

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Hemeon, 2005NSSC171

Date: 20050622
Docket: CR 233399
Registry: Halifax

Between:

Her Majesty the Queen

v.

Troy Hemeon, Tyrone Blades and James Hood

Judge: The Honourable Justice Felix A. Cacchione

Heard: June 6th to 15th, 2005, in Halifax, Nova Scotia

Written Decision: June 22nd, 2005

Counsel: Robert P. McCarroll, for the Crown
Philip J. Star, Q.C., for Mr. Hemeon
Duncan R. Beveridge, Q.C., for Mr. Blades
Stanley J. MacDonald, for Mr. Hood

By the Court:

[1] Troy Lynn Alexander Hemeon, Tyrone Terrence Blades and James Samuel Campbell Hood are charged jointly that they on or about the 9th day of October 2003 at or near Halifax in the County of Halifax, Province of Nova Scotia did in committing an assault on Mark McKay cause bodily harm to Mark McKay contrary to s.267(b) of the **Criminal Code**. Troy Hemeon is charged separately on the same indictment with unlawfully assaulting Chelsea Chisholm at the same time and place contrary to s.266(a) of the Criminal Code.

[2] The events leading up to and surrounding the alleged offences can best be described as short-lived and chaotic. The theory of the Crown is that the three defendants went looking for a confrontation with the complainant Mark McKay, a person with whom one of the defendants had had a verbal confrontation earlier on at the Sicilian Pizza shop. The Crown claims this defendant to be James Hood. The theory is that as a result of the verbal altercation the three defendants acted in concert to chase down and assault the complainant McKay. It is alleged that all three of the defendants were principals in the assault on Mr. McKay and that the resulting bodily harm could be foreseen by them. The theory is that their activities were conducted in concert and because it was the three defendants against Mr. McKay their solidarity made it possible to punch him and knock him to the ground. It is also alleged that while on the ground one or more of the defendants kicked the complainant numerous times while he lay unconscious on the concrete pedestrian walkway near the public library. The prosecution seeks to establish liability on the basis that two of the defendants were parties as aiders under s.21(1)(b) or abettors under s.21(1)(c) of the **Criminal Code**.

[3] The theory further claims that the defendant Hemeon assaulted Chelsea Chisholm by punching her in the jaw at some time during the confrontation between the two groups of participants.

[4] In support of its theory the Crown led evidence from eight civilian witnesses, one medical doctor and five police officers; two of whom were called on a *voir dire* and whose evidence was made part of the trial with the consent of all counsel. These witnesses, in particular the civilian witnesses, are alleged to have seen part or all of the events which led up to Mr. McKay's injuries. It is not contested by the Crown that the events involving the physical confrontation

between the complainants Mr. McKay and Ms. Chisholm and one or more of the defendants occurred very quickly.

[5] The reliability of the evidence given by the independent civilian witnesses, given the speed with which events took place and their different vantage points, is a live issue as is the credibility of certain of these witnesses in particular Mr. McKay, Ms. Pick, Ms. Chisholm, Lieutenant Hanna and Sergeant Ouellette.

PROSECUTION EVIDENCE

[6] Dr. Leif Sigurdson, a plastic surgeon performed surgery on the complainant. He noted a fractured cheek bone which was quite depressed. His evidence was that four different bones need to be fractured in order to fracture the cheek bone. The entire right area of the cheek bone was pushed in. He clearly noted a point of impact on the right cheek. He found no facial lacerations, just abrasions which he termed to be consistent with contact with a cement or concrete walk. His examination of the complainant noted no injuries to the lips or teeth. His opinion was that the injury could have been caused by one blow to the face followed by a fall to the sidewalk. His evidence was that a cast worn on an arm from the wrist to the elbow could have caused the injury if the end of the cast was used. The injury suffered by the complainant would not occur as a result of being hit with the broad side of the cast.

[7] Lieutenant Paul Hanna, a member of the Canadian Forces was at a pizza shop on the corner of Grafton and Blower Street directly across the street from Sicilian Pizza. He was in the company of Sergeant Ouellette. They had been out for a few drinks before stopping for a bite to eat. He noticed a dark male with a goatee and a cast on his right arm, apparently yelling at two persons, a male and a female who were across the street. The Sergeant could not hear what was being said. Approximately one minute later he noticed two males come out of the Sicilian Pizza Shop and they had pizza in their hands. His evidence was the three males talked for approximately 30 seconds and then ran in the direction that the male and female he had previously seen were walking.

[8] Approximately one and a half to two minutes later he and Sergeant Ouellette left their location and headed south on Grafton Street. They reached the walkway leading to the library from Grafton Street. He saw what he described as three guys kicking and beating a guy who was on the ground. They were the same three he

had seen coming from Sicilian Pizza. He and Sergeant Ouellette started running and the three males drew back. There was a female who was screaming and yelling the word “cowards” at the three males. Lieutenant Hanna testified that one of the three males punched the female in the face and within 30 seconds the police were there.

[9] He described the beating as occurring in front of the library steps. He estimated that he and Sergeant Ouellette witnessed the beating for approximately five seconds. All the blows he saw were directed to the head and face of the man on the ground.

[10] He testified that the female who was hit in the face did not fall to the ground.

[11] He did not know where the three males who administered this beating were when the police arrived. He described the three males in the following fashion. One was a dark male with a goatee, a dark shirt, the second had a plaid shirt and blonde spiky hair and the third had a blue shirt. He could not identify any of the defendants in Court.

[12] His evidence was that the man on the ground was lying on the cement walkway in front of the library. The male with a cast on his arm appeared to have blood on the cast near the knuckle area.

[13] In cross-examination he indicated that he and Sergeant Ouellette were together in a police vehicle when they wrote out their statements.

[14] His evidence was that he and Sergeant Ouellette walked from the pizza shop to the walkway leading to the library and once there they began running.

[15] He described the male who hit the female in the face as the guy with the plaid shirt and blonde spiky hair. He saw him throw a punch but could not recall if it was with his left or right hand and could not say if the punch landed, but noticed that the female’s head went back and she grabbed her jaw.

[16] He could not say if any of the kicking motions he saw landed and could not say if anyone kicked the complainant more than the others or how many kicks were administered.

[17] He agreed in cross-examination that he and Sergeant Ouellette exchanged information while giving their statements and that they probably talked about the incident subsequently.

[18] On cross-examination his evidence was that it was approximately one and a half minutes after the male and female left Sicilian Pizza that the two males came out and spoke to the third male for 30 seconds before the three males left.

[19] He agreed that his memory was better at the time he gave his statement and at the time of the preliminary inquiry.

[20] His evidence was that he and Sergeant Ouellette finished eating their food before they left to see what was happening.

[21] He could not say where any of the three males were in relation to the man on the ground, but said they were pretty much in a semi-circle around his head and that all were kicking him. It was within seconds of his arrival with Sergeant Ouellette that the police arrived.

[22] Lieutenant Hanna testified that he exchanged words with the guy wearing a cast. He says that the words were exchanged when there was a police officer in between him and the fellow with the cast. The fellow with the cast allegedly told him words to the effect that "You're Lebanese like me". In response Lieutenant Hanna said "No, I'm not a coward" at which point the fellow with the cast said words to the effect "I won't forget you. I'll get you". Lieutenant Hanna construed this as a threat.

[23] Lieutenant Hanna's evidence was that he noticed blood around the knuckle area of the cast and that he pointed this out to the police officer who was between him and the fellow wearing the cast.

[24] He stated that he saw the fellow with the cast kicking the man on the ground and subsequently saw blood on the shoes of the man with the cast.

[25] Sergeant Ouellette testified he heard no yelling when he was in the pizza shop. Lieutenant Hanna was the one who drew his attention. He went with Lieutenant Hanna and saw a man on all fours being kicked in the face by three or four persons. Sergeant Ouellette was half way up the walkway when he saw this.

He and Lieutenant Hanna hollered and ran toward the group and everything stopped. There was shouting between him, Lieutenant Hanna and the three or four persons. Shortly after the police arrived and he pointed out the three or four persons to them. He and Lieutenant Hanna were told to get into a police car and fill out a witness statement form. He described three persons. One had a goatee, dark shirt and a cast on his right hand. The second wore a white shirt and the third a plaid shirt. The three or four guys did not go anywhere when he and Lieutenant Hanna approached. He recalled seeing the man in the plaid shirt punch a female as he and Lieutenant Hanna approached the group of men.

[26] In cross-examination, he agreed that he discussed the incident with Lieutenant Hanna. His evidence was that he wrote what he observed in his statement. He said that the statement he wrote shortly after witnessing the events was somewhat similar to his recollection of the events.

[27] The complainant Mark McKay testified in direct examination that he was working as a DJ at the Kyber Club on the evening of October 8th, 2003. He began work approximately 10:00 to 10:30 p.m. and finished at 1:00 a.m. He consumed approximately six beers while working. He left with his girlfriend Sabrina Pick and another friend Chelsea Chisholm some time after finishing his work. All three went to Sicilian Pizza to get some food. His evidence was that the girls went in before he did and when he entered he found a guy talking to his girlfriend and she was a bit upset. It appeared that the guy was coming onto her. He confronted the fellow verbally and said “fuck off, this is my girlfriend”. He could not recall the fellow’s response. There was no physical altercation and he did not recall any threats. He paid for the pizza that had been ordered. He had a few more words for the fellow as he and his group were leaving. He stated he was probably cursing and that the conversation between them continued to be heated.

[28] As they were leaving he noticed a fellow standing outside eating a piece of pizza. He believed he had a cast on. He stopped and told this man to “check your boy”. He assumed this man was with the fellow who had come onto his girlfriend.

[29] He and the two women walked toward Spring Garden Road and when they reached the library steps he heard shouting coming from behind them. He turned and saw the fellow who had been inside the pizza shop, the man who had been outside and a third man. He could not recall what they were shouting, but said that it was nothing nice. He told them to fuck off and his girlfriend told the men to go

home while Chelsea was telling him and his girlfriend that they should go home. He stated that one man ran up from the group and punched him in the face. He did not believe he had any warning that he was going to be hit and said he did not quite remember exactly what happened because it had been so long ago. It was one of the three men who struck him. He did not believe it was the guy that he had exchanged words with in the pizza shop or the guy outside the pizza shop, but he was not 100% sure. He stated that the three were at the bottom of the path when the fellow broke away from that group, ran towards him and punched him. The bottom of the path is on Grafton Street and the library steps where Mr. McKay says that he was is approximately a distance of 100 feet, more or less.

[30] He next described the group of three men as being five to six feet away from him and the two women. The men were taunting them. He testified that at this point he was afraid and he reached into his pocket, took his keys out and put them between his fingers and went on the offensive because he felt there was no safe way to retreat. His belief was that the three in his group would not make it home. He believed that the men would continue to fight or taunt them. He decided to go on the offensive when the men were five to six feet away and picked the fellow who had punched him. The two other men were standing next to this fellow. He hit him with his fist which had the key in it. He believed that he made contact with this man's back or his head, but did not recall how many times he struck him. He could not recall what the other men did but he heard the girls screaming and turned his head. He was then cold cocked in the face by the guy with the cast who struck him with the cast. This knocked him right out. He next recalled hearing things, opening his eyes and seeing a foot near his face before it connected and knocked him out. He recalled that the foot was coming directly toward the centre of his face and knocked him out for a second time.

[31] Mr. McKay described the man who punched him in the face as being heavier and stalkier and having dark hair. There was nothing to distinguish that man from the other two. One of the other two had lighter hair and the third had a cast on. He stated that it was not the man with the light hair or the man with the cast who hit him first.

[32] Mr. McKay could not identify any of the defendants in court.

[33] Mr. McKay, on direct examination, was shown photographs taken of him sometime after he had surgery. In describing one photograph which showed his

face and neck he referred to the red or brownish-red substance on his neck and upper chest area as being a bruise caused by the blows inflicted on him. He stated that the injury shown on that photograph did not require medical attention but that it hurt. He agreed that in a conversation with the prosecutor, one week before trial he indicated, at that time that he sustained no injuries to his neck. It was Dr. Sigurdson's evidence that the colouration around Mr. McKay's neck was likely iodine or some such substance used in preparing a patient for surgery.

[34] In cross-examination he agreed that he was upset and angry when he told the fellow in the pizza shop to fuck off. He could not recall what that fellow's response was.

[35] He assumed that the man standing outside the pizza shop was with the man inside with whom he had a verbal confrontation. He had never seen any of the three men before that night and could not identify the three defendants as being those three men. He could not recall any facial features of any of the three men and the only description he provided was that one had lighter coloured hair, the other had a cast on and the third was stalkier with dark hair.

[36] He stated that he and his group had reached the library steps when they first heard shouting at which point he turned and saw the group of three men at the base of the walkway leading to the library. Words were exchanged and he told them "fuck off faggots".

[37] Some days after the incident and after surgery he gave a statement to the police. He agreed that certain things in his statement were left out, such as using his keys as a weapon. He attributed this to being under a lot of medication and in considerable pain at the time the statement was taken. In that statement he described the exchange of words between the two groups as being "heckling".

[38] His evidence was that he heard the three men when he was at the library steps and they were at the base of the walkway. He turned and faced them. He described the entire incident as being a bit "hazy" and that to the "best of his recollection" he was punched first. He could not recall who punched him and suffered no injuries from that punch. He described putting the keys in his right hand and charging into the group and swinging at the fellow who hit him. Mr. McKay in his statement to the police indicated that he was swinging wildly at the two guys in front of him. The altercation lasted approximately fifteen seconds

from the time he charged in the group until he was knocked out. He could not say if any of the three men struck either of the two women who were with him.

[39] His evidence regarding the presence of other patrons at the pizza shop was that only Sabrina and Chelsea and the one fellow who spoke to Sabrina were in the shop when he entered.

[40] His evidence at trial was that he told the fellow who had been hitting on his girlfriend to “fuck off”. In his statement to the police he said that he told the guy “I don’t appreciate what you are doing”. He agreed that his statement to the police was an understatement of what he actually said to this fellow. His evidence was that when he entered the pizza shop his girlfriend had already ordered. She appeared physically shaken up and when the pizza came he paid for it. He could not recall where Chelsea was during the time he was in the pizza shop. His evidence at the preliminary inquiry was that the girls were physically shaken.

[41] He agreed that he expressed his anger verbally at the fellow who hit on his girlfriend and made a final derogatory comment to him before he and the girls left the pizza shop.

[42] Mr. McKay agreed that the events in front of the library occurred very quickly. The incident there was in his words “pretty much a blur”. In describing his attack while armed with the key, he stated he landed blows to the guy and they grappled with each other. While they were grappling he heard something, turned his head and then was struck in the face by what he believed to be a cast. He could not recall seeing a cast hit him in the face. He fell down but did not know how he landed or on what side he landed.

[43] Mr. McKay agreed he discussed the incident numerous times with his girlfriend Sabrina Pick and their friend Chelsea Chisholm. He also agreed that it was possible that Sabrina and Chelsea discussed in his presence how they believed the incident happened. He testified the incident was also discussed with other persons. He acknowledged he was told a lot of things by Sabrina and Chelsea including that he was kicked in the face.

[44] He said that when he was knocked unconscious and fell to the ground it was near the library steps and that he only regained consciousness long enough to go back into unconsciousness.

[45] Chelsea Chisholm testified she went to the Kyber Club with Sabrina Pick at about 11:00 p.m. and left at 12:30 to 12:45 a.m.. She consumed four to five bottles of beer. Ms. Chisholm testified in direct examination about being at the Sicilian Pizza Shop with Mr. Mckay and Sabrina Pick and witnessing a guy hit on or flirt with Sabrina Pick. She said the complainant told the man she was his girlfriend and to leave her alone. The man turned to his friend and said something like this guy wants to fight. A man, whom she believed was with these two men, left the shop. She went outside and spoke to him. She told him words to the effect that the complainant was drinking and wanted to be a man sticking up for his girlfriend. The man she spoke to told her he did not want to fight.

[46] The complainant and Sabrina then exited the shop and she walked with them to go home. When she and her friends were near the entrance to the library walkway on Grafton Street she heard hollering. The complainant yelled back “fuck off you faggots”. The other group shouted back something she could not make out. By the time her group reached the library steps she noticed the three men from the pizza shop speed walking towards them. She asked the fellow in the navy shirt what they were doing and she was hit on the side of the face. She fell to the ground. She identified the defendant Hemeon as being the person who hit her. She saw no one in her group being struck before she was. She was knocked unconscious. She did not get up. Her next clearest memory was of seeing the fellow who hit her on top of the complainant, holding him by the shirt with one hand and punching him in the face three to four times.

[47] She saw the blonde guy just standing there a few feet away from where the complainant was being beaten. Hemeon stopped and it appeared the complainant was unconscious and that the men would walk away. She then saw the blonde fellow take two to three steps and kick the complainant in the face.

[48] The three men walked away. As they were passing her she got up and was screaming and holding her jaw. She went to a police officer who was at the Spring Garden Road end of the walkway and pointed out three men. The officer told them to stand by the police car.

[49] She also testified to having a brief memory of the man with the cast swinging the cast at the complainant but she did not see it connect.

[50] Sabrina Pick was the complainant's girlfriend at the time of the incident. She testified in direct examination that she and Chelsea Chisholm went to the Kyber Club between 11:30 p.m. and 12:00 a.m. on October 8th. They left with the complainant at approximately 1:15 to 1:30 a.m. During that one and a half to two hours she had three or four drinks of vodka and orange juice. Her group went to Sicilian Pizza where she noticed approximately 20 people already present. While standing in line to get a slice of pizza she said that one guy started talking to her and flirting with her. The complainant heard him and told the fellow to leave them alone. She stated that in order to avoid a confrontation she told the complainant that they should leave. She was not outraged or bothered by the comments made to her by the person who was flirting with her, however the complainant was not appreciative of the fellow flirting with her. She described the flirt as having darkish blonde hair and wearing a light blue plaid button up shirt. She could not recall what the complainant said to the flirt, nor could she recall his response but thought it was something which indicated to her that there would be trouble. Her evidence was that the three to four drinks she consumed might have made her happy, but she was not on the road to being drunk.

[51] She and her group headed toward the library. She believed some words were exchanged but she could not say what or who said them. When her group was close to the front of the library they turned around and noticed the flirt and two other guys walking briskly towards them. She could not recall if there was an exchange of words and said that it happened so fast that the details were not that specific.

[52] Her evidence in chief was that she remembered seeing the three men all punch the complainant. She then testified she was not sure if all three punched him but they swarmed the complainant and he fell to the ground. Her evidence was "I didn't really see most of the fight since I was restraining one of them". She stated she looked over at one point and saw the complainant on the ground and he was getting kicked in the head, she believed by two men. She did not remember the specific details of who threw the first punch. She said that she was physically restraining one of the men from going back towards the complainant. She first restrained the fellow after the complainant was down.

[53] In direct examination she also said either one, two or three people who swarmed the complainant hit him and he went down. She could not identify the fellow who was flirting with her or the other two, but described them as follows:

the flirt was 5'11", 150 to 160 pounds with a light blue plaid button up shirt. The second fellow had a cast on his arm with dark skin and dark hair and she thought he was of some ethnic origin. She had no recollection of the third man's appearance.

[54] Ms. Pick in cross-examination agreed that she, the complainant and Chelsea Chisholm related the incident to each other numerous times in each other's presence and that they had discussed the incident with others. Her evidence was that the three in her party entered Sicilian Pizza at the same time. In cross-examination she described the complainant's reaction to the flirtation in Sicilian Pizza as being mildly annoyed. However, in her statement to the police given a short time after the incident, she said that the complainant was "pissed off". She denied that the complainant was yelling or swearing when in the pizza shop, but agreed that the words she used in her statement to the police were that "Mark got pissed off and told the guy to fuck off".

[55] She stated that she could not remember the details of the incident but recalled the complainant being punched, however she did not know where he was punched or by whom. She did not see Chelsea Chisholm get struck.

[56] Her evidence concerning the incident was that she saw the three guys around the complainant, fists started going and the complainant fell to the ground, but she did not see the fists connect. She was not sure how many of the three men were throwing fists. She had never heard prior to trial of the complainant putting keys in his fist and punching with them. She never saw the complainant swinging with the keys between his fingers. While she was restraining one of the three men she looked over and saw the complainant being kicked while on the ground. She could not remember where he was kicked or by whom. In her statement to the police she said nothing about the complainant being kicked. At trial, while describing what she saw while restraining one of the three men she stated "in the one half second I looked, I might have seen two to five kicks".

[57] She was asked in cross-examination at trial about a police officer helping her to identify the defendants by looking through the courtroom window prior to the preliminary inquiry and she denied that this had occurred. Her evidence at the preliminary inquiry was that this had occurred. Later on, while being questioned at the preliminary inquiry on this issue, she changed her evidence from being told by the officer to being told by Chelsea Chisholm who had been told by the officer.

[58] The Crown called three independent civilian witnesses: Jason Bailey, Travis Teakle and Gregory McConnell who saw bits and pieces of what occurred.

[59] Jason Bailey went to Sicilian Pizza in the early morning hours of October 9th, 2003 with his two friends Travis Teakle and Gregory McConnell. Mr. Bailey testified the pizza shop was pretty busy. Outside he observed two groups yelling back and forth. When the complainant's group was at the entrance to the library walkway on Grafton Street three men who were by the church, approximately one block away, started running. Mr. Bailey and his friends then ran up the hill by the church to get a better vantage point. By the time they got to a position where they could see, the complainant was on the ground. Mr. Bailey said two men were beating him and kicking his face and head. He recalled the kicking and when he saw this he ran down to where the complainant was. At that point more people arrived. He could not identify the men who were doing the kicking, had never seen them before and could not point them out as being in court. He referred to the argument between the two groups as being loud and harsh. He saw the complainant on the ground with a key sticking out between the fingers of his hand. He described two individuals in the following fashion. One was middle aged and had gray hair and the other had a plaid shirt. He agreed that the lighting was dim and he could not make out any facial features. He could not say if all three males were yelling.

[60] In his statement written in point form that evening he indicated that three men kicked and punched the complainant and the complainant then fell to the ground. The three were kicking and punching the complainant in the head, however in his testimony at trial he indicated that by the time he and his friends made it up the hill to where they could see, the complainant was on the ground and two men were beating him.

[61] He testified at trial that as the three men who were chasing the complainant's party ran by him, one man picked up a branch on the ground which was approximately two inches in diameter. This was not included in his statement to the police. At trial his evidence was that he saw the complainant on his back on the ground but did not know what caused him to fall to the ground. Other witnesses referred to the complainant as being face down. In his statement he wrote that he saw the three kick and punch the complainant and the complainant fall to the ground. However at trial he could not remember seeing the complainant

being kicked and punched while he was standing. He indicated in his statement that the three males were kicking and punching the complainant in the head however his evidence at trial was that only two were kicking. He agreed that he and his friends discussed the incident after it happened and that each told the other what they had seen.

[62] At trial he was uncertain if he saw a girl being hit in the face and recalled only that she was holding her face yet in his statement he wrote that one girl was hit in the face.

[63] He saw food on the ground in the vicinity.

[64] Travis Teakle recalled seeing the two groups of people yelling back and forth but he did not know who initiated it. He testified that from the vantage point he and his friends had on top of the hill he saw the complainant fall to the ground with three guys around him and one guy kicked him in the face. He confirmed that the complainant had a key in his fist. He could not describe any of the three who were present or recall their clothing. His statement was written approximately fifteen minutes after the police arrived. He did not know what caused the complainant to fall to the ground and could not see who hit who. He could not say who kicked the complainant.

[65] Gregory McConnell was with Mr. Teakle and Mr. Bailey. He, unlike his friends, had a couple of drinks before going out to the pizza shop. He testified that there were some things that he did not remember until he read his statement. He described the complainant as yelling over his shoulder and described how he and his friends slowly walked to the direction of where the yelling was coming from. He saw the complainant on the ground and said he was kicked in the head, however he did not see who kicked the complainant but just it was one of the three men he had seen earlier on. He was unable to make any identification of the defendants. He did not see what caused the complainant to go to the ground or how long he had been on the ground before he arrived. His evidence was that when he and his friends arrived the fight was already over. He did not recall going to the top of a hill to get a better view. He described the complainant as being on the cement walkway. He did not see who did the attacking and says that it was dark and he was unable to make out any facial features.

[66] Constable Carolyn Smith arrived at the scene with her partner Constable Christina Martin when the incident was over. She testified that she and Constable Roulston tried to locate the scene of the event so that photographs could be taken. They travelled along the walkway and on the walkway approximately midway down from the library steps toward Grafton Street she noticed what she believed to be spots of blood on the concrete and some on the grass. No photographs were taken.

[67] She was also the officer who took a statement from Sabrina Pick. There was nothing in Ms. Pick's demeanor to indicate that she could not convey information. She had no concerns about Ms. Pick's ability to give a statement.

[68] Constable Christina Martin's involvement in this investigation was to provide statement paper to several witnesses whose names she did not get. She could not recall how many statement forms she gave out. She did not collect the statements once they were completed. She agreed that in most instances a police officer would sit with a witness and take their statements, however that did not occur in this case.

[69] She took a statement from Chelsea Chisholm and did not note any injuries to Ms. Chisholm. Her evidence was that while at the scene she spoke to Chelsea Chisholm who indicated to her that she had been struck by a male in a plaid shirt.

[70] Constable Roulston was the first officer on the scene. He was approached by Chelsea Chisholm who told him that she had been struck in the jaw by a male who wore a blue and white checked shirt.

[71] He described the scene as chaotic when he arrived. One or more of the three defendants told him they were defending themselves. He asked them to go stand by the police vehicle which they did. All of them were cooperative and did not attempt to flee. He testified that a lot of people were coming up to him and talking at the same time. His evidence was that Chelsea Chisholm never mentioned anything about the complainant being hit. She only talked about herself being hit.

[72] Constable Roulston denied he assisted either Chelsea Chisholm or Sabrina Pick in identifying the defendant at the preliminary inquiry. His evidence was that he took the complainant's mother to the courtroom window and pointed out who the three defendants were because she wanted to know.

[73] No photographs were taken. The scene was not secured because the identification section was not working that evening. There was nothing done to obtain any physical evidence from the scene and he did not check any of the defendants for injuries.

[74] He denied Lieutenant Hanna told him that the fellow with the cast on, had blood on his cast or blood on his shoes. Constable Roulston indicated that if he had been told this he would have looked at the cast. He did not look for nor did he see blood. He would have remembered if Lieutenant Hanna had told him anything about blood. He denied that any of the three defendants made any comment in his presence to Lieutenant Hanna that could be construed as a threat.

[75] His evidence was that Chelsea Chisholm did not tell him that she saw the complainant get kicked in the head.

[76] He was the officer who took a statement from the complainant on October 15th, 2003. He stated that if he had had any concerns about the complainant's ability to give a statement he would have waited before taking the statement. He denied that he pressured the complainant into giving a statement at that time. The complainant did not tell him that he was under the influence of medication and could not give a statement when he did.

[77] He described the three defendants as being very cooperative. They did not appear drunk in any way. They told him at the scene that they had done nothing wrong and said something about acting in self defence. As a result of speaking with Sabrina Pick at the scene he arrested and charged the three defendants with assault causing bodily harm.

[78] Photographs introduced as **Exhibits 9, 10 and 11** were taken at the police station when the defendants were booked that evening.

[79] The evidence given by Constables Fairbairn and McKinnon on a *voir dire* was made part of the trial with the consent of counsel. These officers were the two who placed the three defendants in the paddy wagon.

[80] Constable Fairbairn recalled that Mr. Blades had a cast on and that handcuffs could not be put on him due to the cast. He noted no blood on the cast, and if he

had seen some he would have made note of it. Constable Fairbairn described the three defendants as being very cooperative.

[81] Constable McKinnon also did not see any blood on the cast and if there had been some he would have made note of it.

[82] Constable Roulston testified the three defendants would not have had time to shave after they were arrested and before **Exhibits 9, 10 and 11** were taken.

DEFENCE EVIDENCE:

[83] All three defendants presented evidence. The defendant, Hemeon, testified. The defendant, Blades, lead evidence of good character and the defendant, Hood, presented a private investigator who introduced photographs of the area where the incident was alleged to have occurred.

[84] The defendant, Hemeon, testified that he and Hood were in Halifax having come from Yarmouth to purchase a car. In the evening they went out with the defendant, Blades, his first cousin, whom he had known his entire life. He referred to Mr. Hood as being a long-time friend. They watched a World Series game at a bar and he consumed four to five beer between 10:00 p.m. and 1:00 a.m. His friends also consumed some beers during the same period. The three then went to Sicilian Pizza to have some food before going home. There were quite a few people there. While in the shop, he heard the complainant curse at someone, who he then realized was Mr. Hood, to leave his girlfriend alone. He testified Chelsea Chisholm and Sabrina Pick took the complainant out of the pizza shop, and that the complainant cursed some more on the way out.

[85] Hemeon and the two others got some pizza and left. They decided to eat their food on the benches by the Public Library. When they reached the walkway leading from Grafton Street to the front of the library, he heard cursing directed at his group. The complainant was calling them “fucking faggots” and was, in Mr. Hemeon’s, terms “pissed off”. Both groups were walking towards each other and he next recalls the complainant coming at his party. Chelsea Chisholm was in front of the complainant and she fell to the ground as he came towards Mr. Hemeon. He did not know if Ms. Chisholm was pushed or hit by the complainant.

[86] The complainant went at Mr. Hood, who pushed him off and he then went after Mr. Hemeon. Mr. McKay was swinging and had something in his fist. He believed it was a knife. Mr. McKay grabbed his right shoulder with his left hand and was swinging at Mr. Hemeon with his right. Hemeon was bent over to his right side trying to keep his face away. He said he was hit four to five times in the back of the head and neck, and the last blow to the neck cut him. He swung and hit the complainant in the face on his left side. The complainant fell to the ground.

[87] He denied that he, Mr. Hood and Mr. Blades were running toward the complainant. He said their hands were full of food and it would have been difficult to do that.

[88] He placed the encounter as occurring closer to Grafton Street than the front steps of the library. After the complainant fell to the ground he did not move. Mr. Hemeon walked away. He saw Hood being blocked and punched by Sabrina Pick. Mr. Hemeon then went to Spring Garden Road where he spoke to a police officer and told him he was attacked. A short time later Chelsea Chisholm arrived, saying that she had been hit. Mr. Hood and Mr. Blades were then at Spring Garden Road and the officer told them to stand by his police car. There was nothing preventing him and the others from leaving, but they stayed. They were then arrested and taken to the Police Station. He was never asked if he wanted to give a statement.

[89] He did not see any blows to the complainant, nor to Chelsea Chisholm. He denied kicking the complainant and denied that there was any agreement between him and his friends, Hood and Blades, to go and get the complainant. He maintained that the complainant came toward his group and directed his first blows at the defendant, Hood, who pushed him off. His evidence was that he was the only one who fought with Mr. McKay. He described his co-defendant, Blades, whom he has known all his life, as a “Momma’s boy”.

[90] His testimony was that the mark or injury on the defendant, Hood’s, forehead, shown in **Exhibit #9**, was not present before the altercation and neither was the swollen left upper lip.

[91] In cross-examination, he recalled the defendant, Hood, saying nothing in response to being told by the complainant to “fuck off” while they were in the pizza shop. He did not recall Mr. Hood, saying something like “this guy wants to

fight”. He says it was a few minutes after the complainant left the pizza shop that he and his group did.

[92] When he and the two others reached the walkway, the complainant’s group was proceeding towards them with Chelsea Chisholm in the front of the group, trying to get the complainant and Sabrina Pick to stop and to go home. The complainant was pissed off. Mr. Hemeon and his group kept walking knowing that they were going to meet. He said that he first heard shouting when he and the two others reached the walkway entrance at Grafton Street. He did not recall his group yelling back at the complainant.

[93] Three witnesses were called on behalf of the defendant, Blades, to give evidence of good character. Todd Bethune, the defendant’s brother and two co-workers, David Reid and Randy Bain.

[94] Mr. Reid testified that the defendant, Blades’ general reputation in the work community was good and that he had never heard anyone say anything bad about the defendant. He would have been shocked to hear of any suggestion of the defendant being part of a group assaultive behaviour.

[95] Randy Bain, as well as being a co-worker of the defendant, Blades, was also a classmate of his for 12 months at a computer college. His evidence was that in the school community the defendant did not have a reputation for assaultive behaviour.

[96] Mr. Bethune testified that his brother did not have a reputation for assaultive behaviour. His reputation in the general community was that it would not be normal for him to be aggressive or assaultive, and that the same could be said even if the defendant had been drinking.

[97] The evidence presented on behalf of the defendant, Hood, was from Mr. Fred Fitzsimmons, a private investigator , who took photographs and measurements in the area where this incident was alleged to have occurred. The photographs showed the concrete walkway and the adjacent cobblestones. The photos depicted a difference of approximately one inch in elevation between the concrete walkway and the adjacent cobblestones. The photographs and measurements were taken on June 12th , 2005. The distance from the area in front

of the library steps to the start of the walkway leading to the library steps measured in excess of 100 feet.

LAW AND ANALYSIS

[98] In weighing the evidence the Court must be mindful that it is a common occurrence that witnesses see and hear things differently. Discrepancies do not necessarily mean that testimony must be wholly discredited. Discrepancies in small or unessential matters may be and usually are unimportant. On the other hand discrepancies and inconsistencies relating to essential matters are important. I am not obliged to accept everything a witness says or conversely if I feel I cannot accept part of what a witness says, I am equally not obliged to reject the whole of that witness' testimony. I may accept the whole, none or part of a witness' evidence.

[99] Mere discrepancies may easily and innocently occur in light of prevailing circumstances. A deliberate falsehood on the other hand is an entirely different matter. It is nearly always serious and may well taint the whole of a witness' testimony.

[100] In weighing the testimony of the witnesses I am obliged to consider human factors which may affect the giving of perfectly honest evidence. These factors may be phrased in the form of the following questions: (1) Did the witness have any particular reason to assist him or her in recalling the precise event that he or she attempted to describe? (2) Could the witness, because of the turmoil surrounding the event at the time it occurred, have been easily or understandably in error as to detail, or even as to the time of the occurrence? (3) What real opportunity did the witness have to observe the event? Where was he or she when the event happened? Was it a situation of panic or a relatively calm period and how would that affect recollection? If the witness' recollection was recorded when were the notes made? (4) Did the witness have any interest in the outcome of the trial or any motive for either favouring or injuring one side or the other or was the witness' evidence entirely independent? (5) What was the memory capacity of the witness? What was the appearance and demeanor of the witness in the witness box? Was the witness forthright and responsive to questions or was the witness evasive and hesitant? Was the witness argumentative? (6) Was the witness' testimony reasonable and consistent within itself and with the uncontradicted facts.

[101] I am not bound either to decide an issue in conformity with the testimony of the largest number of witnesses if it does not prove convincing to the mind either itself or as against declarations and testimony of a smaller number of witnesses or other evidence which appeals to the mind with more convincing force. The testimony of any one witness who is found to be believable and credible is sufficient for the proof of any fact that must be established beyond a reasonable doubt.

[102] In finding the facts in this case the whole of the evidence must be considered and weighed. There are no facts until certain evidence is accepted as believable, as credible, as truthful.

[103] The fundamental principle applicable to this and all criminal trials is that the defendants are presumed to be innocent until the prosecution has proven their guilt beyond a reasonable doubt. It is not the responsibility of any defendant under our law to demonstrate, establish or prove his or their innocence or to explain away the allegations made against him or them. The onus always rests with the Crown to prove guilt beyond a reasonable doubt.

[104] The onus resting upon the Crown to prove the guilt of the defendants beyond a reasonable doubt is inextricably linked to the presumption of innocence. The standard of proof beyond a reasonable doubt is higher than the standard applied in civil actions of proof based on the balance of probabilities yet it is less than proof to an absolute certainty. As the prosecution burden of proving the guilt of the defendants beyond a reasonable doubt is inextricably linked with the presumption of innocence it never shifts.

[105] A reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence. A reasonable doubt is not one based on sympathy or prejudice, nor is it one which is imaginary or frivolous. Proof establishing the probability of guilt is not sufficient to establish guilt beyond a reasonable doubt. It is not proof beyond a reasonable doubt when guilt is suspected. A reasonable doubt must be based upon the evidence or lack thereof and as well must be in respect of an essential element of the offence and not in respect to an unessential matter.

[106] In the present case the Crown must prove beyond a reasonable doubt the following essential elements: the identity of the defendants as the offenders, the

time and place of the offence as set out in the indictment, that the defendants applied force directly or indirectly to Mr. McKay and Ms. Chisholm, that they intended to apply force, that Mr. McKay and Ms. Chisholm did not consent to the application of force and that the defendants knew that they did not consent and with respect to the count relating to Mr. McKay that the assault by them caused bodily harm to Mr. McKay and that a reasonable person would inevitably have realized that such an assault would subject him to the risk of bodily harm.

[107] Section 265 of the **Criminal Code** defines assault as the intentional application of force to a person directly or indirectly without that person's consent or an attempt or threat by an act or gesture, to apply force to another person if the defendant has or causes that other person to believe upon reasonable grounds that he has the present ability to effect his purpose. Section 265(1)(c) is not applicable in these proceedings.

[108] The Crown with respect to the charge of assault causing bodily harm alleges that all of the defendants were parties to this offence. Section 21(1) of the **Criminal Code** states as follows:

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.

[109] Section 21(2) states:

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.

[110] A person commits an offence if he alone or along with somebody else or others personally does everything necessary to constitute an offence. This is what is required to be convicted as a principal.

[111] A person also commits an offence if he does anything or fails to do anything that it is his duty to do for the purpose of helping another person to commit the offence.

[112] Anyone who actively encourages somebody else to commit an offence is as guilty of the offence as the person who actually commits it.

[113] A person may also commit an offence by being involved with others in a joint criminal enterprise. If anyone of the group commits an offence in carrying out their original enterprise, any other member of the group who knew or should have known that the offence would likely be committed by a group member carrying out their original design is guilty of the offence the other person actually commits.

[114] In the present case the Crown argues that each defendant was a party to the offence of assault causing bodily harm either as a principal in which case each defendant would have to personally do everything necessary to constitute the offence or as an aider under s.21(1)(b).

[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.

[117] The Crown also seeks to impose liability on the basis of s.21(1)(c). In order to be an abettor there must be actual encouragement by words, conduct or both and the person who offers the encouragement must intend to encourage the other

person to commit the offence. It is not enough that what the abettor does or says has the effect of encouraging the other person to commit the offence. By what he says or does the abettor must also intend to encourage the other person to commit the crime.

[118] It is not enough that the person was simply there when the crime was committed by somebody else. Just being there does not make someone guilty as abettor of any crime the other person commits.

[119] If a person knows that someone intends to commit a crime and goes to or is present at a place to encourage that other person to commit the crime, that person who encourages is also guilty of the crime the other commits.

[120] Abetting relates a specific offence. An abettor must intend that the other person commit the offence or know that the other person intends to commit it and intend to encourage that other person to do so.

[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.

[127] In the present case the liability of any of the defendants under s.21(2) is not possible because if there was formed an intention in common to carry out an unlawful purpose, that unlawful purpose being an assault was not different than the offence committed. The common unlawful purpose must be different than the offence as each term is used in s.21(2). *R. v. Simpson* (1988), 38 C.C.C. (3d) 481 (S.C.C.). Accordingly s. 21(2) will not be considered as a basis for liability. In the event I am mistaken on this point I find a lack of any evidence on the elements of agreement and knowledge.

[128] Lieutenant Hanna's evidence at trial was that he saw some punching, however when he testified at the preliminary inquiry he said nothing about punching.

[129] In his statement to the police Lieutenant Hanna did not write that he saw anyone kick the complainant. Instead he used the word "beat". He acknowledged a difference between punching and kicking. He knew the word "kick" when he wrote his statement but did not use that word.

[130] He did not see what started any physical altercation, nor did he hear anything the complainant may have said or done. He did not see the complainant swinging wildly or lunging at anyone or having a key sticking out between the fingers of his clenched fist.

[131] In cross-examination he acknowledged that he could not say he saw the fellow, whom he described as wearing a blue shirt kick the complainant, however he said in direct that he saw the three kicking at the man.

[132] He described the complainant as lying on his right side with the right side of his face being on the ground.

[133] It is obvious that Lieutenant Hanna had a limited opportunity to observe what he testified to at trial. He came upon the scene after things had started. It was one and a half to two minutes after seeing three males running from the pizza place that he arrived at the area where he saw the male on the ground.

[134] The statement he gave to the police was given at a time when the events were freshest in his mind and it is telling that his statement took only a few minutes to write and was completed in the presence of Sergeant Ouellette and after discussions with Sergeant Ouellette. He could not identify any of the three defendants as the men who he says were beating and kicking the guy on the ground. His evidence was that the female was struck in the face after the male was on the ground being kicked and beaten.

[135] At trial he described the man on the ground as facing south, however at the preliminary inquiry he could not tell what direction the man's head was facing. Another Crown witness Chelsea Chisholm described the complainant as facing northeast.

[136] Lieutenant Hanna's evidence, given the various discrepancies in it and his willingness to embellish what he saw at the scene, is unreliable. I do not accept that he saw three males kicking the complainant nor do I accept his testimony about seeing blood on the cast and pointing that out to the Constable Roulston. I do accept Constable Roulston's evidence that he saw no blood on the cast and that Lieutenant Hanna did not point out blood to him. Blood on the cast would have been a crucial piece of evidence which any trained and experienced police officer would note and record. Constables Fairbairn and McKinnon also did not see blood on the cast. Both testified they would have made note of it had they seen it. I also do not accept that the man wearing the cast threatened Lieutenant Hanna in the presence of a police officer. The fact that Lieutenant Hanna was prepared to testify under oath about things that he did not see or hear taints the entirety of his evidence. Little, if any, weight can be attached to his evidence.

[137] Sergeant Ouellette's evidence, although appearing to be credible, is unreliable. His statement written less than one half hour after the incident was minimal in terms of the details contained in it. It was written while he and Lieutenant Hanna were together and discussed what they had seen. His evidence at trial was inconsistent with his statement to the police in particular when he referred at trial to seeing three to four people kicking the complainant in the face. He testified at trial that his statement was "somewhat similar to his recollection". Although both he and Lieutenant Hanna were together and saw the same thing, their evidence is quite different. Sergeant Ouellette testified that the complainant was on all fours when he was being kicked, but Lieutenant Hanna testified that the complainant was lying on the ground when being kicked.

[138] Sergeant Ouellette testified at trial that he saw a female get punched, however there is nothing in his statement about seeing a female being hit just that he saw her holding her face. At trial he testified that it was the fellow wearing the plaid shirt who hit her, however no reference was made in his statement to a fellow with a plaid shirt. As well there are no references in his statement to kicking, but in his testimony at trial he referred to kicking.

[139] Sergeant Ouellette's evidence was inconsistent within itself. For example, he testified that he saw three or four fellows who were kicking the complainant, but saw only two kicks. He described what he observed as lasting at most five seconds. He was mistaken as to the location where he and Lieutenant Hanna were

eating. He was prepared to testify about things that he did not record in his statement nor did he disclose to the Crown in a pre-trial interview. For example he did not tell the Crown when interviewed before trial that he saw any kicking, nor did he write in his statement that he saw any kicking. However, he testified at trial that three or four people were kicking the complainant in the face. His evidence went from three to four people kicking the complainant to seeing only two kicks and then to agreeing that it could have been one person administering two kicks.

[140] It is obvious from Sergeant Ouellette's evidence at trial and the inconsistencies in his evidence that he was prepared to add things which he did not observe. Sergeant Ouellette's statement given shortly after the events and at a time when the events ought to have been freshest in his mind was minimal. He indicated in redirect examination that he was trying to get into the statement everything he could remember. It is obvious that Sergeant Ouellette could remember little at the time he gave his statement, yet was prepared to testify to much more at trial. It would be dangerous to attach any weight to Sergeant Ouellette's evidence.

[141] The following facts arise from the evidence presented: the incident happened quickly and the scene at the time was chaotic.; the lighting in the area was dim; both groups were exchanging unpleasanties in the area of the walkway.

[142] The exchange outside the pizza shop began when the defendants were near the Sicilian Pizza Shop and the complainant and his group were on Grafton Street near the beginning of the walkway leading to the library.

[143] The police investigation, if that term can be used, was incomplete. No photographs of the scene were taken, no measurements were made and no physical evidence was collected. The police never interviewed or questioned the defendants to obtain a statement containing their version of the event. One officer at the scene, after speaking with Ms. Chisholm, Ms. Pick, Lieutenant Hanna and Sergeant Ouellette, arrested the three defendants on a charge of assault causing bodily harm. Most, if not all, witness statements taken were the result of the witness being given a witness statement form and told to fill it out.

[144] The complainant, Sabrina Pick and Chelsea Chisholm, all consumed sufficient alcohol to impair their judgment. The witnesses Hanna and Ouellette had also consumed alcohol as had all three defendants.

[145] The complainant was upset and cursing at the defendant, Hood, while inside Sicilian Pizza and as he left the pizza shop. Sometime later, both parties began to exchange derogatory comments. A confrontation occurred on the walkway near the library. The complainant was upset about things that had been said to his girlfriend inside the Sicilian Pizza shop. Ms. Pick was not upset or outraged by these comments.

[146] Mr. McKay, when giving his statement to the police, was prepared to downplay his aggressiveness. He told the police what he said to the fellow in the pizza shop was “I don’t appreciate what you’re doing” when really what he said was “fuck off”. He described to the police the words which he used when near the library steps as being “heckling” when in fact he was saying “fuck off you faggots”. He did not tell the police that he had keys between the fingers of his fist before charging into the group of three men and swinging wildly with both hands. He acknowledged that he was not as honest as he could have been in giving his statement to the police and that he never called the police back to point out any omissions in his statement.

[147] Mr. McKay’s independent recollection of the events in front of the library is questionable. He acknowledged being told a lot of things by Sabrina and Chelsea and his entire testimony, both in direct and cross-examination, was peppered with “I don’t recall”, “I think”, “I don’t quite recall”, “I don’t remember”, and “I don’t remember exactly what happened since it’s been so long, the entire incident is a bit hazy”, and “my recollection is a blur”.

[148] Mr. McKay’s lack of candour when giving his statement to the police, his questionable independent recollection of the events, coupled with his piecing together of information from various sources and his fabrication at trial about injuries that did not exist all affect the weight to be given to his version of how the incident developed and occurred. His evidence is unreliable and cannot form the basis of a conviction.

[149] Chelsea Chisholm was one of the women with Mr. McKay the night that this incident occurred. Her evidence, while appearing to be credible and honestly given, was questionable. She was in error as to the time when she and Sabrina arrived at the Kyber Club. She was mistaken when she said that she was punched in the face before anyone else in her group was struck. She stated that she fell to

the ground and did not get up right away. Her evidence was that she was in and out of consciousness, however there is no independent evidence of her falling to the ground and being unconscious. She testified that when she regained consciousness she viewed from ground level Mr. McKay on the ground a distance away. The guy who had hit her was on top of him punching him in the face three or four times.

[150] I accept her evidence in relation to Sabrina's reaction when she was hit on in the pizza parlour. Her evidence was to the effect that Sabrina just shrugged it off. This corroborated by Sabrina Pick who said that what the fellow told her in the pizza shop was not really a big issue and it did not outrage her or matter to her.

[151] Ms. Chisholm confirms that the incident happened quickly. Ms. Chisholm's powers of observations were affected by the four to five beer she consumed in a period of one to one and a half hours. Her evidence at trial was that Mr. McKay was not aggressive when he was in the pizza shop, however this is inconsistent with Mr. McKay's own evidence previously referenced and with what Sabrina Pick told the police the night of the incident. Ms. Pick told the police in her statement given shortly after the event that Mr. McKay was pissed off. Ms. Chisholm attempted to downplay Mr. McKay's aggressive behaviour and attitude while he was in the pizza shop. She told Mr. Blades outside the shop that Mr. McKay was drinking and wanted to be a man for his girlfriend. Ms. Chisholm testified that when her group had reached the start of the walkway from Grafton Street to the library, they heard yelling coming from in front of Sicilian Pizza and Mr. McKay yelled back.

[152] I also accept that when Mr. McKay was exchanging taunts with the defendants she told him to shut up. This evidence further bolsters a finding that the complainant behaved in an aggressive fashion from the onset of his contact with one or more of the defendants at the pizza shop.

[153] She stated on direct examination that a guy with a navy shirt was the one who hit her and she fell to the ground. She identified the defendant Hemeon as the one who hit her. Mr. Hemeon's shirt worn that evening was introduced as defence **Exhibit #15** and it shows that the shirt is not navy but rather a greyish plaid shirt with a white background. In direct examination she testified that when she woke from her state of unconsciousness she noticed Mr. Hemeon on top of the complainant who was on the ground and Mr. Hemeon was punching him in the

face three or four times. Mr. Hood was standing a few feet away from Hemeon and the complainant and when Hemeon stopped punching the complainant Mr. Hood, who she described as the guy with blonde hair, took two or three steps and kicked Mr. McKay in the head. She stated she saw the complainant's head bounce. Her evidence was that the three men started to walk away and then the police were there. She testified that she went over to the officer and pointed out the three who were involved and the officer put them near the police vehicle. Constable Roulston's evidence was that she only told him that she had been struck. She describes Sabrina Pick as being hysterical.

[154] In direct testimony she also testified as to having a brief memory of the guy with the cast swinging the cast at the complainant but she never saw it connect.

[155] The descriptions she gave of the three involved were one had blonde hair, spiky wearing a baby blue plaid shirt and he was the shorter of the three. He was fair skinned and had a little facial stubble. The second description was of a guy with a cast whom she thought was Arabic or Lebanese due to his hair colour and skin tone. He was chubby and approximately six feet tall. The third fellow she described as being approximately six feet tall or more, he was fit with short dark brown hair and a navy shirt. She then said she believed it was a navy plaid shirt and she thought he had facial hair.

[156] She agreed that she and Sabrina discussed the case and that Mr. McKay was present for some of those discussions.

[157] Ms. Chisholm's identification of any of the defendant is suspect given that she was never asked to view a lineup and more importantly because prior to testifying at the preliminary while waiting outside the courtroom she asked one of the police officer's who attended the scene the evening in question if the three defendants were inside the courtroom. She stated she and the police officer looked in the window and there were only three people inside and the officer told her that one of them wore a green shirt. She later on at the preliminary before testifying told Sabrina that the three were in the courtroom and where they were sitting. This was prior to either of them testifying at the preliminary inquiry.

[158] At trial she stated that she believed the fellow who hit her had facial hair, however **Exhibit #11**, a photograph of Mr. Hemeon taken the night of his arrest shows him without facial hair. Although she testified in direct examination that

Mr. Hemeon was the fellow she saw grab the complainant by the scruff of the neck and hit him, in her statement to the police she was not sure who did this. Her statement to the police was given that same evening approximately one hour after the incident.

[159] Although Ms. Chisholm testified at trial that she lost consciousness after she was struck in the face, she agreed in cross-examination that when she spoke to the paramedics at the scene she told them that she did not lose consciousness and also told a nurse at the hospital a short time later the same thing. In her statement to the police she indicated that she was hit and fell down and got up right away. She agreed that it was a traumatic event which happened quickly. She described her memory of the fellow with the cast swinging his cast at the complainant as being a clouded memory. Her identification at trial of the fellow with the blonde hair and a baby blue plaid shirt is not consistent with the photograph taken of that person by the police shortly after the event. In the photograph the person was not wearing a baby blue plaid shirt but rather a brighter blue sweater. Her evidence on direct was that it was a buttoned up shirt.

[160] Ms. Chisholm agreed that she and Sabrina told others about the incident and that this was done in the presence of the complainant. She and Sabrina Pick also told each other what happened numerous times. She stated there were numerous discussions between herself, Sabrina and Mr. McKay about the incident. Her evidence at trial showed inconsistencies with her evidence at the preliminary inquiry. For example, at trial she disagreed with the statement that the fellow who hit on Sabrina was not spoiling for a fight but her evidence at the preliminary inquiry was that he was not doing anything spoiling for a fight.

[161] Ms. Chisholm testified that in the numerous conversations she had with the complainant before the preliminary inquiry he never stated that he had put keys between his fingers and swung at the men with those keys.

[162] The most telling example of the unreliability of Ms. Chisholm's evidence came from a response she gave to the prosecutor on redirect examination. She was asked questions about the identification of the defendant through the courtroom window prior to the preliminary inquiry. When asked why she knew that the people in the courtroom were the assailants she described she stated "I knew they were the people because they were the only people there. If there had been more people in the courtroom it would have been harder for me to pick them out".

[163] Little, if any, of the Ms. Chisholm's evidence can be accepted as being reliable and truthful. I place no weight on her evidence at trial. There were significant discrepancies between Ms. Chisholm's description of the three defendants she defendant and the photographs introduced as **Exhibits 9, 10 and 11**. Ms. Chisholm, while at times appearing credible, was clearly mistaken as to many things, including the sequence of events.

[164] Serious questions were raised about the reliability and truthfulness of Ms. Pick's evidence, not only concerning identification but also concerning what she observed and actually recalled of the events of that evening. She was prepared at trial to change her evidence from the statement she gave to the police regarding the complainant's demeanor at the pizza shop. She and Chelsea Chisholm downplayed anything that might have suggested an aggressive behaviour on the part of the complainant. She testified at trial to seeing some kicking, however in her statement to the police given a short time after the incident she made no mention of kicking.

[165] Ms. Pick's evidence was inconsistent within itself. In direct examination she began by testifying that all three defendants struck the complainant. She then testified that it was one, two or three of the defendants who directed blows at the complainant. She further testified that in the one half second she looked over at the complainant she saw two to five kicks.

[166] Her credibility and reliability were seriously brought into doubt when she was asked and answered questions about how she came to identify the defendants at the preliminary.

[167] She displayed a somewhat carefree attitude in testifying and had little, if any, real recollection of the incident which led to these charges. Her evidence concerning the confrontation near the library has no probative value and is not accepted. Her testimony like that of Mr. McKay and Ms. Chisholm is suspect.

[168] The evidence of the defendant Hemeon is that he struck the complainant but did so in self defence. He testified the complainant first went after Mr. Hood who pushed him away and then he attacked Mr. Hemeon.

[169] The defence of self defence under s.34(1) and s.37(1) has an air of reality based on the complainant's aggressive behaviour inside the pizza shop, his continued engagement by directing unpleasantries at Hemeon's group once outside the shop and his admitted offensive thrust at the defendant's group while swinging wildly with both hands, one of which had a key clenched in it to be used as a weapon. These factors together with Mr. McKay's exaggeration of certain events and downplaying of others leads me to question the validity of his assertion that he was struck first.

[170] I am not satisfied that the prosecution has proven beyond a reasonable doubt that the defendant Hemeon was not acting in self defence when he admittedly struck the complainant.

[171] The defendant, Hemeon's, testimony and his credibility must be considered in light of the Supreme Court of Canada's direction in *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397, which requires that if the evidence of the defendant is believed, he must be acquitted; if his evidence is not believed, but leaves me in a reasonable doubt, he must be acquitted; and finally, if the evidence of the defendant is not believed, and does not leave me in reasonable doubt, I must consider whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt of the guilt of the defendant.

[172] While there may be some aspect of Mr. Hemeon's testimony that I do not accept, such as that it was only at the point when he and the other defendants reached the walkway near Grafton Street that he first heard the complainant curse at them and that the complainant was the first to do so. I cannot discount the entirety of his testimony. I am left in a state of reasonable doubt by his evidence. Accordingly, I find the defendant, Hemeon, not guilty of assault causing bodily harm on Mark McKay. I am also not satisfied of his guilt on the charge of assaulting Ms. Chisholm, and accordingly find him not guilty.

[173] I accept the evidence of Mr. Bethune, which indicates the defendant, Mr. Blades, has no reputation for assaultive behaviour, even when consuming alcohol, and that it is not normal for the defendant, Blades, to display aggressive or assaultive behaviour. Mr. Bethune's evidence qualifies as evidence of good character because it was based on information gained from people who live in the same community as the defendant, namely, his landlord and others in the building, as well as from others who socialized with the defendant, Blades, when he had

consumed alcohol. Mr. Bethune's extensive contact with family, friends and acquaintances of the defendant allows me to consider it as proper evidence of good character.

[174] The evidence of good character given by David Reid and Randy Bain carries little, if any, weight as it was based almost entirely on their personal knowledge and opinion of the defendant. Their evidence has not been considered in arriving at the verdict.

[175] Evidence of good character is admissible because it renders it less probable that what the prosecution has averred is true. *R. v. Barbour* (1938), 71 C.C.C. (1) (S.C.C.). This kind of evidence also renders it less probable that the defendant committed the offence: *R. v. Tarrant* (1981), 63 C.C.C. (2d) 385 (Ont.C.A.). Evidence of good character may itself raise a reasonable doubt. Such evidence should be considered together with all of the other evidence in determining whether the prosecution has discharged its burden: *R. v. H.(C.W.)* (1991), 68 C.C.C. (3d) 146 (B.C.C.A.).

[176] In considering the evidence against Mr. Blades, I am not satisfied that the prosecution has proven his guilt beyond a reasonable doubt. Even if I were to ignore the evidence of his good character, I would still be left in a state of reasonable doubt based on the insufficient and contradictory evidence against him.

[177] The guilt of the defendant, Hood, has not been proven beyond a reasonable doubt based on the totality of the evidence presented against him. Accordingly, I find him not guilty of the charge of assault causing bodily harm.

[178] The liability of all three defendants, either as principals or as parties, has not been established beyond a reasonable doubt. Accordingly, all three are acquitted of all charges.

Cacchione, J.