

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. MacDonald, 2009 NSPC 12

Date: April 1, 2009
Docket: 1931069
Registry: New Glasgow

Her Majesty the Queen

v.

Richard MacDonald

DECISION

Judge: The Honourable Theodore K. Tax

Heard: November 18, 2008; January 7, 2009 and February 2, 2009

Decision: April 1, 2009

Charge: **Criminal Code of Canada**
Section 267(b)

Counsel: Jody McNeill for the Crown
Ian A. (Sandy) MacKay for the Defence

Introduction:

[1] After completing their work for the week, on the evening of Friday, April 25, 2008, Malcolm Halliday and his friend Damien Duplessis had a few drinks in their apartment and then walked the short distance to the nearby Highlander Pub. Their plan was to have a couple more drinks at the Pub and enjoy the evening's entertainment.

[2] Unfortunately, the evening ended tragically in the early morning hours of April 26, 2008, with Mr. Halliday lying on the floor "screaming in agony" near the entrance to his apartment with shards of glass in his eye. Crown witnesses testified that the glass window in the entrance door was broken by a male individual punching his fist through the window, thereby causing the shards of glass to enter Mr. Halliday's eye. Mr. Halliday has lost vision in his left eye.

[3] Mr. Richard James MacDonald stands charged with the offence of having committed an assault on Malcolm Halliday causing bodily harm contrary to section 267(b) of the **Criminal Code**.

Issues:

[4] The Crown led evidence, and the Defence does not question, that the injuries sustained by Mr. Halliday occurred as a result of the intentional application of force, directly or indirectly, by a male assailant, and that Mr. Halliday did not consent to the application of that force. The Defence does not take issue with the seriousness of the injuries sustained by Mr. Halliday. The injury and damage done to Mr. Halliday was

more than an injury of a transient, fleeting or trifling nature.

[5] As a result, the only issue between the Crown and the Defence is the identification of the male assailant who punched his fist through the glass window of the entrance door to Mr. Halliday's apartment, breaking the glass and thereby causing the shards to enter Mr. Halliday's eye.

[6] Only one witness at the trial, Damien Duplessis, specifically identified the accused person, Richard James MacDonald, as the assailant in this case. The Crown submits that Mr. Duplessis' evidence taken together with all of the other evidence provided at the trial is reliable and credible, thereby satisfying the identification element of this charge.

[7] Defence Counsel submits that there is reasonable doubt about the identification of the assailant and whether Richard James MacDonald was involved at all in this offence. Defence Counsel questions the credibility of the evidence of Mr. Damien Duplessis, and submits that the Crown has not proved its case beyond a reasonable doubt.

The Facts:

[8] At the time of this incident in the early morning hours of April 26, 2008, Mr. Halliday, his common-law wife, Margot Murphy and their friend, Damien Duplessis, were living in the most westerly end unit of a four-unit apartment building located on St. Andrew's Street (locally referred to as the "Barracks") in Pictou, Nova Scotia.

The altercation at the Pub:

[9] On the evening of April 25, 2008, Mr. Halliday and Mr. Duplessis drank several bottles of beer at their apartment before taking a short walk [about 5 minutes] to the Highlander Pub to enjoy the entertainment at the Pub. Their rough estimate of arrival time at the pub was around 10 p.m.

[10] While at the Pub, Mr. Halliday and Mr. Duplessis testified that there was a verbal altercation between Mr. Halliday and the accused person, Richard MacDonald, which occurred when Mr. Halliday accidentally bumped into Mr. MacDonald on his way to the washroom. Mr. Halliday stated that this altercation lasted for a few minutes with the two of them exchanging profanities and cursing at each other. This altercation did not become physical, but Mr. Halliday said that Mr. MacDonald “stared him down” on his return from the washroom.

[11] Mr. Halliday and Mr. Duplessis said that they had never seen or ever met Richard MacDonald before that evening. Mr. Halliday and Mr. Duplessis identified the accused person, Richard MacDonald in Court. In addition, they both identified him as the person with whom Mr. Halliday had the verbal altercation in the Highlander Pub.

[12] After the altercation with Richard MacDonald, Mr. Halliday returned to his table, calmed down and told Mr. Duplessis that they should leave the Pub before there was “trouble.” Mr. Duplessis agreed with the decision to leave the Pub “before

anything happened.” He was concerned that, if they waited until closing time, they would be “jumped” on their way home. Mr. Halliday and Mr. Duplessis estimated that they left the Pub shortly before its closing time at 2 a.m.

[13] Mr. Halliday estimated that, during the course of the entire evening from approximately 6:00 p.m. on April 25, 2008 to 2:00 a.m. on April 26, 2008, he had between 6 and 7 bottles of beer. Mr. Duplessis testified that he probably had about 8 bottles of beer during the course of the evening. Mr. Duplessis said that he was “feeling a little good,” but stated that he was not drunk. However, Mr. Duplessis believed that Mr. Halliday was a “little drunk.”

[14] The Defence called Melissa Irving to give evidence on the events of the evening of April 25, 2008, and the early morning hours of April 26, 2008. Ms. Irving testified that she and Richard MacDonald had a few drinks together at her residence before going to the Highlander Pub. Ms. Irving estimates that she and Richard MacDonald arrived at the Highlander Pub at approximately 11 p.m. She sat with Mr. MacDonald and she did not see any altercations between Richard MacDonald and any other person at the Pub that evening. She did not recall seeing Malcolm Halliday at the Pub that night. On cross-examination, Ms. Irving agreed that she did not know Malcolm Halliday or Damien Duplessis prior to April 26, 2008, and therefore she could not say whether they were at the Pub or not.

[15] Ms. Irving estimated that she had 4 to 6 “coolers” at home and was fairly

certain that she only had another 2 “coolers” during the rest of the evening. Ms. Irving was not sure how much alcohol Richard MacDonald had to drink during the course of the evening. On cross-examination, Ms. Irving was asked to review her statement previously given to a police officer. She was no longer sure about the statement’s reference to Richard MacDonald being “very” intoxicated, since she was not keeping tabs on how much he had to drink. However, Ms. Irving was sure that Richard MacDonald was intoxicated.

[16] Ms. Irving testified that she and Mr. MacDonald left the Highlander Pub shortly before the Pub’s closing time (2:00 a.m.). Their intention, at that time, was to wait for a taxi at the cab stand located across the street from the Highlander Pub, and then continue their evening at a late-night Cabaret on Provost Street in New Glasgow.

Description of clothing worn by Richard MacDonald at the Pub:

[17] Defence counsel posed questions of all Crown witnesses regarding the clothing worn by Mr. Richard MacDonald at the Highlander Pub on the evening in question. Mr. Duplessis said that Mr. MacDonald was wearing a jacket, and although he was not sure, he believed it was maroon, red or brown in colour. Mr. Halliday, on the other hand, had no recollection whatsoever of the clothing worn by Richard MacDonald.

[18] Ms. Irving stated that Richard MacDonald was “most likely” wearing a navy blue, black or gray shirt, blue jeans, and he was “most likely” wearing a gray, black or navy blue jacket that evening. She has known Richard MacDonald for six years

and has never seen him wear a plaid jacket.

[19] The Defence also called Ms. Tammy McLennan, who has known Richard MacDonald for 20 years and was in a relationship with him for 16 years. Ms. McLennan said that she bought Mr. MacDonald's clothes for 16 years and she is 100 percent certain that he has never owned a plaid jacket. She said he usually wears jeans, sneakers and T-shirts in dark colors such as gray or black.

The shattering of the glass window of the apartment door:

[20] Mr. Duplessis and Mr. Halliday left the Pub shortly before 2:00 a.m., and walked by themselves the short distance back to their apartment. Mr. Halliday indicated that he did not see anyone behind them until he went into his apartment, and then he saw a group of people coming up St. Andrew's Street, but he did not recognize anybody. Mr. Duplessis said that he had not initially noticed a group of four or five people running up the street behind them, but at a certain point, he turned and heard the group yelling insults and "calling us on" for a fight.

[21] Immediately after entering the apartment, Mr. Halliday proceeded to use both hands to lock the exterior door. Mr. Halliday testified that Mr. Duplessis was standing right behind him in the entrance hallway of the apartment, while he was proceeding to lock the door. As a result of focusing his attention down toward the door lock, Mr. Halliday's face was approximately one foot from the window of the apartment's door. At that moment, he heard a male voice, which he could not recognize, say "let us in,

let us in.”

[22] Mr. Halliday acknowledged that what occurred next “happened quick.” Suddenly, Mr. Halliday heard a “smash” from the glass window being punched out. Mr. Halliday was certain that the glass had been shattered by the male assailant’s fist, because he felt the fist punch him in the eye. Shards of glass went into Mr. Halliday’s left eye and he fell to the floor “screaming in agony.”

[23] Because the focus of Mr. Halliday’s attention was down toward the door lock, he testified, on cross-examination, that he could not identify the male assailant who punched the glass window.

[24] Damien Duplessis also stated that he was standing right behind Malcolm Halliday when the window was smashed. Mr. Duplessis testified that Richard MacDonald came up to the apartment door while the other people in the group waited a short distance up the street. As Mr. Halliday was proceeding to lock the door, Mr. Duplessis heard Richard MacDonald demand that the door be opened and then saw him smash the window with his fist.

[25] Mr. Duplessis was “100 percent sure” that it was Richard MacDonald who had smashed the window with his fist. Mr. Duplessis testified that he was looking “face to face” with Mr. MacDonald, while standing right behind Malcolm Halliday when Mr. MacDonald smashed the window. Mr. Duplessis testified that his view of the person on the doorstep was not obstructed by Mr. Halliday. He “could see everything

perfect” - he saw the Richard MacDonald punch his fist through the window, pull it back out and immediately after that, saw him run away.

[26] Mr. Duplessis stated that he did not know Richard MacDonald before this incident. However, knowing what the male assailant looked like, shortly after this incident, Mr. Duplessis began asking questions around town to obtain the assailant’s name. As a result, Mr. Duplessis learned that the assailant’s name was Richard MacDonald and he identified Mr. MacDonald in Court.

[27] The final Crown witness was Mr. Craig MacDonald, who lives in a house located at 54 St. Andrew’s Street, in Pictou Nova Scotia, directly across from the four-unit apartment building (the “Barracks”). On April 26, 2008, he was sleeping with his window open and at approximately 2:00 a.m., he was awakened by the sound of footsteps running in the street and voices.

[28] Mr. Craig MacDonald testified that he got up, put on his glasses and looked out the window to see what was happening. He saw a male person standing outside the apartment door of the unit occupied by Malcolm Halliday and Margot Murphy and a group of four or five individuals standing approximately 50 feet down St. Andrew’s Street. Mr. MacDonald did not see the male individual on the doorstep approach the apartment, nor did he get a view of that person’s face, so he could not identify him.

[29] Although the street was generally well lit, Craig MacDonald testified that it was still dark enough that he could not tell the colours of the assailant’s clothes, and

because he was looking at a distance, he was not sure whether the jacket was dark blue or dark brown. Moreover, with only a view of the back of the jacket, Mr. MacDonald thought it looked like a plaid pattern.

[30] Mr. MacDonald testified that everything “took place quick.” As he briefly looked away from the male person on the doorstep to the group on the street, at that very moment, the window on the exterior door to the apartment was smashed. He did not actually see the window being smashed, but Craig MacDonald saw the male assailant’s right hand recoil back from the window.

[31] Immediately after the window was smashed, Craig MacDonald heard a female, who was standing with the group of people, scream something at the male on the doorstep. Mr. MacDonald then saw the male on the doorstep meet that female person and they went down the driveway next to the apartment building in a southerly direction toward the post office. The rest of the group of people on St. Andrew’s Street, except for one female, started going in a westerly direction toward the St. Andrew’s Church.

Richard MacDonald’s whereabouts after leaving the Highlander Pub:

[32] Ms. Melissa Irving and Richard MacDonald left the Highlander Pub shortly before its closing time (2:00 a.m.) and walked across Twinning Street to wait at the taxi cab stand for a drive to New Glasgow to continue their evening, as they had planned.

[33] While waiting for a cab to arrive, Ms. Irving thought that her friend, Erica Jeffrey, was walking with a group of people up Twinning Street toward St. Andrew's Street, so she shouted out "where you going?" Someone in the group ahead shouted back "who are you talking to, you whore?" With that, Richard MacDonald said that those words were inappropriate, and someone from the group said "well come up here and deal with it." Ms. Irving testified that, at that point, Richard MacDonald left her and started walking up the street. She remained at the taxi stand.

[34] On cross-examination, when it was suggested that Richard MacDonald might have jogged or run up the street, Ms. Irving said that she "was not making regards to whether he was walking, jogging or running." After reviewing her statement given to a police officer, Ms. Irving remembered that Richard McDonald "took off" up the street, but could not recall whether he had run, walked or jogged. Ms. Irving also testified that when he left her at the cab stand, Richard MacDonald did not appear to be "visibly upset."

[35] Ms. Irving confirmed that when Richard MacDonald went up Twinning Street, turned right (going in an easterly direction) on St. Andrew's Street and he disappeared from her view. She did not see him again that evening.

[36] After waiting at the taxi stand for a few minutes, Ms. Irving walked up the street. At the top of the street, she noticed that there was "chaos coming from" Margot Murphy's apartment and no one from the group of people was in sight. Richard

MacDonald was nowhere to be seen.

[37] Ms. Irving did not see Richard MacDonald for another week and never talked to him about that night, because she was unaware that anything had happened until the police came to visit her. On cross-examination, Ms. Irving agreed that, although they had a plan to go to New Glasgow, she did not think there was anything unusual in Mr. MacDonald suddenly leaving her at the last minute, because people “cop out all the time” on her.

Events immediately after the window was smashed:

[38] Mr. Craig MacDonald testified that one female, who had been with the group of people on the street went over to the Halliday/Murphy apartment. Mr. McDonald saw her knock on the door of the apartment and heard her ask for her friend Erica. From inside the apartment, Mr. MacDonald heard someone shout “get the f— out of here,” and then he saw the female leave the area after speaking with a “lanky male.” Melissa Irving confirmed that she came to the Halliday/Murphy apartment, asked for her friend Erica and that she spoke with Mr. Duplessis.

[39] Ms. Irving said she heard a lot of screaming and shouting from inside the apartment, asked if everything was all right and if her friend Erica Jeffrey was there. She noticed that the glass window of the exterior door was broken and that no one from the group of people was in the area. She did not recall seeing anyone in the area wearing a plaid jacket.

Injuries sustained by Malcolm Halliday:

[40] Mr. Halliday testified that as a result of the shards of glass going in his left eye, he was in “pure agony” for a couple of days. On April 27, 2008, he required emergency surgery to get the glass out of his left eye. Mr. Halliday’s surgery required 26 stitches to repair the corneal lacerations, and then he spent five days in the Aberdeen Hospital. Since then, Mr. Halliday has worn a patch over his left eye due to the sensitivity to ultraviolet light and bright lights. As a result of the injuries sustained from the shards of glass going in his eye, Mr. Halliday testified that the vision in his left eye is quite blurry. Although he can see light, Mr. Halliday cannot make out shapes and Dr. Archibald suspects that he may require a corneal transplant.

Meetings between Mr. Duplessis and Mr. MacDonald after April 26, 2008:

[41] Mr. Damien Duplessis described two meetings at the Highlander Pub between himself and Richard MacDonald after April 26, 2008. The first meeting occurred approximately one week after Mr. Halliday was injured. That evening, Mr. Duplessis called Richard MacDonald over to talk about the incident involving Malcolm Halliday. Mr. MacDonald did not say anything about the incident. According to Mr. Duplessis, Mr. MacDonald said that Mr. Duplessis was trying to set him up, and that he should leave the Pub. After a short conversation, they shook hands, at which point, Mr. Duplessis saw and felt a scar on Mr. MacDonald’s right hand.

[42] A couple of weeks later, Mr. Duplessis was again at the Highlander Pub and Richard MacDonald was there with his wife or girlfriend. During this second

meeting, Mr. Duplessis testified that Richard MacDonald called him “rat” when he wanted to discuss what had happened to Malcolm Halliday. Mr. MacDonald “just stared him down” and did not say anything about the incident, but did tell him to leave things alone and get out of the bar. Mr. Duplessis also said that, after calling him a “rat”, Mr. MacDonald challenged him to a fight outside the Pub. However, they did not have a fight and Mr. Duplessis left the Pub.

[43] Ms. Tammy McLennan testified that, on two occasions she was at the Highlander Pub with Richard MacDonald, when they encountered Damien Duplessis. On the first occasion in late April 2008, she did not know Damien Duplessis, but learned who he was at a later date. On this occasion, she said that there were no comments or fighting words exchanged between Mr. Duplessis and Mr. MacDonald.

[44] On the second occasion, which Ms. McLennan believed was in May 2008, Damien Duplessis came by their table and said “I’m going to f—ing kill you” to Richard MacDonald. She asked Richard MacDonald who had made the comment, but did not ask him what that was all about. Mr. MacDonald did not say anything. Ms. McLennan did not know if words had been exchanged between Mr. MacDonald and Mr. Duplessis elsewhere in the bar, because she stayed at the table and Mr. MacDonald left her on a couple of occasions to go to the washroom or to smoke.

[45] Finally, Ms. McLennan stated that Richard MacDonald is employed as a pressman and he has had many injuries to his hands and arms. When they lived together, she did not pay any special attention to his injuries, unless a cast or stitches

were involved. However, on cross-examination Ms. McLennan said that she did notice a scrape or scar on Richard MacDonald's hand in late April or early May 2008, but she did not know how or when the injury occurred and could not remember which hand was injured.

Analysis:

[46] It is a fundamental principle in our system of criminal justice that an accused person is presumed to be innocent of the charge against him or her unless and until the Crown proves their guilt beyond a reasonable doubt. The entire burden of proof rests upon the shoulders of the Crown. In general, the Crown is not required to prove any particular fact, apart from the essential elements of the offence, beyond a reasonable doubt. There is no obligation on the accused person to prove or establish anything. An accused person has the right to remain silent.

[47] The leading decision defining "reasonable doubt" is the Supreme Court of Canada case of **R. v. Lifchus**, [1997] 3 SCR 320. The Court noted that the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence. In **Lifchus**, *supra*, and later in **R. v. Starr** [2000] 2 SCR 144, the Court outlined the key aspects of the definition of "reasonable doubt." From these decisions, "reasonable doubt" can be defined in these terms:

- 1) A reasonable doubt is not a doubt based upon sympathy or prejudice. Rather, it is based upon reason and common sense;

- 2) It is logically connected to the evidence or absence of evidence;
- 3) It does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt;
- 4) More is required than proof that the accused is probably guilty; if the trial judge or jury concludes that the accused is probably guilty, they must acquit;
- 5) Proof beyond a reasonable doubt is much closer to absolute certainty than it is to proof on a balance of probabilities or probable guilt.

[48] In their submissions, both the Crown Attorney and Defence Counsel referred to the Supreme Court of Canada Decision of **R. v. W.(D)**, [1991] 1 SCR 742. In **W.(D)**, Mr. Justice Cory stated that where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. According to Cory J, appropriate instructions for the trier of fact [either the trial judge or the jury] should be along the following lines:

First, if you believe the evidence of the accused, you must acquit.

Second, if you do not believe the testimony of the accused, but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[49] Our Court of Appeal has repeatedly applied the principles established in

W.(D.), but the Court has pointed out that these principles are not a “magic incantation.” In reality, **W.(D.)** describes how the assessment of credibility relates to the issue of reasonable doubt. For example, in **R. v. Mah**, 2002 NSCA 99, Mr. Justice Cromwell (as he then was) stated at paragraph 42:

“The W.D. principle is not a “magic incantation” which trial judges must mouth to avoid appellate intervention. Rather, W. D. describes how the assessment of credibility relates to the issue of reasonable doubt. What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant’s version is preferred. W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge’s function is the more limited one of deciding whether the essential elements of the charge have been proved beyond a reasonable doubt....As Binnie, J. put it in Sheppard, the ultimate issue is not whether the trial judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility, but reasonable doubt.” (Emphasis is mine)

[50] In this case, defence evidence was presented. A reasonable doubt can arise from the consideration of the defence evidence, or solely on the consideration of the Crown's evidence or absence of the Crown’s evidence. In considering the evidence adduced at a trial, a court may believe all, some or none of the evidence of a witness. A trier of fact may accept parts of a witness' evidence and reject other parts. And a trier of fact may apply different weight to different parts of the evidence of a witness that the trier of fact has accepted. In the final analysis, if after consideration of the totality of evidence, I am not satisfied beyond a reasonable doubt as to the guilt of the accused, then I must acquit the accused.

[51] The key issue in this case is whether there is a reasonable doubt concerning the

identification of the accused, Richard MacDonald as the person who assaulted Malcolm Halliday, and thereby caused him “bodily harm” as defined in Section 2 of the **Criminal Code of Canada**.

[52] Defence counsel has submitted that there is reasonable doubt about the identification of the male assailant, and whether Richard MacDonald was involved at all in this offence. Essentially his submission is that the evidence of Damien Duplessis, the only person who specifically identified Richard James MacDonald as the male assailant, lacks credibility because Mr. Duplessis had consumed 8 or 9 bottles of beer during the course of the evening in question. Defence counsel also submits that there is reasonable doubt on the identification issue as result of Mr. Craig MacDonald’s belief that the male assailant was wearing a plaid jacket.

Events occurring at the Highlander Pub:

[53] In reviewing the facts of this case, there is no doubt whatsoever that Malcolm Halliday, Damien Duplessis, Melissa Irving and Richard MacDonald were all at the Highlander Pub, in Pictou, Nova Scotia, on the evening of April 25, 2008 and the early morning hours of April 26, 2008. The facts of the case establish that Mr. Halliday and Mr. Duplessis arrived at the Highlander Pub around 10 p.m. that evening, while Ms. Irving and Richard MacDonald arrived around 11 p.m.

[54] Mr. Halliday and Mr. Duplessis both described, in some detail, a verbal altercation between Mr. Halliday and Richard MacDonald, which occurred at the Pub. After the altercation, Mr. Halliday and Mr. Duplessis were concerned that there might

be “trouble” or that they might be “jumped” outside the Pub if they left at closing time. In referring to possible “trouble”, I have no doubt that they were concerned for their physical safety. Given the fact that Mr. Halliday and Mr. Duplessis had never met Mr. MacDonald before this evening, neither one had any reason to mislead the Court on any of these points. Their evidence was forthright and candid, and moreover, it did not portray Mr. Halliday in the most favourable light.

[55] For the defence, Ms. Irving categorically stated that there were no altercations that evening between Richard MacDonald and anyone else at the Highlander Pub. She did not recall seeing Malcolm Halliday at the Pub that evening. The credibility of this evidence is undermined by her admission, on cross-examination, that she did not even know and had never met Mr. Halliday prior to that evening, so she could not say if he was at the Pub or not. There is a lack of internal consistency of her testimony and when considered with the detailed account provided by the two Crown witnesses, the most that can be said is that Ms. Irving did not see the verbal altercation occur. I have no doubt that there was a verbal altercation between Malcolm Halliday and Richard MacDonald at the Pub that evening.

[56] In terms of their sobriety, Mr. Duplessis, Mr. Halliday, Ms. Irving and Mr. Richard MacDonald had all consumed alcohol over the course of the entire evening. Mr. Halliday was “a little drunk” in the opinion of Mr. Duplessis. Mr. Duplessis was “feeling a little good”, but denied being drunk. Ms. Irving had between 6-8 “coolers” but was not asked to comment on her state of sobriety. Ms. Irving testified that Mr.

MacDonald was intoxicated, but she could no longer say that he was “very intoxicated” as she had advised the police in her statement.

Events occurring after leaving the Pub:

[57] I find that the facts of this case establish that Mr. Halliday, Mr. Duplessis, Ms. Irving and Mr. MacDonald all left the Highlander Pub shortly before its closing time at 2 a.m., on April 26, 2008. Mr. Halliday and Mr. Duplessis walked the short distance up Twinning Street, then turned right on St. Andrew’s Street to go to their apartment. They were not accompanied by anybody else. Ms. Irving and Mr. MacDonald also left the Pub shortly before 2 a.m. and went across the street to wait for a taxi at the cab stand located on Twinning Street, just across from the Highlander pub. Their intention was to go to New Glasgow and continue their evening at a late-night cabaret.

[58] At this point, the versions of events related by the Crown and Defence witnesses differ, but they do not conflict on any critical factual findings related to the essential elements of this offence.

[59] Mr. Halliday and Mr. Duplessis testified that they were followed by a group of four or five people running up the street behind them, yelling insults and “calling us on” for a fight. They say that the group of people remained down the street while one male came to their apartment. He demanded to be let in and then suddenly smashed the glass window of the entrance door with his fist. The male assailant then ran away. I find that Mr. Craig MacDonald corroborated the testimony of Mr. Halliday and Mr.

Duplessis regarding the presence of the group down the street and a lone male assailant on the doorstep. Mr. MacDonald also confirmed that he saw the assailant smash the window with his right hand and immediately thereafter, saw him leave the area.

[60] Mr. Craig MacDonald's evidence was that at about 2 a.m. on April 26, 2008, he observed a lone male person at the door of the Halliday/Murphy apartment and a group of four or five people about 50 feet down St. Andrew's Street. He did not see the lone male approach the door to the Halliday/Murphy apartment, but he heard the window being smashed and then saw the male assailant's right hand recoil back from the window. After the window was smashed, the male assailant met a woman and they left the area in a southerly direction by a nearby driveway. Most of the group of people standing on the street departed in a westerly direction, except for one female who then came to the Halliday/Murphy apartment. He heard that woman ask about her friend Erica. I find that Ms. Irving corroborated part of the evidence of Craig MacDonald and Damien Duplessis by stating that she did go to the apartment door and ask if her friend Erica was there.

[61] The defence witness, Melissa Irving said that while waiting for the cab with Richard MacDonald, she called out to a group of four or five people walking up Twinning Street toward St. Andrew's Street, to ask about her friend Erica Jeffrey. An unknown person up the street replied to her in a derogatory fashion. Mr. MacDonald intervened and said that the unknown person's comments were inappropriate. The

unknown person's reply was "well come up here and deal with it" and with that, Ms. Irving testified that Richard MacDonald started walking up the street. On cross-examination, after reviewing her statement to the police, she did agree that Mr. MacDonald "took off" but she could no longer recall whether he ran, walked or jogged up the street. Despite her reference to the fact that Mr. MacDonald "took off", she did not believe that he was visibly upset when he left her. Ms. Irving's evidence concerning Mr. MacDonald's departure lacks credibility as it does not have internal consistency having changed on the stand, seeks to downplay his level of agitation and highlights her inability to observe and recall events.

[62] Ms. Irving testified that once Richard MacDonald went up Twinning Street and turned right onto St. Andrew's Street, he completely disappeared from her view. After waiting for a few minutes at the cab stand, she walked up to St. Andrew's Street to see where Mr. MacDonald had gone. By the time she got to St. Andrew's Street, which is a short distance from the Halliday/Murphy apartment, Richard MacDonald and the four or five people in the group that she had previously described, were all gone. She did not see Richard MacDonald again that evening.

[63] After analyzing the evidence of Mr. MacDonald and Melissa Irving, I find that the clear inference from Craig MacDonald's evidence is that Ms. Irving was either originally a member of the group of four or five people who were chasing after Mr. Halliday and Mr. Duplessis or after walking up the street, she joined the group standing on St. Andrew's Street near the Halliday/Murphy apartment. Either way,

Ms. Irving's testimony regarding the activities of the group of people on the street lacks credibility as it is externally inconsistent with independent evidence of Craig MacDonald which I find to be credible and reliable. Mr. Craig MacDonald did not overstate his evidence in any way or seek to flavour his matter-of-fact description of the event. His evidence casts doubt on the accuracy and truthfulness of Ms. Irving's testimony with respect to what she did and saw after leaving the Highlander Pub.

[64] In addition, Ms. Irving testified that there was "chaos coming from the apartment", when she got to the door and asked about her friend Erica. However, she said that she never discussed this incident with Richard MacDonald, because she was "unaware that anything had happened" until the police came to visit her. It bears repeating here, Ms. Irving and Richard MacDonald had plans to go to New Glasgow, but he "took off" to respond to a challenge made by an unknown person and then completely disappeared from her view and for the evening. A few moments later she arrives at a scene that she described as "chaos." In these circumstances, Ms. Irving, as a longtime friend of Mr. MacDonald, had a motive to mislead the court and her explanation lacks credibility, as it does not, in my view, pass the "air of reality" test.

[65] Furthermore, based upon the evidence of Craig McDonald, it may be that Ms. Irving and Richard MacDonald were part of the group of four or five people chasing after Mr. Halliday and Mr. Duplessis and calling them on for a fight. The evidence of the altercation at the bar gives Mr. MacDonald a motive for being agitated with Malcolm Halliday. The evidence of derogatory remarks and the exchange on

Twinning Street with an unknown person provides an additional motive, particularly if those derogatory remarks were made by Mr. Halliday or Mr. Duplessis.

[66] The fact that Mr. MacDonald “took off” immediately after the exchange, is consistent with him being agitated or upset at that time. Once he disappeared from Ms. Irving’s view around the corner near the Halliday/Murphy apartment, there is circumstantial evidence of the opportunity to commit the assault. However, rather than trying to speculate on what might have happened, I am reminded of Mr. Justice Cromwell’s comments in **R. v. Mah**, *supra* that I am not trying to resolve “the broad factual question of what happened.” I have a more limited function - “deciding whether the essential elements of the charge have been proved beyond a reasonable doubt.”

[67] Ms. Irving’s testimony places Richard MacDonald on St. Andrew’s Street, at approximately 2 a.m. on the morning of April 26, 2008, going in the direction of and only a short distance from the Halliday/Murphy apartment when he disappeared from her view. Mr. Craig MacDonald’s evidence is that the assault of Mr. Halliday occurred at approximately 2 a.m. on April 26, 2008. This is, of course, circumstantial evidence, but it can be relevant in the analysis of identification evidence.

The identification evidence:

[68] In this case, the only outstanding essential element to determine is whether the Crown has proved beyond a reasonable doubt the identification of Mr. Richard MacDonald as the male assailant who punched out the glass window, thereby causing

the shards of glass to go into Mr. Halliday's eye. The Crown submits that Mr. MacDonald is guilty of this assault based upon the credible and reliable eyewitness testimony of Damien Duplessis in the context of all of the evidence.

[69] In **Mezzo v. The Queen**, [1986] 1 SCR 802, the Supreme Court of Canada adopted the decision of Lord Widgery C.J. in **R. v. Turnbull**, [1976] 3 All ER 549 (Eng.CA) which pointed out the frailty of visual identification evidence and the directions which the trial judge or jury should keep in mind when assessing the "quality" of the evidence. Mr. Justice McIntyre, writing for the majority, accepted Lord Widgery's statement that "if the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger." Mr. Justice McIntyre went on to conclude, at para. 61 of the **Mezzo** case that, in his view, the term "quality", as applied by Lord Widgery C.J., in **Turnbull** was, in reality, nothing more than a synonym for "weight."

[70] In Madam Justice Wilson's reasons in **Mezzo**, *supra*, she stated that the English Court of Appeal's decision in **Turnbull** provides guidance to courts which might be useful when dealing with the issue of visual identification. In **Mezzo** *supra* Wilson J. said at paragraph 24:

"I do not mean to suggest that the trial judge should in every case be held to a rigid tabulation of the factors listed in *Turnbull*. A mechanical test would not reflect the infinite particularity of possible fact situations. The *Turnbull* caution does, however, identify a number of factors which can clearly affect the quality of eyewitness evidence: length of observation, distance, light, obstructions to view, recognition, time between original observation and subsequent description to the police and discrepancies between that description and the accused's appearance. No doubt there are many more. The consistency

in the witness' descriptions; his or her degree of attention and awareness at the time of the crime; the witness' reaction at subsequent encounters with the accusedare some that readily come to mind."

[71] I now propose to briefly analyze the identification evidence of Mr. Duplessis utilizing some the factors set out **Turnbull** case, which as I have indicated above, have been approved by the Supreme Court of Canada in **Mezzo**, *supra*.

1) Length of the observation:

[72] Mr. Duplessis had two occasions to view Richard MacDonald on the evening in question. The first occasion was at the Highlander Pub during the several minute verbal altercation between Mr. Halliday and Mr. MacDonald. Both Mr. Halliday and Mr. Duplessis identified Richard MacDonald, a person previously unknown to them as the other participant in the verbal altercation.

[73] The second observation occurred at approximately 2 a.m. on April 26, 2008, at the entrance door to the Halliday/Murphy apartment, a few minutes after he left the Highlander Pub. Although everything happened very quickly, Mr. Duplessis specifically identified Richard MacDonald as the person on the doorstep and described his actions in smashing the window. I find that the evidence of Malcolm Halliday and Craig MacDonald corroborates Mr. Duplessis's description of the assailant's actions, although neither one of them actually saw the assailant's face. However, Mr. Duplessis is "100% sure" that it was Richard MacDonald who smashed the window.

2) Distance from which the observation was made, lighting and any visual obstructions

[74] Mr. Duplessis testified that he was standing 2 or 3 feet behind Malcolm Halliday, looking face-to-face with Richard MacDonald, when Mr. MacDonald smashed the window of the entrance door. Mr. Craig MacDonald, viewing this scene from across the street in his bedroom, testified that he saw the male assailant standing on the doorstep, close enough to the door to reach out and touch the handle. As a result of this evidence, I conclude that Mr. Duplessis was in very close proximity to Mr. Richard MacDonald when he identified him as the assailant on the doorstep

[75] Mr. Halliday testified that the apartment's outside light on the doorstep was on and the doorstep of the apartment was well lit. Mr. Duplessis said there were no visual obstructions, as Mr. Halliday was bending over to lock the door and he had a clear view of Richard McDonald through the window of the door.

3) Subsequent encounters with the accused person:

[76] Mr. Duplessis had not met or previously known Richard MacDonald before the events of April 26, 2008; however, it is evident from his testimony that he had a solid visual image of the male assailant. Mr. Duplessis testified that he made inquiries around town in the first week or two after the assault of Mr. Halliday, and in that way, he learned Richard MacDonald's name.

[77] Mr. Duplessis described two encounters with Mr. MacDonald after April 26, 2008. These subsequent meetings provided additional opportunities for Damien

Duplessis to verify his visual identification of Richard MacDonald as the assailant. Both of these meetings between Mr. Duplessis and Mr. MacDonald occurred at the Highlander Pub and they were corroborated by the testimony of Mr. MacDonald's former common-law wife, Tammy McLennan.

[78] On the first occasion in late April, Mr. Duplessis met with Mr. MacDonald at the Highlander Pub. According to Mr. Duplessis, they had a short conversation, but Mr. MacDonald did not say anything about the incident, but said that he thought Mr. Duplessis was trying to set him up. At the end of this meeting, when Mr. Duplessis shook hands with Richard MacDonald, he saw and felt a scar on Mr. MacDonald's his right hand. While this injury is consistent with someone having punched his fist through a window and breaking the glass, Ms. McLennan explained that she had also noticed the injury, but she was not sure of when or how it had occurred. She testified that the injury could have occurred during Mr. MacDonald's work as a pressman.

[79] On the second occasion, in early May 2008, Mr. Duplessis testified that Richard MacDonald called him a "rat" when he wanted to discuss what had happened to Mr. Halliday. Mr. Duplessis said that Mr. MacDonald did not say anything about the incident with Mr. Halliday, but did challenge him to a fight. Ms. McLennan also said that, during the second encounter, Mr. Duplessis came over to their table and said "I am going to F—ing kill you" to Mr. MacDonald.

[80] In my view, Mr. Duplessis being called a "rat" and Mr. MacDonald challenging him to a fight on this occasion are only consistent with the fact that Mr. Duplessis and

Mr. MacDonald had some animosity for each other. Bearing in mind that Mr. Duplessis and Mr. MacDonald had never met each other before April 26, 2008, and only had one brief meeting at the Pub a few days later, it is reasonable to conclude that this animosity between them came from the fact that Mr. Duplessis had specifically identified Richard MacDonald as the male assailant in this case. Furthermore, I find that Ms. McLennan's evidence relating to Damien Duplessis's remark to Mr. MacDonald is also consistent with his identification and recognition of Mr. MacDonald as the assailant and his response to Mr. MacDonald's challenge to have a fight or for being called a "rat."

[81] The evidence of Damien Duplessis clearly establishes that he had several opportunities to identify and recognize Richard MacDonald as the assailant through his encounters with Mr. MacDonald before, during and after the window of the Halliday/Murphy apartment's door was smashed. I find that Mr. Duplessis's identification and recognition evidence had internal and external consistency and material particulars of his evidence were corroborated by the independent witness, Mr. Craig MacDonald, and as well the defence witness, Ms. Tammy McLennan.

[82] Defence counsel had submitted that the identification evidence of Damien Duplessis was not credible or reliable, based upon the fact that he had consumed approximately 8 bottles of beer over the course of the evening. Mr. Duplessis denied that he was drunk, but said he was "feeling a little good." On the strength of that evidence alone, I have no logical reason to give any less or no weight to the evidence

of Damien Duplessis or to conclude that his ability to observe and recall events was impaired by alcohol. Moreover, as I have indicated in my analysis of the eyewitness evidence, I have concluded that most, if not all, of Mr. Duplessis' testimony was corroborated by the independent witness, Mr. Craig MacDonald, Mr. Halliday and also the two defence witnesses.

[83] The other aspect of defence counsel's submissions challenging the credibility and reliability of the eyewitness identification revolves around the issue of whether the male assailant on the doorstep of the Halliday/Murphy apartment was wearing a plaid jacket. This submission is based upon the evidence of Mr. Craig MacDonald who had viewed the male assailant from across the street.

[84] I now propose to briefly analyze the evidence of Mr. Craig MacDonald regarding the assailant's jacket utilizing the factors set out in **Turnbull** and adopted by the Supreme Court of Canada in the **Mezzo supra** decision.

1) Length of the observation:

[85] Mr. Craig MacDonald only had one brief occasion, which "took place quick" to view the male assailant. Just after waking up, he looked over at the Halliday/Murphy apartment and he saw a lone male on their doorstep. Mr. MacDonald did not see the lone male approach the apartment, and when he looked down the street at a group of people, he suddenly heard the window being smashed. He did not see the punch going forward, but did see the assailant pull his arm out from the broken window, meet with a woman and leave the area down a nearby driveway. He never

saw the face or front of the male assailant. He believed that the assailant's jacket was either dark blue or dark brown, and he thought it looked like a plaid pattern.

[86] None of the other witnesses who answered questions about the jacket worn by Richard MacDonald could categorically state the colour of the jacket. Mr. Duplessis said that Mr. MacDonald was wearing a jacket that he believed to be maroon, red or brown in colour. Ms. Irving testified that Mr. MacDonald was "most likely" wearing a gray, black or navy blue jacket that evening. Ms. Tammy McLennan testified that Mr. MacDonald "usually" wears dark colors such as gray or black and she was certain that he has never owned a plaid jacket. All witnesses who testified on this issue believed that Richard MacDonald was wearing a dark colored jacket.

2) Distance from which the observation was made, lighting and any visual obstructions:

[87] Mr. Craig MacDonald got his brief view of the back of the male assailant from across the street in his third-floor bedroom. As a result, I find that Mr. MacDonald's observations of the male assailant on the doorstep were made at some distance, and not in close proximity like those of Mr. Duplessis.

[88] In terms of the lighting on the street at that time, Craig MacDonald testified that the street was well lit, but because it was dark outside, the street lights affected the spectrum of colours, especially where he was looking at some distance. As a result, he could not tell whether the jacket was dark blue or dark brown and he could not tell for sure whether the jacket had a plaid pattern, although he thought it looked like a

plaid pattern. Mr. MacDonald said that there were no visual obstructions to his view across the street to the Halliday/Murphy apartment.

3) Subsequent encounters with the accused person:

[89] Mr. Craig MacDonald only had one brief occasion to view the assailant. He never saw the face of the assailant, so he was not able to provide any specific identification information.

[90] Under these circumstances, I cannot accord a great deal of weight to Mr. Craig MacDonald's general belief that the male assailant was wearing a plaid-patterned jacket. In his testimony, he indicated that the street lights affected the spectrum of colours, and it was evident from his testimony that he was not sure of the colour or pattern of the assailant's jacket. Mr. Craig MacDonald's observations amounted to a "fleeting glance" under what he referred to as difficult lighting conditions which, in turn, made it difficult for him to make a more categorical statement regarding the colour and pattern, if any, of the assailant's jacket.

[91] It was clear from Mr. Craig MacDonald's testimony that he was far less certain of the colour or pattern, if any, of the assailant's jacket than he was of his other evidence. Comparing the *Turnbull* factors, Mr. Duplessis had a longer time to observe the assailant under good lighting conditions and in close proximity to the assailant. In addition, Mr. Duplessis had additional encounters both before and after the glass window was broken to identify and recognize Richard MacDonald as the assailant in this case. After conducting a detailed examination of the *Turnbull* factors of both Mr.

Duplessis's eyewitness identification evidence and Craig MacDonald's evidence regarding the assailant's jacket. I cannot conclude that Mr. Craig MacDonald's thought or speculation that the assailant was wearing a plaid patterned jacket undermined the credibility of Mr. Duplessis's eyewitness identification of Richard MacDonald as the assailant.

[92] In reaching my conclusion on this identification evidence, I have considered all of the evidence that is capable of casting doubt on Mr. Duplessis's identification of Richard McDonald as the person who smashed the window of the Halliday/Murphy apartment. I have cautioned myself about the frailties of eyewitness identification and I have reviewed the factors established by the Supreme Court of Canada in the **Mezzo** decision *supra* which approved the **Turnbull** factors from the English Court of Appeal.

[93] Having regard to the **Turnbull** factors as approved by the Supreme Court of Canada in the **Mezzo** decision and applying them to the facts of this case, I find that the "quality" or weight of Mr. Duplessis' evidence remained good at the close of the accused's case. I am satisfied beyond a reasonable doubt that Mr. Duplessis accurately and truthfully identified Mr. Richard MacDonald as the person who assaulted Malcolm Halliday.

Conclusion:

[94] As I indicated at the outset of these reasons for judgment, the only issue in dispute was the identification of the male assailant who smashed the exterior door

window of the Halliday/Murphy apartment causing shards of glass to go into Mr. Halliday's eye. Defence counsel did not take issue with the seriousness of the injuries sustained by Mr. Halliday, but in any event, I find that those injuries were much more than an injury of a transient, fleeting or trifling nature, in accordance with the definition of "bodily harm" found in Section 2 of the **Criminal Code of Canada, R.S.C. 1985, chap. C-46.**

[95] Furthermore, according to **R. v. DeSousa**, [1992] 2 SCR 944 and **R. v. Brooks** (1994), 91 CCC (3d) 541 (Sask. CA), reasonable foreseeability that harm will occur as a result of the assault is not a necessary element of this offence. I find that Mr. MacDonald intended to punch the glass window of the exterior door to the Halliday/Murphy apartment and he is responsible for the consequences that flow therefrom. Whether he could foresee shards of glass going into Mr. Halliday's eye and thereby causing "bodily harm" is not a relevant consideration nor is it an essential element to establish guilt beyond a reasonable doubt for the offence of assault causing bodily harm contrary to section 267 (b) of the **Criminal Code of Canada**. The offence is made out when the *mens rea* or intent to intentionally apply force to the victim is proved beyond a reasonable doubt in circumstances where bodily harm results.

[96] In the result, I find the accused, Richard James MacDonald guilty of assault causing bodily harm, contrary to section 267 (b) of the **Criminal Code**.

[97] I will now hear from counsel with respect to their sentencing submissions.

Dated at the Town of New Glasgow, in the Province of Nova Scotia, the 1st day
of April, 2009.

Theodore K. Tax, J.

