NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Thomas*, 2015 NSCA 112

Date: 20151217
Docket: CAC 433623
Registry: Halifax

Between:

Jahmal Leslie Thomas

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	MacDonald, C.J.N.S., Beveridge and Scanlan JJ.A.
Appeal Heard:	September 28, 2015, in Halifax, Nova Scotia
Held:	Appeal allowed in part, per reasons for judgment of MacDonald, C.J.N.S. and Beveridge, J.A.; and Scanlan, J.A. concurring
Counsel:	Michael K. Power, Q.C. for the appellant Jennifer A. MacLellan for the respondent

Reasons for judgment:

[1] Jahmal Leslie Thomas appeals his conviction and 66 month sentence for aggravated assault and assault with a weapon.

BACKGROUND

[2] In October of 2013, Robert Childs and his wife, Lacey, were celebrating Robert's fortieth birthday at Tops'l Tavern in Bridgewater. Their friend Adam Acker also joined them. He was the designated driver.

[3] The trio left the bar around closing time. Just outside the bar, they began talking to friends. There was a crowd around. Lacey wanted a cigarette, but they were in their car, parked in a nearby lot. Robert agreed to go and get her one. He never did make it. Just as he rounded the side door of the tavern, he accidentally bumped into a stranger. Robert reacted by uttering: "What the fuck?" The stranger responded by taking out his knife, clicking open the blade, and stabbing him. Robert immediately ran, crying for help. A mêlée ensued. Mr. Thomas was arrested at the scene. Robert was taken away by ambulance.

[4] The wound was very serious, requiring surgery and hospitalization. The injuries included a lacerated spleen, diaphragm, and a fractured rib.

[5] Everyone agrees that Mr. Childs was the victim of an unprovoked stabbing. In his police statement, Mr. Thomas acknowledged bumping into Mr. Childs that evening. However, he denies the stabbing, insisting that someone else in the mêlée must have done so.

[6] Provincial Court Judge James H. Burrill heard the matter. In the process, he admitted into evidence a portion of Mr. Thomas' statement to the police. However, he rejected that portion which he felt to be the product of an improper inducement. Then, after considering all the admissible evidence, the judge was satisfied that Mr. Thomas was the assailant. He therefore found Mr. Thomas guilty of aggravated assault and assault with a weapon. For the aggravated assault, the judge imposed a 66 month sentence, and for the assault with a weapon, he imposed a concurrent sentence of two years.

[7] On appeal to this Court, Mr. Thomas challenges both the verdicts and the sentence.

ISSUES

[8] In his Notice of Appeal, Mr. Thomas raises the following grounds:

1. The Learned Judge erred in law in failing to consider or weigh the evidence which could have raised a reasonable doubt and in particular as to the identity of the alleged assailant and specifically, *inter alia*:
   a) The victim did not identify Jahmal Thomas as his assailant and recalled only that the assailant wore a hat with a white brim.
   b) No blood of the victim was found on the alleged assailant.
   c) No DNA or fingerprint evidence of Jahmal Thomas was found on the knife recovered at the scene.
   d) Allowing the evidence of witnesses who describe an incident which occurred in the dark of the night on the date in question.
   e) The judge erroneously allowed evidence of Jahmal Thomas having a similar knife months before.
   f) The Learned Judge erred in law in relying upon the evidence of Adam Acker who described seeing a stabbing from a distance of 20 feet away in the black of the night.
2. The Learned Judge erred in law in failing to consider/weighing the evidence particularly as it related to the presence of another African Canadian at the scene that night in question.
3. The Learned Judge erred in law in deciding the statement of Jahmal Thomas was free and voluntary and admitting same into evidence.
4. The Learned Judge erred in law in failing to consider or weigh the evidence of the four defence witnesses.
5. The Learned Judge erred in law in finding guilt on both the 268 and 267(a) charges when they are basically the same offence.
6. Further the defence appeals the sentence and with respect to this ground states the Judge erred in law in imposing five and half years imprisonment in the circumstances.

[9] Grounds 1, 2 and 4 challenge the reasonableness of the verdict. They should be considered together.

[10] Ground 5 invokes the so-called *Kienapple* principle which prevents an offender from being convicted twice for the same wrongful act.

[11] We distill and restate the issues as follows:

1. The admissibility of the police statement;
2. The reasonableness of the verdict;
3. The *Kienapple* issue; and
4. The fitness of the sentence.

[12] In the course of addressing these issues, we will highlight the appropriate standard upon which they should be reviewed.

ANALYSIS

The Admissibility of the Police Statement

[13] We first address the standards upon which we are to review the judge's decision to admit a portion of Mr. Thomas' statement to the police. The judge must articulate the appropriate test for admissibility. That is a question of law for which the judge must be correct. This aspect of his decision-making function leaves no room for error. However, when applying this test, it is for the trial judge and not this Court to determine how much weight to give to the evidence. See *R. v. Oickle*, 2000 SCC 38 at para. 22.

[14] Here, the judge was well aware of his role and correctly articulated the test for admissibility:

> It is trite law that in order for a statement given to a person in authority to be admissible, the Crown must establish beyond a reasonable doubt that is was provided voluntarily. That has long been the statement of law surrounding the admissibility of statements to persons in authority. Clearly it was established by the Supreme Court of Canada in the case of *R. v. Boudreau* (1949), Supreme Court Reports 262. And the statement may be involuntary if it is the result of either an inducement or a threat. It may also be involuntary if it is not the product of an operating mind.
>
> The statement of the rule long considered to be definitive is found in a case that's a hundred years old now. *Ibrahim v. The King***,** that every law student learns in taking evidence. It's 1914 Appeal Cases, 599 from the Privy Council. And the statement of the law was that:
>
> > "No statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the

> sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised by a person in authority."

That common law rule was based on the premise that involuntary confessions are more likely to be unreliable. The admission of such evidence will increase the ranks of the wrongly convicted and the underlying principle stated by that rule was reaffirmed and in fact expanded upon by the Supreme Court of Canada in *R. v. Oickle*, 2 S.C.R. 3 in 2000. In *Oickle*, the Court decided that it was time, they said, to restate the rule. The Court in *Oickle* stressed the dangers of false confessions and simply encourages now trial judges to consider whether or not a particular inducement or promise had an actual impact upon an accused's person's decision to speak to police.

And it was…it is confessions that were induced by such threats and promises that are a problem. If the hope of advantage or fear of prejudice emanates from the accused's own mind, that is not an issue that the Court needs to be concerned with.

And where there is no causal connection between the police inducement or subsequent confession, it cannot be considered to be improper. It's important for the Court to carefully review the nature of any inducement offered and not all statements obtained as a result of an inducement will be ruled admissible.

In *Oickle*, it was held that exclusion will occur:

> "Only when the inducements, when standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne."

And that comes from paragraph 57 of the *Oickle* decision.

The inducement must, as I just stated, must be offered by a person in authority. Self-generated inducements, and that's what I was speaking of when I spoke about if it was emanating from the accused, will not result in a statement being ruled inadmissible.

According to the Supreme Court of Canada, the most important consideration in all cases is to look for a *quid pro quo* offer by the interrogator. Essentially, we will give you something if you give us something, regardless of whether it comes in the form of a threat or a promise. And that comes from paragraph 57 of *Oickle* as well.

And of course *Oickle* stands for the proposition that any analysis of voluntariness must be contextual and look at the full circumstances surrounding the taking of the statement.

In *Oickle*, it's clear that the contextual analysis to determine voluntariness must not only look at inducements or threats, but look at the issue of operating mind and oppression.

[Emphasis added]

[15] In applying this test, the judge in fact concluded that Mr. Thomas was offered an improper inducement part way through his interrogation. As a result, he excluded everything Mr. Thomas said from that point onward:

> The ebb and flow of that conversation is difficult to engage from me reading it, however, we viewed it on the video and there is raised therein a concern as to whether or not the officer offered an inducement to the accused to provide a statement.
>
> Not all inducements are improper. An inducement to, that appeals to an individual's morality or spiritual side is not an improper inducement. In *Kaufman* on confessions, they were once characterized as spiritual exhortations or inducements. There's nothing wrong with those. It's only ones that are, *Kaufman* calls temporal inducements or the Supreme Court of Canada in *Oickle* refers to *quid pro quo* inducement, where the accused will gain some advantage that could be considered to be improper inducements.
>
> When the officer says to him, all I can say though, how would it look to a Crown Attorney having a fellow that is sorry for what he did as opposed to a fellow that says, you know what, I'm just going to roll the dice again? Is that an improper inducement? The Crown argues no because the officer had no control over what the Crown would do. But control in my view is not a necessary factor. There are a host of cases out there that deal with officers who simply say to individuals, it would be better if you confessed. That comment, it would be better, would have to be considered in the full context of all the statement to determine what was meant by it and the affect it had on the accused.
>
> In this case, there is absolutely no doubt in the Court's mind that this meets the category of an improper inducement. There is no doubt that when the officer said that, he was referring to how it would look to a Crown Attorney who would ultimately, we knew from the prior part of the interview, was taking control of this case. How would it look and how would it affect their decisions if they had a person who was sorry for what he had done and implicitly had written out an apology, as opposed to someone who was going to say, I'm just going to roll the dice again?
>
> Having concluded that it's an improper inducement does not determine the matter. There was a time prior to *Oickle* that it might have. However, it is important that I carefully review that, the nature of that inducement offered, that I have just done. And whether that alone or in combination with other factors are strong enough to raise a reasonable doubt as to whether or not the will of the accused was overborne. To raise a reasonable doubt as to whether or not that induced the statement in this circumstance.
>
> I've had some days to think about that now and consider the full import of that. I've reviewed a large portion of the transcript. I have considered the fact that Mr.

> Thomas was well aware of the process and he knew very well that he was entitled to make a statement or not make a statement in this circumstance.
>
> But at the end of the day, considering all that was said by him and given the fact that it was soon thereafter that he began to write out the apology, I am not convinced beyond a reasonable doubt that that improper inducement did not affect him and was not something that he latched upon and was held out by the officer, that convinced him that if he did make the statement, that things might go better for him, because in the eyes of the Crown Attorney, he, by giving a statement at that time and up front, would better his plight.
>
> And in fact, that's essentially the very thing that he repeats near the end of the statement. He wants to make sure that people know that he apologized up front. He didn't wait to the time of trial. He didn't wait to the time of sentencing, which he referred to earlier. That he took…he stood up and apologized right off, off the bat, to use a colloquial phrase. And he also wanted to ensure that the Crown was made aware of all these circumstances.
>
> Now it's quite right that at the end of the interview, when he says, you need to tell that to the Crown too, he was referring specifically at that point in time to how he could have gotten on the phone and made it all go away. And didn't specifically refer to the apology. However, I'm satisfied from the context of all of what was being said during that phrase or in that phrase and all of what had occurred before, that he was also concerned that, and expressed a knowledge that the statement of apology would not only go to the alleged victim, but to the Crown Attorney as well.
>
> At the end of the day, I am satisfied beyond a reasonable doubt that statements made by the accused orally on video-tape up to the point of approximately hour 1:51, at the time the officer had left the room and then comes back into the room with the blanket, all statements made by the accused up to that point in time were freely and voluntarily given and may form part of the evidence at this trial.
>
> However, I am not satisfied beyond a reasonable doubt that the Crown has discharged its burden for any statements that were made after the time that the officer said, all I can say is though how would it look to a Crown Attorney having a fellow that is sorry for what he did as opposed to a fellow that says, you know what, I'm just going to roll the dice again?
>
> It's unfortunate, but those words were spoken. And in my view, for the reason that I have given, any statement made by the accused either in writing or orally after that time in the interview may not form part of the evidence at this trial and are excluded.

[16] In his factum, Mr. Thomas simply offers this to support his contention that the entire statement should have been excluded:

> Mr. Thomas was tired, cold and hungry and was induced into his actions.

[17] Respectfully, the record does not support this contention. In fact, these same concerns were raised with the judge who responded with these unassailable findings:

> With respect to his clothing, it's clear that his clothing had been removed from him on the…at the time of his arrest and he was given what in the evidence was called a paper suit, and it's clear that he had that on throughout the course of the interview, but it fully covered him. He reported to being sometimes hot, sometimes cold, so there's nothing that can be said from the evidence that would cast any doubt on the, you know, effectiveness of the clothing that he was given. It wasn't something that was going to keep him too cold or, too hot, because it's clear from all the evidence that sometimes he was too hot, sometimes he was too cold, just as anybody could be who was clothed in, in their normal clothing.
>
> …
>
> With regard to the arguments concerning the oppressive conditions, I find no serious merit in those arguments. It's clear that the accused was not feeling his best. It's clear that he was upset by his detention. And that is not surprising. He found himself in a difficult spot, but that does not amount to oppressive conditions. With regard to his not feeling well, I watched carefully the video and while it's clear that he wasn't feeling his best, I'm not satisfied that in combination and in the context of all the factors, that his discomfort in any way affected his volition in those circumstances.
>
> He had not eaten, but that was his choice. Likely he didn't have an appetite. And the period of time which he had not eaten, he said he had eaten nine o'clock the morning before, was not in all the circumstances of concern to the Court. He could not be characterized as having been dehydrated. That overstates his discomfort in my view. It may be splitting hairs, but at best, I think you could call him thirsty, and he was provided with Gatorade.
>
> He was clearly agitated over his predicament. He was clearly agitated when he was told that the charge had been upgraded from assault with a weapon to aggravated assault. He clearly had a desire to inform his family of his predicament. But it cannot be said in my view that it's implicit that he wrote out the apology or statement to get the phone. He had asked for the phone and it wasn't provided forthwith, but he was never denied it. And really at the end of the statement, he asked once again about the phone and a phone was brought in so that they could do the Justice of the Peace remand hearing. And he asked if he could call his family first and the officer said why don't we do this first and he said in reply, all right, we'll do this first.
>
> He was treated with kid gloves for the most part by the officer.

[18] There is no merit to the Appellant's assertion that cold, hunger or thirst induced him to provide a statement.

[19] In oral argument, Mr. Thomas' counsel took a somewhat different angle, suggesting that the inducement which led to the exclusion of some of the evidence existed subtly throughout the entire interview process. Counsel suggested that his client, familiar with the process, was angling for a deal throughout the entire interview. Respectfully, this suggestion amounts to no more than conjecture. In any event, the judge's task was to assess the police officer's impugned actions as opposed to what Mr. Thomas might have been angling for. In fact, the judge addressed this head on in the passage quoted above (¶ 14): "If the hope of advantage or fear of prejudice emanates from the accused's own mind, that is not an issue that the Court needs to be concerned with".

[20] Simply put, a finding of an improper inducement does not have the retroactive effect of vitiating what may have transpired beforehand. See *R. v. Jack* (1992), 76 Man. R. (2d) 168 (Man. C.A.).

[21] We dismiss this ground of appeal.

The Reasonableness of the Verdict

[22] We owe significant deference to a trial judge's factual findings, considering it was he (and not us) who observed the witnesses first hand. For example, in *R. v. Roach*, 2011 NSCA 95, where identification was also the key issue, this Court confirmed:

> [23] Here, the variety of complaints raised by the appellant come down to two principal points: that the judge ignored or did not give proper weight to significant flaws in the Crown's evidence on identification, specifically, Mr. Casey's capacity to identify the appellant as the man who tortured him, and mistakes made by the police in conducting the photo line-up.
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> **[**24] In considering this ground of appeal the test we apply is whether the verdict is one a properly instructed jury, or trial judge, acting judicially, could reasonably have reached. Further, a judge's conclusions with respect to identification are (like credibility) entitled to considerable deference.

[23] Here, Judge Burrill provided a thorough analysis in which he made clear factual findings, all solidly grounded in the evidence. Furthermore, he addressed almost all the issues that Mr. Thomas now invites us to revisit. Specifically, we offer the following detailed response to each applicable ground of appeal.

[24] Ground 1(a):

> …
>
> a. The victim did not identify Jahmal Thomas as his assailant and recalled only that the assailant wore a hat with a white brim.

The judge addressed this issue head on:

> Robert Childs described his assailant as having a white hat. I believe…a white brim on his hat. I believe that's his perception, but I believe he's wrong on that point. He was involved in speaking to someone who had bumped into him. He wasn't speaking kindly to that person. He essentially asked him what the fuck was his problem. And words were exchanged and then the knife came out and he was stabbed. I doubt that in a circumstance such as that, you're going to be looking at somebody's hat to describe later what colour it is. You may give a statement, you may think about it and think you remember a white hat, but the probability of being wrong might be pretty high in that circumstance. But if you got a knife in the side and saw it come out, you might be looking at the knife at that particular time and might miss the colour of the hat.
>
> I listened carefully to the evidence of Robert Childs and I found him to be a generally credible witness, and I believe he gave accurate testimony, except for that one particular aspect of it. He couldn't specifically identify that person in the courtroom when he gave his testimony, but he was clear that the person who stabbed him was not some third party but the person that bumped into him. Lacey Childs, Adam Acker gave the same testimony.

[25] Ground 1(b):

> b. No blood of the victim was found on the alleged assailant.

This is not surprising considering that Mr. Childs was the victim of one sudden stab. His wife did not even know he was stabbed until he showed her the wound. There was no evidence of blood gushing from Mr. Childs.

[26] Ground 1(c):

> c. No DNA or fingerprint evidence of Jahmal Thomas was found on the knife recovered at the scene.

This is a proverbial red herring. There was no evidence of anyone else's DNA nor fingerprints on it either. This was not lost on the judge as evident from this exchange with Mr. Thomas' counsel:

> MR. POWER: Other than the similarity. Now if it was his knife, you would have expected to find something connecting him to the knife other than the fact that the officer saw a similar knife so many months prior to that. I think that's…
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> THE COURT: Would you really? I mean, presumably you're talking about fingerprints, DNA?
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> MR. POWER: Yes. So…
>
> THE COURT: But other than Bobby Childs' DNA, there, there was no DNA on the knife and no fingerprints on the knife, so presumably if it belonged to somebody, if your argument holds merit, somebody's fingerprints should have been on it or not.
>
> MR. POWER: I would have thought somebody's fingerprints would have been on it.
>
> THE COURT: Yeah. So if there weren't, what does that say?
>
> MR. POWER: It's not Mr. Thomas'.
>
> THE COURT: Or anybody else's, would be the logical extension

[27] Grounds 1(d) and 1(f) are similar.

> d. Allowing the evidence of witnesses who described an incident which occurred in the dark of the night on the date in question.
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> f. The Learned Judge erred in law in relying upon the evidence of Adam Acker who described seeing a stabbing from a distance of 20 feet away in the black of the night.

These grounds read like alleged errors as to the admissibility of this evidence, but in oral argument Mr. Thomas' counsel placed them under the unreasonable verdict allegation. In any event, the judge was well aware of the witnesses' vantage points and that this event occurred after dark:

> With regard to Adam Acker, quite frankly I found him to be the best witness that I heard during the course of the trial. He gave his evidence in a straightforward, clear manner. He did not try to overstate his evidence. And despite the fact that he was friends with the complainant, he didn't try to describe anything more than what he saw or did on that particular occasion.
>
> The police asked, you sure? They asked him if he had, if he was sure he had the right person and he said yes, he was. Well, I'd be surprised that in cases where identity was important, that the police didn't ask that question at the scene that night. That doesn't detract from the accuracy of his observation. It perhaps speaks to a police officer that's trying to be careful to make sure that the identity is something that the witness is certain of.

> He saw the person jump off a wall and walk down the sidewalk. No other witness saw that, but I attribute that to the fact that he was looking at the time and saw that happen, while others perhaps didn't, didn't see it. Twenty feet away, not a great distance that would detract from his ability to observe, in my view. And the fact that there were a large group of people in the area does not detract from the accuracy of his testimony either as well or his ability to observe. Because it's very clear from the totality of the evidence that there were no altercations, there were no…nothing other than people milling around at closing time, until the bump and the stabbing took place.

[28] Ground 1(e):

> e. The judge erroneously allowed evidence of Jahmal Thomas having a similar knife months before.

Again, although this appears to challenge an evidentiary ruling, we are satisfied from oral argument that this too falls under the unreasonable verdict allegation. Mr. Thomas' essential complaint is that the judge placed too much reliance on the fact that, in an unrelated encounter with the police months earlier, Mr. Thomas was found carrying a knife similar to that found at the scene. Here is what the judge said, during oral argument about this evidence:

> THE COURT: And of course I don't know what he's going to state. But, if a person were charged with dangerous driving and the vehicle with a certain license number could be identified, and if a witness saw that pers…saw a person who is the accused or some other person for that matter driving the accused on an earlier occasion, wouldn't the fact that the person was driving it on a prior occasion present some evidence that the person might be associated with a particular vehicle? So I guess, I guess what I'm saying is, in this case, wouldn't the questioning be admissible but then the, the weight that could be attached to any answer be ultimately determined after appropriate cross-examination?
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> MR. POWER: I, I suppose.
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> THE COURT: I mean, for example, if it was, if the item in question was a common silver butter knife that we might have in every, every kitchen and that was the alleged weapon, and the officer was going to testify that two months earlier I saw this person sitting at the dinner table eating with a, with a, with a butter knife, it seems to me that the questioning might be appropriate and admissible, although at the end of the day likely little weight would be attached to, to it because of the fact that it would be so common. So, any…I guess what I'm saying is, I think it's admissible but, you know, the weight to be attached to any answers given by the officer would ultimately be determined. I mean, unless you can point me to some authority that would suggest that because it happened at

> an earlier time, these observations, that it wasn't relevant, I think I'm going to allow it.
>
> MR. POWER: Well, it has of course prejudicial value and it doesn't have much relevance to the night in question, what the officer might have seen on a previous and, and what that might have been in relation to this particular night.
>
> THE COURT: Crown, a response?
>
> MS. MACDONALD: Your Honour, I agree with Your Honour and, and what you've said. I think that this line of questioning is something that is admissible. I think there would be the issue of weighing what evidence comes out of it in terms of the probative value versus prejudal…prejudicial effect, in terms of what comes out. It's a circumstance where the line of questioning is not being used to determine any bad character evidence, just what the officer's encounter with this particular item was on a previous occasion.
>
> THE COURT: No, I see no basis upon which to exclude the questioning as inadmissible in these, in these circumstances. As with any evidence, prejudicial effect versus probative value is something that need be considered, but I don't see that as being an issue with respect to the proposed questioning that I anticipate the Crown will, will ask here. So, the questioning is, is, is appropriate. The answers will be admissible and the weight to be attached to any of the answers will ultimately be, be determined. So go ahead, Crown.

[29] The judge's admission of this evidence was completely proper. As to the use he made of it, we likewise see no error. The trial judge did not appear to place much weight on this evidence. At one point in his reasons he said:

> Constable Himmelman gave evidence that was relevant to the issue of identity. Constable Himmelman described the knife that had, well actually, the knife had been seized by Constable Bartlett and has been introduced into evidence and it's an exhibit at this trial. It was examined by Constable Himmelman and it's clear that it is a knife that has some distinctive features and that it's a knife that Constable Himmelman is of the opinion is the same knife that he saw in July 2013 in the possession of the accused.
>
> However, there was, as the Defence pointed out, no evidence before the Court about the particular uniqueness of this knife and how common it might be. Certainly it had distinctive features, and I'm satisfied that the best Constable Himmelman could say is that it's a knife that looked exactly like the knife that Jahmal Thomas had when he had, on his person when he dealt with him in July, I believe it was July 27th of 2013.

[30] The key evidence against the appellant was his admission to Cst. Himmelman that he bumped into the victim. In fact, the trial judge found that he was satisfied beyond a reasonable doubt the appellant had stabbed the victim without regard to the evidence of the knife. This is what he said:

> The evidence in my view in connection with this matter, the accused's statement, the fact that he had a knife that looked identical to the one that had the blood of Bobby Childs on it, but even without that, the fact that Robert Childs and Adam Acker say that the person that Robert Childs bumped shoulders with was the same person that stabbed him. And the fact that Jahmal Thomas acknowledges that it was he who bumped shoulders with someone that night, establishes beyond a reasonable doubt that the accused is guilty of committing an assault on Robert Childs, while using a weapon, to wit: a knife, and also wounding Robert Childs, thereby committing an aggravated assault under Section 268 of the Criminal Code, and I find him guilty of both those charges.

[31] Ground 2:

> The Learned Judge erred in law in failing to consider/weighing the evidence particularly as it related to the presence of another African Canadian at the scene that night in question.

The judge was well aware that there were other African Canadians in the bar that evening. He addressed this, reaching these unassailable findings:

> Yes, certainly there were other African Canadians at the bar that night. Some that were known to, to others. One that had a gray sweater on. But at the end of the day, I am satisfied that Jahmal Thomas' statement that he bumped into someone, that someone bumped into him when he was mad and pissed off, that then there was a melee or chaos that the police saw after that, and that he felt singled out. He said there was me and four of them. There wasn't anyone there that he says was helping him. That confirms the evidence of Robert Childs; that he bumped into someone and the someone he bumped into was Jahmal Thomas.
>
> When Robert Childs and Adam Acker specifically say that the person that bumped into Robert Childs was the same person that stabbed him, I believe them and I accept their evidence. It proves beyond a reasonable doubt that the accused was the person who had a knife and clicked it open and then put it into Robert Childs' side that night.

[32] Issue 4:

> The Learned Judge erred in law in failing to consider or weigh the evidence of the four defence witnesses.

It is just wrong to suggest that the judge failed to consider the defence evidence. He did:

> The Defence also called evidence. They called the evidence of Jenna Ryan, who was sitting on the wall as it were, with Ryan McCarthy waiting for a drive. Jenna

> says that she saw Jahmal Thomas, the accused, there. And he accidentally bumped into another person and that he tried to walk away. She described him as wearing a black sweater and that there was another African Canadian that was wearing a gray sweater in the tavern that night. Although she clearly in her testimony says that she only saw Jahmal Thomas as the only African Canadian in the particular location at that time.
>
> She acknowledged that she had a few drinks and in fact used these words to describe her state of sobriety, she described herself as pretty drunk. And after the bump, after the bumping of shoulders or the rubbing of shoulders, she didn't see what, didn't see what took place.
>
> Ryan McCarthy, he was seated waiting for a drive and remained seated at that time, and he reported that there was another African Canadian there, some ten feet away, but he acknowledged that he didn't see what happened.
>
> And Ryan Zinck who left the bar from the front door and turned to the right as he left the door, confirmed that he had seen an African Canadian with a gray sweater on that day and had never seen Jahmal Thomas.
>
> Merissa Herring, who had been with the accused, said that there were three altercations. She said that she saw Jahmal Thomas there. She had been going to meet up with him and had walked by him. And for some reason they weren't, although they had been together earlier, weren't particularly communicating at that time. She was somewhat questionable as whether she actually made eye contact with him, but she did see him. She said that she had walked by and then became aware shortly thereafter that something had taken place. She did not see the stabbing occur. And she described him as not wearing a bandana, although it's clear from the evidence that one was seized from him that he, he had on his person that night.
>
> The Crown argued that in dealing with her testimony, I should be careful to note that she acknowledged that she had been involved, at least in part, in…for a time, in an intimate relationship with the accused.
>
> The Defence says there are some discrepancies in the testimony that I just pointed out. That there was another African Canadian present in the vicinity of the bar that had a gray sweater on. That some of the witnesses identified the stabber as having a gray sweater. And the Defence argues that it's not proven beyond a reasonable doubt that Jahmal Thomas had been the attacker that night.

As this summary reveals, none of these witnesses saw the stabbing. Their main purpose appears to establish that there were other African Canadians present. However, as noted above, the judge dealt with that issue.

[33] In short, there is no merit to this aspect of the appeal. While Mr. Childs was unable to identify Mr. Thomas as his assailant and was mistaken as to the type of

hat he wore, he was certain that the person who bumped into him was the same person who stabbed him. Then we have the overwhelming evidence, even from Mr. Thomas in his police statement, that the two men bumped into each other that evening. All this added up to proof beyond a reasonable doubt for the judge.

[34] We dismiss this aspect of the appeal.

SENTENCE APPEAL

The Fitness of the Sentence

[35] Mr. Thomas asserts that a 66 month sentence is too harsh in the circumstances. For the following reasons, we say that it is not.

[36] First of all, we acknowledge that Judge Burrill's choice of sentence is owed significant deference by this Court. This Court in *R. v. Adams* 2010 NSCA 42 explained:

> [15] In fixing sentence a judge is exercising a statutorily authorized discretion under s. 718.3(1) of the *Criminal Code*. As with other discretionary decisions, the standard of review on appeal is a deferential one. This standard has been articulated in a number of ways. As expressed by Macdonald, J.A. of this Court in *R. v. Cormier* (1975), 9 N.S.R. (2d) 687 at p. 694:
>
> > 20 Thus it will be seen that this Court is required to consider the "fitness" of the sentence imposed, but this does not mean that a sentence is to be deemed improper merely because the members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the proper principles a sentence should be varied only if the Court is satisfied that it is clearly excessive or inadequate in relation to the offence proven or to the record of the accused.
>
> [16] In *R. v. M.(C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500; S.C.J. No. 28 (Q.L.), Lamer, C.J.C., for a unanimous Court, said:
>
> > [90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code* ...
> >
> > (Underlining in original)

[37] Here, Mr. Thomas can point to no error in principle. In fact, the judge identified and properly applied all the relevant principles of sentencing. Thus, the only remaining question is whether this sentence is demonstrably unfit.

[38] Considering the very serious nature of this very violent and unprovoked attack and Mr. Thomas' lengthy record for violent crime, this sentence is not outside the range of sentence.

[39] As to the seriousness of the offence, the judge noted:

> Both counsel have commented on the gravity of the offence and there's no question here that the offence is serious. It was not premeditated but it was an offence that occurred with the slightest of provocations. And I really hasten to caution against using the word provocation to describe an accidental bump in the night that occurred by two passer…two persons passing on the sidewalk. It was just an accident to which he reacted in the most violent and inappropriate and dangerous way.
>
> As to the responsibility of the offender, there's no question that he is solely responsible for his actions on that particular night.

[40] He added this about the effect the crime had on Mr. Childs:

> For whatever reason, and really there was no reason, he came into contact with Jahmal Thomas that night at approximately two o'clock in the morning. They bumped into one another and Mr. Thomas pulled out a knife, stabbed him in the side, fractured a rib, lacerated his spleen and his diaphragm. He was rushed to the hospital where he had surgery. And he continues to suffer from the effects of the stabbing.
>
> A Victim Impact Statement has been filed. It indicates that he has a permanent hole in his spleen and that he has some limitations in his activity. He was in hospital for three days. He was released earlier because he couldn't handle being in the hospital. He was away from work for the best part of the fishing season, he reports in his Victim Impact Statement. He has suffered a lot of turmoil emotionally. He has had a lot of stress put on he and his family, he says. They are trying as best they can to heal from this. He says he still cannot handle hearing someone open a jackknife.
>
> He sets out his financial loss. He said his wife had to go to work two jobs to try and keep their home going. They had their power ultimately disconnected because they were unable to get money paid on the power bill. It was causing him to lose food from their freezer that they had for the winter. And he reports that, "The morning of October 6, 2013 changed my life in so many ways, I then realized in the blink of an eye your life can be changed for the worst. I think about that night and the one thing I'm thankful for is I'm still alive as the stab wound was so close

to my heart. I never want to experience anything like this ever again and I also never want to witness anything like this. The stress and pain and problems this has caused my family and I was very overwhelming". He put his total monies lost, his lost wages and out-of-pocket expenses as being somewhere around forty-three thousand five hundred and thirty-eight dollars.

[41] Turning to Mr. Thomas' lengthy criminal record, the judge observed:

> He began serving sentences in the Young Offenders' facility. He reports in the Pre-sentence Report that at age 18, he received a federal sentence served in an adult institution. And while I'll not repeat the, the criminal record of the accused, it forms part of the sentencing record, which is public. It sets out the details of his criminal convictions up until 2006 in the Province of Ontario, as detailed in what's known as the CPIC or Canadian Police Information Centre, a printout, and then three convictions referred to by the Crown that are attached to the Pre-sentence Report and JEIN Offender Summary. JEIN being the justice oriented information system the Province maintains.
>
> There was a somewhat confusing entry in the criminal record as to the sentence he received in 2006, but I am informed by the warrant expiry date that the entry which says, "Three years for possession of a prohibited or restricted weapon (credit for the equivalent of twenty months pre-sentence custody)", means that the twenty months came off of that three year sentence, leaving a balance of sixteen months on that sentence. And then he received, on three other offences, one year recurrent each, but consecutive to the earlier sentence, which brought that sentence to a total of twenty-eight months, because it was imposed on October 30th, 2006 with a warrant expiry date of February 28th, 2009. It meant that the sentence he received going forward on October 30th was a sentence of twenty-eight months. He was released prior to the warranty expiry date, I'm advised, sometime in 2008, with a statutory release date having been, the Crown tells me, May 20th, 2008.
>
> After that time, after that sentence was served, he was released to the community and spent a significant portion of that time in Nova Scotia, where he entered relationships with other individuals and has two young children from relationships in Nova Scotia. He has three children in total. One is eight years old and resides in Toronto with the child's mother. He hasn't had contact with that child since that child was one year of age. He had a four year relationship with an individual in Nova Scotia who has now a child that is, at the time of the writing of the report, ten months of age. And with Ms. Deneka Crouse, he had been living with her since April of 2013, and he has a child that was three months of age with her, at the time of the writing of this report, which is dated August 18th of this year.
>
> While he was in the Bridgewater area, he had become employed. And from July until the date of the offence, he was employed with Clearwater, who work on, on vessels, and was developing a good reputation with his family and coworkers at that time. With, by family, I mean Deneka's relatives and, and her, and it's clear

> that they had welcomed him into their family and continue to be supportive of him.
>
> After that release from that prison sentence from Ontario, he has not been crime free, but he had been involved in offences in 2009 and 2010 for which he received sentences. He had received sixty, sixty days for being involved in a riot. That sentence had been imposed on May 9th, 2012. He had received ten months for two offences that occurred in 2009, after his release, for being in possession of a prohibited or restricted weapon, and also being in possession of firearm while he was prohibited from possession of such items.

[42] In conclusion, although the sentence is at the higher end of the range, we are not persuaded that it is demonstrably unfit.

The *Kienapple* Issue

[43] The appellant argues that the trial judge erred in law by entering a conviction on the assault with a weapon charge. Keep in mind what happened. The trial judge sentenced the appellant to 5.5 years' incarceration on the aggravated assault charge (s. 268) and 2 years' incarceration on the assault with a weapon charge (s. 267), to be served concurrently. In other words, so long as the sentence appeal on the s. 268 charge does not result in a reduction below two years' incarceration (and it plainly does not), the life or death of the conviction for assault with a weapon has no practical consequences on the actual sentence the appellant must serve.

[44] To overcome the practical futility of pursuing this point, the appellant argues that where there are two counts, trial judges "hit him [the accused] hard on the more serious charge on the first count" and go easy on the other. In other words, without the conviction for the assault with a weapon, the sentence on the first count of aggravated assault would have been less.

[45] There is absolutely no merit in this argument. There is not the slightest suggestion in the record, nor any authorities identified, that support such a submission.

[46] Despite the lack of any immediate practical significance arising from this issue, it must be addressed.

[47] The appellant says that the judge should have entered a conditional stay on the assault with a weapon charge because a conviction would offend the rule

against multiple convictions. For reasons that follow, we agree a stay should have been entered.

[48] But it is difficult to attach any fault to the trial judge in the circumstances; neither the Crown nor defence counsel made any submissions to the trial judge that the rule against multiple convictions precluded a conviction on the s. 267 (assault with a weapon) charge, despite the trial judge having raised the topic.

[49] What happened was this. The defence case closed on April 25, 2014. The trial was adjourned to May 5, 2014 for Crown and defence submissions. During those submissions, nothing was said about the rule against multiple convictions.

[50] The trial judge reserved his decision. On May 20, 2014 he delivered oral reasons. The sole relevant issue in dispute was the identity of the person who wielded the knife, thereby wounding the victim. Satisfied that the evidence established beyond a reasonable doubt that the appellant was that person, the trial judge found him guilty of assault with a weapon and aggravated assault.

[51] The sentencing hearing was eventually held on October 20, 2014. The Crown and defence each filed written submissions in advance. Neither party mentioned the rule against multiple convictions. During oral submissions, defence counsel sought a sentence of time served. The trial judge raised the issue of *Kienapple* (the rule against multiple convictions). He even invited submissions on it. The transcript reveals the following exchange:

> MR. POWER: So he has, he has...he's done that equivalent time period for this particular offence. And offences is technically what he was convicted on. But I'd ask the Court to look at the nexus or the, the, the relationship between those two; that they involved a stabbing incident to Mr. Child's, and although you differentiate under 267 and 268, it was, we submit, one incident.
>
> THE COURT: No question, it would be one act.
>
> MR. POWER: One act. And...
>
> THE COURT: Yes. It's the question..
>
> MR. POWER: And...
>
> THE COURT: I think it's the question with regard to the *Kienapple* issue and whether or not there was a legal, a sufficient legal nexus between the two or sufficient legal distinction between the two to warrant the two, two convictions. So if you didn't want to be heard on the issue of whether or not a judicial stay should be entered on one, I'd hear you both in that regard, but proceed.

[52] Despite the invitation, no submissions were in fact made by the Crown or defence. The trial judge did not again specifically refer to this issue. When he announced sentence, he simply said:

> With regard to the sentencing for the aggravated assault charge, I am satisfied that there needs to be an additional period of custody above and beyond the period of remand. I've decided that an appropriate sentence for this offence would have been and is five and a half years or sixty-six months and will reduced by nineteen months' time already spent in custody leaving a balance of forty-seven months to be served in a federal institution.
>
> The charge of assault with a weapon, I'm satisfied occurred out of the same act and it is appropriate that that be a concurrent sentence of two years in a federal institution.

[53] The issue then, is this: as a matter of law, should the assault with a weapon count be judicially stayed by operation of the rule against multiple convictions? We conclude the answer is yes.

[54] The respondent says there is a division of Canadian appellate judicial opinion on this very issue. The British Columbia Court of Appeal in *R. v. D.J.W.*, 2011 BCCA 522 and the Alberta Court of Appeal in *R. v. Strawberry*, [1995] A.J. No. 579 concluded that *Kienapple* does not apply; the Ontario Court of Appeal in *R. v. Basilio* (2003), 175 C.C.C. (3d) 440 said it does. With all due respect to those who may hold a contrary view, we agree with the analysis and outcome in *R. v. Basilio*.

The Rule Against Multiple Convictions

[55] The case of *R. v. Kienapple*, [1975] 1 S.C.R. 729 was by no means the first Canadian case to expressly recognize and apply the common law rule against entering multiple convictions for the same wrong. It is undeniably the most widely known - even to the point that the case name is routinely used as shorthand for the rule.

[56] In *Kienapple*, the appellant was charged with two counts arising out of the same incident: rape (s. 143) and having unlawful carnal knowledge of a female under the age of fourteen years (s. 146). The complainant was thirteen years of age. A jury found the appellant guilty of both offences. The trial judge sentenced the appellant to two concurrent ten year terms of imprisonment.

[57] The issue of the viability of multiple convictions was not raised at trial nor on appeal to the Ontario Court of Appeal. The Supreme Court of Canada granted leave. The majority judgment, written by Laskin J., as he then was, quashed the second conviction. It was common ground that carnal knowledge under s. 146 was not an included offence in a charge of rape under s. 143. The elements of the charges are different, but there can be an overlap in the charges depending on the circumstances. Laskin J., referred to the second charge in those circumstances as being "alternative". He reasoned:

> It is plain, of course, that Parliament has defined two offences in ss. 143 and 146(1), but there is an overlap in the sense that one embraces the other when the sexual intercourse has been with a girl under age fourteen without her consent. It is my view that in such a case, if the accused has been charged, first, with rape and, secondly, with a s. 146(1) offence, and there is a verdict of guilty of rape, the second charge falls as an alternative charge and the jury should be so directed. Correlatively, however, the jury should also be directed that if they find the accused not guilty of rape they may still find him guilty under s. 146(1) where sexual intercourse with a girl under age fourteen has been proved.
>
> The rationale of my conclusion that the charges must be treated as alternative if there is a verdict of guilty of rape on the first count, that there should not be multiple convictions for the same delict against the same girl, has a long history in the common law. A convenient beginning is with the maxim expressed in *Hudson v. Lee* [(1589), 4 Co. Rep. 43a, 76 E.R. 989], at p. 990, "*nemo debet bis puniri pro uno delicto*", which although framed in terms of double punishment, has come to be understood as directed also against double or multiple convictions; in short, *nemo bis vexari* as well as *nemo bis puniri*. This was exemplified in the unanimous judgment of this Court in *Cox and Paton v. The Queen* [[1963] S.C.R. 500], which involved, inter alia, convictions of the accused on two counts, numbered (1) and (3), for conspiracy to steal and conspiracy to defraud, both relating to the same money and securities. Cartwright J., as he then was, speaking for this Court, held that the Manitoba Court of Appeal had properly quashed one of the convictions. He put the matter in these words (at p. 516):
>
> > The reason that the convictions on counts 1 and 3 cannot both be supported is not that they are "mutually destructive", as was said of the counts in *R. v. Mills* [1959] Cr.L.Rev. 662, but rather that if both were allowed to stand the accused would in reality be convicted twice of the same offence. It is the same conspiracy which is alleged in the two counts and it would be contrary to law that the accused should be punished more than once for the same offence.
>
> Of course, in a strict sense, *Cox and Paton* was no more a case of multiple convictions for the same offence than is the present case. Rather it was a case, as is the present one, of multiple convictions for the same matter. …

p. 744-5

[58] After canvassing English and Canadian authorities, Justice Laskin concluded that, in his view, *res judicata* best expressed the theory of precluding multiple convictions for the same delict, although "the matter is the basis of two separate offences" (p. 748).

[59] No hard and fast criterion emerged from *Kienapple*. At most, an approach is suggested. Laskin J. wrote:

> If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions: see *Connelly v. Director of Public Prosecutions* [[1964] A.C. 1254], at pp. 1305 and 1308, per Lord Morris of Borth-y-Gest; cf. *Rex v. Kendrick and Smith* [(1931), 23 Cr. App. R. 1].
>
> p. 751

[60] To test whether the rule against multiple convictions precludes the second conviction, he looked at the legal consequence should the Crown seek to prosecute the accused for the second count in a subsequent trial after a conviction on the rape charge:

> I test the matter in two other ways. If an accused may be charged on two counts, as in the present case, and may properly be found guilty on each for the one act of sexual intercourse with the same girl, it should be open to the Crown to charge him successively in the same way. If it obtains a verdict of guilty of rape it should be entitled to prefer another charge under s. 146(1) in order to obtain another verdict of guilty and seek a further consecutive sentence. Yet it seems clear enough that on the second charge, res judicata would be a complete defence since all the elements and facts supporting the conviction of rape would necessarily be the same under s. 146(1). …
>
> pp. 751-2

[61] Applying this approach to the case at hand, the answer in our view is clear: the second conviction for assault with a weapon is precluded. The more serious offence is aggravated assault, which in these circumstances could not have been committed without the use of the knife.

[62] Aggravated assault is a straight indictable offence, carrying a maximum sentence of 14 years' imprisonment. It is defined as follows:

> 268. (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

[63] Assault with a weapon and assault causing bodily harm is found in s. 267 of the Code. It is a dual procedure offence, punishable either on summary conviction or by indictment. If the Crown proceeds by indictment, the maximum is 10 years' imprisonment. It is defined as follows:

> 267. Every one who, in committing an assault,
>
> (a) carries, uses or threatens to use a weapon or an imitation thereof, or
>
> (b) causes bodily harm to the complainant,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

[64] The Information charged the appellant that he,

> On October 6th, 2013 did in committing an assault on Robert CHILDS use a weapon to wit: a knife contrary to Section 267(a) of the Criminal Code of Canada.
>
> And furthermore did:
>
> wound Robert CHILDS thereby committing an aggravated assault contrary to Section 268 of the Criminal Code of Canada.

[65] It seems obvious that if s. 267 is not an included offence in s. 268 by operation of law (a proposition that was not argued, and on which we express no view) it would not take much to draft the s. 268 charge to specifically include the allegation that the wounding occurred by the appellant's use of the weapon. After all, that was the allegation the appellant actually faced at trial.

[66] In other words, the wrong he was alleged to have committed, and for which he was convicted, was an assault with a weapon that wounded the victim. There was no other wrongful act in play. If the appellant were convicted in a sole count Information of aggravated assault by wounding, could the Crown later proceed against him on a charge of assault with a weapon? We think not. He would have already been convicted and sentenced for that very same assault, although outside the protection offered by *autrefois convict* since technically s. 267 is a different offence.

[67] The converse would also hold true. If the appellant were convicted in a sole count Information of assault with a weapon, could the Crown later proceed against

him for aggravated assault under s. 268? Not only would the common law preclude such a course[1], s. 610 of the *Criminal Code* bars a subsequent indictment.

[68] Some suggest that the Supreme Court of Canada's later decision in *R. v. Prince*, [1986] 2 S.C.R. 480 amounts to a *de facto* reversal of *Kienapple*. In the case at bar, the Crown argues that the test articulated in *Prince* introduces a narrower scope to the rule against multiple convictions; one that results in a conviction for the lesser offence of assault with a weapon because it contains different elements.

[69] We see no resiling from the *Kienapple* principle, let alone a reversal. In *Prince*, a single stab to a pregnant woman triggered a premature delivery. The female victim gave birth to a child who lived, but for 19 minutes. There were two sets of proceedings. At the first, a court acquitted Ms. Prince of attempted murder, and convicted her of assault causing bodily harm. Subsequently, Ms. Prince was charged with manslaughter arising out of the death of the child. Attempts to stop the trial were initially unsuccessful. The Manitoba Court of Appeal quashed the indictment, invoking *Kienapple*.

[70] Dickson C.J. wrote the unanimous reasons for judgment. The appeal was allowed, and the matter was remitted for trial. This is hardly surprising since the law has never invoked the rule against multiple convictions where there are multiple victims. Chief Justice Dickson wrote:

> Also of particular relevance to the present appeal is a passage at pp. 744-45 in which Justice Laskin referred to his conclusion in *Kienapple* in the following terms:
>
> > The rationale of my conclusion that the charges must be treated as alternative if there is a verdict of guilty of rape on the first count, that there should not be multiple convictions for the same delict against the same girl, has a long history in the common law.
> >
> > (Emphasis added.)
>
> **It would appear from this passage that, at least in so far as crimes of personal violence are concerned, the rule against multiple convictions is inapplicable when the convictions relate to different victims. Indeed, I believe it was never within the contemplation of the majority in *Kienapple* that the rule**

[1] *Connelly v. D.P.P.*, [1964] A.C. 1254 at p. 1357; *R. v. Gee* (1973), 14 C.C.C. (2d) 538 (Ont. C.A.); *R. v. Walsh* (1996), 149 N.S.R. (2d) 169 (C.A.).

> **enunciated therein would preclude two convictions for offences respectively containing as elements the injury or death of two different persons.**
>
> Society, through the criminal law, requires Prince to answer for both the injury to Bernice Daniels and the death of the child, just as it would require a person who threw a bomb into a crowded space to answer for the multiple injuries and deaths that might result, and just as it compels a criminally negligent driver to answer for each person injured or killed as a result of his or her driving: see *R. v. Birmingham and Taylor* (1976), 34 C.C.C. (2d) 386 (Ont. C.A.)
>
> pp. 506-7 [Emphasis added]

[71] In any event, Chief Justice Dickson observed that divergent judicial views and legal commentary about the nature and scope of the principle of *res judicata* articulated by Laskin J. in *Kienapple* justified a review of the jurisprudence. Obviously, that review centered on the majority judgment in *Kienapple*.

[72] We see no disagreement by Dickson C.J. with the rule set out in *Kienapple* that precludes multiple convicions for the same "delict", "matter" or "cause". In fact, Chief Justice Dickson expressly approved of the rule and its rationale, although he "found merit" in questioning the use of the term *res judicata* to support the rule (p. 489).

[73] Dickson C.J. observed that the controversy over the rule against multiple convictions, or the *Kienapple* principle, stemmed from the failure by courts and commentators to recognize the need for more than just a common act underlying the charges (p. 490). In other words, more than simply the same act or transaction is required to trigger the rule - there must also be a legal nexus between the charges. The reason to require such a nexus was explained by Chief Justice Dickson:

> The next question which must be addressed is whether the presence of a sufficient factual nexus is the only requirement which must be met in order to justify application of the *Kienapple* principle. Counsel for Sandra Prince refers in his factum to the *Kienapple* principle as one relating to multiple convictions for the same act. Similarly, Sheppard, in his early commentary on *Kienapple*, propounds a same transaction test for the rule against multiple convictions. Some courts, too, have referred to the "same act" or "same transaction" underlying two offences in terms which might suggest that that was sufficient to sustain the operation of the rule: see, for example, *R. v. Boyce* (1975), 23 C.C.C. (2d) 16 (Ont. C.A.), *R. v. Allison* (1983), 33 C.R. (3d) 333 (Ont. C.A.) and *Hagenlocher* (Man. C.A.)
>
> In my opinion, the application of *Kienapple* is not so easily triggered. Once it has been established that there is a sufficient factual nexus between the charges, it

remains to determine whether there is an adequate relationship between the offences themselves. **The requirement of an adequate legal nexus is apparent from the use by the majority in *Kienapple* of the words "cause", "matter" or "delict" in lieu of "act" or "transaction" in defining the principle articulated in that case.** More telling is the fact that Laskin J. went to considerable pains to discuss the legislative history of rape and carnal knowledge of a female under 14 years and to conclude that the offences were perceived as alternative charges when there was non-consensual intercourse with a female under 14. I am not prepared to regard Laskin J.'s analysis in this regard as unnecessary or irrelevant to the outcome in *Kienapple*, which it would of course be if the rule against multiple convictions applied whenever there was a sufficient factual nexus between the charges.

In my opinion, the weight of authority since *Kienapple* also supports the proposition that there must be sufficient nexus between the offences charged to sustain the rule against multiple convictions. In a unanimous judgment in *McKinney v. The Queen*, [1980] 1 S.C.R. 401, delivered orally by Laskin C.J., the Court saw no reason for interfering with a decision of the Manitoba Court of Appeal reported at (1979), 46 C.C.C. (2d) 566. Although *Kienapple* was not referred to in the reasons of this Court, it had been argued in the Court of Appeal. McKinney and others were charged and convicted of hunting out of season and hunting at night with lights contrary to ss. 16(1) and 19(1), respectively, of the *Wildlife Act*, R.S.M. 1970, c. W140. Both charges arose out of the same hunting incident. O'Sullivan J.A. for the majority held that the case involved two "delicts". Monnin J.A., dissenting on another issue, said that hunting out of season and hunting with lights were two different "matters", totally separate one from the other and not alternative one to the other. The judges of the Court of Appeal all agreed that *Kienapple* was inapplicable. Thus, notwithstanding there was but a single act of hunting, there were distinct delicts, causes or matters which would sustain separate convictions.

Numerous other cases can be cited to illustrate that a single act of an accused can involve two or more delicts against society which bear little or no connection the one to the other. *R. v. Logeman* (1978), 5 C.R. (3d) 219 (B.C.C.A.) involved charges of driving while suspended and impaired driving; *R. v. Lecky* (1978), 42 C.C.C. (2d) 406 (N.S. Co. Ct.), contributing to juvenile delinquency and trafficking in a narcotic; *R. v. Earle* (1980), 24 Nfld. & P.E.I.R. 65 (Nfld. C.A.), breach of recognizance and possession of a narcotic; *R. v. Pinkerton* (1979), 46 C.C.C. (2d) 284 (B.C.C.A.), breach of probation and common assault; *R. v. Pere Jean Gregoire de la Trinité* (1980), 60 C.C.C. (2d) 542 (Que. C.A.), contempt of court and unlawfully detaining children. Notwithstanding that a single act of the accused appears in each of these cases to have given rise to two charges, *Kienapple* was held to be inapplicable. In my view, these cases were correctly decided. If an accused is guilty of several wrongs, there is no injustice in his or her record conforming to that reality. In short, I agree with the following remarks of Lambert J.A. in *R. v. Harrison* (1978), 7 C.R. (3d) 32 (B.C.C.A.), at p. 37:

> It is not sufficient to consider the charges and to ask whether conviction on one will involve conviction on another. It is not sufficient to consider the facts and to ask whether only one act is involved. The facts and the charges must be considered together and in their relationship to each other.
>
> pp. 493-5 [Emphasis added]

[74] It is of course proper to focus on the presence or absence of an additional and distinguishing element in the offence sought to be stayed. Chief Justice Dickson wrote of this aspect of the inquiry as follows:

> It has been a consistent theme in the jurisprudence from *Quon* through *Kienapple* and *Krug* that the rule against multiple convictions in respect of the same cause, matter or delict is subject to an expression of Parliamentary intent that more than one conviction be entered when offences overlap: see, in particular, *McGuigan v. The Queen*, [1982] 1 S.C.R. 284. In *Krug*, La Forest J. was careful to explain that the presence of additional, distinguishing elements was in itself an expression of such an intent. **No element which Parliament has seen fit to incorporate into an offence and which has been proven beyond a reasonable doubt ought to be omitted from the offender's accounting to society, unless that element is substantially the same as, or adequately corresponds to, an element in the other offence for which he or she has been convicted.**
>
> I conclude, therefore, that the requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle.
>
> pp. 498-9 [Emphasis added]

[75] Dickson C.J. acknowledged that the question, when is an element additional or distinct, defies a precise answer. Without being exhaustive, he referred to three ways that sufficient correspondence between elements can be found. First, where an element may be a particularization of another element; second, where the elements correspond to more than one method to prove a single delict; third, where Parliament has created another offence that makes proof of the same wrongful act that is included in another offence.

[76] Here, the wrong committed by the appellant was an assault on the victim that wounded him, thereby committing the offence of aggravated assault under s. 268 of the Code. Aggravated assault is one of the most serious non-sexual offences prescribed by Parliament. To wound someone typically involves the use, by the offender, of a weapon. Indeed normal grammatical usage presupposes the

use of a weapon. The *Shorter Oxford English Dictionary*, 3d ed (Oxford: Clarendon Press, 1973) defines the verb "wound" as follows:

> **1.** *trans.* To inflict a wound on (a person, the body, etc.) by means of a weapon;

[77] In our view, there was but one wrong committed, an assault that wounded the victim. Granted, the appellant used a weapon (the knife) to commit that assault, but in these circumstances the s. 267 charge is an alternative (and lesser) offence to the more serious offence of aggravated assault. It was an implicit particularization of the aggravated assault. Another way to look at it is that without the use of the weapon, the aggravated assault could not have been established. There is no additional element involved in the commission of the offence of assault with a weapon.

[78] As noted earlier, the Crown's factum identified the division in Canadian appellate authority. It is to these cases we turn.

[79] First, *R. v. Basilio*. In that case, as in this one, the wounding required to ground the aggravated assault charge was inflicted by the use of a knife. Gillese J.A., for the Court, considered the issue of legal nexus by observing that s. 267 does not create a stand-alone weapons offence, but rather a type of assault (para 20). She explained:

> [21] In *Prince*, the court sets out three ways in which sufficient legal correspondence can be found to exist. First, an element may be a particularization of another element. Second, there may be multiple ways of proving a single delict. The third arises where Parliament, in effect, deems a particular element to be satisfied by proof of a different nature, not because logic dictates the conclusion but because of social policy or inherent difficulties in proof. The court concludes by emphasizing that application of the criteria is not to be done in a fashion that causes us to "lose sight of the overarching question whether the same cause, matter or delict underlies both charges".
>
> [22] On the facts of this case, the same delict underlies both charges. The wounding in the charge of aggravated assault was inflicted through the use of the knife to stab Kerr. It is a knife wound. It is this same wrongful use of a knife to stab Kerr that underlies the charge of assault with a weapon. To focus on the distinction between the elements of wounding and use of a knife, without reference to the essential connection between these two elements on the facts of this case, is to lose sight of the overarching consideration that the same wrong underlies both charges. The wrongful use of the knife is addressed through the more serious offence of aggravated assault. Thus, the conviction for the lesser offence of assault with a weapon should be set aside.

[80] This conclusion is also found in the endorsements in *R. v. French*, [1993] O.J. No. 1063 (C.A.) and *R. v. Villon-Laverde*, [2003] O.J. No. 4219 (C.A.).

[81] As to the contrary authorities, the Alberta Court of Appeal in *R. v. Strawberry*, [1995] A.J. No. 579, in an oral decision, declined to apply the *Kienapple* principle on charges of aggravated assault and assault with a weapon because:

> [9] The appellant also argues that the *Kienapple* principle should apply so that the conviction on a second count should be stayed. We do not agree. The fact of a wound having been inflicted introduces an additional element to the assault with a weapon. In this respect we follow the rationale of this court in *R. v. Switzer* (1987) 32 C.C.C. (3d) 303.

[82] Justice Gillese, in *Basilio*, referred to *R. v. Strawberry*. She did not find the reliance on *R. v. Switzer* to side step the *Kienapple* principle persuasive. With respect, we agree. *R. v. Switzer* involved charges of aggravated assault and use of a firearm contrary to s. 83(1)(a) of the *Criminal Code*. By the time *Switzer* was decided, the Supreme Court of Canada had already ruled definitively in *R. v. McGuigan*, [1982] 1 S.C.R. 284 that Parliament had abrogated the rule against multiple convictions for the offence of s. 83(1)(a). (See also *R. v. Krug*, [1985] 2 S.C.R. 255.)

[83] In *R. v. D.J.W.*, the accused performed an "operation" on his four year old son – a botched circumcision. He was found guilty of criminal negligence causing bodily harm, and acquitted of charges of aggravated assault and assault with a weapon. The Crown appealed the acquittals. The accused appealed the conviction.

[84] Hinkson J.A. wrote for the Court. He concluded the trial judge had not erred in finding the appellant guilty of criminal negligence, but had erred in law in failing to find the elements of aggravated assault had been made out, and that the appellant had used a weapon in the commission of an assault. Accordingly, the Court entered a conviction for the offence of aggravated assault, but stayed the criminal negligence charge on the basis of *Kienapple*.

[85] As to the potential application of the *Kienapple* principle to the charges of aggravated assault and assault with a weapon, Hinkson J.A. reasoned:

> [75] The Crown takes the position that, unlike the entry of a conviction for aggravated assault, the entry of a conviction for assault with a weapon is not

> precluded under the *Kienapple* principles if the accused is also convicted of criminal negligence causing harm. I agree with the Crown on this submission, and find that the submission is equally applicable if a conviction for aggravated assault rather than one for criminal negligence causing harm is entered.
>
> [76] In *Dawydiuk*, this Court upheld convictions for both criminal negligence in the operation of a motor vehicle causing bodily harm and assault using a weapon where the motor vehicle was also found to be a weapon. The question of whether such dual convictions offended the principles in *Kienapple* was not argued in the case.
>
> [77] The charge of assault with a weapon requires proof of an element that was not required to make out the proof of aggravated assault; that is, the use of a weapon. Clearly the first two examples given by Chief Justice Dickson in *Prince* are not met. What then of the third example? I am unable to conclude that there is sufficient correspondence between elements required to prove the two offences to satisfy the third example, and thus conclude that a conviction on both the first and the third counts alleged in the indictment should be entered.

[86] For the reasons expressed by the Ontario Court of Appeal in *Basilio* (which were not adverted to in *R. v. D.J.W.)*, and our own analysis outlined earlier, we respectfully disagree. There was but one wrong or delict, an assault that caused a wound and which resulted in a conviction for aggravated assault. That more serious charge subsumes the lesser offence of assault with a weapon.

[87] In *R. v. D.J.W.*, leave was sought and granted ([2012] S.C.C.A. No. 15). The Supreme Court of Canada ultimately dismissed the appeal in an oral judgment delivered by LeBel J., (2012 SCC 63). Justice LeBel was careful to point out that no comment was being made as to whether the assault with a weapon charge ought to have been stayed:

> LeBEL J.:— We all agree with Hinkson J.A., writing for a unanimous Court of Appeal, that all the elements of the charges against the appellant had been established. **We will not comment on whether the charge of assault with a weapon should have been stayed, as this issue was not raised in this Court.** Nor do we need, on the specific facts of this case, to rule definitively on whether a circumcision performed by a person without medical training can ever be considered reasonable and in the child's best interest. For these reasons, the appeal is dismissed.
>
> [Emphasis added]

[88] In result, the appeal from conviction on the charge of aggravated assault is dismissed, as is the appeal from the sentence for that offence. The appeal from conviction on the charge of assault with a weapon is allowed, and a judicial stay entered by operation of the rule against multiple convictions.

MacDonald C.J.N.S. and Beveridge J.A.

Concurred in:

Scanlan J.A.