

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

DELROY NICHOLAS MORGAN

Transcript of the Oral Reasons for Judgment delivered
by the Honourable Justice L.A.M. Charbonneau, sitting
at Yellowknife, in the Northwest Territories, on
April 4th, A.D. 2007.

APPEARANCES:

Ms. M. McGuire: Counsel for the Crown

Ms. D. Keats:

Ms. P. Taylor: Counsel for the Accused

(Charge under s. 268 Criminal Code)

1 THE COURT: Good afternoon, everyone.

2 MS. KEATS: Good afternoon, Your Honour.

3 MS. TAYLOR: Good afternoon.

4 THE COURT: Counsel, I am ready to give my
5 decision in this case. In my review of this
6 case, I have gone through the evidence in some
7 detail, so I am going to ask you to bear with me.
8 I am not sure how long it will take me to deliver
9 these reasons, but I have gone into some level of
10 detail, so it probably won't be the briefest
11 decision that I have delivered.

12 Mr. Morgan is charged that on or about the
13 21st day of July last year he committed an
14 aggravated assault on N.D. by
15 wounding him. This incident occurred shortly
16 after the Raven Pub closed in the early morning
17 hours that night. I heard testimony from some of
18 the many people who were there, and, not
19 surprisingly, there are many inconsistencies in
20 the evidence of the witnesses. I say "not
21 surprisingly", because most of the people who
22 were there and testified about what they saw had
23 consumed alcohol that night. This all happened
24 in a short time and in circumstances that appear
25 to have been fairly chaotic. So in those
26 circumstances, it is not surprising that there
27 are inconsistencies in each person's account of

1 the events.

2 This is not a case where forensic evidence
3 is of assistance in reconstructing what happened
4 that night. I did hear evidence of certain
5 samples and items being seized from the scene,
6 but no evidence of any test results. There was
7 evidence of blood being found at the scene, but
8 that evidence was very limited in scope. There
9 was blood there. It could have been human, it
10 could have been animal blood, it could have been
11 fresh, it could have been there for a while. We
12 do not know and I cannot speculate.

13 Sergeant Spence Robertson took a videotape
14 of the scene, which was filed as Exhibit 2. He
15 took several still photographs filed as a booklet
16 in Exhibit 4. He prepared a diagram that shows
17 the surroundings of the Raven Pub and the Corner
18 Mart. This was filed as Exhibit 3. The diagram
19 is not to scale, because not every single
20 measurement in the drawing is accurate, but,
21 nevertheless, it was helpful to visualize the
22 scene in a general way, especially in conjunction
23 with the scene photos.

24 The diagram and the photos show the general
25 layout of the parking area between the Raven Pub
26 and the Corner Mart, the general location of
27 dumpsters located at the back of each of these

1 buildings, the back alley that runs behind the
2 buildings and a chain-link fence which is behind
3 the Raven, all of which were referred to during
4 the evidence.

5 Some findings of facts can, in my view,
6 easily be made on the basis of the evidence
7 heard. So I will start with those before I get
8 to the analysis of the evidence bearing on the
9 more difficult aspects of this case.

10 It is clear that Mr. Morgan and Mr.
11 D. were both patrons at the Raven Pub
12 that night. Mr. Morgan had gone there with some
13 friends, including a person named Jeffrey Morris
14 and another individual. Mr. D. had also
15 gone there with some of his friends. Mr.
16 D. and his friends were introduced to
17 Mr. Morgan and his friends. The person who did
18 the introductions was Chris Martin, who was
19 acquainted with both Mr. Morgan and Mr.
20 D. The atmosphere at the bar was
21 friendly and normal. Mr. Morgan bought rounds of
22 shots for everyone. There was no sign of
23 animosity or problems during the evening.

24 At one point during the evening Mr. Morris
25 showed Mr. D. a knife that he was
26 carrying. Mr. D. testified that he did
27 not feel threatened by this, just was perhaps a

1 bit taken aback, and this was the only knife that
2 Mr. D. ever saw that evening.

3 At some point the lights went out in the
4 pub. People were not sure if the bar staff had
5 shut off the lights to get people out of there or
6 if there was, in fact, a power outage, but people
7 were essentially asked to leave the bar at that
8 point, and people started being ushered out of
9 the bar.

10 At some point after this a verbal argument
11 and then a series of physical altercations broke
12 out in the parking lot area between the Raven Pub
13 and the Corner Mart. Mr. D. was still in
14 the Raven Pub when the fighting started, but at
15 some point he got out and became involved in
16 fights, as well. Mr. D. was angry and he
17 fought with more than one person.

18 The last person Mr. D. fought with
19 was Mr. Morgan, the accused in this case. This
20 fight started near the back of the Corner Mart
21 and moved in the back alley towards the area
22 behind the Raven Pub, and it ended with the two
23 of them fighting near the chain-link fence that
24 is behind the Raven Pub, which was also referred
25 to in the evidence as the fence near the daycare.

26 After the altercation with Mr. Morgan ended,
27 Mr. D. realized that he was bleeding. He

1 walked back towards the sidewalk and eventually
2 fell down or laid down. The police were called,
3 as well as an ambulance, and Mr. D. was
4 taken to the hospital.

5 Mr. D. had a number of lacerations
6 on his body; some on his forearms, some on the
7 back of his torso, some on the back of his head.
8 He suffered a collapsed lung as a result of one
9 of those lacerations and stayed in the hospital
10 for two days. Photos were taken of his injuries
11 when he got out of the hospital and were filed as
12 an exhibit. I am satisfied beyond a reasonable
13 doubt that these injuries constitute wounding
14 within the legal meaning of that word.

15 In admissions filed at the beginning of this
16 trial as Exhibit number 1, Mr. Morgan
17 acknowledges that he was involved in a physical
18 altercation with N.D. on the night
19 in question. He further acknowledges that after
20 that altercation he left the scene with Jeffrey
21 Morris and another friend in a red Ford Focus
22 four-door hatchback.

23 The only real issue in this case is whether
24 the Crown has proven beyond a reasonable doubt
25 that Mr. Morgan was the one who caused some or
26 all of the wounds observed on Mr. D. In
27 examining this issue, there are important legal

1 principles that I must take into account.

2 In a criminal trial the Crown bears the onus
3 of proof throughout. That onus never shifts from
4 the Crown. Mr. Morgan has no obligation to
5 explain the evidence presented by the Crown, nor
6 does he have the obligation to show that he is
7 innocent or to prove anything to any degree. He
8 is presumed innocent and he is entitled to
9 benefit from that presumption throughout the
10 proceedings.

11 The standard of proof beyond a reasonable
12 doubt is a high standard of proof. It is more
13 than possible, probable or even likely guilt. It
14 is not a standard of proof to absolute certainty,
15 because that is an impossibly high standard of
16 proof, but it is closer to absolute certainty
17 than it is to probability.

18 The rule that a person must get the benefit
19 of any reasonable doubt applies to the issue of
20 credibility of witnesses. In simple terms, it
21 means that if I am left with a reasonable doubt
22 arising from the credibility or reliability of
23 witnesses, Mr. Morgan is entitled to the benefit
24 of that doubt. If I am unsure of who or what to
25 believe, that means I have a reasonable doubt and
26 he is entitled to benefit from it.

27 In this trial I heard some evidence from Mr.

1 D. about certain things he felt
2 physically while he was fighting with Mr. Morgan,
3 specifically that he felt something entering his
4 body while he was fighting with Mr. Morgan.

5 I have also heard some circumstantial
6 evidence about some of the things that were
7 observed before, during and after Mr.
8 D.'s altercation with Mr. Morgan. I have
9 heard evidence of a statement given to the RCMP
10 by Mr. Morgan where he denies carrying a knife
11 that night and says that if he had stabbed
12 someone, he would know it. All of this evidence
13 must be weighed bearing in mind the standard of
14 proof and the rule about reasonable doubt.

15 I have reviewed and considered all of the
16 evidence, but I will comment now more
17 specifically on the aspects of the evidence that
18 are focused on the circumstances of the
19 altercation between Mr. D. and Mr.
20 Morgan.

21 Starting with Stephanie Walsh, she was
22 outside the Corner Mart when all this started.
23 There was a verbal argument that escalated to a
24 physical fight. She saw Joseph Masongsong get
25 punched. She says that Mr. D. came out
26 of the bar and basically started punching people.
27 She saw him throwing someone down towards the

1 side of the Corner Mart building. She remembers
2 the person hitting his head. Then she says Mr.
3 D. went towards the back of the bar
4 towards the chain-link fence and the back alley,
5 and this is where she saw Mr. D. and Mr.
6 Morgan fighting.

7 Her description of what exactly was going on
8 is not entirely clear, nor is it entirely
9 internally consistent. As I understood her
10 evidence in-chief, she described them almost like
11 in a bear hug, struggling or wrestling with each
12 other, and she demonstrated this while she was
13 testifying. I was able to observe it.

14 She was pressed in cross-examination about
15 what she saw, and, if I recall, she said at one
16 point she did not see anyone throwing any
17 punches, but later in cross-examination she did
18 say she saw people throwing punches. She was
19 confronted with her statement to the police where
20 she said that Mr. D. had Mr. Morgan down
21 and was hitting him constantly. She did not
22 adopt her statement, but maintained essentially
23 that it was an even fight; no one was getting the
24 best of it. She did say the two were leaning
25 against the fence, and she did say that at one
26 point Mr. Morgan fell into the fence.

27 She also said that while Mr. D. was

1 fighting with Mr. Morgan there was a crowd
2 gathered around watching the fight; that they
3 were a few metres away from the people fighting.
4 She said she saw one person approach Mr.
5 D. and Mr. Morgan; that this person
6 appeared to be trying to break the fight up. She
7 said when Mr. D. walked away from this
8 last fight he had blood on him. She had not seen
9 blood on him before that.

10 I accept that in her testimony Ms. Walsh did
11 her best to describe what she remembered
12 happening. I take into account she was observing
13 all of this through a crowd of people, that she
14 herself had consumed a fair bit of alcohol, and
15 that all of this happened very quickly, which
16 explains, perhaps, some of the inconsistencies in
17 her evidence.

18 Another witness who was called was Kyle
19 Gordon. Mr. Gordon's evidence was entirely
20 unhelpful. He claims to have consumed 30 to 40
21 drinks on the night in question. If that is
22 true, one wonders how he would have been able to
23 stand, let alone get involved in a physical fight
24 that night. So whether he was that intoxicated
25 or whether he exaggerated his consumption of
26 liquor to create a convenient reason for his lack
27 of recollection does not really matter. In my

1 view, his evidence is of no assistance.

2 Chris Martin testified, as well. He was
3 with Jeffrey Morris at Harley's Bar and was
4 joined by Mr. Morgan. They then went to the
5 Ravens' Pub. Nothing out of the ordinary
6 happened. Then the lights went off in the bar
7 and people started being taken out. When he got
8 out of the bar, he says he saw there was an
9 argument going on. He said he grabbed someone
10 involved in that argument - someone he did not
11 know - and punched him. He said he saw Mr.
12 D. swinging or throwing someone against
13 the wall of the Corner Mart. He said he did not
14 know who that person was and described him as a
15 Native person.

16 Mr. Martin also said he approached Mr.
17 D. while he was fighting someone -
18 Mr. Martin said he did not know who - near the
19 chain-link fence behind the Raven Pub. He says
20 he told Mr. D. to stop fighting. He says
21 that Mr. D. said words to the effect,
22 quote, "He is beating up my friend," and then,
23 quote, "I am hurt. I am hurt." Mr. Martin says
24 he walked Mr. D. back towards the
25 sidewalk and that Mr. D. said he needed
26 to lie down.

27 Mr. Martin's testimony about what happened

1 next was evasive, to say the least. He said he
2 was feeling very uneasy because he said of, "the
3 whole scenario"; that he did not feel welcome
4 there; that this was not a good place to be at
5 2:00 in the morning; that he did not know who
6 were his friends and who were not his friends;
7 that he left the area in his truck; that he
8 contacted Jeffrey Morris later on and got
9 together with him.

10 My impression in that portion of
11 Mr. Martin's evidence was that he was not being
12 entirely forthcoming in his testimony. Whether
13 this is because of issues of divided loyalty
14 because he was friends with people on both sides
15 of this fight or whether there are other reasons
16 is not something I can speculate about.

17 Mr. Martin said he did not know who Mr.
18 D. was fighting with by the fence. I
19 have enormous problems with that part of his
20 testimony. It has been established clearly, in
21 my view, that at that point Mr. D. was
22 fighting with Mr. Morgan. Mr. Martin knew Mr.
23 Morgan. It would be surprising that he did not
24 notice that this is who Mr. D. was
25 fighting with, especially if he was right there
26 next to them trying to break up the fight.

27 I have similar concerns with Mr. Martin's

1 description of the person who was thrown against
2 the wall of the Corner Mart. I find as a fact
3 that that person that Ms. Walsh saw Mr.
4 D. throw against the building or in that
5 area was Mr. Morris. Mr. Martin knows
6 Mr. Morris. It would be very strange that Mr.
7 Martin would not recognize either of his friends
8 or acquaintances that were involved in a fight
9 with Mr. D. that night.

10 I mention these things about Mr. Martin's
11 testimony because, in my view, they taint his
12 testimony to a significant degree. As the trier
13 of fact, I can accept nothing of what a witness
14 says, part of what a witness says or all of what
15 a witness says. I certainly do not accept
16 everything that Mr. Martin said. Where his
17 evidence contradicts the evidence of other
18 witnesses, I prefer the other witnesses' version.

19 For example, although Mr. Martin made no
20 reference of going back inside the bar to get
21 Bethann Williams, I accept her testimony that
22 this is exactly what happened. I find as a fact
23 that after Mr. Martin broke up the fight he went
24 inside the Raven Pub to get Ms. Williams and
25 afterwards he left the scene.

26 I do accept that Mr. Martin was the one who
27 intervened during the fight between

1 Mr. D. and Mr. Morgan. Quite likely he
2 did so because he knew both of them. I accept
3 that he heard Mr. D. say, "I am hurt. I
4 am hurt," and that at that point Mr. D.
5 was bleeding.

6 Mr. Martin's evidence accords with Ms.
7 Walsh's testimony about someone having approached
8 Mr. Morgan and Mr. D. and looking like he
9 was trying to break up a fight. Ms. Walsh's
10 words that it was, "kind of weird," or words to
11 that effect she used - that the person looked
12 like they were trying to break up the fight and
13 then just walked away - seemed to fit with the
14 way Mr. Martin himself appeared on the witness
15 stand when he talked about what he did
16 afterwards. It may be that he was acting strange
17 that night.

18 The other witness I want to talk about is
19 Mr. Bruce. He had been at the Raven Pub. He and
20 his friend left the bar after the lights went
21 out, and when they came out the fighting was
22 already in progress. They watched what was going
23 on. At one point they saw someone fall over and
24 heard someone say he had been stabbed.

25 Without much thinking about what they were
26 doing, they ran towards the back alley behind the
27 Raven Pub to chase individuals who I infer they

1 thought were involved. In his
2 examination-in-chief, Mr. Bruce said they were
3 chasing two or three people. In
4 cross-examination, he said it could have been
5 more, it was dark and he was not sure.

6 In any event, he says that one of the people
7 they were chasing turned around, he was holding a
8 knife, and he asked Mr. Bruce if he wanted some
9 of it, or words to that effect. Mr. Bruce
10 described this man as a black man with not
11 extremely dark skin. He said he was of medium
12 build, not scrawny, not a weightlifter. He was
13 asked on cross-examination how Mr. Morgan's build
14 compared with the build of the person he saw, and
15 he said he was not sure.

16 This individual then started running again.
17 Mr. Bruce and his friend were not able to catch
18 up with him. He says the people they were
19 chasing ran to the end of the back alley and left
20 in a car. He described the car as a small car, a
21 station-wagon type. He said it was red and had
22 four doors for sure. He also said it was
23 similar, like a foreign type car, if I am not
24 mistaken.

25 I accept Mr. Bruce's testimony. He
26 testified in a straightforward way, admitted
27 freely the things he did not know or did not

1 notice or did not see. I am satisfied that he
2 did his best to describe without exaggeration or
3 embellishment what he observed. Again, all this
4 happened very quickly. He had been drinking. It
5 appears as if he acted on impulse, spur of the
6 moment. So it is not surprising he could not
7 provide many details about what he saw.

8 Mr. Bruce did not identify Mr. Morgan as the
9 person he saw holding the knife. Mr. Morgan is a
10 black man, but I do not recall there being any
11 evidence adduced at this trial that he was the
12 only black man in the Raven Pub that night or the
13 only black man in the parking lot. So not only
14 is Mr. Bruce's evidence not identification, by
15 any stretch of the mind, it is also not evidence
16 of a description that can be said to be pointing
17 inevitably to Mr. Morgan; far from it. But
18 Mr. Bruce testified that the man who was holding
19 the knife and the others that he chased left the
20 area in a car, and his description of that car is
21 consistent with the vehicle Mr. Morgan admits he
22 left the area in, this admission made in Exhibit
23 1. So this is a piece of circumstantial evidence
24 for me to consider along with the rest of the
25 evidence.

26 Then I heard evidence about a statement
27 given to the police by Mr. Morgan. Mr. Morgan

1 was interviewed by Corporal Chris Culhane in
2 relation to this incident. The interview began
3 on July 23rd and was interrupted because of a
4 power outage. The interview continued the next
5 day. Both portions of the interview were
6 videotaped.

7 At this trial Mr. Morgan waived his right to
8 a voir dire and acknowledged that this statement
9 was made freely and voluntarily. The videotapes
10 were entered as Exhibits number 12 and 13 on the
11 trial. Mr. Morgan seemed calm throughout the
12 interview. At the beginning of each segment he
13 indicated he did not really want to talk about
14 this, but then he went on to respond to some of
15 the things Corporal Culhane said and answered
16 some of his questions.

17 Clearly, Mr. Morgan was not willing to talk
18 about everything during the statement. For
19 example, he did not want to give Corporal Culhane
20 the names of the two people that were with him
21 that night. He was also somewhat evasive about
22 the whereabouts of one of the two people in
23 question. It was Mr. Morgan's right to speak
24 about some things and not speak about others.
25 The right to remain silent means exactly that.

26 In the statement, Mr. Morgan says he was not
27 carrying a knife on the night in question. On a

1 number of occasions he made statements to the
2 effect that if he had stabbed someone, he would
3 know about it. But also, many, many times during
4 the course of the statement Mr. Morgan is asked
5 what he remembers about the night and answers
6 that he does not remember anything except coming
7 out of the bar and being rushed or attacked from
8 behind and then waking up the next day with a
9 very sore hand and also his head hurting.

10 Several times he said, "It was a drunken
11 night." He says when he drinks, he drinks
12 heavily. He does not remember how much he had to
13 drink, but he was drinking beer at Harley's and
14 then beer and shots at the Raven. He does not
15 appear to have any recollection of what happened
16 in the parking lot except what happened
17 immediately after he and his friends came out of
18 the bar. He says in a couple of different ways
19 that he remembers coming out of the bar, being
20 attacked and then waking up the next day. He
21 remembered where he woke up the next day, but has
22 no recollection about how he got there.

23 What Mr. Morgan says about being rushed or
24 attacked by more than one person outside the bar
25 is consistent with the observations of the
26 witness called by the defence, Jody Larkin, who
27 was at the scene and saw two people beating up on

1 a black person. As I have said, there is no
2 evidence that Mr. Morgan was the only black
3 person in the bar or parking lot that night, but
4 given Mr. Morgan's description of what happened
5 when he exited the bar, the inference can be
6 drawn that it was him that Ms. Larkin saw being
7 beaten up. So I accept that Mr. Morgan was
8 assaulted by two people when he left the bar, but
9 that fact does not assist with making findings
10 about what happened after.

11 As I have said, Mr. Morgan had the right to
12 not talk to the police at all about this
13 incident. He also had the right to talk about
14 some things and not talk about other things. But
15 in this statement Mr. Morgan does not say, "I
16 don't want to talk to you about the fight in the
17 back alley," or, "I don't want to talk to you
18 about what happened after I got attacked when I
19 left the bar." That is not what he says. He
20 says he does not remember anything beyond being
21 attacked when exiting the bar. He also says, it
22 is true, that he thinks he would know if he
23 stabbed someone, but I find that statement does
24 not carry any weight considering his lack of
25 recollection about most of what happened after he
26 exited the bar.

27 In dealing with evidence of an accused's

1 statement adduced by the Crown, as the trier of
2 fact I must first decide whether it is
3 established that the statement was, in fact,
4 made. In this case that is an easy finding to
5 make, because the statement was on videotape.

6 Next, I must examine and weigh the statement
7 just like the rest of the evidence. My
8 assessment of Mr. Morgan's statement is that he
9 either does not recall the fight with Mr.
10 D. because of his consumption of alcohol
11 and possibly because of some of the hits he
12 received during the events in the parking lot or
13 that he was being deliberately evasive about that
14 portion of events. Either way, that statement is
15 of no assistance in resolving the issue of
16 whether, in fact, he inflicted wounds to Mr.
17 D. during the physical altercation he had
18 with him.

19 That takes me to the evidence of Mr.
20 D. himself. Mr. D. testified
21 about his recollection of the fight. He says he
22 was inside the Raven Pub still when Joseph
23 Masongsong came in bleeding from above his eye,
24 saying he had been assaulted. I note this is
25 consistent with Ms. Walsh's account that
26 Mr. Masongsong was struck and this was how the
27 what had until then been a verbal argument

1 escalated to a physical fight.

2 Mr. D. says he ran out of the bar.

3 He saw one of his friends facing Jeffrey Morris.

4 He pushed the friend out of the way and punched

5 Mr. Morris, who fell to the ground. Mr.

6 D. then said, I think, that he corralled

7 him towards the dumpster that is at the back of

8 the Corner Mart. He says he threw him down in

9 the area of the dumpster. That is not entirely

10 consistent with Ms. Walsh's description, who said

11 the person was thrown against the wall of the

12 Corner Mart, but the difference is not

13 significant, especially since I understood Mr.

14 D. to say that he referred to the

15 dumpster because it was a landmark of sorts, one

16 thing he remembered being in the general area

17 where he threw Mr. Morris.

18 Then he says something caused him to turn

19 around and Mr. Morgan was right there. They

20 engaged in an altercation. Mr. D. says

21 that while he was fighting Mr. Morgan he could

22 feel something piercing his body. He said he was

23 looking Mr. Morgan in the eye and was being hit

24 by him and he could feel something entering his

25 body on the back of his head, and he said he was

26 sure about that.

27 Mr. D. acknowledged he was focused

1 on Mr. Morgan during the fight and was not paying
2 attention to who else was around. He did say
3 there was no one within a few metres of them. I
4 observe this is consistent with the observations
5 made by Ms. Walsh, who said that although people
6 were watching the fight, no one was within a few
7 feet of them; people were a few metres away.

8 Mr. D. was cross-examined about
9 things he said at the Preliminary Hearing and
10 things that he had told the police when he gave
11 his statement. In submissions, defence counsel
12 argued that these were areas where there were
13 inconsistencies in Mr. D.'s evidence and
14 suggested that Mr. D. is confused and his
15 account of what happened is not reliable or, at
16 the very least, should leave me with a reasonable
17 doubt about when and by whom he was wounded.

18 I have reviewed the testimony of Mr.
19 D. carefully, and I will refer to some
20 parts of it, specifically from the transcript
21 prepared by the Court Reporter, which was filed
22 March 29th in this court.

23 One area he was cross-examined about was the
24 issue of why he turned around after he had thrown
25 Mr. Morris down. In his examination-in-chief he
26 was asked the question:

27 Question: Okay, so carry on from

1 the point that you punch Mr. Morris.
2 His answer was:
3 Answer: Okay, so I punch him and he
4 kind of goes down, kind of grabbed
5 him and corralled him, threw him
6 towards the dumpster that was in the
7 parking lot. At this point, you
8 know, for some reason like I got hit
9 in the back, or I don't know if I
10 was hit or stabbed or what. I
11 turned around and Delroy is right in
12 front of me and he just like
13 instantly we -- you know, he comes
14 at me and I go at him...

15 Then he describes the fight.

16 In cross-examination, Mr. D. was
17 reminded of some questions that were asked of him
18 at the Preliminary Hearing, and counsel reminded
19 him of being asked this question:

20 Question: And then I understand you
21 indicate that...I'm trying to
22 envision this in my mind while I'm
23 listening to you - that once you've
24 dealt with Mr. Morris what happens
25 next?

26 The answer at the Prelim.:

27 Answer: For some reason, I don't

1 know if it's because I got stabbed
2 in the back or because I got punched
3 in the back but I turned around and
4 then Delroy was right in front of
5 me, you know, and we kind of locked
6 arms at that point.

7 Mr. D. acknowledged that this is
8 what he said at the Preliminary Hearing. I do
9 not see an inconsistency between the answer Mr.
10 D. gave in his evidence in-chief at this
11 trial and the answer he gave to that question in
12 cross-examination at the Preliminary Hearing.

13 Mr. D. did acknowledge - because it
14 was put to him during cross-examination in this
15 trial - that he was confused about some things.
16 His answer was that he was stabbed several times
17 and he knew for a fact about some of when he got
18 stabbed and for some other ones, yes, he was
19 confused.

20 The second area of cross-examination had to
21 do with something Mr. D. said in his
22 statement to the police. Again, defence counsel
23 was reminding him that the Constable had asked
24 him, "Start with the night, let's get all the
25 details," and then referred to Mr. D.
26 saying:

27 "And then I turned towards the

1 black, the black guy, kind of short
2 stocky guy and went after him. I
3 think that's when the other guy
4 stabbed me from behind. That was
5 when I got the real big wound and I
6 don't know if he got me in the
7 shoulder too. Could have been his
8 smaller buddy."

9 So after that counsel asked Mr. D.
10 if that was a fair representation of what he told
11 the police officer, and Mr. D. agreed
12 that that was a fair representation of what he
13 said. Then in the trial counsel put the question
14 to him again:

15 Question: Will you agree that you
16 seem to be a little bit confused as
17 to who stabbed you?

18 His answer was:

19 Answer: Well I have six different
20 stab wounds and there were a lot of
21 people behind me, so, you know, I
22 wasn't sure if there was more people
23 involved. But I was staring Delroy
24 Morgan in the eyes and when he was
25 hitting me I could feel the knife
26 going into my body so ...

27 Then counsel asked:

1 Question: Where?

2 He answered:

3 Answer: Where? In the back of my
4 head. I know that for a fact.

5 Then he confirmed that he did not see a knife at
6 any time.

7 So it is clear from this and other aspects
8 of Mr. D.'s testimony that he
9 acknowledged that there were things he was not
10 sure about. He was cross-examined thoroughly by
11 defence counsel and was not shaken to any
12 significant degree, in my view. My understanding
13 of his evidence, when I consider it as a whole,
14 is that he is not sure when he was first stabbed
15 and he is not sure that all his wounds were
16 inflicted by Mr. Morgan, but he is sure that
17 while he was fighting with Mr. Morgan and Mr.
18 Morgan was hitting him he felt something going
19 into his body on the back of his head.

20 Having reviewed and considered all of this
21 evidence, what am I left with? I am left with
22 Mr. D.'s testimony, as I just mentioned,
23 that he felt something entering the back of his
24 head while he was fighting with Mr. Morgan. I am
25 left with Ms. Walsh's evidence that although
26 there were a large number of people in the
27 parking lot at the relevant time, those people

1 were observing the fight from a distance of a few
2 metres. Only one person was seen approaching
3 them, and I find as a fact that this was Chris
4 Martin.

5 I am also left with someone seen by
6 Mr. Bruce holding a knife running down the back
7 alley and leaving in a red four-door
8 station-wagon type car, a description that
9 matches the vehicle that Mr. Morgan admits
10 through Exhibit 1 that he left the scene in.

11 I am left with the warned statement where
12 although Mr. Morgan says he would remember if he
13 had stabbed someone, he also says on several
14 occasions that this was a drunken night and that
15 all he remembers is being attacked from behind
16 and waking up the next day with injuries.

17 I accept Mr. D.'s evidence. I
18 accept it because it is cogent evidence given in
19 a straightforward manner, because he readily
20 admitted to doing things that did not necessarily
21 put him in the best of lights. Whatever
22 inconsistencies there are in his evidence, in my
23 view, are not significant and do not call into
24 question his credibility or the reliability of
25 his testimony.

26 In many ways, the fact that he admitted he
27 was unsure about certain things - including about

1 how many people stabbed him - makes him more
2 credible. If he was too certain about too many
3 details, given the overall circumstances of this
4 event, one might wonder about his level of
5 honesty. I also accept his evidence because it
6 is in some aspects corroborated by other evidence
7 before me, as I have alluded to in my summary of
8 the evidence.

9 The statement given to the RCMP by Mr.
10 Morgan, which I have carefully considered, does
11 not raise a reasonable doubt in my mind. Maybe
12 Mr. Morgan does not remember stabbing Mr.
13 D., maybe he finds it hard to believe
14 that he did, but, based on the limited
15 recollection of events Mr. Morgan says he had
16 during his statement to the police, that
17 statement does not leave me with a reasonable
18 doubt about the fact he caused the wounds to the
19 back of Mr. D.'s head.

20 So I am satisfied that the Crown has
21 established beyond a reasonable doubt that Mr.
22 Morgan is responsible for inflicting those wounds
23 to the back of Mr. D.'s head during the
24 course of the physical altercation that occurred
25 on the night in question, and, for that reason, I
26 find Mr. Morgan guilty as charged.

27 However, there are aspects of the evidence

1 that do leave me with a reasonable doubt as to
2 whether Mr. Morgan is responsible for all the
3 wounds inflicted on Mr. D. that night.

4 Just to refer to some parts of that evidence
5 that cumulatively, I suppose, raises this doubt
6 in my mind: Mr. Morris was carrying a knife that
7 night, all of this happened very fast, and Mr.
8 D. had basically attacked Mr. Morris a
9 short time before he realized he was bleeding.
10 Mr. Morgan and Mr. Morris were together that
11 evening. Mr. D. was not sure if he was
12 hit or stabbed in the back at the time where he
13 was fighting with Mr. Morris and was caused to
14 turn around. The transition between the fight
15 with Mr. Morris and the fight with Mr. Morgan
16 appears to have all happened very quickly, like
17 the rest of these events. There were lots of
18 people around, things appear to have been very
19 chaotic, and I do not think any witness who was
20 there that night, even a stone cold sober
21 witness, could have possibly been expected to
22 have seen everything.

23 To this day, Mr. D. himself is not
24 sure how many people stabbed him. Neither am I.
25 I must give the benefit of that doubt to Mr.
26 Morgan. So this is why my finding is that what
27 has been established beyond a reasonable doubt is

1 that he is responsible for the wounds to the back
2 of Mr. D.'s head.

3 One last issue I want to deal with, mainly
4 for the record - because it was referred to
5 during submissions, and I just want to make this
6 very clear - is the use that I have made of the
7 identification of the photo lineup; the evidence
8 on, more specifically, Mr. D. having
9 identified Mr. Morgan as the person who was
10 involved with this.

11 There was this evidence adduced that Mr.
12 D. identified Mr. Morgan through a photo
13 lineup a few days after these events. Mr.
14 D. testified about it and he identified
15 the photo that he identified. Sergeant
16 Cunningham testified about the procedure that was
17 followed, and, of course, this was all
18 videotaped, which is, of course, an excellent way
19 to proceed in those matters. So it was there for
20 all of us to see what happened during this
21 identification process, and the tape was filed as
22 Exhibit 8.

23 I may have misunderstood, but if I
24 understood the Crown's submission correctly, the
25 argument was made that this evidence could be
26 used as evidence going to what Mr. Morgan
27 actually did. In other words, it could be used

1 not just with respect to the issue of
2 identification in the sense of Mr. Morgan being
3 the person that was involved in the fight with
4 Mr. D., but also as evidence going to the
5 question of what Mr. Morgan actually did during
6 that altercation. I think the Crown was arguing
7 that this was all something I should consider as
8 part of the identification evidence.

9 Evidence of out-of-court identification is
10 admissible. This is an exception to the usual
11 rule against admissibility of hearsay and the
12 usual rule that prevents a party from adducing
13 evidence of prior consistent statements. The
14 evidence of out-of-court identification, as I
15 understand it, is admissible to bolster the
16 weight of the in-court identification made by a
17 witness. It provides context for the evidence of
18 the witness who says in court that the accused is
19 the person who was involved with whatever is
20 being talked about. There is a good analysis of
21 the law on this in a case called R. v. Tat and
22 Long reported at Volume 117 C.C.C. (3d), page
23 481.

24 The Crown says that the utterances of Mr.
25 D. to the effect that Mr. Morgan stabbed
26 him twice in the back of the head - these
27 utterances made during the photo lineup - is part

1 of the identification evidence, but I am not
2 convinced it is. It is not clear to me at all
3 that descriptive utterances about what a suspect
4 supposedly did should be treated the same way as
5 the out-of-court utterances that identify the
6 suspect as the person involved.

7 It may be a distinction without a
8 difference, but, for my part, I think the danger
9 in using the statements about what a suspect did,
10 as opposed to who the suspect is, is that it
11 really amounts to oath helping, and I do not
12 think that that was what was meant to be captured
13 by the very narrow purpose for which out-of-court
14 identification evidence is admissible. I
15 recognize there may well be other views and
16 possibly other very learned views on this, but
17 that is my view.

18 So for that reason, in reaching my decision
19 in this case, I have used the evidence about the
20 photo lineup strictly as evidence providing
21 context to Mr. D.'s in-court
22 identification of Mr. Morgan. In other words,
23 that evidence, to me, goes to a fact that by the
24 end of the case really was not in issue; that is,
25 the fact that it was Mr. Morgan who was fighting
26 with Mr. D. near that chain-link fence
27 behind the Raven Pub. My findings about the fact

1 that Mr. Morgan did cause these two wounds to the
2 back of Mr. D.'s head were, then, based
3 on Mr. D.'s in-court testimony only, as
4 well, of course, as other in-court testimony and
5 other aspects of the evidence that I have
6 referred to.

7 So for these reasons and on the basis that I
8 have indicated, I find Mr. Morgan guilty and a
9 conviction will be entered on the charge.

10 Now, counsel, what is your wish with respect
11 to sentencing?

12 MS. MCGUIRE: Your Honour, I understand that
13 defence would like some time, and I agree.

14 THE COURT: Okay. How much time would you
15 like, Ms. Taylor? Depending on how much time you
16 need, I may have to get information about my
17 schedule.

18 MS. TAYLOR: I see. If I could just have a
19 moment, Your Honour. Sometime maybe end of next
20 week, Your Honour.

21 THE COURT: Yes. Next week is definitely
22 an option. I don't think there is anything
23 scheduled in this courtroom next week, to my
24 knowledge. When you say the end of next week, do
25 you have a specific day that would work better
26 for your purposes?

27 MS. TAYLOR: Thursday the 12th.

1 THE COURT: Thursday the 12th. I think
2 that should work, Ms. Taylor. I really don't
3 think there is any other criminal case set for
4 this courtroom. So we will adjourn, then,
5 sentencing to April 12th at 10 a.m.

6 Now, Madam Clerk, if this presents a problem
7 that I have overlooked, please let me know and we
8 will make arrangements to schedule some other
9 time next week, but I hope that that can work.

10 THE COURT CLERK: Yes, Your Honour.

11 THE COURT: There will be a remand warrant
12 for that date to make sure Mr. Morgan is taken
13 back here.

14 Anything further required at this point,
15 counsel?

16 MS. MCGUIRE: Yes, Your Honour. I won't be
17 here next week, but Ms. Keats will be here.

18 THE COURT: All right. Okay. Thank you
19 counsel, we are adjourned.

20

21

22 Certified to be a true and
23 accurate transcript pursuant
24 to Rules 723 and 724 of the
Supreme Court Rules.

25

26

Jill MacDonald, CSR(A), RPR
Court Reporter

27