled to weigh all the witnesses' statements in light of the given explanations for the changes. See: ***R.v. B.(K.G.)*** (1993), 79 C.C.C. (3d) 257 (S.C.C.).

[42] I therefore conclude and find that, on the total evidence, Thompson's and Johnson's testimonies, however truncated or adversarial each delivery, contained common reliable threads of evidence that when woven together with the whole admissible evidence, was rationally coherent, substantially trustworthy and crucially assisted in disclosing, without doubt, the identity of the youths who left 16 Catherine Street and went to 15 Catherine in response to Thompson's call.

2. ***Who did respond to Thompson's call?***

[43] On the issue of who responded to his call I find that Thompson was worthy of belief. In support, he testified without hesitation, that the persons

who answered to his call and who, as a result of that call, “showed up,” were Dwight, D-Bow, Sparky and Sal. He knows Sparky for one to two years and that he, Sparky, “hangs around” with his son. He only knew D-Bow for a short period of time. As for Sal, he knew him for a year or two. These were nicknames. However, he was able, in court and without any hesitation, to identify and to point out that Sal is Germaine Beals and D-Bow is Devon Wright. But, in court, he failed to identify or to point out who answered to the name of Sparky although in a forensic photographic line-up, he had made a positive prior out of court identification of a person known to him as Sparky whom he also stated was present at the scene.

[44] So, who is Sparky? Despite what I concluded and found to be Thompson’s feigned lack of memory recollection on the in court identification of Sparky, I find that his ability and opportunity to observe the incident and his intimate knowledge of the youths who responded to his distress call, demonstrated that he was more conversant with their identities and their activities than to what he was prepared to testify. Nonetheless, in my opinion, there were strands of evidence that when combined formed a strong fabric of

circumstances that, rationally and without doubt, exposed and revealed the real identity of Sparky.

[45] First, I do not doubt the testimonies of David Hansch and Johnson that all the youths who entered the apartment, went into the back yard or alley where Clark was located. I accept and find that Sparky was a member of this group and that he also went outside. Furthermore, I accept and find that there were no other persons in the alley or backyard but the youths who came, Clark, his brother, Thompson and Johnson.

[46] Second, there are also the similar testimonies of Shauna Munn, Marcus Munn and Johnson which I accept to be credible and trustworthy, that the group of youths, that included Sparky surrounded Clark and, as a group, with no identifiable distinguishing action for any individual in the group, all engaged in the common enterprise of stomping, kicking and punching him, both when he was standing and when he was on the ground. I so find.

[47] Third, as I ruled during the course of the trial, that during the forensic photographic lineup procedure, Thompson signed on the back of and selected

photograph number seven and also signed the Instruction Sheet that he was one hundred percent certain that the photograph which he selected was that of Sparky. Also, he stated that Sparky was present and participated in the assault. Consequently, I find that he knows who is Sparky. However, Thompson failed to make a nexus between the photograph and any person in the court. Put another way, he did not make an in court identification of Sparky.

[48] Fourth, as I earlier ruled on this point, I noted that in ***R.v. Swanston*** (1982), 65 C.C.C. (2d) 453 (B.C.C.A.), Nemetz C.J.B.C., reviewed similar situations and adjudged that:

> Evidence of an extra-judicial identification is admissible, not only to corroborate an identification made at the trial . . . but as independent evidence of identity. Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached . . . evidence of an extra-judicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind . . . The failure of the witness to repeat the extra-judicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extra-judicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination.

[49] Furthermore, as determined in ***R.v. Tat*** (1997), 14 C.R. (5th) 116 (Ont.C.A.), the prior statement of an out of court identification may be admitted where the identifying witness is unable to identify the defendant at trial but can testify that he previously gave an accurate description or made an identification. See also: ***R.v. Starr*** (2000), 147 C.C.C.(3d) 449 (S.C.C.).

[50] Thus, it seems to me that here the situation was a case of an extra-judicial identification. As a result, the exclusionary rules of evidence were not infringed by permitting Thompson to state that whomever he identified on an earlier occasion was present at the crime scene. That he has done. As a result, the Crown could have then proven through the police officer who received the Instruction Sheet and who showed the forensic photographic lineup that the person identified by Thompson was present in the court.

[51] However, this procedure was not necessary. Following a recess, the accused Aaron Sparks admitted through counsel that he was the individual known to Johnson by the name of Sparky. Furthermore, he was the individual whose photograph was selected at the forensic photographic lineup by Thompson as photograph number seven. His was the photograph that

Thompson declared was Sparky. Thus, the accused Aaron Sparks, in court and through counsel, has self-identified himself as Sparky. Consequently, I conclude and find that Sparky, as identified by Thompson in the forensic photographic lineup as picture number seven, and as one of the persons who "showed up" at 15 Catherine Street, in response to his call, is the accused, Aaron Mandell Sparks.

[52] Therefore, on the issue of the identity of the youths, relevant to these proceedings, who left 16 Catherine Street to go to 15 Catherine Street in response to Thompson's call, I am satisfied that the Crown has proved beyond a reasonable doubt the identity of these youths to be the accused persons, Aaron Mandell Sparks, Devon Terell Wright and Germaine Lemar Beals. I so find.

### 3. ***The assault and parties to the assault***

[53] There is uncontradicted evidence that I do not doubt, as it is supported by the medial examiner's evidence, that Clark was struck, in the head, by an

object that caused him to fall to the ground perhaps in an unconscious state. This is also supported by similar strands of evidence that is not contradicted, and, as a result, I accept and find, that Clark was struck forcibly in the head with an object and, on being struck, he fell forward to the ground with his arms outstretched and that his arms remained outstretched throughout the whole incident of the assault.

[54] Additionally, there is also the common thread of uncontradicted evidence, that I do not doubt, that Clark never struck any of his assailants during the assault. All these indicia support the medical opinion that Clark was probably unconscious or in a dazed state of consciousness after the object struck him in the head and before he was set upon by the group of youths.

[55] Thus, there is evidence on which I can find that the physical acts of the group of young men who engaged in punching, kicking and stomping on Clark, when he was alive, was the intentional application of physical force to his person without his consent. I so find. Further, on the evidence that I accept, I conclude and find that these acts were the immediate cause of the

injuries that he received prior to the gunshot wound from which he died. Moreover, in light of the admission that Clark's injuries amounted to an aggravated assault, I conclude and find that the blows administered to Clark's body by his assailants, the group of young men who surrounded him, were the causative factor or factors of the aggravated assault, as charged.

[56] But, who are the assailants? I do not doubt and I find that when Dwight, Sal, D-Bow and Sparky came to 15 Catherine Street in response to Thompson's call, they all rushed out of the apartment building to the rear where Clark was located by the fence. Thompson also stated that he saw D-Bow, Sal and Sparky in Beauvais' kitchen and that he told them that "the guys had gone."

[57] Furthermore, when he went outside to see what was happening, he saw people arguing and he recognized them as D-Bow, Sal, Dwight, Sparky, Clark and his brother. There were no other persons present. I also accept and find as attested to by Thompson, Marcus and Shauna Munn and Robert Clark that this group of men was all engaged to some degree, where individual actions were indivisible, in kicking, punching, stomping and bludgeoning

Clark. It was these persons and no other who were fighting with Clark who was beside the fence. Thus, whether it were six or seven or fifteen persons that arrived at 15 Catherine Street the fact remains and I accept and find that Sal, Sparky and D-Bow were part of that group.

[58] The evidence is clear and I accept and find that it was this group of men and no other persons that surrounded Clark. Thus, as this body of evidence stands uncontradicted and nothing has been offered by way of explanation or to diminish liability generally, I can and do conclude, without doubt, that included in and being members of the group who assaulted Christopher Clark, on March 19, 2005 at 15 Catherine Street were the accused persons, Germaine Beals aka Sal, Devon Wright aka D-Bow and Aaron Sparks aka Sparky. In short, I accept and find that the Crown has proved beyond a reasonable doubt that the accused persons, were members of the group of persons who were punching, kicking, stomping on and bludgeoning Christopher Clark.

***4. Liability of the parties***

[59] The accused persons have admitted that Christopher Clark sustained injuries that amounted to aggravated assault. They, however, do not admit to any responsibility for his injuries. Therefore, before I can find them responsible for the results of the blows that they applied to Clark's body so as to ground guilt beyond a reasonable doubt for the offence of aggravated assault under s.268, it is necessary that I should find that it was their common activity and no other causative factor or factors that did wound, maim, disfigure or endanger Clark's life.

[60] Concomitantly, it is necessary that I should find that either (a) although the extent of their individual participation in the violence is unclear and the precise part that they each played in the commission of the offence of aggravated assault may be uncertain, even so, whether or not as a principal, they did aid and abet each other in committing an aggravated assault. Or, (b) they formed an intention in common to unlawfully assault Clark and assisted each other in the unlawful assault and that, if any one of them, in committing the assault committed an aggravated assault by wounding, maiming, disfiguring or endangering his life, that each of them knew or ought to have known would be a probable consequence of participating in the assault they

all would be liable for the subsequently charged offence of aggravated assault. See**: *R.v. Thatcher,*** [1987] 1 S.C.R. 652.

[61] Therefore, I begin my analysis on these issues by citing the ***Criminal Code***, s.21:

> **21. (1)** Every one is a party to an offence who
>
> (a) actually commits it;
>
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> (c) abets any person in committing it.
>
> **(2)** Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[62] Accordingly, concerning legal liability, under the provisions of s.21(1), it makes no difference whether the accused persons aided and abetted another or personally committed the offence as charged. Either mode of committing the offence makes all the accused persons culpable whether they personally committed the aggravated assault or aided and abetted in the aggravated assault and not some other separate distinct offence. See: ***Thatcher***, *supra*.

[63] So, if the Crown can show that one of the accused persons, wounded, maimed, disfigured or endangered the life of Clark and one or the other accused person or both of them were present at the scene, had some prior knowledge of the intention of the principal to commit that offence and they did some act for the purpose of assisting the principal in the wounding, maiming, disfiguring or the endangerment of the life of Clark, or encouraged the principal in committing that offence, they also, along with the principal, would be guilty of the offence of aggravated assault. See: ***R.v. Dunlop***, [1979] S.C.J. No.75, [1979] 2 S.C.R. 881.

[64] Instructing myself on the provisions of s.21(1) and upon reading relevant case authorities, I considered the argument advanced by the Crown that the accused persons acted as principals in committing the offence of aggravated assault. Upon my assessment of the total relevant evidence and that which I accept, here, it is difficult for me to conclude that all three accused persons individually struck or delivered a blow that can be identified and be attributed to one or each of them severally and which can be identified as the blow or blows that would have caused Clark's injuries that amounted to aggravated

assault. On that point, in my opinion, the evidence is insufficient for me to find them all as principals. Nonetheless, in my opinion, the evidence is clear that their combined activities did cause the injuries, as described. Therefore, how do I ground legal liability?

[65] The Crown, in the alternative submitted that the accused persons aided and abetted one or the other in committing the offence of aggravated assault. In other words, one or two of the accused gave assistance to or encouraged the third in the commission of the offence.

[66] However, a person who aids another to commit an offence does so by doing something or failing to do something. As was put by Cacchione J., in ***R.v. Hemeon,*** [2005] N.S.J. No. 268, 2005 NSSC 171 at paras. 115 -116:

> 115 An aider may help another person commit an offence by doing something or failing to do something. It is not enough that what the aider does or fails to do has the effect of helping the other person commit the offence. The aider must intend to help the other person commit the offence. Actual assistance is necessary. It is not enough under this section that a person was simply there when a crime was committed by someone else. In other words, just being there does not make a person guilty as an aider of any or every crime somebody else commits in the person's presence. Sometimes people are in the wrong place at the wrong time.

> 116 On the other hand, if a person knows that someone intends to commit an offence and goes to or is present at a place when the offence is committed to help the other person commit the offence that person is an aider of the other's offence and equally guilty of it. Aiding relates to a specific offence. An aider must intend that the offence be committed or know that the other person intends to commit it and intend to help that person accomplish his goal.

[67] Thus, in my view, if the Crown was seeking to impose liability under s.21 (1) (b), (c), this, in my opinion, would only be successful if it presented evidence to show that one of the accused went to the scene with the intention of applying some measure of force to the person of Clark and that the other two, who were present at the scene, knew in advance, that Clark was going to be assaulted by the assailant and was present on the scene to assist the principal assailant by kicking, punching and stomping on Clark.

[68] In my opinion, the Crown's submission, on that point, was not clear on whether they were relying on the evidence that one of the assailants who, for the sake of argument only, could have been Beals, threw an object that struck Clark and afterwards, Beals and the other two as a group, closed in on Clark and continued with the assault. If this were in fact the Crown's theory of events, then respectfully, it presented no evidence to support any prior knowledge in Wright and Sparks that they knew that Beals was going to assault Clark and that they attended with him to assist him in the commission

of the offence, by actively participating in the continuing assault by kicking, punching and stomping on Clark.

[69] Thus, on that theory, for me to find Sparks and Wright guilty of aiding and abetting Beals there must be some evidence on which I could find that they knew that the aggravated assault was going to take place and by some action on their part they assisted Beals in carrying out the same aggravated assault. The evidence, on this point that I accept, is that when all the accused persons arrived on the scene someone threw an unidentified object that struck Clark a glancing blow in the forehead. Thereupon, all persons present closed in on him and as a group, commenced to punch, kick, stomp and bludgeoned him. There was no evidence of any prior knowledge by anyone that an aggravated assault was to be executed on the person of Clark.

[70] However, after putting this theory to the test, and on the evidence presented and that which I accept, I have great difficulty in finding any evidence of prior knowledge of the principal's intention to commit the offence of aggravated assault. Even though it is clear that the accused persons participated in an unlawful act, I conclude that they cannot properly be

convicted of aiding and abetting in the commission of an aggravated assault if they did not know that it might have been or was intended.

[71] Put another way. The Crown must present evidence from which I could properly infer that the accused persons had prior knowledge that the aggravated assault was planned and that their presence on the scene was with that knowledge of the intended aggravated assault. Therefore, on that essential point, I conclude and find that, pursuant to s. 21 (1), there is insufficient or no evidence on which I can make a positive finding of guilt beyond a reasonable doubt for the commission of the offence of aggravated assault.

[72] Nonetheless, in the absence of aiding and abetting, if the Crown can show that the accused persons were together for the purpose of committing an unlawful act and to assist each other in doing so, and, while acting together in that unlawful common object, they as a group assaulted Clark and, with a blow or blows, wounded, maimed, disfigured or endangered his life, pursuant to s.21(2), it is immaterial who delivered the causative blow, for that blow, in

law, is one of all of them and it is not necessary to prove who struck that blow.

See: ***R.v. Simpson***, [1988] 1 S.C.R. 3, [1998] S.C.J. No. 4.

[73] Furthermore, as was adjudged in ***Hemeon***, *supra*. , at paras. 121-126:

> 121 Under s. 21(2) when two or more persons join together in a criminal venture each may be responsible for what others do pursuing their original goal. This basis of establishing a person's guilt has three elements that may be described as: (a) agreement; (b) offence; and (c) knowledge. Each must be proven beyond a reasonable doubt before any defendant can be convicted on this basis.
>
> 122 The first element, agreement, requires the prosecution to prove beyond a reasonable doubt that the defendant agreed that they would carry out an unlawful purpose and assist each other to do so. There need not be any formal written plan or agreement in place amongst the participants. The agreement may arise on the spur of the moment, even at the time the offence is committed or it could have been made at some time earlier. Something may but does not have to be said about it at all. It can be made with a nod and a wink or a knowing look. It may also be established because of the way in which the participants acted.
>
> 123 To determine whether there was an agreement amongst the defendants and what it included all the evidence must be considered. What each person did or did not do, how each person did or did not do it and what each person said or did not say should be taken into account. Each person's words and conduct before, at the time of, and after the offence charged was committed must be examined. All these things and the circumstances in which they happened may shed light on the question of whether there was an agreement and if so what it involved.
>
> 124 The offence committed, in this case assault causing bodily harm must occur in the course of carrying out the original agreement or plan. It must also

> be a crime other than the one that those involved agreed on in the first place. The offence committed, in other words, must be one that the members of the original agreement did not set out to commit but one that still took place in the course of carrying out their original agreement or plan.
>
> 125 The third element, knowledge, may be proven in either of two ways. In the case at bar the prosecution may prove that the defendant actually knew that one of the participants in the original agreement would probably commit assault causing bodily harm in carrying out their original agreement. Probably means likely, not just possibly. To determine what a defendant actually knew about the likelihood of another participant in the original agreement committing assault causing bodily harm in carrying out the original agreement, their words and conduct before, at the time and after that other participant is in the original agreement committed that offence must be examined.
>
> 126 Crown counsel may also prove knowledge by showing that an defendant should have known that one of the participants in the original agreement would probably commit assault causing bodily harm in carrying out their original agreement. To determine whether knowledge has been proven on this basis the Court must be satisfied beyond a reasonable doubt that a reasonable person in the same circumstances would know that one of the participants in the original agreement would probably commit assault causing bodily harm in carrying out their original agreement.

[74] Thus, in my opinion, if the Crown can show or I can properly infer from the total evidence that:

> (a) when Thompson made his call for assistance, in case of trouble by Clark, that the accused persons showed up specifically with the common intention to help him in any anticipated fight;

(b) they did engage in unlawfully applying force to the person of Clark without his consent and, in the course of that unlawful application of force did wound, maim, disfigure or endanger his life, which they did not originally set out to do;

(c) they actually knew that one of them, in the application of the unlawful force, would probably wound, maim, disfigure or endanger Clark's life or, that each of them should have known that, as a reasonable person, in the same set of circumstances, any one of them, in applying the unlawful force to the body of Clark without his consent and the manner of the application of that force, by his conduct, would probably wound, maim, disfigure or endanger his life.

***5. Did the accused persons form an agreement in common to carry out an unlawful purpose and to assist each other in carrying out that purpose?***

[75] I do not doubt and I have found that the accused persons were members of and were in the group of assailants who deliberately, intentionally, unlawfully and without his consent, punched, stomped, kicked and bludgeoned Clark. I concluded and found that all of the accused persons rushed over from 16 Catherine Street to 15 Catherine Street upon receiving a telephone call from Thompson who indicated that they had to come over to back him up in case of a problem.

[76] Given the scenario that there was a party ongoing at 16 Catherine Street where quantities of beers were consumed and that Thompson's call could be considered an urgent request for help as there could be a fight, I think that it is in harmony with the preponderance of the probabilities that then existed and which a practical and informed person would readily recognize as reasonable that the youths rushed over with a mind set for an anticipated fight as their common purpose.

[77] Further, I think that by their conduct of rushing in together into the hallway and also outside and confronting and arguing together with Clark could be considered as a spontaneous group activity arising out of the fact that they

came to fight and that none of them was going to be dissuaded from engaging in a fight. Thus, I think that with this presumed individual mind set that was reinforced by being a member of a group of the same thinking nothing needed to be said aloud to form an agreement to carry out an unlawful purpose and to assist each other in doing so.

[78] Thus, in that context, I conclude and find as it is in harmony with the preponderance of the probabilities that a practical and informed person would readily recognize and accept as reasonable that the agreement to do something in common was implicit in their conduct, when upon receiving a call for help, they decided to run together to go to 15 Catherine Street to carry out an unlawful purpose, which was voluntarily to engage in an anticipated fight. It was also implicit in their conduct when they decided to dispute, as a group, with Clark and to surround him in a hostile manner. Therefore, I do not think that in these set of circumstances which a practical and informed person would readily recognize and accept as reasonable it was necessary for any one of them to say anything to the other in order to agree to do something which, it is rational to conclude, they were all of a mind to do.

[79] Hence, in the set of circumstances as presented, it is also rational for me to conclude, without doubt, as it is in harmony with the total evidence, that by their conduct, each of the accused persons by their individual activity that was reinforced and supported by the activity of the other, when conjoined, created the condition of an implied agreement to act and support each other in that now common activity. Likewise, their further joint conduct in punching, kicking and stomping on Clark confirmed each of their acceptance to participate in the common purpose for them being together and assisting each other as they physically acted as if of one mind notwithstanding the lack of a verbal exchange. I so find.

***6. Did the accused persons, as their original agreement or plan, apply force unlawfully to the person of Clark without his consent and in the course of applying that unlawful force wounded him or endangered his life?***

[80] I do not think, on the evidence that I accept, that I can conclude, without doubt, that the group's purpose in going to 15 Catherine Street was anything more than to engage in an ordinary fight. Neither is there any evidence that they specifically agreed in advance to wound, maim, disfigure or endanger Clark's life. Therefore, it is rational to conclude, as it is in harmony with the

preponderance of the probabilities that then existed and which an informed reasonable person would readily recognize and accept as reasonable that their purpose, in going, was to assist Thompson in case he got into a fight. However, when he told them that things were under control but that the troublemakers were outside they went outside to confront and dispute with Clark. It is therefore reasonable to conclude that as Thompson was not in any physical danger they were still determined to have a fight when they approached Clark.

[81] Additionally, I find that there is insufficient evidence for me to find beyond a reasonable doubt that the accused persons either jointly or severally planned, in advance to wound, maim, disfigure or endanger Clark's life. However, in my view, there is sufficient evidence for me reasonably to conclude, without doubt, that on their first contact with Clark, by their conduct, they intended to engage in a fight with him. Thus, as it is in harmony with the preponderance of the existing probabilities, I find that, in their states of mind, they intended to apply unlawful force to Clark's body. But, I think that the extent of that unlawful force could be gauged ***only after*** their initial intended

application of force and ***not before*** that intended force was actually applied.

[82] Hence, in my opinion, the unfortunate outcome of wounding and endangering Clark's life, that I find did result, was not preplanned. The wounding and the endangerment of his life followed as a result of the accused persons common intention and purpose to apply unlawful force, the assault, and it happened only during the application of that unlawful force as distinct to it being their initial or first agreed upon intention.

[83] In other words, I find that there is not enough evidence for me to conclude beyond a reasonable doubt that when the accused persons set out to go to 15 Catherine Street they planned to wound or endanger Clark's life. Even so, I conclude and find that the evidence is in harmony with the conclusion that their plan was to engage him in a fight the outcome of which was unplanned and unknown. I therefore conclude and find that the wounding and endangering of Clark's life, the aggravated assault, occurred during the course of carrying out their original plan or agreement of assaulting him. I so find that, beyond a reasonable doubt.

> 7. ***Did any of the accused persons know that one of them would probably wound, main, disfigure or endanger Clark's life? Or, should each of them, as a reasonable person, have known, in the set of circumstances, that any one of them, in the manner in which they carried out the assault, by kicking, punching and stomping on Clark would probably wound, maim, disfigure or endanger his life?***

[84] In order to determine the knowledge capable of grounding liability beyond a reasonable doubt, my inquiry would now focus on whether a reasonable person standing in the shoes of the accused persons and possessing the same set of facts would expect to make a connection between their application of force and the injuries inflicted. In other words, did any of them take all reasonable care, in the circumstances, to avoid the wounding of Clark and endangering his life? In short, what would a reasonable man, with the knowledge available to the accused persons, have done in the set of circumstances?

[85] On the medical evidence as it is supported overall by the eyewitnesses' testimonies of Thompson, Robert Clark, Shauna and Marcus Mann, Christopher Clark was struck by an object, at high velocity, that either stunned him or rendered him semiconscious. As a result, he fell to the ground and at

no time during the fracas did he offer any resistance to his attackers or defended himself. He was helpless. In that state of passive defencelessness, the accused persons stomped on him, punched, bludgeoned and kicked him as hard as they could. A sense of the savagery of the attack can be gathered from the desperate conduct of Robert Clark when he reentered the apartment, in a bloody state, looking for a weapon, and his despairing utterances when imploring David Hansch to help him, saying: “They are f...ing killing Christopher.”

[86] Under these set of circumstances, it seems to me that, objectively, a reasonable person in the shoes of any of the accused persons, would have known that punching, stomping on and kicking as hard as one could at the body of a passive, motionless, defenceless person would probably cause some serious injury to that person. Also, I think that a reasonable person in possession of those sets of facts, as was the accused persons, would have made a connection between the kicking, punching and stomping, the manner in which that was done, and the putting of Clark’s life at risk. Moreover, I think that a reasonable person, in the same set of circumstances, would have taken all reasonable steps to avoid the particular event.

[87] Therefore, in my view, knowledge can be imputed in all the accused persons given their reason for rushing over to 15 Catherine Street, to engage in a possible fight; their rationale for confronting and disputing with Clarke, to engage him in a fight; and the excessive force that they applied physically to his person. It seems to me that any one of them, as a reasonable person, in those set of circumstances and in possession of the information held by each of them, reasonably would have known that in assaulting Clark by fighting with him that one of them would probably wound him or endanger his life while kicking, punching and stomping on him.

[88] In any event, on the evidence that I accept, I find that the assault on Clark was a savage, unprovoked, callous and baseless attack on a partially defenceless individual. Therefore, in my view, in the set of circumstances, as presented, and, as it is in harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable, I conclude and find that, from the standpoint of a reasonable person, the accused persons must have known that they were committing a wrongful act. Yet, they continued to do so perhaps with the expectation that in some manner they could escape the consequences and the effects of their actions. They,

however, as reasonable persons, should have known that all the effects, adverse or otherwise, were inescapable.

[89] As a result, on the evidence that I accept, I am satisfied that the Crown has proved beyond a reasonable doubt knowledge in one or all of the accused persons. I conclude and find that a reasonable person, in the same set of circumstances, would have known that in committing an assault on Clark and in the manner of the assault, by kicking, punching and stomping as hard as one could, one of them, in the process of committing the assault, would probably wound him or endanger his life and thereby commit an aggravated assault in carrying out their original plan of assault.

### *8. The physical exhibits.*

[90] The admissibility of several Crown Exhibits has been challenged on the grounds that the Crown had not established, either directly or circumstantially, any nexus, relevancy or evidential relationship between these exhibits and the accused persons or the offence as charged. The exhibits are as follows:

| | | |
|---|---|---|
| (1) | Exhibit 6 | metal pipe |
| (2) | Exhibit 7A | Moosehead beer can |
| (3) | Exhibit 7B | Moosehead beer can |
| (4) | Exhibit 7C | Moosehead beer can |
| (5) | Exhibit 19 | Stick |
| (6) | Exhibit 21 | Four Moosehead beer cans |
| (7) | Exhibit 22 | Nine empty and one full can of Moosehead beer |
| (8) | Exhibit 23 | One Moosehead beer can |

[91] Concerning these exhibits, I bear in mind that only one object was thrown and only this object could have caused the subject injury. Thus, in my opinion, by presenting all these exhibits as the likely object, in my view demonstrated that the Crown's submission for their admissibility was not only weak but was also speculative and subjective and not grounded on any scientific, forensic or any other credible evidence. The fact that these items were located near or around the crime scene do not automatically make them admissible.

[92] I think that to be admissible the Crown must establish beyond a reasonable doubt that they are relevant and material. To be relevant, they must be logically probative or helpful in proving that they were indeed the physical objects that caused Clark's injuries. Further, to be material, the Crown must establish that they relate to the issue of causation. Thus, to be receivable they must relate directly or circumstantially to the issue of causation of the injury in question.

[93] Here, in my opinion, there were no physical traces from the accused persons or Clark on these items. For example, there were no bloodstains, fingerprints or DNA that would have allowed me to draw a reasonable inference, from expert testimony, traceable to the accused persons. All that I received as evidence of relevancy and materiality from the Crown, in my opinion, were baseless subjective conjectures that established no probative value beyond a reasonable doubt. Therefore, I conclude and find that these itemized physical exhibits are inadmissible.

**Conclusion**

[94] On my observations, assessment and weighing the testimonies of all the witnesses in light of the total evidence and on my above analysis I am satisfied that the Crown has proved beyond a reasonable doubt that the accused persons were present in the backyard of 15 Catherine Street and that they all as a group or as a member of a group assaulted Christopher Clark. Further, I am satisfied that the Crown has proved beyond a reasonable doubt that the conduct of the accused persons, in the set of circumstances as presented, constituted an agreement in common to assault Christopher Clark.

[95] Additionally, I am satisfied that the Crown has proved beyond a reasonable doubt that in the course of committing the initial agreed upon assault, as I have found, that by kicking, punching and stomping on Clark as hard as they could, they wounded him and endangered his life and thereby committed an aggravated assault. Likewise, I am satisfied that the Crown has proved beyond a reasonable doubt that a reasonable person, in the position of each of the accused persons and with the information that was in their possession, would have known that punching, kicking and stomping on the supine, defenceless and immobile body of Clark probably would have wounded him or endangered his life.

[96] In the result, I find the accused persons, Aaron Mandell Sparks, Devon Terell Wright and Germaine Lemar Beals guilty of the offence that on the 19th day of March 2005, at or near Dartmouth, Nova Scotia, did unlawfully wound and endanger the life of David Christopher Clark thereby committing an aggravated assault. Convictions will be entered on the record.

J.