

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Comer, 2006 NSSC 217

Date: 20060706
Docket: CR 226993
Registry: Halifax

Between:

Her Majesty the Queen

v.

William Robert Comer and Michael Ryan Smith

Judge: The Honourable Justice Felix A. Cacchione

Heard: May 15-19, 23-26, 29-31, June 1- 2, 5-6, 8-9, 2006,
in Halifax, Nova Scotia

Written Decision: July 6th, 2006

Counsel: Frank P. Hoskins and Denise Smith, for the Crown
Brian F. Bailey, Q.C., for Mr. Comer
Stanley W. MacDonald, for Mr. Smith

By the Court:

[1] The accused William Comer (Comer) and Ryan Smith (Smith) are charged with manslaughter in the death of Robert (Bobby) Smith (the deceased). The charge arises out of a physical altercation which took place outside Busters Bar in Bedford, Nova Scotia in the early morning hours of July 17th, 2004.

[2] The theory of the Crown is that the accused Comer and Smith together with Jaret Hodgson left the bar with the intention of confronting the deceased about an incident involving Comer, the deceased, and a pitcher of beer which had taken place earlier on in Busters Bar. The Crown argues that Comer and Smith provoked the accused into striking the first blow so that they could then assault him and because of this provocation Comer and Smith were not acting in self-defence. The Crown's theory is that liability can be based on Comer and Smith both being principals to the offence under s.21(1) of the *Criminal Code* and also on the basis of a common intention under s.21(2) of the *Code*, although the latter theory was not pursued vigorously by the Crown. The factual situation of this case leads to the conclusion that liability under s.21(2) of the *Code* is not applicable and therefore will not be considered.

[3] The theory of the defence for both Comer and Smith is threefold. Firstly, it is argued that the totality of the evidence and in particular the evidence of Doug Durant raises a reasonable doubt that a second incident occurring after the first one involving Comer and Smith is the incident which lead to the deceased's death and therefore the Crown has not proven its case beyond a reasonable doubt. Secondly, both accused argued that they were acting in self-defence and did not use excessive force while so acting. Finally, that even if the Court were to find that some blows struck were more than necessary, the prosecution has still failed to prove that the unjustified blows caused the deceased's death.

[4] The totality of the evidence presented leads to the following findings of fact: Bobby Smith (the deceased) died from a subarachnoid hemorrhage caused by multiple blunt force trauma sustained in a fight. The blows he received to the head caused this global hemorrhaging. The head injuries were consistent with being punched and could have been occasioned in the course of a fight. There were three injuries to the upper forehead on the right side. The largest of which was above the right eye and measured 3 x 3 centimetres. There was also a bruise in the hairline approximately 2 centimetres wide. There was a laceration and bruise below the

left eye in the vicinity of the cheekbone. The laceration along the left eyebrow was most likely attributable to his fall to the ground. In total 11 injuries to the head and neck were found. Dr. Bowes estimated that these injuries came from five to seven different impacts. No single blow could be identified as having caused his death.

[5] There were five injuries to the chest and upper body area. These were to the clavicle, shoulder, ribs, elbow and tricep on the left arm. Of these injuries, the tricep injury could have been caused at a separate time and the elbow injury was consistent with contact with a cement or rough surface.

[6] The degree of force required to inflict the injury to the cheek was according to the pathologist Dr. Bowes, not particularly forceful and could have been as a result of a standard blow. Dr. Bowes' evidence was that the injuries to the head and neck area were consistent with the physical injury one would see from duellists. It was not so much the force of the individual blows but rather the cumulative effect of the blows which caused the brain hemorrhage.

[7] The injury to the chest area, which broke three ribs, was the one that required the greatest amount of force. This injury was described as requiring more force than could be caused by a fist. Dr. Bowes described this injury as consistent with having been caused by a foot because a leg can deliver twice the amount of mechanical force than a fist. This injury did not cause death. It was the head injury which resulted in Mr. Smith's death.

[8] There were no fractures of the head and face bones and the injuries to the face could have been occasioned by a fist fight. Dr. Bowes did not see any injury to the brain and for this reason he was able to say that no single blow caused the deceased's death. The interval between the various impacts to the head could have been as little as milliseconds according to Dr. Bowes.

[9] The injuries to the hands were consistent with being either attack or defensive wounds and it was for this reason that Dr. Bowes could not rule out those injuries as having been caused by the deceased throwing punches.

[10] The injuries to the forehead appeared to be two separate injuries which bled together. They were sustained within minutes of each other and not on separate days.

[11] Dr. Macaulay gave expert opinion in the field of neuropathology. He examined the deceased's brain and found no bleeding inside the brain and no aneurysm. He noted that it is not uncommon for someone who has sustained head trauma to have a subarachnoid hemorrhage. His evidence was that this was not a severe impact injury. He could determine this because there was no accumulation of amyloid precursor protein (APP) which would be present if this had been a severe impact injury. He defined severe impact injury as something occurring due to a motor vehicle accident, a fall from a building, or a blow from a crowbar or an axe. He described the force required to cause the deceased's injury as mild to moderate.

[12] His opinion was that on balance the deceased was not unconscious when he received the head trauma. He based this opinion on the fact that no contusions to the brain were found.

[13] The injuries he noted were consistent with having been sustained by punches and fists in the course of a fist fight. He could not say how long it would have taken for the bleeding to incapacitate the deceased. He referred to repeated blows to the head as meaning four or five or more blows.

[14] His evidence was also that a person suffering from a subarachnoid hemorrhage could remain functioning for some period of time and could remain on his feet and keep throwing punches. There was no evidence of one physical blow which would have caused unconsciousness.

[15] Finally Dr. Macaulay noted the fact that there was bleeding near the temporal lobe did not mean that there was an injury to that region.

[16] Comer and the Crown witnesses Warner, Maes, Southwell and Morrison were good friends; Smith and the Crown witness Hodgson were roommates and good friends, but they were not part of the close circle of friends involving Comer, Warner, Maes, Southwell and Morrison; Smith and Hodgson were acquaintances of these people.

[17] On July 16th, 2004 Comer was fired from his three year old part-time/summer employment. He was "down in the dumps" as a result of this occurrence. That evening he and his close circle of friends were at Maes' house having a barbeque and drinking alcoholic beverages. It was a Friday night, one of

the weekly or biweekly drinking nights for these friends. Apart from the late teenage male ritual of drinking to get drunk, these friends had a purpose to their drinking, which was to cheer up their close friend Comer. They succeeded. By the time they left the residence all were drunk, having consumed substantial quantities of alcoholic beverages during the course of the evening. They left the residence and went to Busters Bar because they were bored and had run out of alcoholic beverages. By the time they arrived at the bar Warner had consumed eleven beers, Morrison eight, Maes eight to twelve and Southwell over one half pint of rum. All consumed more alcohol at the bar.

[18] Smith and his friend Hodgson had been working that day clearing brush and debris. After work they went to the home of Smith's parents where they ate and also consumed some alcoholic beverages. They left and visited friends. Before taking a taxi home they consumed more alcohol and shared a joint with these friends. Both Smith and Hodgson were also under the influence of alcohol. Smith had consumed at least five beers and some hard liquor and Hodgson drank over one half quart of liquor.

[19] As the result of a disagreement with the taxi driver over a flat rate fare Smith and Hodgson were told to get out of the taxi at a location near Busters Bar. They entered the bar in order to call for another taxi. Upon entering the bar they noticed their acquaintances Comer, Warner, Maes, Southwell and Morrison and joined them at their table.

[20] Robert Smith, the deceased, was also at the bar that night. He was intoxicated and had been cut off by bar staff because they determined that he had had enough to drink. The deceased was an experienced and heavy drinker as evidenced by his history of alcohol-related motor vehicle offences and the admission contained in **Exhibit 56**.

[21] Lori Campbell, who was qualified as an expert in the field of forensic toxicology, extrapolated the deceased's blood alcohol level from a serum reading taken from the deceased at the time he was admitted to the hospital. Her findings were that the deceased's blood alcohol level at the time of the occurrence would have been anywhere from a low of 149 mg of alcohol per 100 ml of blood to a high of 273 mg of alcohol per 100 ml of blood. Her evidence, that an experienced drinker with a reading 200 mg per 100 ml of blood would appear outwardly drunk, together with the evidence of the two servers who cut off the deceased from further

alcohol consumption that night, as well as the observations of the other witnesses who testified that the deceased appeared drunk to them, even in their state of intoxication, leads to the conclusion that the deceased's blood alcohol level was at the higher end of the range given by Ms. Campbell. Ms. Campbell's evidence was that at these levels, intoxication would be manifested by slurred speech, staggering, mental confusion and an exaggeration of any existing emotional state.

[22] Comer and his friends Morrison and Southwell arrived at the bar first and were met shortly thereafter by Warner and Maes. Comer ordered a pitcher of beer at approximately 1:25 a.m. which he shared with some of his friends. Morrison bought his own beer. The pitcher of beer was on the table closest to where Comer and Warner were sitting. All at the table were in good spirits. The deceased, having been denied further drinks from the bar, approached the table, advised the group of his situation and asked for a drink of their beer. This request was refused. The deceased then picked up the pitcher of beer and attempted to take a drink from it. He was prevented from doing so by Warner who grabbed the pitcher and placed it back on the table. Some beer was spilled on the table and onto Comer's lap.

[23] While the start of the incident, when the deceased asked for some beer may have been annoying because it would appear the deceased would not accept no for an answer to his request, the situation moved to a different level when he attempted to help himself to Comer's beer. The situation became tense and words were exchanged. All at the table participated in telling the accused to leave. The tone and content was not pleasant. Some things said were disrespectful of the deceased. The incident got Comer and the group "riled up" or "fired up" as Morrison and Maes described it. Comer was the most upset of them all.

[24] The deceased left the table after the exchange of words. He sat at a nearby table and stared at the group of young men for a short while. The deceased then went to a different area of the bar. At some point he convinced Ms. Oickle to purchase a beer for him. He continued staring at the occupants of Comer's table. There was no further contact between the deceased and Comer's group in the bar.

[25] The tension at Comer's table cooled and the group resumed enjoying their evening. Some 10 to 15 minutes after the beer pitcher incident, Smith and Hodgson arrived at the bar and joined the group at Comer's table. It was shortly before closing time.

[26] The evidence establishes that last call at the bar was at 1:30 a.m. and no alcoholic beverages were served after 2:00 a.m. At 2:00 a.m. the lights in the bar would be turned on and the music would be turned off. The patrons would then have approximately 30 minutes to finish their drinks before being asked to leave the bar.

[27] When Smith and Hodgson arrived at Comer's table they related their incident of being ejected from the taxi. Comer and his friends told of their experience with the deceased. The recounting of this incident got Comer and his friends heated up again. One or more of the persons at the table noticed and commented upon the fact that the deceased was staring at them. Evidence concerning what was said, by whom, and in what context was minimal and unreliable due to the state of intoxication of those witnesses and impairment caused by it on their ability to recall with any degree of accuracy that discussion.

[28] The reliability of Morrison's evidence that either the accused Smith or his cohort Hodgson said "We can help you get him if you want" is questionable, as is his evidence that the accused Comer stated "We should get him". Mr. Morrison drank eight bottles of beer at the Maes' residence together with another bottle of beer at the bar. By his own admission he was intoxicated and that intoxication compromised his ability to comprehend and retain information. It also affected his ability to recollect, from his own memory what was said, by whom and in what context. Whatever was said, if anything, was said in a bar with music playing and people talking.

[29] The evidence does not support a finding that a plan was hatched to confront the deceased outside the bar about the incident with the beer pitcher, nor does the evidence support a finding that the accused intended to follow the deceased out of the bar in order to cause him harm.

[30] The deceased left the bar before Comer, Smith and their entourage did. Comer, Smith and Hodgson left the bar before the others at their table. Those who remained were finishing their drinks. How long this group remained in the bar is unclear as is the time when they left. The accuracy of the times given by all the witnesses who were in the bar, for the various events which transpired that evening both inside and outside the bar, is unreliable because none of them wore watches, no one was keeping track of time and all were intoxicated. The evidence suggests that the interval between the groups leaving the bar was at most a matter of

minutes. What time the deceased left the bar and how long after that Comer, Smith and Hodgson left the bar is unclear.

[31] The only times which are known with any degree of accuracy are that at 2:45 a.m. an ambulance was called. It arrived at the scene at 2:50 a.m. and departed for the hospital at 3:07 a.m. arriving there at 3:23 a.m. Smith and Hodgson were captured on a video surveillance tape at the Ultramar service station on the Bedford Highway at approximately 2:54 a.m.

[32] As the group consisting of Warner, Maes, Southwell and Morrison exited the bar, they came upon a verbal exchange in progress between the deceased and Comer, Smith and Hodgson. Comer, Smith and Hodgson were on the sidewalk heading east toward the Bedford Highway. The other group moved into the parking lot in the same direction, but parallel to Comer and the two others. The deceased was standing in front of Siesta Tan.

[33] It is uncertain who started this verbal exchange and exactly what was said. Part of the exchange concerned the earlier beer pitcher incident in the bar. At one point the deceased made a derogatory remark about Hodgson's weight. This caused Comer, Smith and Hodgson to stop their travel and exchange further unpleasantries with the deceased.

[34] I accept the evidence of the two accused together with that of Warner, Maes, Southwell and Morrison as to who struck the first blow. The deceased, threw down his cigarette, uttered a threat to hospitalize all seven young men and then kicked at Smith twice. One of the two kicks landed on Smith's body. Comer then kicked at the deceased with what was described as a push kick which propelled the deceased forward towards Smith. Smith punched the deceased in the face. A fight involving the deceased, Comer and Smith then broke out. All three were punching at each other.

[35] For different reasons not everyone who witnessed the event or part of it saw the same thing. This is often the case in situations such as this involving the sudden outburst of violence. The duellists were not stationary. The observers had different vantage points. The view of some of the observers was obstructed by the physical layout of the scene. Some witnesses such as Morrison and Southwell turned away from the scene and one witness, Maes, was not wearing his eyeglasses which he required for distance viewing.

[36] The evidence of Warner, Maes, Morrison and Southwell must be carefully scrutinized. The reliability of their recollection of the event; including words allegedly spoken, acts done and estimates of time must be viewed in the context of their inebriation by alcohol. It must also be examined in light of the friendship that existed between the witnesses Warner, Maes, Morrison, Southwell and the accused Comer and those witnesses' acquaintance with the accused Smith and prosecution witness Hodgson. The fact that those recollections of the events were not recorded until five or six days after the fact and that in the interim the witnesses Southwell, Maes, Morrison and Warner exchanged information about their individual recollections is also to be considered when weighing their evidence.

[37] The concern that their evidence or parts of their evidence was not from their personal recollections but rather from assumptions made based on what others told them is exemplified by the testimony of Morrison. Morrison testified that he turned away from the physical altercation to speak to Maes once he saw the deceased kick at Smith. Morrison stated that he turned back after five to eight seconds and saw Smith kick the deceased with his right leg. The deceased was on the ground by the time Morrison turned around. Morrison could not say if the deceased was face up or face down, nor could he say whether the deceased was moving or where the kick landed, only that it was above the waist. Morrison told the police that he was assuming Smith kicked the deceased with his right leg. Morrison also told the police that the deceased threw down his cigarette before striking Smith, however he acknowledged in his testimony that he did not personally see this, but rather that it was information he received from the other witnesses before they gave their statements to the police.

[38] Another example of the frailties of the evidence relied upon by the Crown comes from the evidence of Warner who was the witness closest to the fight. At trial his evidence was that Comer kicked the deceased six or seven times, but that he, Warner, only saw one or two of those kicks land. At the preliminary inquiry, however, Warner's testimony under oath was that Comer kicked the deceased once or twice for sure, but later on in that same testimony he testified he was not sure how many times the kicks landed. He agreed at trial that he guessed that Comer was making a kicking motion.

[39] Warner also testified that Hodgson kicked the deceased in the stomach. Hodgson denied this and none of the other witnesses observed it. The pathological

evidence did not support a finding that the deceased was kicked in the stomach. Warner also testified that after Hodgson administered his kick Comer and Smith continued to kick the deceased, however Warner in his statement to the police given some days after the incident said that after Hodgson moved into kick the deceased he (Warner) could not see much after that and then they all ran off.

[40] Warner's evidence that after the fight, while he and his friends were across the street in the Chris Brothers parking lot, he saw a woman come out of the bar and scream is not supported by the evidence of those who were with him. None of the others there testified to hearing or seeing this.

[41] Yannick Southwell did not see anyone kick the deceased. He testified that the last thing he saw before turning away from the fight was the deceased in a fighting stance with his fists clenched in front of his face. Southwell testified that when he turned back to view the altercation the deceased was on the ground and Comer, Smith and Hodgson were all running away in the same easterly direction. Southwell's evidence was that a goldish coloured car entered the parking lot from the Hammonds Plains Road entrance and then backed up and drove away. His recollection was that his group left the parking lot heading toward the Bedford Highway whereas all the others recalled crossing the Hammonds Plains Road.

[42] Southwell's evidence at trial had more detail than his statement given to the police six days after the event. For example at trial he testified that Comer kicked and punched the deceased before he (Southwell) turned away. However in his statement to the police Southwell said that he saw Comer hit the deceased once and then Southwell turned away. Southwell never saw anyone kick the deceased when he was down on the ground.

[43] Geoff Maes recalled seeing what he described as a blue rust bucket of a car in the lot but was not sure if that was before or after the fight. The car was situated by a pillar closest to the bar and its headlights were facing in an easterly direction. Morrison described seeing a car in the parking lot. He could not recall seeing it enter nor could he tell what colour it was. His evidence was that the car was stationary in front of the bar when he observed it.

[44] Maes in direct examination testified that he saw a number of punches being thrown by Comer and Smith. However, in cross-examination his evidence was that he could not say how many punches were thrown and that he was guessing at the

number. He also testified that he saw Smith kick the deceased before the fight ended, however he could not say if the deceased was facing up or facing down or whether the deceased was moving. His view of the events was obstructed by the pillars and further affected by his intoxication and the fact that he was not wearing his eyeglasses. In cross-examination he could not say if he saw the kick land.

[45] The fight was of short duration. It lasted less than one minute. The deceased threw the first blow by kicking Smith. During the fight both Comer and Smith punched the deceased and he punched them back. There was evidence of a verbal confrontation before the fight started, however the evidence as to what was said, when and by whom is uncertain. The totality of the evidence as to what occurred outside the bar before the fight started is unreliable and insufficient for a finding that Comer and Smith provoked the deceased into fighting with them.

[46] Admissions made pursuant to s.655 of the *Criminal Code* were filed as rebuttal to the testimony of Constable Williams and Constable Lamkin, peace officers who dealt with the deceased in 1997 and who were called by the defence for Comer. Their evidence concerned an unprovoked attack on them by the deceased when he was in an intoxicated state. These officers were acting in the execution of their duties when the assault took place. Despite the deceased's slight physical stature, at least three, possibly four peace officers were required to subdue him.

[47] The rebuttal evidence contained in **Exhibit 56** came from three other police officers who had also dealt with the deceased in the past while in the execution of their duties. Their evidence indicated that the deceased was a heavy drinker and although he could at times be verbally defiant, he was never physically violent toward these police officers. The contact these officers had with the deceased involved non-violent alcohol or drug related events, but not bar fights.

[48] This rebuttal evidence was lead to counter the defence evidence which was presented to show that most likely the deceased was the aggressor in the present case. While it is true that the deceased while intoxicated had non-violent contact with peace officers, this evidence does not, for the following reasons, convince me that in the case at bar the deceased was not the aggressor. In the present case the deceased was not dealing with police officers but rather with intoxicated teenagers. These teenagers had refused to give him a drink when he asked for one. They had, in no uncertain terms, told him to get away from them and their table. They had

been rude and disrespectful to him. They made fun of him and laughed at him. The deceased, although he left the bar first, was still outside and near the premises when the accused and their friends left the bar sometime later. The deceased struck the first blow by kicking Smith twice in rapid succession. The attack on Smith was unprovoked. The evidence supports a finding that the deceased was the initial aggressor.

[49] The deceased kicked at Smith who was the smallest of the three young men closest to him. Smith's height and weight was virtually identical to that of the deceased. Smith was shaken by the kick that landed. Comer then kicked the deceased in a manner that propelled him forward in the direction of Smith. Whether the deceased turned to face Comer or kept facing Smith is unclear. Comer's evidence was that he did and Smith could not say. None of the other witnesses gave evidence on this point.

[50] Smith responded quickly by punching the deceased in the face and head. Smith was wearing a ring identical to that shown in **Exhibit 7**. One of the blows from Smith was the cause of the injuries to the deceased's left cheek as depicted in **Exhibit 42, photograph #17**. Smith's blows were likely the cause of the injury to the left side of the deceased's clavicle as shown in **photograph #40**. The injury to the left elbow, according to Dr. Bowes, was most likely caused by a fall to the ground. The deceased began fighting.

[51] It is difficult to determine from the evidence of all the witnesses if the deceased began fighting with Smith or with Comer at that point. Comer testified that the deceased stared directly at him and started throwing punches at him and Smith. Smith's evidence was that after he was kicked by the deceased, the deceased came at him and Smith punched him and the fight began. Smith's focus was on the deceased and not on what Comer was doing. The same can be said for Comer.

[52] The speed at which the events took place and the shifting vantage point of the various witnesses makes it difficult to determine if the deceased started fighting with Smith or Comer at that point. All three were throwing punches. The fight was of short duration lasting no more than 30 seconds.

[53] Smith and Comer both threw a number of punches at the deceased. At least three of Smith's punches hit the deceased. Comer directed punches at the

deceased as quickly and as hard as he could. At least one and likely more than one of those punches struck the deceased. Comer was at this point angry at the deceased, not only because of the incident which had taken place inside the bar, but also because of the deceased's actions outside the bar.

[54] The deceased fell to the ground as a result of the blows he received. Either while falling or while on the ground the deceased covered his head. The head injuries identified during the autopsy were consistent with having been caused by punches.

[55] The evidence of what occurred while the deceased was on the ground is conflicting. Southwell's evidence was that he turned away from the fight when Comer, Smith and the deceased were punching at each other. When Southwell turned back to face the protagonists the deceased was lying face down on the ground and Comer and Smith and Hodgson were running in an easterly direction.

[56] Maes testified in direct examination that he could not say with any certainty if anyone kicked the deceased while he was on the ground. His memory was refreshed by his reading the statement he gave to the police six days after the event. In this statement Maes told the police he saw Smith kick the deceased once above the belt before they all ran off. He also stated in direct examination that he was drunk, his vision was blurred and he was not wearing his glasses which he needed for distance vision.

[57] In cross-examination Maes testified that he had no idea what happened after Comer, Smith and the deceased began fighting because people were in front of him and he could not see through them. He also testified that when the deceased was on the ground his view was obstructed by one of the pillars in front of the veterinary hospital and the deceased was behind that pillar. He could not say if the deceased was face up or face down or if the deceased was moving. His evidence was that he saw the end of something that happened very quickly. He could not say he saw a kick land on the deceased's body.

[58] Morrison's evidence in direct examination was that once the deceased kicked Smith, Morrison turned around and spoke to Maes telling him that the deceased had just done something stupid. When Morrison turned back the deceased was on the ground and Smith kicked him. He was not sure if the kick was to the mid-section or to the head, nor could he comment on the degree of force

used to deliver that kick. Morrison testified that Comer, Smith and Hodgson all ran off in the same direction.

[59] In cross-examination Morrison acknowledged that he was drunk when he made his observations and that intoxication compromised his ability to comprehend and retain information. He agreed that in his statement to the police, given six days after the event, he gave the police information about certain events as if he had actually witnessed them when in fact what he was relaying was information he had received from other witnesses with whom he had discussed the events of that evening. He admitted to making assumptions in his statement to the police such as assuming that Smith kicked the deceased with his right leg. He agreed at trial that he was assuming the kick was with the right leg and in fact all he saw was a leg moving.

[60] Warner testified in direct examination that he witnessed Comer and Smith kicking the deceased once or twice when the deceased was on the ground. He also stated that he saw Hodgson kick the deceased in the stomach. After this kick he saw Smith take a step back and kick the deceased with a soccer-style kick in the area between the shoulders and the head. Warner demonstrated this last kick in court and it appeared from his demonstration that the kick was made with full force and with the kicker's weight behind the kick. His evidence was that all the kicks he saw landed on the upper body of the deceased between the belt and the head area.

[61] In cross-examination his evidence was that Comer threw six or seven kicks, but that he only saw one or two land. At the preliminary inquiry his testimony was that he was not sure how many of Comer's kicks landed. He also stated at the preliminary inquiry while under oath that he knew one of Comer's kicks landed and as for the rest he was guessing. He acknowledged that the entire incident happened very quickly, that he was drunk and that it was an unexpected event. His evidence was also that when Hodgson moved in on the deceased he closed off his vantage point and that he could not see the deceased anymore after that. Warner agreed he told the police that when Hodgson kicked the deceased he (Warner) could not see much after that and then Comer, Smith and Hodgson ran off, however Warner maintained at trial that he saw Smith kick the deceased before running off.

[62] Mr. Warner was a very good friend of Comer and an acquaintance of Smith. He like the other Crown witnesses was drunk having consumed at least 11 bottles of beer before going to the bar. He also consumed more beer while at the bar. Of the witnesses Morrison, Maes, Southwell and Warner, Warner was the closest to the scene when the events occurred. He testified that there was a lot of activity at the time of the incident and that he did not see everything that went on.

[63] While it appeared that Warner was attempting to give accurate evidence of his observations, his testimony was nonetheless replete with phrases such as “I believe” or “It seemed” or “I guess”. It was evident that his recollection of the events was clouded by the passage of time and his intoxication when the observations were made. He as well, discussed the evidence with the other witnesses before giving his statement to the police some days after the occurrence.

[64] Warner also testified that he saw Hodgson kick the deceased during the incident, however none of the other witnesses testified to seeing this. Hodgson denied that he ever touched the deceased. He referred to Warner as a liar for saying this. Warner’s testimony was that the fight began and ended in front of the Siesta Tan location, whereas the other witnesses described it as moving from that location in a westerly direction toward the veterinary hospital location.

[65] Warner’s description of the number of kicks administered by both accused to the deceased’s body including his head and his description of Smith’s soccer-style kick directed to the deceased’s head is not supported by the pathological findings. Dr. Bowes testified that a leg can deliver twice the amount of mechanical force than a blow from a fist. There was no skull fracture nor was there injury to the brain. No facial bones were fractured. The head injuries which Dr. Bowes noted were in his opinion consistent with a punch and could have been occasioned during the course of a fist fight. Dr. Bowes could not identify one single blow that caused the deceased’s death. Dr. Macaulay, the neuropathologist agreed with Dr. Bowes that the injuries he noted could have been sustained in a fist fight.

[66] Jaret Hodgson testified as a prosecution witness. In direct examination he described how the fight started, that is with the deceased kicking Smith and then Comer and Smith fighting with the deceased. He stated that at some point the deceased was slouched over and then fell face forward to the ground. His evidence was that Comer kicked the deceased in the head. He observed no other kicks and denied that he ever kicked the deceased or that he saw Smith kick the deceased.

[67] In cross-examination Hodgson acknowledged having reviewed all the disclosure materials including the various witness statements at the time when he was charged with an offence arising out of this incident. His testimony at trial was that Comer's kick was to the front of the deceased's head, however in his statement to the police he could not recall if the kick was to the front or to the back of the deceased's head. His evidence at trial was that his memory had improved since the giving of his statement two years previously. He acknowledged telling the police that he saw Comer's kick out of the corner of his eye. His evidence on re-direct was that he was turning when he saw Comer kick the deceased.

[68] Both accused testified. Comer's evidence was that he only kicked the deceased once and this was immediately after the deceased had kicked Smith and before the punching began. Comer's testimony was that he saw no one else kick the deceased.

[69] Smith denied ever seeing the deceased on the ground or kicking the deceased. His evidence was that Hodgson pulled him out of the fight and that at that point the deceased was still fighting. Smith's evidence was that when he last saw the deceased he was still standing.

[70] As stated previously, the evidence concerning what happened to the deceased when he was on the ground is conflicting. The evidence surrounding the entire event came through witnesses who were all intoxicated and who had different allegiances. Their recollection of the events were not recorded until six days after. Warner, Southwell, Maes and Morrison discussed the events of that evening amongst themselves before giving their statements to the police.

[71] Two of these witnesses, Southwell and Morrison were turned away from the action for a large portion of it. Southwell did not see anyone kick the deceased while he was on the ground. Morrison's evidence about what he saw is unreliable and not trustworthy because he was prepared to and did testify about events which he had not seen as if he had seen them. He viewed an event that was unexpected and which happened very quickly. Accepting Morrison's evidence at its best, all that he saw from a distance of 10 meters away while drunk at night and while turning was a kicking motion by a person whom he identified as being Smith. Morrison was a good friend of Comer's but simply an acquaintance of Smith. It

would be unsafe to rely on his evidence for a finding that Smith kicked the deceased while he was on the ground.

[72] The evidence of Maes suffers from some of the same frailties as that of Morrison in that he was also drunk when he made his observations, it was nighttime, the occurrence was unexpected and happened quickly and he discussed his recollection with others and his recollection of the events was not recorded until six days later. In addition to this Maes was not wearing his prescription glasses which he needed for viewing things at a distance. He also testified that Warner, Southwell and Morrison were in front of him and blocking his view. His view was also compromised by the pillar which further obstructed his view. The action was not stationary and was of short duration. As with the evidence of Morrison it would be unsafe to accept this evidence that Smith kicked the deceased as fact.

[73] Hodgson was not an impressive witness. He was flippant and argumentative. He was intoxicated, having consumed one half quart of vodka prior to this incident. Despite having consumed that quantity of alcohol Hodgson maintained that he was talking and walking fine and had not consumed enough alcohol to get him drunk. Hodgson was a friend of Smith and an acquaintance of Comer. There were significant inconsistencies between his evidence at trial and what he told the police. These inconsistencies affected his credibility and the weight to be attached to his evidence.

[74] In July 2004 Hodgson was unable to say where Comer's kick landed on the deceased, yet two years later at trial without anything occurring to improve his memory and without reviewing his statement to the police, he testified that Comer kicked the deceased in the head. At trial he testified that Comer was in front of him when he saw the kick, however in his statement to the police he stated that he was turning and saw it out of the corner of his eye. These are but a few examples of the inconsistency in his testimony.

[75] An indication of Hodgson's cavalier attitude toward testifying under oath is exemplified by the fact that he did not bother to read his statement, given when the events were supposedly fresh in his mind, before testifying in court. He presented as having a rather large chip on his shoulder. This was evident by his demeanour and responses to questions posed to him both by the Crown and by the defence. For example, when asked by Mr. Hoskins for the Crown what he first observed

when he exited the bar, Hodgson's response was that it was dark out. Hodgson's evidence is not worthy of belief and little, if any, weight is attached to his evidence.

[76] The totality of the evidence given by these witnesses, despite the frailties previously identified leads to the conclusion that the deceased was kicked at least once and possibly twice by Comer when he was on the ground. The exact location of this kick or kicks is hard to ascertain. Although I have not accepted as truthful and reliable some of Warner's evidence I do accept that he saw Comer kick the deceased. Warner was Comer's best friend. They partied, drank and played sports together. Warner was the closest to the action when the events occurred. It was obvious that the giving of this evidence was hard for Warner to do.

[77] I reject Comer's evidence that he did not kick the deceased other than the push kick he threw at the start of the physical altercation. Comer was angry in the bar when the pitcher incident took place. Although he regained his composure afterwards, I can only conclude that his anger returned when the verbal argument began outside the bar and subsequently escalated into a physical confrontation.

[78] Comer's evidence in many respects sounded scripted and rehearsed. He downplayed his alcohol consumption and level of intoxication. He testified that on the Monday following the incident his hands were examined for the presence of bruises or other marks and that the result of that examination was negative. It is true that his hands were examined by Mr. Mott with negative results but this examination took place six days after the event, not two.

[79] Comer's evidence that Warner was not always a loyal and honest friend of his flies in the face of the evidence of the other witnesses who described the two as best friends. I also reject Comer's evidence that all seven individuals at the bar left as a group within seconds of each other. Comer's evidence that he did not give the deceased a drink of beer because he did not want to get into trouble with the bar staff for providing a drink to somebody who had been cut off is not believable since Comer had no concerns about providing his underage friend Southwell with a drink while they were in the bar.

[80] Comer's evidence regarding the deceased's reaction to being denied a drink was also questionable. Initially he stated that the deceased grumbled something about the denial, however in cross-examination he stated that the deceased yelled

derogatory remarks. He then said that the deceased did not yell but was grumbling curse words under his breath which he could not make out. I also reject Comer's evidence that he froze when the deceased threatened to hospitalize all the individuals present.

[81] I do however accept his evidence that a plan had been made with Maes earlier in the day for Comer to sleep over at Maes' house that evening. It is quite likely that this was not made known to Warner as Comer and Maes spent time together before Warner joined them.

[82] The incident ended when someone in the group yelled out something. Comer testified that he saw headlights in his face and said "Let's get the hell out of here". He, Smith and Hodgson ran in an easterly direction, around the Scotiabank and then made their way to the path Comer and his friends had taken to get to the bar. They parted ways there with Comer returning to Maes's house while Smith and Hodgson went to the Ultramar service station on the Bedford Highway to call a cab. They were captured there on a surveillance camera videotape at approximately 2:54 a.m.

[83] Warner, Maes, Morrison and Southwell left the scene and headed in a north easterly direction. They crossed the Hammonds Plains Road and then walked through the Chris Brothers and Shoppers Drugmart parking lot across the Bedford Highway and to Martha's Pizza where they ate before going home.

[84] Comer was at Maes' house when Warner and Maes returned there. There was some discussion about what had occurred and they went to bed.

Law and Analysis

[85] The accused are charged with the offence of manslaughter. Under s.222 of the *Criminal Code* a person commits homicide when, directly or indirectly, by any means, he causes the death of a human being. Homicide may be culpable or not culpable. It is only culpable homicide which is an offence. A culpable homicide may be murder, manslaughter, or infanticide.

[86] The applicable *Criminal Code* provision in this case is s.222(5)(a) which states a person commits culpable homicide when he causes the death of a human

being by means of an unlawful act. Section 234 states culpable homicide that is not murder or infanticide is manslaughter.

[87] Manslaughter, unlike murder and infanticide, is not expressly defined in the *Criminal Code*. It is a residual category that covers an almost infinite array of circumstances, ranging from near accidental killing to near murder.

[88] Culpable as used in s.222 of the *Code* simply means blameworthy.

[89] Before deciding whether a homicide is culpable, it must first be determined that a homicide has occurred. Since s.222(1) of the *Code* provides that a person commits homicide when directly or indirectly by any means he causes the death of a human being. Causation is therefore a preliminary factor in determining culpability. Absent causation, there is no homicide and no basis for a finding of murder or manslaughter.

[90] The causation standard as it relates to culpable homicide offences is set out by the Supreme Court of Canada in *R. v. Nette* (2001), 158 C.C.C. (3d) 486. The court determined that the question regarding the causation standard is whether the act in question was “a significant contributing cause” to the death.

[91] Intervening acts or omissions will not shield an accused from liability if it can still be said that the accused’s conduct contributed to the death in some “significant” way. There may be intervening events which are so significant or extraordinary that they will break the chain of causation. An example of this is the case of *R. v. Reid* (2003), 180 C.C.C. 151 (N.S.C.A.). In this case the victim died as a direct result of a “botched” attempt at CPR, carried out by a group of intoxicated bystanders. It was held that, in those circumstances, the trial judge was obliged to explicitly instruct the jury to consider whether the botched CPR attempt was a supervening cause of death that effectively severed the link between the injury inflicted by the accused and the premature death of the victim. Saunders J.A. set out examples of interrupting events that might exculpate the accused where he stated at page 180:

...consider the situation where A strikes B and leaves him unconscious under a tree where later a branch falls killing the man by its own weight. Or A strikes B and the blow renders B unconscious. Other people carry B to a nearby clinic but on route they tumble down an open well where B drowns; or they are waylaid by

a gang of thieves and in the ensuing robbery B is stabbed to death; or, upon arrival at the hospital for treatment B contracts streptococcus, flesh eating disease from which he dies within days. These are all examples where the law would recognize a supervening cause, an interrupting exculpatory event. The intervening acts break the chain of causation. They interrupt the original infliction of injury. Some other act or event has intervened before death. The question for the jury is whether the initial injury can still be viewed as a significant contributing cause of the victim's death"...

[92] The requisite fault for manslaughter is grounded in the commission of the predicate offence that resulted in death, be it an unlawful act, or an act of omission amounting to criminal negligence. The requirement that the predicate act be dangerous implies that the risk of bodily harm must be foreseeable. A dangerous act is one "that is likely to injure another person"; *R. v. Larkin* (1942), 29 Cr. App. R. 18. A dangerous act is also one that "put the bodily integrity of others at risk": *R. v. DeSousa* (1992), 76 C.C.C. (3d) 124 (S.C.C.). The foreseeable harm must be more than trivial or transitory but there need not be an objective foresight of death on the part of the accused.

[93] The physical and mental elements of unlawful act manslaughter are inextricably linked. The general rule is, that *mens rea* will flow inexorably from the *actus reus*. By its very nature, an objectively dangerous act will carry with it objective foresight of harm.

[94] 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.

[95] 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.

[96] 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.

[97] 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 the 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.

[98] 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.

[99] 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.

[100] 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's burden of proving the guilt of the defendants beyond a reasonable doubt is inextricably linked with the presumption of innocence it never shifts.

[101] 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. Proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities: *R. v. Starr* (2001), 36 C.R. (5th) 1 (S.C.C.) at para. 236.

[102] The acceptance of Warner's evidence that Comer kicked the deceased and the rejection of Comer's evidence that he did not does not however dispose of the matter. This is not simply a question of choosing the more believable of two competing stories. It is in fact an error to choose between whether to believe the Crown's evidence or that of the accused: *R. v. Nadeau* (1984), 15 C.C.C. (3d) 499 (S.C.C.). Putting the resolution of the matter as an either/or proposition excludes the third alternative, namely, that the trier of fact without believing the accused after considering the accused's evidence in the context of the evidence as a whole may still have a reasonable doubt as to his guilt: *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.) at p.409.

[103] In the present case both accused testified. Their credibility was in issue and some of their evidence was in conflict with that of the other witnesses. The decision in *R. v. W.(D.)* makes it clear that where credibility is a live issue the principle of reasonable doubt applies to that issue. This Court must assess the credibility of the accused's testimony according to the three step direction set out as follows in *R. v. W.(D.)* at p. 409:

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

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

Thirdly, 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.

[104] In the present case I accept the evidence of Smith that he was acting in self-defence when he struck the deceased after he had been kicked by the deceased. The evidence of Smith in this respect is corroborated by that of the witnesses Maes, Southwell, Morrison, Warner, Hodgson and the co-accused Comer who all saw the deceased strike the first blow. As indicated previously I do not find that the deceased was provoked into striking this blow.

[105] Under s.34(1) of the *Criminal Code* Smith was justified in repelling force by force if the force he used was not intended to cause death or grievous bodily harm and was no more than was necessary to enable him to defend himself. The onus is on the Crown to prove beyond a reasonable doubt that self-defence under s.34 is not available to the accused. *Latour v. R.*, [1951] S.C.R. 19; *R. v. Nadeau*, [1984] 2 S.C.R. 570; *R. v. Westhaver*, [1992] N.S.J. 511 (N.S.C.A.). The Crown has failed to discharge its burden in respect of the accused Smith.

[106] The fact that Smith did not retreat from the confrontation does not preclude him from relying on the provisions of s.34; *R. v. Deegan* (1979), 17 A.R. 187 (Alta. C.A.) nor must an accused be reduced to a state of frenzy; *R. v. Antley*, [1964] 2 C.C.C. 142 (Ont. C.A.). The blows struck by Smith were delivered during the course of a fist fight. Those blows were not excessive given that the deceased was, by all accounts, continuing to strike blows at Smith and Comer. I am not satisfied on the evidence that Smith kicked the deceased while he was on the ground. The evidence also does not establish that Smith was assisting Comer. He was simply defending himself. Accordingly, I find the accused Smith not guilty.

[107] As stated previously a finding that Comer kicked the deceased while he was on the ground does not by itself dispose of the question of liability, nor does the

rejection of Comer's evidence lead to an automatic finding of guilt. The third prong of the *W.D.* instruction requires the Court on the basis of the evidence it does accept to be convinced beyond a reasonable doubt of the guilt of the accused.

[108] The evidence of Doug Durant, the only independent and sober witness to the events who was called by the Crown, cannot be reconciled with the evidence of any of the other Crown witnesses.

[109] Mr. Durant was on his way to work when he drove into the Village Mall from the Hammonds Plains Road in order to make a bank deposit. He estimated that it was between 2:30 and 2:40 a.m. Given the admission contained in **Exhibit 47** that the ambulance was called at 2:45 a.m. and was on scene at 2:50 a.m. together with Mr. Durant's evidence that the incident he witnessed lasted two to three minutes it would appear that Mr. Durant's arrival was closer to 2:40 a.m. After the incident he drove to the bank which was a short distance away in the same mall, made his deposit and noticed someone coming from the bar and calling 911 for assistance. The ambulance arrived shortly thereafter at 2:50 a.m.

[110] Mr. Durant testified that he saw a man coming from around the corner of the Scotiabank located at the far east side of the mall. This man was being chased in a westerly direction by a group of 10 to 15 males and females. All persons he saw were Caucasians. He indicated that the group could have been larger or smaller than the number he gave but he was sure that the group was comprised of both males and females.

[111] The group chasing the man split into two groups with one group of four to five persons continuing to pursue the man along the sidewalk while the second group consisting of eight to ten persons went into the parking lot. A part of this second group stayed in the lot and the other part of that group went ahead and cut off the chased man's escape. One of the members of the sidewalk group started to fight with the man they had been chasing by punching him. Mr. Durant described this first assailant as wearing a white T-shirt and tan shorts. This assailant was joined in the fight by another young man whom Durant described as wearing a medium to dark blue short sleeved collared T-shirt or golf shirt, jeans and sneakers. Both men then punched the man who was being chased. According to Mr. Durant the fight did not last very long before the man was down on the ground in front of the veterinary hospital where the entirety of the fight took place. Most of the punches were struck by the young man wearing the tan coloured shorts.

[112] Mr. Durant saw the man wearing jeans try to drag the man on the ground into the parking lot by pulling on his arm. When it was obvious that he could not do so the man wearing the jeans while still holding onto the other man's arm kicked him twice in the area of the head. Mr. Durant noticed a third person in the area where the fight took place, but this person did not participate in the beating.

[113] The two groups then dispersed in various directions. Two of the three men who had been closest to the fight ran in an easterly direction. The third person in this group ran in a northwesterly direction towards the Hammonds Plains Road and behind Mr. Durant's car.

[114] Mr. Durant made all of his observations from his vehicle which was parked in a southerly direction facing the bar entrance. His headlights faced the bar the entire time of the fight.

[115] Mr. Durant only moved his vehicle after all persons involved had left the area. He then noticed males and females, who had come out of the bar, find the man on the ground. He drove to the bank, made his deposit and then waited three to four minutes for the arrival of the ambulance and the police. Mr. Durant spoke to the police and provided them with a statement on July 17th, 2004. Mr. Durant did not see any of the persons involved in the fight wearing a ball cap nor did he describe any of those persons as wearing a red T-shirt. None of the Crown witnesses, Maes, Warner, Morrison and Southwell saw a car in the parking lot after they left the area and looked back at the lot.

[116] The evidence from other Crown witnesses and from Comer himself was that he wore a long sleeved white T-shirt with no collar and a light blue logo on the front. He also wore blue jeans and a baseball cap which was introduced as **Exhibit 49**.

[117] Mr. Smith described himself as wearing a red G Unit T-shirt, **Exhibit 55** and dark blue jean shorts that went to mid-calf. Comer's evidence was that he thought Smith's shorts were black in colour but he confirmed, as did Hodgson, that Smith wore a red T-shirt that evening.

[118] Mr. Durant's evidence describes an incident unlike that described by any of the other Crown witnesses. None of the other Crown witnesses described the

deceased as being chased nor did they indicate that there were females in their group or in the parking lot when the fight they witnessed occurred. Mr. Durant described all the people he saw as being white. Mr. Southwell, a Crown witness, who was present in the lot is a very dark skinned black male. None of the witnesses including the two accused testified that the deceased was chased by anyone nor did they testify that he was running at anytime. No one saw anyone including either of the accused attempt to drag the deceased into the parking lot and kick him in the head while holding onto his arm. Mr. Durant's description of how the parties fled is also at odds with the evidence of the other witnesses.

[119] I accept Mr. Durant's evidence because he was a sober and disinterested person who was not inclined to favour or injure one side or the other. He was an independent witness. As well Mr. Durant was the only witness to have his recollection of the events recorded by the police that same day.

[120] There was nothing in the evidence presented to show that Mr. Durant was either incorrect or mistaken in his observations. To accept the Crown's proposition that Doug Durant, the only sober and independent party, witnessed the same incident as that described by Warner, Maes, Southwell and Morrison by implication means that these witnesses were not merely bystanders but rather were actually involved in chasing and preventing the deceased's escape. This would make them parties to the offence and therefore make their evidence even more suspect, however, the evidence does not support such a finding.

[121] The difficulty in determining the time when the accused and others left the bar and the fight began together with Mr. Durant's evidence coupled with the fact that there had been previous unsolved swarmings in that area raises a reasonable doubt on the issue of an intervening cause and that the two accused's were the ones involved in the fight which Mr. Durant witnessed. The fight that Mr. Durant witnessed is the one that caused the deceased's death.

[122] Even if I am mistaken on this and Mr. Durant did witness the same fight as that described by the other Crown witnesses, on the totality of the evidence I am still left in a state of reasonable doubt as to which blows to the deceased caused his death. The blows struck by Smith were in self-defence and did not amount to the use of excessive force. Those blows could have been the ones that caused death. The deceased was seen falling to the ground before any kicks were thrown.

[123] The cause of death was due to head injuries sustained in a fight and not to broken ribs. Comer struck the deceased with his fists when he, Smith and the deceased were fighting. Although I do not believe Comer's evidence in many respects it does leave me in reasonable doubt on the issue of whether the punches he threw were in self-defence. The kicking of the deceased when he was on the ground was not in self-defence and was excessive, however I cannot conclude beyond a reasonable doubt that this unjustified blow was the cause of death. The evidence does not support a finding that the kick was to the head of the deceased.

[124] The benefit of that doubt must be resolved in favour of the accused. Accordingly, I find both accused not guilty as charged. I am however satisfied that Mr. Comer unlawfully assaulted the deceased when he kicked him after the deceased was on the ground. At this stage Mr. Comer was not acting in self-defence nor was he preventing the commission of an indictable offence. As such a conviction for common assault will be recorded against Mr. Comer.

Cacchione, J.