R. v. T.B.

Ontario Judgments

Ontario Court of Justice

N.S. Kastner J.

Heard: March 6, 2003.

Oral judgment: March 6, 2003.

[2003] O.J. No. 6250 | 2006 ONCJ 391 | 71 W.C.B. (2d) 713

IN THE MATTER OF the Young Offenders Act R.S.C. 1985, c. Y-1 Between Her Majesty the Queen, and T.B.

(144 paras.)

Counsel

Mr. T. Shuster, for Crown.

Mr. E. Brown, for Accused.

N.S. KASTNER J. (orally)

1 I am dealing with the matter of T.B. T.B. is charged with numerous counts; namely: count one, it is alleged on the 30th day of June, 2002, at the City of Brampton, that he committed an assault on Martin Brown, using a weapon, to wit, a dog, contrary to s. 267(a) of the *Criminal Code of Canada*.

2 Count two, it is alleged that on the same date and place that he did commit an assault on Martin Brown contrary to s. 266 of the *Criminal Code of Canada*. Count three, it is alleged that he did unlawfully commit an aggravated assault on Martin Brown, by wounding, maiming or disfiguring that person contrary to s. 268 of the *Criminal Code of Canada*.

3 Count four is the charge on the same date, that he unlawfully in committing an assault on Guiseppe Alessi, use a weapon, to wit, a dog, contrary to s. 267(a) of the *Criminal Code of Canada*. Count five, it is alleged that Mr. B. unlawfully committed an aggravated assault on Guiseppe Alessi by wounding, maiming or disfiguring that person, contrary to s. 268 of the *Criminal Code of Canada*.

4 Count six, it is alleged that he unlawfully did willfully cause unnecessary suffering to a dog, by bringing the dog to an overly crowded situation, and enticing the dog to attack, wherefore the dog had to be beaten in order to fend off its attacks, contrary to s. 446(1) (a) of the *Criminal Code of Canada*. Count seven, he is charged that he did unlawfully, in committing an assault on Police Constable Tonya Vandervelde, use a weapon, to wit a beer bottle, contrary to s. 267(a) of the *Criminal Code of Canada*.

5 Count eight, he is charged that while bound by a probation order made by His Honour Judge De Filippis, in

Ontario Court of Justice Youth Division, Brampton, on the 7th of May, 2002, willfully failed to comply with such order, to wit abstain from owning, possessing or carrying any weapon as defined in the *Criminal Code*, by commanding a dog to attack another human being, contrary to s. 26 of the Young Offender's Act.

6 Count nine is a charge that while on the same probation order, he failed to comply willfully with such order, to wit, "remain in your residence at all times, except to attend school, work, church or the probation office, to travel directly to and from the aforementioned locations, for medical emergencies or to attend court for the six month period ending November 8, 2002, and except in the company of your father", by attending a Brampton residence of which is not school, work, church or the probation office and not in the company of his father, contrary to s. 26 of the Young Offender's Act.

7 Count ten, as well as count 12, was withdrawn by the Crown by leave during submissions. Count 11, he is charged that while on the same probation order that he willfully failed to comply with such an order, to wit, abstain from owning, possessing or carrying any weapon as defined in the *Criminal Code*, by using a beer bottle as a weapon, while committing an assault with a weapon, contrary to s. 26 of the Young Offender's Act.

8 As indicated during submissions, the Crown sought and was granted leave to withdraw counts ten and 12. Mr. B., through his counsel, conceded that the Crown had proven him guilty beyond a reasonable doubt of count number nine; namely that he, on the date in question, had willfully failed to comply with the probation order of Justice De Filippis by going to this party, of which much will be mentioned, which was at a residence which was not his own residence and clearly was not within any of the notable exceptions in his probation order. This having occurred on or about June 29 to 30, 2002, was in that period of time in which Justice De Filippis had ordered house arrest.

9 Clearly the Crown has established that offence beyond a reasonable doubt and there will be a finding of guilt on count number nine. The court must further consider the remaining counts which are contested.

10 This trial was a lengthy trial, it took place on February 3, 4, 5, 6, 10, 12, 13, 24 and 26 of 2003. In considering this case I have applied the suggested formula and direction in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, (Supreme Court of Canada) as to the burden of proof. It of course rests with the Crown to establish each element beyond a reasonable doubt. That burden never shifts, there is no burden whatsoever on Mr. B. to establish anything, and it remains upon the Crown to establish guilt beyond a reasonable doubt.

11 The court can, as Mr. Brown indicated in submissions, accept all, part or none of the evidence. A lot of the evidence in this case was conflicting. I have listened carefully to the evidence, I have observed the witnesses, many of whom had body language and facial expressions which are not reflected in any transcription of the trial. Full submissions were received from both counsel, which took more than a day to complete.

12 While I may fail to articulate each point made, or each subtlety of evidence, I have carefully considered each submission and the totality of the evidence heard, but the length of this matter precludes such minute reiteration of the evidence.

13 I have also been referred by both counsel to a number of cases, of which I have read and applied the applicable principles. Defence has referred to the case of *R. v. McLeod*, Yukon Territory Court of Appeal, [1993] Y.J. No. 170 (Y.T. C.A.), *R. v. Snyder*, [1996] N.S.J. No. 477 (N.S. C.A.), and *R. v. Wilson*, a decision of what is now the Superior Court of Justice, digested at (1984), 13 W.C.B. 146 (Ont. Dist. Ct.) .

14 Crown counsel has referred to the decision of *R. v. McLeod* which is also reported and which case I am going to make reference to (1993), 84 C.C.C. (3d) 336 (Y.T. C.A.). *R. c. Lucas* (1987), 34 C.C.C. (3d) 28 (Que. C.A.) and *R. v. Godin*, [1994] 2 S.C.R. 484 (S.C.C.).

15 During the evidence the subject of criminal records was raised and the criminal record of the defendant was filed on consent during his examination. I have applied a self-limiting instruction on the use to be made of those

criminal records of any witnesses and especially with respect to the defendant and it is not applied in any sense with respect to propensity. Its use is limited, solely to credibility in the event that there was a dispute over whether or not such a finding was made and that was established by later evidence.

16 In the case of Mr. B., therefore the previous dispositions have no relevance in terms of his credibility, as he readily admitted that record. I have also applied a self-limiting instruction on hearsay as there was a number of pieces of evidence in this case, which were hearsay, and I have disregarded them for the truth of their contents, although they may well be relevant in the course of the narrative of these events. And specifically there was a concession in submissions that the evidence adduced through the officer as to phone calls that were made through 911 were clearly hearsay and can not be considered for the truth of their content.

17 Another legal issue which arose in this case is the use of post-offence conduct evidence. In this case there was evidence of flight. I have considered all of the evidence. The accused in this case was on probation with house arrest provisions. It is clear that he fled from police. He indicated that he fled initially because he was being chased by others trying to attack him. Whether that is so or not, he acknowledged trying to escape the police capture and said this was because he knew he was in breach of his probation.

18 While this is evidence capable of proving guilt of that charge, namely count number nine, this explanation could reasonably be true. That evidence in the result cannot be used to establish mens rea on the assault and weapons charges; that is, the assertion that he fled capture because he knew he was in trouble, because of the dog. Thus I do not consider it as evidence of knowledge when dealing with the evidence as to whether or not the accused is responsible for the dog attacks.

19 There are a number of concessions made candidly by counsel for the defence, which are justifiable on the evidence and on the law and can be briefly reiterated, that is that Mr. Brown acknowledges that a dog can be a weapon. A weapon is defined in s. 2 of the *Criminal Code of Canada* as follows,

> Weapon means anything used, designed to be used or intended for use a) in causing death or injury to any person or b) for the purpose of threatening or intimidating any person and without restricting the generality of the foregoing includes a firearm.

20 Specifically whether or not a dog could be a weapon was dealt with by Mr. Justice Toy in the *McLeod* decision in the Yukon Court of Appeal. In that particular case it was also a pit bull dog. It was an agreed statement of facts that the defendant in that case had "sicced" her dog, a pit bull, upon a dog owned by the complainant. The dog had followed a command given to it by its owner. In that case the legal dispute was whether or not inanimate objects could be weapons.

21 It is a persuasive authority and I agree with Justice Toy when he indicates that the 1985 amendments to the Criminal Law Amendment Act evinced that Parliament intended to enlarge the scope of the definition, and the focus of the definition shifted from the character of the instrumentality in question to the result of its' use or the purpose for which it was used.

22 In the *McLeod* case, due to the factual finding that the accused had the appropriate control or decision making capacity over the dog, Justice Toy concluded that when Parliament employed the word "anything", that word included both animate and inanimate bodies, and that a dog can be used or can be intended to be used as a weapon. The fact that the evidence in that case admitted of no doubt that the accused intended the result which followed the command to the dog, resulted in a finding of guilt. That is that the conviction was entered.

23 Although in this case there is a concession that a dog can be a weapon, it is the position of the defence in this case that the appropriate control or decision making capacity was lacking on the part of the defendant. It is further conceded that people were bitten and that bodily harm resulted to the two named complainants.

24 It is not seriously contested that if the accused was the principal or party to the dog generated injuries, that this would amount to a wounding, maiming or disfigurement in these circumstances. There is abundant evidence that there were wounds of such nature, that stitching was required both internally and externally to address the wounds.

25 However in this case the accused argues he is not responsible in law for these wounds. He doesn't seriously contest that there was a wounding, maiming or disfiguring of each of these two named individuals.

26 It is further conceded that a beer bottle is capable of being a weapon and referring back to the definition, that it would become a weapon if it was used or intended for use to cause death or injury to any person or to threaten or intimidate any person.

27 It is further conceded that the accused threw a beer bottle, which resulted in landing near the policewoman, Constable Vandervelde, although it is argued here that it was thrown not at her but in self defence against pursuing parties.

28 There is some commonality to the evidence and I will deal with that portion of the evidence first. John Storace, a teenager attending St. Thomas Aquinas High School, had a house party at his family home at 43 Lord Simcoe Drive, Brampton, on the night in question to celebrate the end of the school year. His parents were out of town for the long weekend.

29 He had invited ten to fifteen friends. Word got around and a large number of adolescents and young adults attended. Many were consuming alcohol. The party began to fill the home and backyard, spilled out to the front yard and street, and by all accounts got too large (possibly over 100 people and upwards to around 150). The evidence varies as to the estimate of numbers.

30 But the party appeared to be calm and in control prior to the attendance of the accused and his friends. They were not invited to the party but had "heard about it" and decided to go after meeting up in a local coffee shop called Good Times. The dynamics of the party changed when the accused brought a pit bull dog to this party. Tiger the pit bull was portrayed as docile and used to crowds by the accused and several defence witnesses, who described him as wagging his tail and attracting girls. The dog had a leather collar with metal studs on it.

31 On the other hand, other witnesses described the dog as menacing and scary. The Court accepts that this clearly was the perception of many of the partygoers and that the accused and his associates were told the dog was not welcome and would have to leave.

32 The accused had brought the dog to the party and had control of him, at least to the point of an argument in the backyard. B. knew this dog for some period of time and would take him on walks and play with him. The dog knew the accused and several of his friends, who operated as close associates. Tiger was "owned" by the accused's friend Andre Alleyne, who had acquired him when another friend Marty Dupont went to jail. On the day of the party the accused got the dog from the Alleyne home when Alleyne was not home and brought him out for the evening.

33 A number of smaller squirmishes broke out, these were essentially fights between invited guests and the accused and his friends.

34 Marty Brown was bitten by Tiger on the stomach and arm, he ran on top of a parked vehicle pleading for someone to call off the dog, he was forced off the car. Eddie Alessi was bitten by Tiger in several places, notably the back of the leg and the groin area. Both Brown and Alessi were treated later at William Osler Hospital and received multiple internal and external stitches.

35 The police were called to the party. The first cruiser on scene was that of Constable Vandervelde, followed closely by Constable Barnaby. After that more police personnel arrived including a tactical team unit to break up the

party and the milling teenagers. An ambulance crew was also on scene. Officer Vandervelde gave chase to the accused. In the course of his flight he threw a large beer bottle which landed near the officer. He ran and eluded police. A warrant was eventually issued for his arrest and he was not arrested for several weeks, when he himself sought medical treatment at the same hospital for an unrelated matter.

36 The Court must review the totality of evidence to determine what findings of fact can be made, and whether some matters of conflict are capable of explanation or able to be resolved. The benefit of any doubt accrues to the accused.

37 Another area that must be dealt with is that of witness contamination. This includes, among other things in this case: Daniel Anderson in the hall the first day telling potential witnesses his view of what happened and telling them they are wrong; Andre Alleyne's presence, contrary to the exclusion order that I made during Julia Dawe's testimony; defence witnesses talking about the events of that evening in the coffee shop and periodically up until the time of the trial; Daniel Anderson and the accused discussing the case when both were in custody together for about three weeks in the fall of 2002; the Crown witnesses at the hospital on that evening aftermath, discussing the identity of the black male with the dog; defence witnesses extrapolating the identities of participants to various brawls, (for example Jeremy Frost) and repeating the same names, demonstrating the dangers of contaminating their evidence where the witness now asserts a fact which is not within their knowledge; and the importation of assumptions as fact, which was clearly demonstrated in particular in the evidence of Whitney Tsang and Julia Dawe.

38 There were two main witnesses to this case that the court accepts without reservation and those are Constable Vandervelde and Simon Keenan. In any conflict with their evidence and others, the evidence of Constable Vandervelde and Mr. Keenan are accepted as truly what actually happened.

39 Turning first then to the evidence of Simon Keenan. At the time of trial he was 20 years old and an electrician for two and a half years. He presented well as the witness. He was extremely careful in the answers which he gave. He was not related in any sense to any of the other witnesses. He was at the John Storace home at Lord Simcoe. He had known Mr. Storace previously and had had a few parties before and he was there with two buddies, Eddie Alessi and another person with the last name McArthur.

40 Although he is a friend of Mr. Alessi's, he did not appear to be motivated to favour his testimony to exaggerate the events with Mr. Alessi nor anyone else. In fact Mr. Keenan readily conceded matters which were obvious and throughout his testimony indicated some matters which were adverse to the position of his friend. Mr. Keenan described this group that came with the accused as "thugs". This was his own terminology.

41 Throughout the trial I should say that although the issue of race was raised in submissions and the defendant in this case is a black male, it did not appear from the totality of evidence that race played any part in this. It is relevant solely to the issue of identity of the defendant and whether or not it is the defendant or some other black male that was involved in certain of the incidents, but it did not appear to be a racial issue in this party. It appeared to be a dispute between invited guests and uninvited guests. A dispute between a group known as the thugs by Mr. Keenan, and a group known as the jocks or the bald headed guys, as Mr. B.'s friends referred to them. These were factions in the community as opposed to a racially divisive group. It is clear that there were black males in both the jock group and in the group of friends of Mr. B.

42 Referring back then to Mr. Keenan's evidence, he arrived at this party around nine o'clock. The backyard was full and the whole first level and the basement of the house was full. He estimated the number of partygoers as approximately 100.

43 He indicated that people were drinking and having a good time. Another feature of Mr. Keenan's evidence which was valuable is that he did not drink, and in fact, he indicates that he doesn't drink at all, and that he himself got in a

little bit of trouble on a cause disturbance charge and ever since then he had not had anything to drink. I accept his evidence on that point.

44 And thus Mr. Keenan was in a very unique position vis-à-vis many of these witnesses, because having not consumed alcohol, his recollection was clearer than some of the persons who described themselves as buzzed or drunk or otherwise. He indicated that people showed up that were not invited, that a guy had a dog, and a couple of scuffles happened in the backyard that carried out to the front. One of his buddies was pushed off the porch, that he bumped into somebody and this was unintended.

45 He identified that buddy that was pushed off the porch as Mr. Alessi. He estimated the number of uninvited guests with the dog at about eight, but he knew a couple of them because he knew some of the older sisters. He described this group as "thugs". He said they were out to cause trouble, they had this dog which he described as an American Pit Bull. There were no other dogs at the party that night.

46 He brought this dog into the backyard and people were asking them to leave. There was a scuffle and this moved to the front. He indicated that John Storace had indicated that he did not want them there. He was unsure of the number of people in the scuffle but was confident that these scuffles were essentially between these two factions.

47 He indicated that it was his friend Eddie that got pushed and he got pushed into a black male. He did not know the black male well, but he did know his name was T. He did know that because he went to St. Thomas Aquinas School in the past and he had seen him a couple of times at school. It is this positive evidence of identification which is corroborated by his, Mr. Keenan's, identification through the photo line-up of T.B. as this male, as well as the evidence of others that I am satisfied beyond a reasonable doubt that Eddie Alessi was pushed into T.B.

48 Mr. Keenan indicated that he had seen T. a couple of times at the school. Many of the people in this group were unknown to him. When he had seen T.B., he was holding the dog by a leash initially. He never saw another person holding the dog that night. He did not think the dog was violent until it got off its leash. He indicated that the reaction of T.B. to the unintentional push by Mr. Alessi being pushed off the porch was this, "You want this eh? Bring it".

49 All of a sudden the dog was let loose and it was all over Eddie Alessi. He said that T.B. was talking to Eddie and he was talking to the dog. It was T. who let the dog loose, that T. was mad and angry and that his buddy got bit in the arm and in the leg and in the pelvis area and that he, Mr. Keenan, hit the dog with the beer bottle and it was crying and ran across the street. He indicated that the dog also bit another party.

50 He said that Eddie was screaming and that this beer bottle that he had obtained from the grass, he picked up and hit the dog with it over the head with full force, that it was just a little cry from the dog and that it let go of Eddie. The dog did not let go of Eddie prior to being hit with the bottle. He also indicated that he heard an expression of "get this" or "get him", and that the dog reacted to this.

51 He indicated that one of his friends, Marty Brown, was on top of a car and he saw the dog jumping up at the car and that somebody ripped Marty's feet from under him and he fell off the car and onto the ground. He indicated that he was not in a position to see who took the feet of Marty Brown out, because it was dark. I found that the fact that Mr. Keenan was not prepared to jump to an assumption or indicate a name when he truly did not know because of the distance of his observation added to his credibility.

52 He indicated that Eddie went inside and he went after him to clean him up. Marty Brown came in afterwards, he was bleeding, he had a cut on his stomach and he was pretty sure that someone told him as well. He saw a cut on the arm. He told Marty he should go to the hospital and Mr. Keenan and Jeff Foster drove to the hospital so that these parties could get treated. He's not sure how the police got there because he was treating or attending to his friends when the police arrived.

53 He was scared for his buddy because he didn't know how bad he was, because there was a lot of blood. As indicated, he identified the defendant in the photo line-up as the male with the dog.

54 Constable Vandervelde also gave her evidence in a very frank and forthright way. She had taken careful notes of her involvement on that day. She indicated that at 12:09 a.m. she arrived on the scene, there was a large crowd of people on the street of this residential area. She was the first on the scene. She saw, when she stopped her cruiser, a black male getting ready to assault a white male.

55 She identifies, later in her evidence, the black male was T.B. She described this scenario as virtually a tableau where she observed as she pulled her cruiser up the accused was frozen in his action of raising his fist and holding on to the shirt of the white male, as if to strike him. She parked her cruiser and stepped out. There were about a hundred people she estimated in the vicinity. She said that the defendant immediately drew her attention to him, he was about one metre to her left. He had grabbed the white male with his right hand. She saw him pull his left hand back and make a fist. I pause here to indicate that the evidence including that of the defendant, was that he was left-handed. She indicated that his body was bladed so she could see the front of him and got a good look at him.

56 I am satisfied that the lighting on the street was such that the officer's observations were able to be made as she indicated. She said she yelled at him and exited her vehicle, that he took off running southbound and she yelled "Hey, What are you doing? Stop." These were not exact words, but these were to the effect of what she indicated.

57 She said he stopped for a moment and ran, that he looked at her before he ran, he saw her and that he ran south. She indicated that he ran away from her and her cruiser. The pace of the run was very fast and when she first started getting close he moved away. She did not see a dog at all during this particular run. He ran double back and around, and she started getting further behind from him.

58 She described this scenario of a double back and a few loops of running, that there was about four houses southbound and then a right and then he ran around the cruiser and then went south again and that she followed him south, ran around the cruiser again at one point. He went up to a group of youths in the street, grabbed a 40 ounce clear bottle and threw it. It arced and hit and landed beside her on the left side. She saw it coming, it was a beer bottle, it was arced in the direction of her head but it did not strike her as she was able to step away because of its trajectory as it was coming down.

59 She indicated that a bunch of people were yelling at her that he was the one. She saw him throw this bottle with his left hand, again he is lefthanded. She said that he turned, looked and checked before he threw it over his shoulder. She said that she was about two houses from him or enough distance to continue to see. She indicated if she did not move it would have struck her directly in the head.

60 She indicated, and this is an important feature in terms of the conflicts with other evidence, that there was no one else around, that is there was no one between herself and the defendant during this chase. The bottle landed to her left foot, on the ground, and broke. She could smell the beer. She indicated then that she continued to chase the defendant. He jumped over a fence on the right side of the road at around number 53 Lord Simcoe. The fence was six to seven feet high and you couldn't see through it.

61 He was ahead of her and she lost sight of him at that point, but she did observe him jumping the fence and where her evidence is in conflict with that of the defendant here, I accept her evidence that he jumped the fence at the point that he was being chased by Officer Vandervelde.

62 She said Constable Barnaby had come up behind her as a second officer and he was even behind her more, and thus he was unable to assist her in this chase. She indicated that she pulled out her own weapon as she got closer to the fenced area, where he went over the fence and commanded the defendant to stop. She did not use her firearm other than to display it at that particular point. She also picked the defendant out of the photo line-up as

the person who threw the bottle at her. She was a very good witness, very precise and given to details and not shaken in cross-examination.

63 Marty Brown was not a particularly impressive witness, he had consumed some 12 Corona beer on his own evidence. He was watching fights from the porch. He was in a position to leave this party at the time, as he had already called cabs and he was waiting for his cab. He indicated the dog was not on a leash but under control at the time and held by either a collar or by the accused by the scruff of the neck.

64 He identified the accused as screaming "Get Him" to the dog twice, namely "get him, get him", that the dog was "going mental". He said he went to the end of the driveway, he was cornered, he tried to get away and that expression "get him" made the dog react literally more nuts. In cross-examination he indicated that the accused said "I'll let the dog go", in a threat, before he let him go.

65 Marty Brown hit the dog, it was biting him and in cross-examination he indicated that the accused said "don't hit my fucking dog". He said that was not a hundred percent sure, but he was pretty sure the first bite was to the stomach. Mr. Brown punched the dog two times, he ran down the street and jumped on a car, didn't make it the first time, got on top of a vehicle and was pleading for people to get the dog off him.

66 He said the dog continually jumped at him from the vehicle and actually climbed onto the vehicle and that he had to kick out with full force at the dog to get him off the vehicle. He indicated that the accused was behind, kept on telling the dog to "get him", that the accused was present but it was not the accused but a white male (who is identified by other witnesses as Danny Anderson), who pulled his feet from under him causing Marty Brown to be removed from the vehicle and being subject to another attack by this dog.

67 He had seen the accused before in the same neighbourhood, around two times a week, to say "what's up" and things like that. He selected T.B. as the person who "sicced" the dog on him. He suffered injury to his arm and four stitches were required to the inside of his arm, eight stitches were required to the outside of the wound on his arm. He suffered shooting pain and had to miss work for a substantial period of time.

68 He indicates that he did not know the black male but was told his name was T., he says, by Eddie Alessi at the hospital. I accept that Eddie Alessi did not know his name and didn't tell him that, but due to the number of individuals that were at the hospital getting treatment that night, which includes Justin Edwards, a friend of the defendant, who was stabbed in an unrelated incident that night, it is logical that Mr. Brown did receive the name from someone at the hospital and was merely mistaken that it was Eddie Alessi that told it to him.

69 The fact that he was told T.B.'s name prior to the photo line-up is a matter which the court must scrutinize carefully in terms of the identity of the defendant. But given the fact that Mr. Keenan knew the defendant and also picked him out of the line-up, and that there is an abundance of evidence establishing that it was Mr. B. with the dog on that night, I am satisfied beyond a reasonable doubt that the person that Martin Brown refers to as the person that "sicced" the dog on him was the defendant.

70 I also have considered the amount of alcohol that Mr. Brown consumed when he gave his evidence, and I have considered the evidence of the ambulance attendant who indicated that Mr. Brown was, although under the influence of alcohol, not obviously drunk and was coherent at the time. So that Mr. Brown was in a position to make observations.

71 Guiseppe Alessi was a good witness, he has no record, his consumption of alcohol he described as enough to have a buzz. He was on the porch hearing argument and he got shoved down into the defendant who he described as a coloured gentleman whom he did not know. He said the dog came out of nowhere and attacked him. He said the accused was not known to him and he did not know his name. He suffered extensive injuries to the leg, knee, groin and elbow and received some 12 stitches to his leg.

72 John Storace, the homeowner's son, indicated that he had two beers himself. He described his invited list as 15 to 20 people mushrooming into some 150 or so persons. He described that the dog was with a white bald guy with no shirt. At the point that he saw the dog later during the scuffles, and when Marty was on the car, it was that white male that was egging the dog on.

73 I am satisfied in all of the evidence, including that of Mr. Storace, that I accept on this point that Danny Anderson was part of the incident that happened with the dog and clearly was the person at the vehicle that was egging the dog on, along with the defendant, and was the one that took Marty Brown's feet out from under him.

74 John Storace found the dog collar in the backyard. He described it as thick black leather, he did not see the defendant at the party and did not know him from school, but John Storace was not in a position to see everything and he certainly had a lot of concerns on his mind, namely his parents' property and his home and a number of blossoming partygoers at his party and thus was not in a position to see the entirety of the matter.

75 Jeff Foster also did not drink that night. He was sober. He was 20 years old. I accept his evidence on this point that is his sobriety, because he indicated that he wanted to be a police officer and that was part of the issues of that night, that although he felt that he had to do something when this group caused disruption to the party, his friends told him not to do anything, because it would jeopardize his future.

76 He identified the accused with the pit bull, he identified the accused holding the leash. He had indicated he had seen the accused about ten times before. He saw the dog attack Marty Brown. He saw the accused antagonize the dog prior. He saw the white guy, later identified as Daniel Anderson, pulling Marty from the car and he said he saw the accused got the dog and antagonized it before it bit Eddie.

77 He saw the accused throw a beer bottle at the female officer and hit her in the head. Obviously this conflict in evidence is of some concern as Officer Vandervelde indicated that this bottle missed her and landed to her left. However, Officer Vandervelde indicated that the manner in which the bottle was thrown and the arcing of this bottle indicated that it would have hit her head, had she not moved to the side and given where Mr. Foster was, which is a different angle than the officer, it may have appeared that it was in that direction and he wrongly drew the assumption that it actually struck her because it made a crash and was broken. He saw the direction in which it was thrown and I find that he was mistaken clearly on whether or not the bottle hit Officer Vandervelde, but it does not detract from the fact that he saw the bottle thrown in her direction, in the manner indicated.

78 Constable Adams retrieved the dog collar and leash for a large dog. It was described as brown, once black, worn, there was a studded collar, the dog tag on the collar had faded but it said Tiger. Of course I accept Officer Adams' evidence in preference to Mr. Brown's as to where this leash and collar were found. Although Constable Adams was not in a position to say where it came from, it was Mr. Storace that indicated it came from around the backyard area, near the air-conditioning unit.

79 Constable Kippin did the photo line-ups for Mr. Keenan, and Officer Vandervelde who picked out the accused. Officer Barnaby corroborated that the beer bottle was thrown in the direction of his fellow officer but he was unable to identify the male black as he was too far away. And again this added to his credibility in that from his distance and vantage point he would not be in a position to see the defendant clearly, or any male black for that matter, clearly.

80 Christopher Anderson's evidence related primarily to the fact that Mr. B. had stayed some three to four nights at the Anderson home that week, contrary to his house arrest provisions. I noted when he was giving his evidence that he was smirking the entirety of the time and looking to the defendant for approval.

81 Daniel Cusatti was not an impressive witness. He was a friend of the defendant and I noted that the defendant's probation order also required him not to associate with Daniel Cusatti during his period of probation. Nor was the

defendant to associate with Andre Alleyne during the period of probation and on Daniel Cusatti's evidence, Andre Alleyne's evidence, the defendant's evidence, Steve Nehme's evidence, Justin Edward's evidence, Whitney Tsang's evidence, Julia Dawe's evidence and others, clearly the defendant was with Daniel Cusatti, and potentially with Andre Alleyne, which I find is questionable under the circumstances, but contrary to his order.

82 Mr. Cusatti describes himself as drunk. He indicated that it was the accused holding the dog, no one else. The accused was with the dog in the back yard and the front yard. He saw Marty Brown on the car pleading. He knew the leash and collar were missing and that he himself took the dog away from the scene with a belt around the neck, in place of the leash and collar. Mr. Cusatti was inconsistent with his statement. He describes his inconsistencies as being explainable by the fact that he was "fogged". I find that his memory was so contaminated by discussion with others that there is very little weight that can be given to his evidence.

83 Steve Nehme is a good friend of the accused. Throughout his testimony his eyes were downcast. He appeared to be confused a lot. He referred to the dog as "our dog". He said the accused was comfortable with the dog and the dog knows the accused. He described a lot of these incidents as being attributable to alcohol. He said that people do stupid things when they are drunk and that drinking makes young people want to fight, like a royal rumble.

84 He indicated the accused was not intoxicated, that nothing happened in the backyard, that someone pushed the accused, pointed at him and touched his head or face. He was asked if it could be an accident and he said no, because the person's arms were outstretched. And he said that the dog got loose when the accused was pushed. The accused was pushed but he went back to get his hat. He helped Dan Cusatti to his feet, the dog was kicked, that Eddie Alessi was just coming out the door looking to see what happened.

85 I pause to indicate that this corroborates both the evidence of Mr. Keenan and the evidence of Eddie Alessi. He said the dog lost it. He saw Marty Brown on the car. The accused was fighting Mulhall at that time and Andre was holding the dog on top. The accused went to control the dog, same as Andre. He indicated that he paid no attention to where Danny Anderson was, that the accused was fighting with both Foster and Mulhall. The accused hit Foster also, and he described "all the bald-headed guys who were drunk wanting to kill the accused".

86 He acknowledged that "killing" was an exaggeration and he meant "to get" the accused. He appeared in his evidence to be proud of the fact that he and his friends were quite capable of handling any of these parties, no matter the number of them. He indicated that Mulhall was hit by the accused and cut his hands when he fell on his beer bottle that was in his hands. He indicated that Marty Brown came out of the house and wanted to start fighting and stuff.

87 Mr. Nehme indicated he left with Justin Edwards and no one else, that at the stabbing that he was present and that there were two guys, one who stabbed Justin. He stated Mr. Cusatti was not there, and there was no altercation with Cusatti being beaten by a number of people. This is relevant because it is in conflict with the evidence of Justin Edwards and thus it diminishes the weight to be given to it.

88 He was inconsistent as to who held the dog at the party. He was inconsistent as to who he left with. Constable Coltson did a photo line-up with Marty Brown. Marty Brown picked out the accused and said, as follows: "that's the guy with the dog". Constable Coltson indicated that he responded to a call to help an officer at 12:10 a.m. himself. He also was contacted at 1:57 a.m. about the stabbing.

89 In cross-examination he indicated that he had reviewed the 911 call from the previous night and that there had been a call at 1:05 a.m. from Foster about his friend being stabbed at a party. His friend was Justin Edwards and he indicated the culprit was the accused. As I have indicated at the outset of these reasons, that information is hearsay and it was not put to either Mr. Foster or the defendant or Justin Edwards.

90 He indicated that he went to the accused home on three occasions where he wasn't home, July 1, 11:09 p.m.,

July 2, 7:58, July 8, 7:41 a.m. And in the result of not being able to locate the accused, issued a warrant on July 21, 2001.

91 Marty Mulhall indicated that he had consumed alcohol, not that many, two or three at the party. He arrived at the party at 10:30 with a couple of friends, that he pushed and pushed the person back -- he was pushed and pushed the person back. He was hit to the side, fell to the ground. He said that the dog was "at him" and that he hit it away, jumped up and kicked the dog and started running down the street.

92 And then realized that his hand was cut. He said the injury was a serious one, it was a cut to one hand and tendon damage and he was taken by ambulance to hospital. But it is clear that he was mistaken when he thought he was bit by the dog, because the injury to his hand was caused by the crushed beer bottle. He did not see the commotion in the backyard. He indicated the defendant punched him first and he punched him back.

93 He said someone blindsided him from somewhere, he didn't know who. He had a beer in one hand, he didn't see the dog on the leash or held by the collar. He did hear the expression "get him", and he didn't know if it was yelled to the person who sucker-punched him or who it was yelled towards. And he heard people say "don't kick the dog".

94 He did not see what happened when the police came. He asked Mr. Nehme for a drive to the hospital and that was declined, but it appears on the evidence Mr. Nehme didn't have a vehicle there and I draw no negative inference from that. He adopted in cross-examination that the expression was something to the effect of "get him, stick him", but that he was adopting the officer's words of "sic him" and felt that the expression was to the effect of "get him, stick him".

95 He felt that those expressions meant the dog to attack. He thought the dog bit him or cut his tooth on him, but he didn't persist in that view. And he saw the accused babying the dog, calming the dog down after.

96 Whitney Tsang and Julia Dawe. I can deal with their evidence together. They both expressed a bias for the accused. They were good friends, they said they didn't want him to go to jail. They appeared in their evidence to be flirtatious with him when he was in the prisoner's box and consistently looked at him for approval of their evidence. They were prepared to not assume when items were unfavourable to the defendant and they assumed when it was favourable to him.

97 And they declined to speculate on any issues adverse to the accused. Ms. Dawe was very smug and smiled consistently. During her evidence Mr. Alleyne was present. He apparently is her boyfriend and was at the time the dog owner. She had consumed one cooler. The difficulty with their evidence is that it appears to be so contaminated by discussion with others that it is unworthy of weight. It is also in conflict with the evidence of other persons and specifically evidence of the defendant as to what occurred in the back yard.

98 And although I have paid close attention to it and made notes of the inconsistencies between their evidence and that of other witnesses, it is so rife with inconsistency that I cannot give it weight.

99 Justin Edwards is a good friend of the accused. He indicated that he was at the party two times, once with Steve Nehme and a friend around nine thirty. They had gone back to Good Times and queued up with other friends and then gone back a second time.

100 He said someone was holding the dog but he declined to say that it was the defendant. He observed guys kicking the dog. He said he thought Jeremy was fighting Dan. He said that when Dan fell and had people on him, Tiger got all "rowded up". He said someone threw a bottle at the dog, he did not see biting but that Marty Brown was yelling "the dog bit me" and holding his arm. He said this Jeremy was in the accused's face pushing and that Frost fought with Dan Cusatti, punched him and fell to the ground, that Mulhall was to the side of the accused and struck the accused in the face. He did not see the accused when he left.

101 He indicated he walked to Good Times and didn't go in. He was looking for a friend and then he went down another road where he stopped and got stabbed. He said Jessie came by and took him to the hospital. At the hospital he saw Marty Brown and someone name Vito and an unknown male. He said the description he gave of the stabber was what someone else told him.

102 There were numerous inconsistencies with Justin Edwards' statement to the police and his evidence at trial, including he did not say to the police that he went to the party two times. The detail about the party was not in the statement that he gave in his evidence. He explained that this lack of detail was because the stabbing was predominant and that explanation is plausible that the lack of detail in the statement was due to the fact he was describing his own stabbing and not the party.

103 However, he indicated that he was leaving when the cruisers were arriving at the party and I accept that his statement to police which was given more proximate to the time on July 2nd, 2002, was more accurate. That is that Justin Edwards left before the police came to break up this party, and he was leaving as the cruisers were arriving.

104 I do not accept the submission of the defendant that Justin Edwards was leaving as the second wave of cruisers was arriving. It is clear on his statement, in the context of his statement, that Justin Edwards was leaving when the first officers were coming. He indicated that he could not explain whether Steve was with him or walking another way. In his statement he said nothing to the effect of Steve. In his testimony he said Steve was walking the other way on the catwalk. This omission is a major omission under the circumstances.

105 Another difficulty with his testimony is the fact that in his statement to police about the stabbing, he said he saw Dan Cusatti fighting with people and that he was trying to break that up when he was stabbed. It appears that Mr. Edwards was perhaps not being truthful with the police when he gave his statement about what he observed and how the stabbing occurred. The stabbing is as yet unsolved.

106 It also does not make sense how Marty Mulhall could punch the accused in the face with a closed fist as Mr. Edwards said, and yet have a beer bottle in each hand, held by the throat.

107 Mr. B. gave testimony. He's now 18. He was argumentative, yet cross-examination was so aggressive that it would be natural to project this, and I do not draw a negative inference from the degree of argumentation on the part of the accused due to the nature of the cross-examination here. However there were a number of flaws to his evidence. He clearly too much anticipated where the questioner was headed and answered the question ahead of it being finished, or would tend to ask the question back to the questioner, such as an exchange where he said to Crown counsel "I know where you're going".

108 He sketched a diagram which is an exhibit in this trial, but I have to diminish the weight to be given to it because he did not draw this diagram for more than seven months after the incident and he drew it after the bail hearing, with testimony; after he had spent three weeks in custody with Danny Anderson; after he talked to friends; after he had heard a substantial amount of testimony, including that evidence of the officer; and so it was not pure recollection and thus it receives little weight.

109 A feature which detracted from the defendant's evidence was that he indicated that he was being chased by other parties, whom he named, before the police officer chased after him. He indicated that in effect what he was running from wasn't the police but he was running from these other parties who he referred to as Ryan and others. No other witness corroborates that whose evidence I can accept and clearly no other witness really made mention of it. I accept Constable Vandervelde's evidence that there was no one essentially between herself and Mr. B. during the chase and that she was not being obstructed by any of these partygoers. They were essentially encouraging her on, saying "that's him", meaning the defendant, and then inspiring her to actually chase him.

110 The entire story of his flight is pure nonsense, in particular where Mr. B. indicates that he was hiding in bushes,

that officers were coming by with flashlights and making flashlights go back and forth and saying words to the effect of "ten four, we lost him". This does not make common sense, and this is in contradiction with the evidence of Constable Vandervelde, which I accept.

111 And it is clearly more logical that Mr. B. hopped the fence. In fact Mr. B. indicated that this is true, when the officers moved from that particular bush area that he hopped the fence.

112 He acknowledges being able to hop a six to seven foot fence but just denies that he did it at the moment the officer indicated.

113 I find that he expressed that because he was trying to portray to the Court that he did not know it was an officer chasing him until he was hidden and that he did not know it was an officer when he threw the beer bottle. I find that he clearly knew that he was being chased by an officer. She had addressed him. She had expressed words to the effect of "stop". She was clearly visible and in uniform and that Mr. B., knowing that he was on house arrest, wanted to hightail it out of there as fast as he could, and did so in the manner indicated by Officer Vandervelde.

114 This fabrication of his evidence diminishes his evidence. Another main feature of his evidence which detracts from his evidence is the minimization of his degree of involvement with the dog Tiger. He indicates that Tiger was essentially a docile animal, that he didn't always follow direction or command, that he didn't always get something when you threw it for him to retrieve. He kept reverting to the expression of this is Andre's dog and not my dog, Andre's dog, and appeared to attempt to divest himself of responsibility for the dog.

115 What was of some significance is that during cross-examination when his guard was down on that particular issue, he described Tiger in a very possessive way. He was asked about egging on the dog, and he said "I'm not going to let my dog attack people". He referred to the dog as "my dog". I accept this little bit of Daniel Anderson's evidence; that is, that this dog was essentially co-owned by a group of friends, and that they all had a relationship with this dog and that the dog was capable of attack and had, from time to time, attacked objects and that had a far more aggressive nature when inspired to do so, than that portrayed by the defendant.

116 I find that the relationship that T.B. had with this dog was a very close relationship, in fact I accept that it was T.B. that went to get this dog from someone else's house and bring it to the party in the first place, and the coffee shop. That it was T.B. who babied this dog and tried to calm it down after it was extremely upset. And that it was T.B. who was possessive of this dog, brought it to the party on the leash, and had possession of it until it was loosened at a material point in time.

117 I have reviewed the entirety of T.'s testimony at length, and without reiterating it due to the length of these reasons and the length of the trial, I have compared his evidence to that of other defence witnesses, that of other Crown witnesses, and to the physical evidence which has been adduced in this trial and I find that the fabrications within his evidence are so material that they colour the remainder of his evidence and I reject his evidence.

118 Of course considering *R. v. W.D.*, I must go on to consider whether or not his evidence raises reasonable doubt, and whether the evidence of other witnesses raise a reasonable doubt, and whether even if that not be the case, in examining the Crown's case and the entirety of the evidence, I can be satisfied beyond a reasonable doubt.

119 Regarding Danny Anderson's evidence, the weight was again substantially diminished. There was substantial inconsistencies between his statement to police shortly after, his testimony at the bail hearing and at the trial. His motive to lie to help his friend was palpable. He interfered with witnesses in the hall.

120 His evidence did not make sense. And on the evidence that I accept, he participated in the attack on Marty Brown and thus was trying to exculpate both the accused, his friend, and himself and was motivated to be untruthful to put himself in a better light.

121 At moments in his testimony when he was unguarded, he did refer to the dog as "our dog" and that "we were co-owners", and I accept that portion of his evidence. Andre Alleyne gave evidence. He has no record. He indicated he consumed beer, one Colt 45. He praises Danny Cusatti for eluding police. He said as follows,

> Dan got away and there was no other canines on the street, so I guess he did good.

In other words Dan Cusatti was the one that took the dog and because he would be totally conspicuous and the police still didn't get Dan Cusatti, he expressed some pride in this result. This pride was also expressed by the accused in describing his elusion of police capture, and appeared to be also expressed by the accused by saying that when he did make his way back to the Good Time cafe that they were taking pictures of each other at that location.

122 Andre Alleyne had the pit bull Tiger for some two years. He said it was a friendly dog which never sought to fight anyone. I reject that evidence. It is inconsistent with what Danny Anderson said and it is inconsistent with what other witnesses say that I accept, and it is clear that this dog whether it was friendly for the most part was capable of violence and had its teeth bared. It was growling and did exhibit violence on this evening.

123 He said he worked until ten thirty at Swiss Chalet, his mom picked him up, he showered, he called Whitney's cellphone, he went to Good Times. Even in cross-examination he seemed confused about whether he even worked at Swiss Chalet at the time. He gave a lot of detail but he could not retain this detail, so he was very inconsistent and in reply evidence, it was indicated that he was mistaken, he did not work at Swiss Chalet at the time, and in fact he had not worked at Swiss Chalet since February of 2002, some many months before June. And thus that clearly diminishes any weight that can be given to Andre Alleyne's testimony.

124 I am unable to find whether Andre Alleyne was even at the party. He clearly was not at the party at the beginning of the party. He did not come with the dog. I accept that it was the accused that had control of the dog. Whether or not he arrived at Good Times Cafe later or whether or not he arrived at the party later is difficult to discern. Danny Anderson who gave the most proximate statement to the police out of the defendant's friends, indicated that Andre Alleyne was not there. At the bail hearing he said he was there. In cross-examination at the bail hearing Danny Anderson said Andre might have been there but he could not be sure of that. At testimony at trial, Danny Anderson said Andre was there.

125 Given that Andre heard Julia Dawe's testimony, that Andre heard all of the discussion at Good Times and with Julia Dawe and Whitney Tsang on several occasions, the fact that he was able to provide detail as to the party was imported by discussion with other witnesses and I cannot be satisfied that he was even at the party.

126 I accept the following evidence about Tiger, that comes from Danny Anderson and Mr. Alleyne, Tiger is trained to respond to commands. The dog would attack if felt threatened or if he, T.B., Danny Anderson or Danny Cusatti were getting attacked. Although they denied that he would attack on command, it is clear that he is responsive to command.

127 Andre Alleyne denied they were part owners but accepts Danny Anderson's evidence of calling them part-owners. It was the expression of Andre Alleyne that these were "friends of the dog".

128 In *R. v. Godin*, supra, Justice Cory speaks of the mens rea required for s. 268(1) of the *Criminal Code* as an objective foresight of bodily harm. It is not necessary that there be an intent to wound or maim or disfigure. This section pertains to an assault that has the consequences of wounding, maiming or disfiguring. Can the Court be satisfied in the circumstances of this case, beyond a reasonable doubt, that the defendant had appropriate control or decision making capacity over the dog?

129 The Crown advances two scenarios, one that the defendant did have de facto control over the dog, in a

physical way, and released the dog upon the complainants. And alternatively the Crown submits that even if the Court cannot be satisfied on that issue, that the Court could be satisfied, it is submitted, that he egged on the dog, enticed the dog or urged the dog to attack, which evinces decision making capacity over the dog with an intention for the dog to be used as a weapon.

130 The charges can be grouped as follows, there is count nine, breach of a house arrest provision, upon which I have already made a finding of guilt. There is count seven and 11 which relate to the use of the beer bottle, which would, if used as a weapon, violate his probation order as well as amount to an assault with a weapon on Tonya Vandervelde.

131 For the reasons I have previously given as to the evidence, which I accept from Constable Vandervelde, which is corroborated by Constable Barnaby, Mr. Foster, the defendant in some senses, I am satisfied that when the defendant released the beer bottle, that it was done intentionally, that it was thrown deliberately in the direction of Tonya Vandervelde in an effort to deter her from catching him. That it was not arced as a signal only, and that it clearly was intended to, if not cause injury, to threaten or intimidate her.

132 Its use in that manner fits within the definition of s. 2, and I have also had reference to the decision of *R. v. Allen*, and amounts to a weapon in the circumstances. And thus I am satisfied beyond a reasonable doubt that the defendant is guilty on counts seven and 11.

133 On the animal cruelty count, it is highly particularized, as I have previously read it. I have a reasonable doubt about the defendant's mens rea on this count, that when he unleashed the dog on people, that he would have the foreknowledge or the objective degree of foreknowledge that the dog would have to be beaten to fend off its attacks. And further I am in a state of reasonable doubt as to whether or not the dog was caused unnecessary suffering within the meaning of the word. The evidence on this point is somewhat lacking. It is clear that the dog was hit with bottles, the dog was kicked and it was punched directly in the face. As to the effect upon the dog, one only knows that the dog ceased its attack on Eddie Alessi when it was hit, ceased jumping up on the car when it was kicked, evinced a little cry but that the dog was taken away from the scene.

134 Although the owner of the dog testified and Daniel Cusatti who took the dog away testified, there was no evidence adduced as to any injury caused to this dog per se. And thus there is a reasonable doubt on both of those essential elements on count number six and there will be a finding of not guilty.

135 The other counts can be grouped into two groups, that is counts one, two, three and eight, all relate to what happened to Marty Brown, and counts four, five and eight all relate to what happened to Guiseppe Alessi, also known as Eddie Alessi. As I have indicated, the focus is whether or not the defendant had appropriate control or decision making capacity over the dog and was the dog responsive to command.

136 In this case I am satisfied on the evidence that I have heard, that the accused said "get him". This was said more than one time. It was not said in an ambiguous way, that one might construe that he was directing that someone, unnamed, get the dog, nor was it construed that it was referring to getting another party to one of the scuffles that was going on in the front yard. In fact that was not the defendant's evidence at all, in any event, the defendant asserting that he never said those words.

137 I am satisfied of this, on the basis of a number of pieces of evidence, including the evidence of Marty Brown, the evidence of Jeff Foster, the evidence of Simon Keenan and the evidence of several defence witnesses that although they either did not hear the expression "get him", but it could have been said, a couple of them said that they heard "get him", but it was not being said by the defendant. For instance Marty Mulhall said that he heard that expression.

138 I find that it was the defendant that said those words and he said those words in an effort to have the dog attack persons whom he perceived were either hostile to him or part of a group of people that he was not liking,

because they had asked him and his dog to leave the party. The defendant, I find, did say something to the effect of "sic him" or "stick him", but I cannot be satisfied as to the exact wording other than "get him", but there clearly was follow up that was to the same effect.

139 I also accept Simon Keenan's evidence who was in a better position even than Mr. Alessi to hear what was being said around Mr. Alessi, because Mr. Alessi was directly and violently involved in the episode, where Simon Keenan indicates that the defendant, when pushed accidentally by Mr. Alessi indicated "you want this", referring to the dog, "bring it".

140 Thus I am satisfied that this pit bull, which by all intents and purposes, whether or not friendly in other context, appeared extremely unfriendly on that night, had teeth bared, was being riled up by the defendant, did follow the command given to it by the person in de facto control over it, the accused. I can take notice of the fact as indicated in the *McLeod* case that when a dog is "sicced" upon another person or told to get another person, it means, in effect, to attack the person to whom the dog is directed.

141 It matters not whether the leash and collar came off in the backyard, at the gate area, or in the front yard because I accept the evidence of Marty Brown that the defendant had the dog by the neck, whether by a collar or by the scruff of the neck, and the evidence of Mr. Keenan, who found and observed the defendant had control over the dog in the front at the point in which it was released. Mr. Alessi indicated the dog came out of nowhere.

142 There is confusion as to which order the attack came upon Mr. Alessi and Mr. Brown, but regardless the dog appeared to be circling back to its co-owners after attack and it is logical that it would return to Mr. B., the person that brought it to the party, for either comfort or direction. Thus I am satisfied beyond a reasonable doubt that the defendant was a principal to an attack by this dog and that this dog fit within the definition of weapon under the circumstances of this case, and in the result that there was wounding, maiming or disfiguring to the two named parties, Marty Brown and Guiseppe Alessi.

143 To summarize then, the defendant is, on count number one guilty; count number two guilty; count number three guilty. At the request of the Crown, the conviction will be registered on count number three and counts one and two will be conditionally stayed, pursuant to *R. v. Kienapple*, [1975] 1 S.C.R. 729, and *R. v. Hammerling*, [1982] 2 S.C.R. 905. On count number four guilty; count number five guilty. At the request of the Crown the conviction will be registered on count number five and count number four is conditionally stayed pursuant to *R. v. Kienapple* and *R.. v. Hammerling*.

144 Count number six not guilty. Count seven guilty. Count eight guilty. Count nine guilty. Count 11 guilty. And so in making these findings I am satisfied beyond a reasonable doubt on the totality of evidence that each of the essential elements of those charges has been proven and the findings will be recorded.

> MR. BROWN: I guess we need a PDR.
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> THE COURT: Yes.
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> MR. BROWN: He has been in custody since last July and I think we should try and get that as soon as possible. It would be better that we come and it's not ready rather than it's ready and he remains in custody after it's already ready.
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> THE COURT: That is fine, Mr. Brown.
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> MR. BROWN: So I am suggesting four weeks from today. That will take us into the first week of April. Is Your Honour available in that week?
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> THE COURT: Yes, what date do you want?
>
> MR. BROWN: The 2nd? Is that a possibility?

THE COURT: Yes. Do you want to have it earlier in the day? Apparently I am doing day three of an eight day matter or I can have it at ten o'clock, whatever is the preference of both counsel.

MR. BROWN: I have a JPT at nine o'clock for another matter, so I would prefer ten o'clock.

THE COURT: All right. Mr. Shuster, is that satisfactory?

MR. SHUSTER: That's fine.

THE COURT: Yes, all right, Mr. B., I am going to order a pre-disposition report that will be prepared while you are in custody and you will come back on April 2nd, 2003, 403 court at 10:00 a.m. for sentence.

MR. BROWN: Thank you, Your Honour.

THE COURT: Thank you, Mr. Brown and thank you for your able submissions.

MR. BROWN: Thank you.
