

R. v. Fisher

Ontario Judgments

Ontario Superior Court of Justice

W.B. Trafford J.

June 26, 2008.

[2008] O.J. No. 2563 | 78 W.C.B. (2d) 68 | 2008 CanLII 31414 | 2008 CarswellOnt 3817

Between Her Majesty the Queen, and ██████████ Fisher and ██████████ Almeida

(224 paras.)

Case Summary

Criminal law — Powers of search and seizure — Application by accused to stay charges for violations of their rights dismissed — Accused found not guilty on all counts relating to execution of search warrant by police at apartment — Police witnesses lacked credibility about need to exercise force in execution of warrant, resulting in significant injuries to accused — Accused also denied right to contact counsel without delay.

Criminal law — Evidence — Methods of proof — Inferences — From failure of party to testify — Of fact — Witnesses — Credibility — Application by accused to stay charges for violations of their rights dismissed — Accused found not guilty on all counts relating to execution of search warrant by police at apartment — Police witnesses lacked credibility about need to exercise force in execution of warrant, resulting in significant injuries to accused — Negative inference drawn from failure of Crown to call all officers as witnesses and failure of police to photograph apartment after warrant executed — Independent evidence corroborated claims by accused they did not resist arrest — Accused also denied right to contact counsel without delay.

Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Protection against unreasonable search and seizure — Right to retain and instruct counsel without delay — Remedies for denial of rights — Stay of proceedings — Application by accused to stay charges for violations of their rights dismissed, because of public interest in trying accused in charges relating to cocaine and firearms — Accused found not guilty on all counts relating to execution of search warrant by police at apartment — Police witnesses lacked credibility about need to exercise force in execution of warrant, resulting in significant injuries to accused — Negative inference drawn from failure of Crown to call all officers as witnesses and failure of police to photograph apartment after warrant executed — Independent evidence corroborated claims by accused they did not resist arrest — Accused also denied right to contact counsel without delay — Canadian Charter of Rights and Freedoms, ss. 7, 12, 24.

Application by Fisher and Almeida for an order staying all charges against them for alleged violations of their rights under the Canadian Charter of Rights and Freedoms. Members of the Toronto Police Service

Drug Squad entered an apartment pursuant to a search warrant. The two accused and another young man were in the apartment. The squad was investigating the third young man for allegedly illegal activity involving cocaine and handguns. They used a ram to break down the door to the apartment and some yelled police search warrant. Two other young men who had been arrested just prior to the breach of the apartment stood nearby while the police entered the apartment. Several firearms and materials for measuring and packaging cocaine were discovered in the apartment, and some weapons were subsequently discovered outside, having been thrown from the balcony. Fisher and Almeida denied knowledge of some of the firearms. The three occupants of the apartment were injured while the police executed the search warrant. Fisher sustained a black eye, fractured rib, bruising to his body and a perforated eardrum. An emergency room physician gave evidence he must have been hit at least four times. Almeida vomited during his transport to the police station. He also presented with injuries to his nose, cheek and leg. A subsequent medical exam revealed abrasions to his back, neck and legs. Neither Fisher nor Almeida was allowed to contact counsel for several hours after they arrived at the police station. The officers who executed the warrant testified they observed Fisher toss what appeared to be a gun over the balcony, after while Almeida and the third man entered the room. They feared they may have retrieved the gun Fisher tossed. They also claimed Almeida attempted to punch an officer, resulting in an all-out fight before Almeida was controlled with a series of knee and elbow strikes administered by several officers. The officers claimed Fisher made a move to leave the apartment, and did not comply when the officers told him to get down. Fisher was therefore forced to the ground by several officers and struck because he continued to resist arrest and failed to show his arms. None of the officers observed injuries on either Almeida or Fisher. The third man in the apartment testified he did not resist the officers. He claimed the officers went after Almeida and Fisher, as the two pleaded with the officers to stop hitting them. He also testified the officers told the accused not to ask for medical assistance when they arrived at the police station, threatening them with more violence if they did. Almeida claimed he remembered little about the incident after he was kicked by an officer as he tried to kneel on the floor as the officers requested. Fisher, who was visually impaired in one eye, testified he immediately lay on the floor when the officers entered, and was then struck several times. He did not see what happened to Almeida or the others in the room. Fisher claimed he was taken to another room in the apartment and hit by the officers as they asked him questions. He corroborated the claim the officers threatened violence if the accused asked for medical assistance. Independent witnesses, neighbours, heard the accused shouting stop hitting me and I am not resisting. Blood was found on the walls and floors of different rooms in the apartment. The police did not photograph this. One officer who waited outside the apartment was not called as a witness.

HELD: Application dismissed.

The remedy of a stay was not appropriate, given the public interest in trying the accused for their possible role in interfering with the police in their execution of the warrant. However, the accused were found not guilty on all counts of the indictment. The evidence of the officers that they observed no injuries on the accused at the apartment was unreliable and weighed against their credibility. Their failure to photograph the apartment was also a consideration. It was implausible that Almeida would try to punch armed officers. The fact the accused were not charged with resisting arrest was also telling. The court drew an adverse inference from the Crown's failure to call the officer who was outside the apartment as a witness. The officers crafted the story about seeing a gun to justify their use of force. Fisher and Almeida may have colluded with the other man in the apartment to craft their stories about what happened in the apartment. However, the court was not satisfied beyond a reasonable doubt they intended to interfere with the execution of the search warrant. The independent evidence rendered reliable claims by the accused

they were not resisting arrest. Both Fisher and Almeida were denied an opportunity to access counsel on a timely basis.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 12, s. 24

Controlled Drugs and Substances Act, S.C. 1996, c. 19,

Criminal Code,

Counsel

Elizabeth Jackson, for the Crown.

Allan J. Lobel, for ██████████ Fisher.

Alana Page, for ██████████ Almeida.

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Reasons for Judgement

W.B. TRAFFORD J.

A. Introduction

1 On June 7, 2008 seven members of the Toronto Police Service Drug Squad West ("TPS") entered Apartment 305, 1550 Lawrence Avenue West at approximately 8:15 p.m. to execute a search warrant for cocaine obtained under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, as amended

("CDSA"). There were three young men in the apartment when the police entered - ██████ Almeida, ██████ Fisher and ██████. As a result of the events that allegedly occurred within a very short period of time after the entry by the TPS, these three men were arrested and charged with a number of offences under the *Code* relating to the possession of three firearms loaded with ammunition. All of them suffered injuries at the hands of the police after they entered the apartment.

2 This is an application by ██████ Fisher and ██████ Almeida, the defendants in this trial, under s. 24 of the *Charter* for an order staying all of the charges on the basis of alleged violations of s. 7 and s. 12 of the *Charter*. The applicants claim that the TPS fabricated the allegations against the defendants, falsely testified in support of the fabricated allegations at the preliminary hearing and during the Crown's case at trial and caused the defendants significant bodily harm after they entered the apartment. The defendants deny possession of the firearms and say they were compliant with the directions of the TPS and did not resist arrest. This is, in the submission of the defence, one of those "... clearest of cases ..." where the integrity of the administration of justice would be severely compromised by permitting a trial of the alleged offences. Reference was made to *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.), *R. v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.) and *R. v. Regan* (2002), 161 C.C.C. (3d) 97 (S.C.C.).

3 The Crown opposed the application on the basis that the use of force by the TPS on the defendants was reasonable in the circumstances of an otherwise lawful arrest that was physically resisted by the defendants as they attempted to take flight from the apartment, having thrown loaded firearms over the balcony to prevent seizure by the police. Reference was made to *R. v. Power, supra*, *R. v. Regan, supra*, and *Canada (Minister of Citizenship and Immigration) v. Tobias*, [1997] 3 S.C.R. 391 especially insofar as they mandate a stay of proceedings only in the "... clearest of cases ..." where the conduct of a trial would aggravate the prejudice caused by the alleged abuse, no other remedy is reasonably capable of removing the prejudice and the integrity of the administration of justice would be otherwise compromised, given the seriousness of the alleged firearms offences.

B. The Procedure in Hearing the Application

4 Let me begin with a brief description of the procedure used to hear and determine the application to stay the prosecution.

5 On the consent of all counsel, rather than beginning the trial with the application to stay, the Crown presented its case in chief in its entirety. The defence was permitted to cross-examine the Crown witnesses on all issues relevant to the application to stay. Once the Crown closed its case, the defence was required to make an offer of proof of circumstances arguably sufficient to justify a stay, as required by *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289 (Ont. C.A.). An evidentiary hearing was granted. On the consent of all counsel, the Crown's case was applied to the application because it was relevant and otherwise admissible to the issues raised by the application. The defence called a number of witnesses on the application. Counsel then made submissions, orally and in writing, in support of their positions on the application.

6 This was not a case where the application to stay raised factual issues that were discretely separate from the factual issues at trial.

C. The Conduct of the Defence on the Merits

7 Moreover, all counsel agreed to apply the defence evidence on the application to the defence at trial, should the Court dismiss the application to stay.

8 Thus, when counsel made submissions on the application to stay they also made submissions on whether the Crown had proven its case beyond a reasonable doubt.

9 Proceeding in this manner simplified the trial to some extent. The repetitious calling of witnesses was avoided. The fairness of the process and the ability of counsel to take positions on the live issues of the application and the trial were preserved. Counsel, in effect, made submissions on one occasion, thereby reducing the cost of the litigation and improving the efficiency in the use of Court resources.

D. The Circumstances of the Case

D.1 Introduction

10 Let me begin, then, with the circumstances of the case as found by the Court.

11 In this part of the judgement I will expressly comment on the credibility of the material witnesses for the Crown and the defence and the reliability of their evidence, keeping in mind the burden on the defence to prove its position on the application to stay and, further, keeping in mind the onus on the Crown to prove its case beyond a reasonable doubt, if the prosecution is not stayed.

12 The real contest in this case relates to the events in Apartment 305 after the TPS entered under the authority of the warrant. Thus, I will begin with my findings of fact relating to the events of June 7, 2006 before and after the TPS entered the apartment. Then I will comment on the credibility of the witnesses for the Crown and the defence insofar as they testified about the events in the apartment. This will lead to my findings of fact concerning those events, and the determination of the application to stay and the trial on the merits, if necessary.

D.2 The Events Before the Entry into the Apartment

D.2.1 Introduction

13 Let me begin with the events before the TPS entered the apartment.

D.2.2 The Obtaining of the Search Warrant

14 On June 7, 2006 Detective McCallum of the No. 22 Division Community Response Unit ("CRU") obtained a search warrant under the CDSA authorizing the search of Apartment 305 at 1550 Lawrence Avenue West for cocaine. This warrant was one of two warrants obtained in connection with the investigation of allegedly illegal activity by Sean Noseworthy in cocaine and firearms, who was known to carry a handgun. Apartment 305 was believed to be a stash house for his drugs. The other location was believed to be the place where his handguns were stored. Detective McCallum was the officer in charge of this investigation.

D.2.3 The Use of the Drug Squad

15 Because Apartment 305 was in the area policed by the Toronto Drug Squad West, Detective McCallum consulted with the officer-in-charge of the street team, Detective Sobotka. He agreed to provide officers to assist the No. 22 Division CRU in the execution of this warrant after Detective McCallum briefed him on the investigation of Sean Noseworthy. The warrant was to be executed by 9 p.m. on June 7, 2006. There was no permission in the warrant to enter the apartment without announcing the presence of the police.

16 Thus, Detective Sobotka became the officer in charge of the execution of the search warrant at Apartment 305. Having been a police officer for twenty-six years and having executed hundreds of warrants as a member of the drug squad, Detective Sobotka, and all the officers acting under his supervision in this case, knew that possession of cocaine often involved the possession of handguns.

D.2.4 The Briefing by Detective McCallum

17 At 7 p.m. Detective McCallum briefed all of the officers involved in the execution of the warrant. Those officers included Detective Sobotka and Detective Constables Arulanandam, Singh, Sardella, Rabbito, Brammall and Tavares. The briefing lasted until 7:10 p.m.

18 During the briefing Detective McCallum summarized the overall investigation of Sean Noseworthy. The information to obtain the warrant was not read to the officers, but a copy of the warrant was displayed. Some of them examined the warrant. Materials were distributed, including a photograph of Sean Noseworthy and a Google map of 1550 Lawrence Avenue West, showing Apartment 305 as the most easterly apartment on the south side of the building, located on the north side of Lawrence Avenue West, its entrance and its parking lot just north of the building. The apartment was described as a "spizzle", that is, a place where cocaine is cooked and transformed into crack cocaine using substances such as baking soda. The officers were also told that firearms were seized earlier in the investigation. Detective McCallum advised them to be very cautious when they entered Apartment 305 because firearms may be present.

D.2.5 The Rendezvous Near the Apartment

19 Following the briefing, Detective Sobotka and some of the other officers went to a rendezvous point near Lawrence Avenue West and Keele Street where the final preparations for the execution of the warrant began. They arrived before 7:30 p.m.

20 Detective Constable Tavares was designated as the central note taker ("CNT") for the project. The role of the CNT is to maintain radio contact with the other officers and to make a note of their communications, and the pertinent times of the described events, in order to facilitate a more effective investigation by the other officers. The other officers are not optimally situated in an investigation like this one to make contemporaneous notes of their aspects of the investigation, particularly in light of their dress as plainclothes officers driving unmarked cruisers, the likelihood of rapid developments as the warrant is executed and the danger inherent in the execution of a warrant at a stash house for cocaine, where the presence of firearms is suspected.

21 All of the officers were dressed in plainclothes and drove unmarked cruisers to ensure the confidentiality of the project.

22 Some officers, including Detective Constable Rabbito and Detective Constable Sardella, were asked to conduct surveillance in the area. This was done to identify the building and any suspects who might be in the area.

23 Detective Constable Brammall was instructed to go to the parking lot behind the building to look for a vehicle linked to Sean Noseworthy, and to stay there.

24 Detective Constable Singh was instructed to go to the underground parking facility of the building and look for a vehicle linked to Sean Noseworthy and to remain there in case it arrived.

25 All of these officers reported back to Detective Sobotka as the investigation unfolded.

D.2.6 The Surveillance of the Area

26 The surveillance of the area of 1550 Lawrence Avenue West was principally conducted by Detective Constable Rabbito and Detective Constable Sardella, in one unmarked cruiser, and, in another unmarked cruiser, by Detective McCallum and Constable Zver.

27 At approximately 7:28 p.m., Detective Constable Rabbito and Detective Constable Sardella observed two men on the balcony of Apartment 305, subsequently identified as Manuel Perea and Kenneth Yu. Both of them were standing near the balcony, looking back and forth along Lawrence Avenue West at the traffic. This in itself was not unusual. Detective Constable Rabbito observed them while stopped at a red light and as he drove eastbound, not quickly, in the passing lane, because there was a lot of traffic around him. Detective Constable Rabbito voiced these observations on the radio to the CNT as he made them.

28 Around 7:55 p.m. Detective Constables Rabbito and Sardella, as well as Detective McCallum and Constable Zver, were again in the vicinity of 1550 Lawrence Avenue West, driving unmarked cruisers. Detective Constable Rabbito and Detective Constable Sardella observed the same two men on the balcony of Apartment 305. One was completely on the balcony and the other was partially in the apartment. Constable Zver made similar observations. It appears that Detective McCallum radioed these observations to the CNT.

D.2.7 The Decision to Approach the Building

29 At approximately 8:05 p.m. Detective Sobotka conferred with Detective McCallum. They decided to approach the building then.

30 Detective Sobotka advised all of the officers to proceed to the rear parking lot of the building, entering it one at a time so as not to bring attention to themselves as police officers to a casual observer.

D.2.8 The Events in the Parking Lot

31 By 8:10 p.m. all of the officers had arrived in the parking lot. They were putting their vests marked "Police" on when two men, Manuel Perea and Kenneth Yu, were observed by Detective Constable Rabbito to exit the rear door of the building. All of the officers were readily identifiable as police officers by that stage of the investigation. Both men looked at Detective Sobotka. Detective Constable Rabbito observed the men walk in a westbound direction, look at the cars, including the unmarked cruiser occupied by him, and then turn so as to walk down the ramp to the underground parking facility of the building. The ramp is on the west side of the northwest corner of the building.

D.2.9 The Arrest of Perea and Yu

32 In those circumstances, Detective Sobotka advised the crew to arrest both Manuel Perea and Kenneth Yu on a charge of possession of cocaine for the purposes of trafficking.

33 Detective Sobotka believed these men were in "possession" of the cocaine in Apartment 305. His grounds for the arrest were:

- * the information from Detective McCallum that the apartment was a stash house for cocaine;
- * the information from Detective McCallum that firearms had previously been seized in the investigation;
- * the presence of Manuel Perea and Kenneth Yu on the balcony of the apartment, as described by Detective McCallum and Detective Constable Rabbito at about 7:28 p.m. and 7:55 p.m.;
- * the inference that the operator of the stash house would not permit anyone to enter the apartment unless he/she was a trusted invitee who would maintain the confidentiality of the presence of cocaine in the apartment. No one is in a stash house unless they are employed by, or closely associated with, its operator;
- * the inference that Manuel Perea and Kenneth Yu, when looking back and forth at the traffic on Lawrence Avenue West, were acting as lookouts for police or a person delivering cocaine to the apartment; and
- * the interpretation of the use of the ramp to the underground parking area as an attempt to take flight from the police whom they observed in the rear parking lot of the building.

These, then, were the circumstances relied upon by Detective Sobotka to arrest Manuel Perea and Kenneth Yu.

34 All of the officers responded to Detective Sobotka's instructions by following them down the ramp into the underground parking facility.

35 Detective Constable Rabbito and Detective Constable Brammall approached Manuel Perea. The following conversation occurred:

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Detective Constable Rabbito:

You are under arrest for possession of cocaine for the purposes of trafficking.

Mr. Perea:

Fuck you.

36 Mr. Perea then pushed Detective Constable Rabbito, but was restrained by him and Detective Constable Brammall and handcuffed. The conversation continued:

Detective Constable Rabbito:

You have the right to retain and instruct counsel without delay. Do you want to call a lawyer now?

37 Mr. Perea did not answer. Detective Constable Rabbito repeated the question. Again, Mr. Perea did not answer. He was then cautioned and given the secondary caution. When asked if he understood, Mr. Perea said "I told you to fuck off". He was then turned over to Constable Zver, who arrived in the underground parking facility with Detective McCallum when both men were in handcuffs.

38 There was no evidence concerning the arrest of Kenneth Yu.

D.2.10 The Approach to Apartment 305

39 Immediately after the arrests in the underground parking facility, Detective Sobotka instructed the officers to proceed to Apartment 305 as soon as possible to execute the warrant. He wanted to make sure that any occupants of the apartment did not receive any information the police were in the area before the warrant was executed. All of them went there, including Detective Constables Arulanandam, Brammall, Singh, Rabbito and Sardella, as did Detective Sobotka.

40 Detective Constable Sobotka also instructed Detective Constable Tavares and Constable Zver to take custody of Mr. Perea and Mr. Yu and to bring them to the hallway near Apartment 305. Detective Sobotka wanted Detective Constable Tavares and Constable Zver near Apartment 305 in case more officers were needed inside the apartment after it was entered or more officers were needed to control Mr. Perea and Mr. Yu. Detective Sobotka believed it was better to keep the crew together at all times. Detective Constable Tavares and Constable Zver arrived in the hallway with Mr. Perea and Mr. Yu just before the entry began.

D.2.11 The Deployment of McCallum below the Balcony

41 Detective Sobotka received information from Detective McCallum, either in the underground parking

facility or when he was in the hallway near Apartment 305 before the door was breached, that he intended to position himself below the balcony of Apartment 305, observing it, while the warrant was executed. This is done by the TPS in situations like this because occupants of apartments sometimes jump from balconies to escape from the police or throw evidence over the balcony in an attempt to prevent its seizure by the police.

D.2.12 The Breach of the Door to Apartment 305

42 At approximately 8:15 p.m. Detective Constable Arulanandam and Detective Constable Brammall began to ram the door, using a heavy metal device that has a handle on each side. One of them was on each side of the device. It took at least ten rams on the door before it was broken open.

43 Shortly after the use of the ram by Detective Constable Arulanandam and Detective Constable Brammall began, several officers yelled "police search warrant". Those officers included Detective Constable Arulanandam, Detective Constable Brammall and Detective Constable Sardella. Detective Constable Singh did not utter those words.

44 None of the officers heard any sounds coming from within the apartment as the door was rammed.

45 The speed with which a door to an apartment is breached is an important factor to the safety of the officers executing a search warrant and the seizure of any evidence under the warrant. The longer an occupant of an apartment has from the moment when the announcement "police search warrant" is made until the moment when entry is gained, the greater the opportunity to take possession of a handgun to resist the officers and, further, the greater the opportunity to destroy evidence. These factors were fully appreciated by Detective Sobotka and all of the other officers as Detective Constable Arulanandam and Detective Constable Brammall rammed the door to Apartment 305.

46 The door to Apartment 305 appeared to be reinforced to Detective Sobotka, Detective Constable Arulanandam and Detective Constable Brammall. There was a metal plate fixed to the door, encasing the door knob, about eight inches by ten inches, but such plates are apparently rather common on doors in older buildings like this one. The door had a deadbolt lock and a lock in the door knob. There was a metal frame for the door. Thus, while I am satisfied that the door was a difficult one to breach, I am not satisfied it was reinforced by anyone for the purposes of the operation of the stash house within the apartment.

47 Moreover, while Detective Constable Brammall testified that he observed some pieces of wood positioned against the door from the wall, apparently to prevent entry into the apartment by anyone without the permission of an occupant, I decline to make that finding of fact. Detective Constable Brammall acknowledged in cross-examination that it may have been a piece of wood that randomly ended up in that position as a result of the damage to the door caused by him and Detective Constable Arulanandam when they breached the door with the ramming device. The photographs of the damaged door, broken in half and, in part, splintered, are consistent with this possibility. Eugene Trozzlo, the superintendent of the building who has repaired many of its doors over the years, expressed an opinion that the two inches by two inches pieces of wood shown in those exhibits are from the door itself. For these reasons I decline to make that finding of fact, as advocated by the Crown Attorney.

D.2.13 The Entry by the Officers

48 As soon as the door to Apartment 305 was breached, Detective Constable Brammall took custody of the ramming device and stood to the side of the door. All of the officers entered the apartment as quickly as possible. Detective Constable Arulanandam was the first officer to enter. Detective Constable Brammall was the last one to enter. Detective Sobotka entered just ahead of Detective Constable Brammall. Otherwise, the sequence of Detective Constables Sardella, Rabbito and Singh is not clear on the evidence.

D.2.14 The Location of Yu and Perea in the Hallway

49 Detective Constable Tavares and Constable Zver had custody of Mr. Yu and Mr. Perea near the end of the hallway until the door was breached. They moved the prisoners to the immediate vicinity of the door to Apartment 305 after Detective Constable Brammall entered the apartment. Both Mr. Yu and Mr. Perea were handcuffed to the rear, kneeling on the floor, facing the apartment. Neither of them could see into Apartment 305, but both of them were within hearing range of the events in the apartment.

D.2.15 Conclusion

50 These, then, are the circumstances of the case as found by the Court before the police entered the apartment.

D.3 The Events after the Incident in the Apartment

D.3.1 Introduction

51 Before I comment on the credibility of the witnesses for the Crown and the defence concerning the events in the apartment, and make my findings of fact on that aspect of the case, let me next deal with the removal of the suspects from the apartment and all of the pertinent subsequent events. This part of the judgement focuses upon the injuries of the defendants caused during the incident in the apartment, the failure of the TPS to photograph the condition of the apartment and the subsequent debriefing of the officers.

D.3.2 The Overview of the Subsequent Events

52 It is helpful to begin with an overview of the pertinent subsequent events.

53 At approximately 8:55 p.m., the defendant ██████████ Fisher and ██████████ were taken from Apartment 305 and, together with Manuel Perea, transported to No. 22 Division by Constable Coleman and Constable Parvin. Eventually, Mr. Fisher was examined by Dr. Goldman at Mount Sinai Hospital and Dr. Kerr at the medical facilities of the Don Jail.

54 At approximately 9:10 p.m. the search of the apartment under the warrant began, about ten minutes after the warrant expired. The work of the Scenes of Crime Officers ("SOCO"), Detective McLeod, was completed by then.

55 At 9:45 p.m. the defendant ██████████ Almeida and ██████████ were escorted from the apartment by

Detective Constable Arulanandam and Constable Zver and transported to No. 22 Division by Constable Munro and Constable Zver.

56 At 9:55 p.m. Detective Sobotka turned the apartment over to the superintendent and advised him to secure the apartment. Detective Sobotka and Detective Tsoutsoulas, the drug dog officer, went to the underground parking facility and checked a car, without a search warrant. The results were negative. Detective Sobotka left 1550 Lawrence Avenue West at 10:20 p.m. and returned to No. 22 Division.

57 At 11:10 p.m. the debriefing of all of the officers involved in the search of Apartment 305 and the related events began in the CRU Office at No. 22 Division. It was completed around 11:25 p.m.

58 Around 11:30 p.m. Valter Almeida was taken to the St. Joseph's Health Center and examined by Dr. Moffatt.

59 Let me now deal with each of these parts of the case.

D.3.3 The Injuries of Fisher

60 At 8:35 p.m. Constable Coleman and Constable Parvin were dispatched to 1550 Lawrence Avenue West to transport some prisoners to No. 22 Division. They met Detective McCallum around 8:40 p.m. in front of the building who advised them that five persons were under arrest in Apartment 305, on charges of possession of firearms and possession of cocaine. They went to the third floor. At 8:55 p.m. the defendant ██████ Fisher, Manuel Perea and Steven Ruiz were turned over to them by another officer, possibly Detective Constable Tavares, who told them Mr. Fisher lived in Apartment 305. In fact, ██████ Fisher lived with his mother in Apartment 315 and Detective Constable Tavares had no reason to believe he lived in Apartment 305. Both Constable Parvin and Constable Coleman observed injuries to ██████ Fisher's face, red bruises to the right side of his face. Constable Coleman was advised by another officer in the hallway that all three of these men had been advised of their rights to counsel and would be able to speak to a lawyer at the station. Constable Coleman and Constable Parvin escorted them to the backseat of the cruiser and left the building for the station at 9:05 p.m. They arrived at approximately 9:25 p.m.

61 After they entered the cruiser at 1550 Lawrence Avenue West, Constable Parvin advised each of them, including ██████ Fisher, of their right to counsel, after he asked them if they understood why they were arrested. All of them said they wanted to speak with duty counsel. Although Constable Parvin did not contact duty counsel for any of these men, he did advise another officer, likely a drug squad officer, of their desire to speak to a lawyer. Constable Parvin believed it was the responsibility of the officers investigating an alleged offence to provide the arrestees with access to counsel. Constable Parvin felt he was merely a transporting officer.

62 When ██████ Fisher was presented to Staff Sergeant Hurley in the booking area of No. 22 Division, he confirmed he was arrested for firearms and cocaine offences and, when asked, expressed a desire to call a lawyer. Mr. Fisher told Staff Sergeant Hurley that he lived in Apartment 315 when Constable Coleman said he lived in Apartment 305, as Detective Constable Tavares led him to believe. Mr. Fisher was asked if he had any injuries and he said "... I'd like to have my eye looked at, but I haven't any injuries ... my ribs hurt ... it hurts bad, my ear ...". Staff Sergeant Hurley suggested he would be taken to the

hospital for an examination. Mr. Fisher said "... I would like to look at it first, to see how bad it is ...". It was approximately 9:45 p.m.

63 Constable Coleman and Constable Parvin then took Mr. Fisher to the CIB offices, for further investigation by the drug squad and a level three search in anticipation of being held in the cells for a bail hearing the next day. The search was conducted by Constable Coleman and Constable Parvin. Although all of his clothing was removed, neither Constable Coleman nor Constable Parvin observed any injuries on him. He did not complain of any injuries.

64 Later, Mr. Fisher was returned to Staff Sergeant Hurley to be taken to the hospital. However, Mr. Fisher confirmed that he did not want to be taken to the hospital. He was returned to his cell.

65 Mr. Fisher appeared in Court on Thursday, June 8, 2006 for a bail hearing. His mother, Lynn Fisher, was present. His right eye and right ear were very swollen. He appeared to be in pain whenever he moved. The bail hearing was adjourned to the next day because his lawyer was not present. However, Mr. Fisher was taken to the hospital in an ambulance by the court officers because he complained of injuries.

66 Dr. Brian Goldman examined Mr. Fisher at the Emergency Ward of Mount Sinai Hospital around 10:15 p.m. on June 8, 2006. He had a fractured rib, the ninth rib on the right side of his body, a perforated right eardrum and bruising around the right eye that included a right subconjunctival hemorrhage. The only treatment prescribed was pain killers and anti-inflammatories. No surgical procedures or hospitalization was required. In his opinion, a minimum of four separate blows caused these injuries, likely more to the rib areas.

67 ██████████ Fisher was examined by a nurse, Marjorie Morrison, at the Don Jail on June 9, 2006 at 12:45 a.m. There was bruising on both hips and he had a black eye.

68 When he attended Court on Friday, June 9, 2006 for his bail hearing, his mother was again present. He looked worse than he did the previous day because of the changed discoloration.

69 On Saturday, June 10, 2006 his mother visited him at the jail. He pulled up his shirt. He was covered in bruises, on both sides of his abdomen. The bruises completely circled the abdominal area of his body, with the exception of a narrow vertical strip in the center of his back. His face was significantly discoloured too. His right eye was more closed than it had been the previous day.

70 Similar observations were made by Dr. Kerr at the jail on June 12, 2006 - a small right anterior eardrum perforation, a right eye hemorrhage and dry skin with big bruises to the flanks. There was no external bleeding from the flanks.

D.3.4 The Examination of the Apartment by SOCO

71 Shortly after the occupants of the apartment were arrested, Detective Sobotka or Detective McCallum arranged for the attendance at the apartment of SOCO from No. 22 Division. Their responsibilities included the taking of photographs of the apartment. The SOCO officer in this case was Detective McLeod. No photographs of the blood on the floors of the living room and dining room were taken. Nor were any photographs of the blood on the dining room wall taken. Photographs of drug paraphernalia on

the kitchen counter, the damaged door to the apartment and the three loaded firearms found below the balcony to Apartment 305 were taken. No photographs of the furniture or boxes in the living room were taken either.

72 However, on June 8, 2006 Aisha Colque, the former girlfriend of Steven Ruiz, the tenant in Apartment 305 on June 7, 2006, and a co-tenant on the lease, came to 1550 Lawrence Avenue West at the request of the superintendent. It was around 11 a.m. There was no door. The apartment was a mess. There were papers and dry dog food, also seen by Victor Medina, everywhere. There was a lot of blood in the dining room and on the wall of the dining room.

73 Consequently, Ms. Colque left the apartment and purchased a disposable camera from a nearby store. She returned to the apartment and photographed all the blood she saw. The blood is located on the living room floor, the dining room floor, particularly against the west wall of the dining room in a significant quantity near the baseboard, and on the west wall of the dining room. She also photographed the search warrant she found on the living room floor.

74 No photographs of this blood were taken by Detective McLeod.

D.3.5 The Injuries of Almeida

75 Let me next deal with the transfer of ██████████ Almeida to No. 22 Division and the hospital for an assessment of his injuries.

76 At 9:45 p.m. Detective Constable Arulanandam and Constable Zver escorted ██████████ Almeida and Kenneth Yu from Apartment 305 to a cruiser for transport to the station. Mr. Almeida's pants were at his knees or ankles as he was escorted to the cruiser, handcuffed. They were placed in the back of a van drive by Constable Munro. Constable Zver remained in the back of the van with the prisoners when it left 1550 Lawrence Avenue West, around 9:55 p.m., until it arrived at the station, around 10:10 p.m. The defendant Almeida vomited as they entered the station.

77 Constable Zver presented Mr. Almeida to Staff Sergeant Hurley in the booking area. Mr. Almeida advised the officer of the vomiting in the van, the injury to his nose, the injury to his left leg and a feeling of nausea. Staff Sergeant Hurley said an injury report would be required from the arresting officer and directed that Mr. Almeida be taken to the hospital.

78 At approximately 11:30 p.m. Constable Vercholuk and Constable Kraft searched Mr. Almeida in preparation for the transfer to the hospital. It was a search that involved the removal of all of his clothing at one stage or another. Neither Constable Vercholuk nor Constable Kraft made any notes of any injuries to Mr. Almeida. Neither of them has any recollection of any such injuries. The record of arrest indicated he had a swollen right cheek, a bloody nose, a scratch to the forehead and a charley horse to the left leg. Nor did either of them recall any blood on his clothing or odor of vomit about his person.

79 Subsequently, Mr. Almeida was transferred to the hospital by Constable Vercholuk and Constable Kraft, with the permission of Staff Sergeant Hurley leaving the station around 11:30 p.m. and returning with Mr. Almeida around 3:10 a.m.

80 Dr. Moffatt examined Mr. Almeida at the St. Joseph's Health Center. He was alert and oriented. His vital signs were stable. There were abrasions on both sides of his forehead. There were abrasions on his back, neck and legs. His nose was bloodied. Dr. Moffatt ordered a CT scan. It revealed there was no lesion or other significant abnormality. There was no evidence of hemorrhage or ischemia.

81 On May 30, 2008 Dr. Stoll examined ██████ Almeida's nose and observed a mild deformity of the nasal bone. This deformity could be due to a healing of a fracture. The age of the fracture could not be determined on the basis of the examinations he conducted.

D.3.6 The Debriefing of the Officers

82 Let me next deal with the debriefing of the officers involved in the execution of the warrant, a process that occurred at No. 22 Division from 11:10 p.m. to 11:25 p.m.

83 All of the officers were present for the debriefing.

84 All of them made their own notes after the debriefing.

85 The principal purpose of the debriefing is to ensure the accuracy of the CNT's notes, Detective Constable Tavares in this case. This is achieved by the CNT reading his notes, as they then are, to the group of officers. When the portions read relate to the work of a particular officer, that officer is expected to ensure the accuracy of that portion of the CNT's notes, correcting or adding to it, if necessary. However, this same process may be helpful to the affected officer in the making of his own notes, in that the CNT's note of his work may refresh his memory of the details lost in the haste or anxiety of the unfolding investigation, perhaps a dangerous investigation.

86 Other purposes of the debriefing include the discussion of the safety issues raised by the execution of the search warrant, the custody of exhibits and the assignment of the paperwork necessary for the prosecution of the case.

87 While this practice is a sound one in the abstract, it opens the officers to criticism, as occurred in this case, that they collaborated to fabricate evidence against an innocent arrestee. Absent a video or audio recording of the debriefing, the failure of the officers to make their own notes before the debriefing may lead to the Court giving less weight to their testimony, particularly where there are omissions of material aspects of the investigation from their notes. Or, alternatively, a series of individual meetings between the CNT and the affected officer may serve the overall purpose of the debriefing without impairing the integrity of the process or the reliability of the notes.

D.3.7 Conclusion

88 These, then, are the events after the incident in the apartment that are most pertinent to me.

D.4 The Events in the Apartment

D.4.1 Introduction

89 Let me, next, deal with the evidence concerning the events in the apartment.

90 The evidence relating to these events consists of the testimony of Detective Sobotka, Detective Constables Arulanandam, Singh, Rabbito, Sardella and Brammall and Constable Zver, for the Crown, and, for the defence, [REDACTED] and [REDACTED] Fisher. Having considered this evidence as a whole, in the context of the rest of the evidence at trial and on the application to stay, some aspects of the events in the apartment are clear to me. Others, as will become evident in these reasons, are a more difficult task for the Court.

91 Let me begin with the events in the apartment that are clearest to me.

D.4.2 The Status of Ruiz as a Drug Dealer

92 Steven Ruiz was a dealer of crack cocaine. After he separated from Ms. Colque in November 2005, he started to sell drugs from Apartment 305. Approximately fifteen to twenty-five people came to the apartment every day to buy drugs from him. He knew all of them to some extent. Most of them purchased drugs and left. There was a significant quantity of crack cocaine in the apartment on June 7, 2006 together with three loaded firearms. They were a 9 millimeter Ruger semi-automatic handgun, a 25 calibre Raven Arms semi-automatic handgun and a 45 calibre Llama Minimax semi-automatic handgun. These firearms were an integral part of the drug business operated from the apartment. Drug paraphernalia, including cutting agents and scales were kept in the kitchen where Mr. Ruiz cooked and packaged the drugs for sale.

93 Looking at the evidence as a whole I am satisfied that Mr. Perea, Mr. Yu, Mr. Fisher and Mr. Almeida all knew that Mr. Ruiz was a drug dealer and used his apartment for such purposes. Mr. Fisher and Mr. Almeida likely did not know the extent of his drug business, that is, the quantity of drugs sold by him, the frequency of sales and the possession of firearms incidental to it.

D.4.3 The Move from Apartment 305

94 On June 7, 2006 Steven Ruiz was moving out of Apartment 305. Manuel Perea agreed to help him with the move and began around 11 a.m. Mr. Yu arrived around 6 p.m. He went to the apartment because he wanted to visit Mr. Perea, who lived in Apartment 509 of 1550 Lawrence Avenue West. Although Mr. Yu helped them pack, nothing was moved out of the apartment after he arrived.

D.4.4 The Invitation to Almeida

95 Mr. Yu invited Mr. Almeida to Apartment 305. Mr. Almeida had previously met Mr. Ruiz and went to his apartment not only to meet Mr. Yu but to buy some marijuana for his personal use.

D.4.5 The Invitation to Fisher

96 Mr. Fisher returned home, to Apartment 315, around 6:30 p.m. He received a call from Mr. Ruiz who told him he was moving. Mr. Fisher decided to visit Mr. Ruiz to say goodbye and to smoke a joint with him. He told his mother he would not be long. It was about 7:30 p.m.

97 When Mr. Fisher arrived at Apartment 305, Mr. Ruiz asked "Where is the music?" In the past Mr. Fisher had given Mr. Ruiz a cd of music downloaded from the internet in exchange for a joint. Thus, he returned home, to Apartment 315, and prepared a cd for Mr. Ruiz.

98 Before Mr. Fisher left his apartment, he received a call from a girlfriend. She told him she had taken delivery of her new car and invited him to go for a ride. He agreed, telling her he would meet her downstairs in fifteen to twenty minutes, after he smoked a joint. Mr. Fisher then returned to Apartment 305 with the cd.

D.4.6 The Departure from the Apartment by Yu and Perea

99 Meanwhile, Mr. Ruiz, Mr. Yu and Mr. Perea had been in Apartment 305, smoking marijuana as they moved in and out of the apartment to its balcony, as observed by Detective Constables Rabbito and Sardella and Constable Zver. There was little or no furniture left in the apartment by this stage of the move. It included a television, three chairs, a few boxes and a Rubbermaid container. There was no furniture in the dining room.

100 Shortly before 8 p.m. Mr. Perea and Mr. Yu decided to return to Mr. Perea's apartment to feed his parrot and to go to a mall to purchase some food for the parrot. They left Apartment 305 and passed Mr. Fisher in the hallway as he approached it with the cd for Mr. Ruiz.

D.4.7 The Presence of Firearms in Apartment 305

101 As I have previously indicated Mr. Ruiz had three loaded firearms in the apartment incidental to his drug business, even at this stage of the move on June 7, 2006.

102 One of them was likely in the kitchen, on the counter, as described by Mr. Perea in his testimony. I accept that part of his evidence. The photographs of the kitchen taken by Detective McLeod of SOCO from No. 22 Division show drug paraphernalia in the kitchen including a weigh scale, a cutting agent, and some packaging materials. The presence of a handgun near such materials would likely be an optimal positioning of a firearm for a drug dealer.

103 At least one of the other firearms was in the living room on the Rubbermaid container. Mr. Yu, Mr. Fisher and Mr. Almeida all testified, to one degree or another, about their knowledge of the location of a firearm on that container shortly after they entered the apartment on June 7, 2006. Mr. Ruiz testified there were two guns on the container, a container that was covered by papers and other miscellaneous items. While I am disinclined to accept Mr. Ruiz's testimony as truthful in its entirety, I do accept his evidence insofar as it proves one firearm was on the container, because it is consistent with the testimony of Mr. Yu, Mr. Fisher and Mr. Almeida on this point. It also accords with common sense that one of three firearms would be in the living room area of an apartment that was used to traffic in crack cocaine. As there was one firearm in the kitchen near the drug paraphernalia, there would likely be one firearm in the living area of the apartment within ready access of an occupant, if needed.

104 As to the location of the third firearm, there is no direct evidence on this issue other than the testimony of Mr. Ruiz. Common sense may lead one to infer the third firearm, if optimally situated for use

in the trafficking of crack cocaine from the apartment, would be situated near the cocaine. The cocaine was located by the TPS in a closet of one of the bedrooms in the apartment. A drug dealer who possesses loaded firearms in his apartment, not one or two firearms but three firearms, would likely situate one of them in the immediate area of the cocaine. That would be the best location for a loaded firearm in the event of a need to use a firearm to protect his possession of the cocaine. However, Mr. Ruiz was moving from the apartment on June 7, 2006 and the location of the third firearm may have been affected not only by the exigencies of the drug business but also the practicality of moving the cocaine and all of the accoutrements of the drug business, including the firearms. For these reasons, out of an abundance of caution, I decline to infer the third firearm was in the bedroom with the cocaine and accept Mr. Ruiz's testimony on this point, that is, it was in the living room on the Rubbermaid container.

105 Although Mr. Fisher and Mr. Almeida testified they only saw one firearm on the Rubbermaid container, I am disinclined to accept their testimony on this point as completely truthful. They did see at least one firearm on the Rubbermaid container. The firearm in the kitchen was on the counter in plain view. Whether they actually saw the second and third firearms, they knew they were in an apartment used to traffic in narcotics and, further, they knew the trafficker, Steven Ruiz, possessed a firearm as an integral aspect of his drug trafficking business.

D.4.8 The Removal of the Firearms

106 Moreover, I am satisfied that the three firearms in Apartment 305 were thrown over the balcony for the purpose of defeating the TPS in the execution of the search warrant. Once Detective Constable Arulanandam and Detective Constable Brammall began to use the ram to breach the door, taking more than ten bangs on the door to open it and a period of up to one minute, complemented by several officers yelling "police search warrant", all of the occupants in the apartment knew of the presence of the police and their intention to enter the apartment to execute a search warrant. Over that period of up to one minute, the three firearms were located, taken to the balcony and thrown over the edge. Two of them, the 9 millimeter and the 45 calibre were subsequently observed by Detective Constable Brammall around 8:35 p.m., about twenty minutes after the entry around 8:15 p.m., to have dirt and grass in their barrels, indicative of being tossed from the balcony. Detective McCallum was situated below the balcony, as deployed by Detective Sobotka, when the rest of the officers gathered at the entrance to Apartment 305, to gather any evidence that might be thrown over the balcony and to apprehend any occupant of the apartment who might attempt flight by jumping from the balcony as the officers announced "police search warrant". I am prepared to infer, looking at the evidence as a whole, independently of the testimony of Mr. Ruiz, that there were no firearms on the grass below the balcony of Apartment 305 when Detective McCallum first situated himself there in compliance with Detective Sobotka's directions. Detective Sobotka went to the balcony, within three minutes of entering the apartment, when someone said a gun had been thrown over the balcony, and observed three handguns in a triangular formulation in the vicinity of Detective McCallum. This evidence leads me to accept the testimony of Mr. Ruiz insofar as he testified the three firearms in the apartment, that is, the 9 millimeter Ruger, the 25 calibre Raven and the 45 calibre Llama Minimax, were thrown over the balcony for the purpose of defeating the TPS in its announced intention to enter the apartment and execute a search warrant.

107 All of the firearms were loaded and operable. The 45 calibre Llama Minimax included a detachable box cartridge magazine designed to hold twelve rounds of ammunition, a "prohibited device" under the *Code*.

108 Thus, respectfully, I disagree with the submission of the defence on the issue of continuity of the firearms and ammunition.

D.4.9 The Circumstances Leading to the Removal of the Firearms

D.4.9.1 Introduction

109 Let me now deal with the critical aspect of this case, that is, the circumstances in the apartment leading to the removal of the firearms over the balcony.

110 In this part of the judgement I will summarize the evidence relied upon by the Crown and the defence, and comment on the credibility of the witnesses and the reliability of their evidence.

D.4.9.2 The Case for the Crown

111 The position of the Crown is that, after the door was breached, all of the officers immediately entered the apartment with the exception of Detective Constable Tavares and Constable Zver, who maintained custody of Mr. Yu and Mr. Perea in the hallway, as directed by Detective Sobotka. Detective Constable Arulanandam was the first officer into the living room. As he entered the living room, he saw three men running towards the balcony. Mr. Almeida and Mr. Ruiz went onto the balcony in that sequence. They were slightly ahead of Mr. Fisher, who did not leave the apartment. Mr. Fisher was holding a shiny object in his right hand. In an overhand motion, he tossed this object, a handgun, towards the balcony. Detective Constable Arulanandam immediately drew his handgun, pointed it at Mr. Fisher and said "police ... don't move ... gun ... gun ... gun ...". He did not see where the handgun landed because he was focusing on Mr. Fisher. Within seconds, Mr. Ruiz and Mr. Almeida re-entered the apartment. Detective Constable Arulanandam was concerned about the possibility that Mr. Ruiz or Mr. Almeida may have caught the handgun thrown towards the balcony by Mr. Fisher and brought it into the apartment to use against the officers. His attention was immediately focused on Mr. Almeida, the last one into the apartment. Detective Constable Arulanandam did not see a handgun in the hand of Mr. Ruiz or Mr. Almeida when they re-entered the apartment. Officer safety was a paramount concern at this stage of the incident. He pointed his handgun at Mr. Ruiz and Mr. Almeida and said "police ... don't move". Neither of them complied with his direction. Detective Constable Arulanandam repeated, several times, "police ... don't move". Mr. Almeida continued towards him, leading Detective Constable Arulanandam to reholster his handgun out of a concern Mr. Almeida might take it and place the officers at greater risk. He believed other officers were in the apartment but did not know if any of them had drawn their guns. Mr. Almeida tried to strike Detective Constable Arulanandam with his right fist. He responded in an attempt to control and arrest Mr. Almeida with a series of knee strikes to his legs and abdomen. It was an all out fight. Mr. Almeida responded, using knee strikes to the thighs of Detective Constable Arulanandam. The strikes by Detective Constable Arulanandam were not effective. Detective Constable Singh assisted Detective Constable Arulanandam because he believed he was not succeeding. He reholstered his handgun before he joined with Detective Constable Arulanandam. Detective Constable Arulanandam delivered an elbow to Mr. Almeida's face, using his right arm, for the purpose of gaining control of him. Detective Constable Singh, using open-handed techniques, also struck Mr. Almeida. Throughout this altercation, the officers yelled to Mr. Almeida "police ... stop resisting ...". However, Mr. Almeida did not comply with their directions. With the help of Detective Constable Singh, Detective Constable Arulanandam took Mr.

Almeida to the floor. Both of the officers attempted to control his hands in order to handcuff him behind his back, but he continued to resist them. Ultimately, they succeeded in handcuffing him. Detective Constable Arulanandam then arrested him on a charge of possession of firearms, as he was advised by Detective Sobotka at this stage of the incident that three handguns had been thrown over the balcony. Mr. Almeida was advised of his right to counsel and asked if he understood those rights and wanted to call a lawyer. He did not respond, other than to say "fuck you". This entire incident was a very dynamic and frightening one for Detective Constable Arulanandam and Detective Constable Singh that lasted less than two minutes.

112 Meanwhile, Detective Constable Rabbito and Detective Constable Sardella followed Detective Constable Arulanandam into the living room. Detective Constable Rabbito saw Mr. Fisher move quickly from the sliding door towards himself, attempting to move past him as if he intended to leave the apartment through its entrance. Mr. Fisher tried to push Detective Constable Rabbito aside. He intended to arrest Mr. Fisher because he heard Detective Constable Arulanandam say "gun ... gun ... gun ...". They grabbed one another and bounced on and off the wall. Detective Constable Sardella joined Detective Constable Rabbito. They yelled to Mr. Fisher "police ... get down" but Mr. Fisher did not comply with their directions. Mr. Fisher was forced to the floor. Detective Constable Rabbito and Detective Constable Sardella both struck him after he was on the floor because he continued to resist him. Detective Constable Rabbito struck him around the shoulder and arm area in order to release his arm, which was then situated under his body. Mr. Fisher did not produce his arm as directed. Consequently, Detective Constable Rabbito used two knee strikes to the torso, between the elbow and the waist on his right side. Mr. Fisher's arm came out in those circumstances, allaying Detective Constable Rabbito's concerns that Mr. Fisher might have a firearm in his waistband and might use it against the officers. Detective Constable Sardella then placed his handcuffs on Mr. Fisher, arrested him on a charge of possession of a firearm and advised him of his rights to counsel. There were no subsequent blows to Mr. Fisher.

113 Meanwhile, Detective Constable Brammall entered the apartment, as the last officer, and went to the living room. He saw two men struggling with other officers. Mr. Ruiz came towards Detective Constable Brammall who had his handgun drawn and pointed at Mr. Ruiz. Detective Constable Brammall said "don't move ... police ... don't move". Mr. Ruiz did not stop, but continued towards Detective Constable Brammall. He reholstered his handgun because he did not see any weapons in Mr. Ruiz's hands. Detective Constable Brammall was pushed in the chest by Mr. Ruiz. He responded by grabbing Mr. Ruiz by the upper body and told him he was under arrest for possession of cocaine for the purposes of trafficking. Mr. Ruiz pushed him aside. Detective Constable Brammall punched Mr. Ruiz in the face and said "stop resisting". Mr. Ruiz attempted to pass Detective Constable Brammall, who responded by grabbing his upper body, kneeling him in the left rib area and taking him to the floor. Mr. Ruiz struggled, but Detective Constable Brammall handcuffed him to the rear. Eventually, Mr. Ruiz calmed down. At sometime during this altercation, Detective Constable Brammall heard someone yell that guns had been thrown off the balcony. He went to the balcony and observed Detective McCallum and three handguns on the grass in the area below the balcony.

114 Detective Sobotka was the second last officer to enter the apartment. He passed through the north end of the living room and went down the hallway to make sure there were no other people in the bedrooms, bathroom and closets. As he went down the hallway he heard Detective Constable Arulanandam say "gun" several times. Detective Sobotka, not finding anyone else in the other areas of the apartment, returned to the living room. It was about one to two minutes after he entered the apartment.

There were several persons on the floor. There were lots of struggles and several officers were saying "stop resisting". Someone said a handgun had been thrown over the balcony. Detective Sobotka went to the balcony to make sure there was no one on the balcony with a gun and, further, to see if Detective McCallum was below the balcony. When Detective Sobotka was on the balcony, he saw Detective McCallum and three handguns near him, in a triangular configuration and not immediately adjacent to one another. In those circumstances, he called the dispatcher and requested the attendance of SOCO and officers to transport the five persons in custody.

115 This, then, is my summary of the main parts of the evidence relied upon by the Crown Attorney.

D.4.9.3 The Case for the Defence

116 Let me now deal with the position of the defence, summarizing the parts of the evidence of most significance to it.

117 The case for the defence is that Mr. Ruiz, having heard the banging at the door, threw the three firearms over the balcony, believing the police were about to enter the apartment. Mr. Ruiz, Mr. Fisher and Mr. Almeida then went to prone positions on the floor and otherwise complied with the directions of the police. None of them assaulted or otherwise resisted any of the officers. All of them were handcuffed and physically abused by an officer, some of whom cannot be identified but, for the most part, by Detective Constable Arulanandam. Neither Mr. Fisher nor Mr. Almeida touched any firearm in the apartment, held any of the firearms or talked about them with anyone.

118 Let me now summarize the material aspects of the evidence relied upon by the defence.

119 Mr. Ruiz testified that he sold drugs from the apartment after he separated from Aisha Colque. He was sitting in the living room with Mr. Fisher and Mr. Almeida when he heard the first bang. He jumped up, frightened. By the third bang he knew it was the police, even though he did not hear the words "police search warrant". He picked up the handguns and threw them off the balcony. Two guns were in front of him on the plastic moving crates. He grabbed them after the second bang, took two steps and threw them off the balcony, together. Then he panicked. He felt he had to remove the drugs and the other handgun out of the apartment too. He picked up the other handgun and threw it off the balcony. He does not recall where it was in the apartment. It may have been in the kitchen or beside him in the living room. He was about to throw the drugs off the balcony too when he saw an officer's leg coming through the door. He returned the drugs to the closet in the hallway and went to his knees. After the first bang, Mr. Fisher and Mr. Almeida appeared frightened, as they jumped out of their chairs and moved towards the dining room. He did not pay much attention to them after this stage of the incident. As the police entered they pointed their guns at him and said "get on the floor". He complied with their direction and placed his hands behind his back. He was handcuffed. He did not resist or put his hands on any officer. The police went towards Mr. Fisher and Mr. Almeida too. An officer, while on Mr. Ruiz's back, placed his knee on Mr. Ruiz's neck and said "Whose house is this?" as he pulled his hair. Mr. Ruiz replied "I don't know". The officer said "If you are lying you will pay for this". The officer then went to the bedroom and, after apparently seeing the photographs there, returned to the living room, pulled his hair and thrust his face into the floor. Mr. Fisher and Mr. Yu were yelling "stop hitting me ... I'm not resisting ...". There were more officers around Mr. Fisher and Mr. Almeida. Some officers kicked Mr. Ruiz in the ribs. When Mr. Yu was in the apartment, he was yelling about the pain in his arm, and cried. This lasted for a long time. To Mr. Ruiz it was as if the

police entered the apartment to beat them up. At one point he was moved to the bathroom by a tall bald officer, apparently Detective Constable Brammall, and told, more or less, "... don't ask for medical attention at the station or more will happen to you ...".

120 Mr. Almeida testified that he heard the banging on the door. He was in the living room. He panicked. He thought about the handgun he saw in the living room. He was moving to a kneeling position on the floor, up and down, before the police entered. Mr. Fisher went towards the floor too. He heard Mr. Ruiz shuffling around the whole apartment, the living room, the dining room and the kitchen. Mr. Ruiz went to the location of the handgun in the living room and bent over with two hands. He picked up something, using two hands. However, Mr. Almeida did not see a second gun in Mr. Ruiz's hands. Mr. Ruiz ran towards the balcony, but Mr. Almeida did not see him after that because the door to the apartment was breached at that stage of the incident. When Mr. Almeida saw the first officer, Detective Constable Arulanandam, he was in the process of going to one knee. Detective Constable Arulanandam said "get down". Mr. Almeida went to the floor immediately, placing his chest and chin on the floor and his hands above his head, also on the floor. He saw a boot. Someone kicked his nose after he was handcuffed to the rear, laying face down on the floor. There were several kicks to his abdomen. A couple of officers stepped on his head as they entered and exited from the apartment, "... as if I was a boardwalk ...". At one point he told the officers to stop hitting him. His nose would not stop bleeding.

121 However, Mr. Almeida does not recall anything about the incident after about one minute, except for memory fragments. He does not recall if he was in other areas of the apartment. Nor does he recall if the police had their guns drawn when they entered the apartment. It is possible someone said "stop resisting" but he would be lying if he testified he recalled such a remark. His memory is dazed and confused. He does not recall being in the elevator as he was escorted from the building. He does recall seeing Mr. Yu in the police van and feeling ill. He could have defecated or vomited, but does not recall. He does not recall if his pants were at his knees or ankles as he left the building. Nor does he recall the blood in the dining room as shown in the photographs taken by Ms. Colque. Mr. Almeida did not touch, talk about or have custody of any handgun in the apartment.

122 Mr. Fisher testified that, after he heard three loud bangs at the door, he believed it was the police. There was some marijuana on the television and he saw a handgun in the living room. He and Mr. Almeida were seated on chairs in the living room and Mr. Ruiz was standing somewhere. They were each smoking a joint. Mr. Fisher's attention was directed towards the door to the apartment. He has difficulty seeing out of his right eye because of a degenerative nerve disease. He can see shapes or motions, but in light darker than the courtroom he cannot see. He could only see out of his left eye throughout the incident. From the first bang on the door to the opening of the door was about forty seconds. Both Mr. Fisher and Mr. Almeida responded by laying on the floor, face down, with their hands above their heads on the floor. Mr. Fisher was laying about two to three feet from Mr. Almeida. Mr. Fisher's head was towards the north, that is, in the direction of the door to the apartment, with his head turned so his left eye, the eye with normal vision, was to the floor, more or less protected, and his right eye exposed, facing towards the television. Mr. Almeida was, in effect, towards Mr. Fisher's back. Mr. Fisher did not know what Mr. Ruiz was doing then, but he could hear the shuffling of his feet, towards the balcony or the dining room, moving quickly. Mr. Fisher heard "police search warrant" once, as well as "stop moving ... get on the ground ...". He felt weight on his back as he was handcuffed. He was struck about six times on the right side of his face, near the right eye, after he was handcuffed. He believes there were two or three officers involved in that aspect of the incident. He was told to "stop resisting" but, as he was not resisting

said, "I'm not resisting". He was then struck repeatedly on both kidneys with something that felt metallic to him, possibly more than a dozen times. Mr. Fisher kept his right eye exposed to prevent any injury to his left eye. He then heard a clapping sound, as an officer, with a hand on one side of his head, struck his other ear with an open hand. He could not hear. He has a distinct memory of this. Detective Constable Arulanandam then took him from the living room to the dining room and choked him. He also hit him four times in the ribs, saying "... you are a piece of shit ... where are the drugs ...", using his knees a few times. Mr. Fisher was then returned to the living room and placed on the floor. He saw Almeida being kicked and screaming.

123 Mr. Fisher was then taken down the hallway by Detective Constable Arulanandam and, when they were near the closet closest to the living room, was pressured to say Mr. Yu and Mr. Perea were in the apartment when the officers entered. Mr. Fisher told Detective Constable Arulanandam they were not in the apartment and was slapped across the face. This happened seven or eight times with each refusal by Mr. Fisher to comply with each such succeeding demand by Detective Constable Arulanandam. Mr. Fisher was then returned to the living room and placed in the prone position on the floor. He was subsequently returned down the hallway, to a location near the bathroom, by Detective Constable Arulanandam who threatened him saying "... if you ask for medical attention, I will be the one taking you to the hospital ... you will need hospitalization ...". He was then returned to the living room. He was very frightened, never having been arrested before. When asked by Detective Constable Sardella to identify himself, he gave his name. When asked about his presence in the apartment, Mr. Fisher told him he came to Apartment 305 from his home, Apartment 315, to deliver a cd. Detective Constable Arulanandam asked Mr. Fisher, when he was escorted from the apartment, if he would find drugs or guns in his apartment. Mr. Fisher told him he would find his mother in the apartment and Detective Constable Arulanandam said "... maybe we will try there later ...".

124 Mr. Fisher did not hear the words "... gun, gun, gun ..." during the incident. It was noisy in the apartment. Mr. Almeida and Mr. Yu were screaming in agony. He himself yelled too because of the pain he experienced. Mr. Fisher saw Mr. Ruiz being kicked in the groin once. Mr. Yu said "... you are going to break my arm ..." to an officer who was situated over him, as he lay on the floor face down, just after Detective Constable Arulanandam returned Mr. Fisher to the living room from the area of the bathroom.

125 Mr. Fisher declined the opportunity to go to the hospital provided by Staff Sergeant Hurley because of the threat by Detective Constable Arulanandam. It was not until he was with the court officers at the Old City Hall Courts on June 8, 2006 that he asked for hospital treatment.

126 Lastly, let me summarize the testimony of Mr. Perea and Mr. Yu. Both of them were held in custody by Detective Constable Tavares and Constable Zver, handcuffed to the rear, just outside the door to Apartment 305 after it was breached.

127 Mr. Perea testified he was on his knees but could not see into the apartment. He heard "... freeze ... don't move ... don't move ... where's the drugs ... stop resisting ... I'm not resisting ...". He also heard people being hit, a thump, then the words "... stop resisting ... I'm not resisting ...", several times over a period of about five to seven minutes. These sounds began about fifteen seconds after the officers entered the apartment. He recognized the voices of Mr. Almeida and Mr. Fisher. He did not hear Mr. Ruiz's voice. Later, he saw blood on Mr. Fisher's lip, and, nose, and all over his shirt. He also saw blood on Mr. Almeida's nose and shirt, and some vomit too.

128 Mr. Yu also testified he was kneeling in the hallway, near the entrance to Apartment 305, beside Mr. Perea. He heard "... we are not resisting ... I am not resisting ... stop hitting us ..." and screaming, together with a lot of wrestling, fighting or movement. After about five to ten minutes in that location, having heard such sounds for that period of time, he was taken into the apartment and placed on the floor in the middle of the living room. Mr. Fisher, Mr. Almeida and Mr. Ruiz were all on the floor too, face down and handcuffed. There were five to ten officers in the living room too. A tall brown officer kicked Mr. Fisher and Mr. Ruiz, with Mr. Fisher responding "stop kicking me". An officer stepped on Mr. Yu's wrist and Mr. Yu, screaming, said "my wrist is hurting". The officer replied "I don't care". This lasted for about two to three minutes and was so painful Mr. Yu almost cried. The officer then put him in a chair in the middle of the living room. Mr. Yu did not see Mr. Fisher being moved around the apartment, to the dining room or to the hallway. Although he admitted his criminal record, he testified he had never been charged with trafficking in a narcotic and did not recall such a charge being withdrawn by the Crown in August 2000. The withdrawal of such a charge was not proven by the Crown.

129 This, then, completes my summary of the parts of the evidence of most significance to the defence.

D.4.9.4 The Comments on the Credibility of the Witnesses

D.4.9.4.1 Introduction

130 Let me now comment on the credibility of the witnesses and the reliability of their evidence. In this part of the judgement I will list the factors that are most important to me in the determination of the circumstances in the apartment after the entry by the TPS.

D.4.9.4.2 The Evidence of the Independent Witnesses

131 Several witnesses who are independent of the TPS and the occupants of the apartment, that is, Mr. Ruiz, Mr. Fisher and Mr. Almeida, described the sounds they heard coming from the apartment after the entry by the TPS and the duration of them.

132 The superintendent, Eugene Trzollo, was in the hallway on the third floor for about two hours, with the exception of a period of about twenty minutes when he returned to his office. While in the hallway, he heard screaming and yelling throughout the entire period of time. It was on and off. The screaming was high pitched. He recalled a few words like "fuck", "ow" and "oh, he shit his pants". These last words were spoken by an officer. All of the other words and sounds were by persons who seemed to be in pain. Later, when he entered the apartment there was an odor of defecation. I accept his evidence.

133 Martha Garcia, the tenant in Apartment 306, the apartment immediately to the west of Apartment 305, was in her apartment around 8 p.m. on June 7, 2006 when she heard a loud banging. She opened the door of her apartment and saw a large man near the door of Apartment 305. She sensed something was happening within that apartment and, thus, went to her bedroom. It was immediately adjacent to the kitchen and dining room of Apartment 305. She heard screaming and yelling. People seemed to be in pain. There was screaming, as if in pain, and anguish. She believes these sounds lasted for about one half hour. She cannot say how many people were screaming, but it was a few, more than one, maybe four, or more.

She could not hear the words spoken, only screaming, that lasted for about one half hour from the banging on the door. I accept her evidence.

134 Therefore, I am satisfied that the events in the apartment led to screaming, yelling and expressions of anguish and pain by persons other than the TPS for a significant period of time after the entry around 8:15 p.m. I reject the evidence of the TPS that the incident lasted for about one to two minutes as unreliable evidence.

D.4.9.4.3 The Injuries to the Occupants

135 Moreover, the injuries of Mr. Fisher, Mr. Almeida and Mr. Ruiz were caused by the TPS after they entered the apartment to execute the warrant. None of them had any of the injuries before the events in the apartment.

136 The injuries of Mr. Fisher and Mr. Almeida were described earlier in this judgment and will not be repeated now. The evidence of Dr. Goldman, Marjorie Morrison and Dr. Kerr, as they describe the injuries of Mr. Fisher, and the evidence of Dr. Moffatt and Dr. Stoll, together with the evidence of Lynn Fisher and Carminda Horta, as they describe the injuries of Mr. Almeida, is accepted by the Court.

137 It was the infliction of these injuries on the defendants by the TPS that led to the screaming, yelling and expressions of pain and anguish heard by the independent witnesses, Mr. Trzollo and Ms. Garcia. None of the officers suffered any injuries in the apartment.

D.4.9.4.4 The Blood in the Apartment

138 There was no blood on the living room floor or in the dining room, on the floor and on the wall, of the apartment before the entry by the TPS.

139 After the events in the apartment, there was a significant amount of blood in the apartment, particularly on the dining room floor and on the dining room wall adjacent to Ms. Garcia's apartment. This blood is shown in the photographs of Ms. Colque taken on June 8, 2006 and was graphically described by several witnesses including the superintendent, Ms. Fisher and Victor Medina, a tenant in the building who helped the superintendent clean the apartment and repair its door after the TPS left. The blood was fresh.

140 Although some of the officers testified about the blood on Mr. Almeida's face and clothing, none of them testified about the significant quantities of blood in the dining room, on the floor near the baseboard and on the wall. The blood in the dining room was the blood of Mr. Almeida. Its location in the dining room is inconsistent with the testimony of Detective Constable Arulanandam and Detective Constable Singh concerning the location of the altercation with Mr. Almeida. Although Detective Constable Rabbito testified that Mr. Almeida was in the dining room at some stage of the incident, he did not testify about the events leading to the depositing of the blood of Mr. Almeida on the floor and wall of the dining room.

141 Thus, insofar as Detective Constable Arulanandam and Detective Constable Singh testified that the altercation with Mr. Almeida occurred in the living room, I reject their evidence as unreliable.

D.4.9.4.5 The Failure of the Officers to Observe Injuries

142 Moreover, most of the officers testified that they did not observe injuries of any significance on the defendants, even though they were in an optimal position to observe and accurately record them.

143 Let me give some examples to illustrate the validity of this conclusion.

144 Detective Constable Arulanandam testified that Mr. Almeida may have been bleeding. He believes there was blood on his face but he does not presently recall it. Nor did he recall any blood in the living room or dining room.

145 Detective Constable Singh testified Mr. Almeida was bleeding from the nose, but the volume of blood was not significant. It was not a lot of blood. He did not recall any pool of blood on the floor.

146 Detective Constable Sardella testified that Mr. Fisher had a cut to his right ear and may have suffered other injuries too. He did observe a swollen eye at the station, but did not see any swelling on his face at the apartment.

147 Detective Constable Rabbito did not recall any injuries to Mr. Fisher.

148 Insofar as Detective Constable Arulanandam and Detective Constable Singh mis-stated or understated the injuries of Mr. Almeida, I reject their evidence as unreliable, especially in the context of the unreliability of their evidence relating to the location of the altercation with Mr. Almeida and the amount of his blood on the dining room floor and wall, as photographed by Ms. Colque.

149 Similarly, insofar as Detective Constable Sardella, who gave some evidence about Mr. Fisher's injuries, that is, the cut to his ear but made no reference to the injury to his right eye, and, further, insofar as Detective Constable Rabbito did not recall any injuries to Mr. Fisher, I reject their evidence as unreliable.

150 Similarly, Constable Parvin and Constable Coleman, who searched Mr. Fisher, and Constable Kraft and Constable Vercholuk, who searched Mr. Almeida, at No. 22 Division in preparation for transferring them to the hospital for an assessment of their injuries, did not observe any injuries on either of them. This is particularly significant in the case of Mr. Fisher who was strip searched by Constable Parvin and Constable Coleman. The injuries of Mr. Fisher and Mr. Almeida should have been, and were, readily apparent to these officers.

151 All of these officers either regarded the serious injuries suffered by Mr. Fisher and Mr. Almeida as insignificant injuries or they have intentionally failed to make reliable notes of those injuries for the purpose of undermining a subsequent independent review of the events in the apartment, whether it be a review by the Crown Attorney, the defence counsel or the Court. The Use of Force Reports and Injury Reports required by the TPS of its members, as well as the recording of the booking procedures at the station, Staff Sergeant Hurley of No. 22 Division in this case, tend against any such latter conclusion. However, it appears that the recorded injuries of Mr. Fisher and Mr. Almeida in these reports were the observations of Staff Sergeant Hurley. The reports signed by Detective Constable Arulanandam and

Detective Constable Sardella are clearly prepared in several stages because they include information relating to the assessment of the injuries at the hospital and the review by the officer-in-charge of No. 22 Division. In all of those circumstances, I do regard the preparation of these reports as a helpful insight into the reliability of the officers' testimony about the injuries - the reports are inconsistent with the memory and notes of Detective Constable Arulanandam and, to a lesser extent, Detective Constable Sardella, as well as Constables Kraft and Vercholuk and Constables Parvin and Coleman.

152 Thus, I reject the testimony of Detective Constables Arulanandam, Singh, Sardella and Rabbito insofar as it includes a description of the injuries to Mr. Fisher and Mr. Almeida as observed by them at the apartment because it is unreliable. The failure of these officers to accurately observe these injuries to make notes of them in order to refresh their memories of the injuries and the circumstances leading to them tends against their credibility.

D.4.9.4.6 The Collaboration by the Defence Witnesses

153 Next, let me deal with the evidence concerning the collaboration amongst the defence witnesses, if any.

154 Mr. Ruiz, Mr. Yu, Mr. Perea, Mr. Fisher and Mr. Almeida all testified that they did not collaborate about their evidence in this case. They had an opportunity to collaborate during their earliest Court appearances on the charges arising from the events of June 7, 2006 and, in the case of Mr. Ruiz, Mr. Yu and Mr. Perea, when they were transferred to this Court on one day to testify.

155 Looking at the evidence as a whole, I am satisfied that Mr. Fisher and Mr. Almeida did not collaborate with anyone concerning their evidence in this case. The opportunity of Mr. Ruiz, Mr. Yu and Mr. Perea to collaborate is a factor to be considered against the reliability of their evidence.

D.4.9.4.7 The Confirmatory Value of the Events before Entry

156 In my view, the evidence of the events of June 7, 2006 in and around Apartment 305 before the TPS entered the apartment given by Mr. Ruiz, Mr. Perea, Mr. Yu, Mr. Fisher, Mr. Almeida, Mr. Trzollo and Ms. Fisher has a confirmatory value for each and all of the witnesses.

157 Clearly, Mr. Ruiz was moving out of Apartment 305 on June 7, 2006. Ms. Fisher's testimony confirms her son's description of his purpose in visiting Mr. Ruiz, that is, to say goodbye and to exchange a cd for a joint. The passing of Mr. Perea and Mr. Yu in the hallway by Mr. Fisher, after they left Mr. Ruiz's apartment to feed Mr. Perea's parrot, is consistently described by all of them. The intention of Mr. Yu and Mr. Perea to purchase some food for the parrot at a mall is consistent with their departure from the apartment building and their use of the ramp to enter the underground parking facility, as shown on the security video of the building and as described by the arresting officers.

158 Thus, in my view, the reliability of all of these witnesses to the events leading up to the entry of the apartment by the TPS has been proven, looking at the evidence as a whole.

D.4.9.4.8 The Confirmatory Value of the Independent Witnesses

159 Let me next deal with the reliability of the testimony of Mr. Yu and Mr. Perea, insofar as they described the sounds they heard coming from Apartment 305 when they were situated in the hallway near its entrance, in the custody of Detective Constable Tavares and Constable Zver. Both of them described words such as "... stop resisting ... I'm not resisting ... stop hitting me ...", and screaming. Although Mr. Perea and Mr. Yu have significant criminal records, their evidence on this aspect of the case is consistent with the testimony of the independent witnesses, Mr. Trzollo and Ms. Garcia, referred to earlier in this judgement. I accept the testimony of Mr. Perea and Mr. Yu about what they heard coming from within the apartment because it has been confirmed by the independent witnesses, in part.

160 Thus, I am satisfied that the defendants both said, at various stages of the events in the apartment, "... I am not resisting ... stop hitting me ...".

D.4.9.4.9 The Absence of Photographic Evidence

161 Let me next deal with the absence of photographic evidence by the TPS in this case.

162 The SOCO officer from No. 22 Division, Detective McLeod, attended at 1550 Lawrence Avenue West at the request of Detective Sobotka made around 8:20 p.m. after he saw three handguns below the balcony of Apartment 305 near Detective McCallum. His responsibilities included the taking of photographic evidence. Several photographs of the three handguns were taken and entered as exhibits.

163 However, there were no photographs taken of the blood in Apartment 305, that is, the blood in the living room and dining room, as shown in the photographs taken by Ms. Colque. Nor was any videotape of any such area taken. There is no legal obligation on the TPS to photograph a crime scene that would necessarily lead to the exclusion of evidence. However, the failure to take photographs of the material aspects of a crime scene, such as the location, pattern and quantity of blood, may lead a Court to give less weight to other pertinent evidence, such as the testimony of officers about the events leading to the injuries that caused the loss of blood. For an analogous principle in the context of a decision by the police to interrogate a suspect without making an audio or visual record of the interrogation when such facilities are available, see *R. v. Moore-McFarlane* (2001), 160 C.C.C. (3d) 493 (Ont. C.A.) at paras. 61-65, *R. v. Ahmed* (2002), 170 C.C.C. (3d) 27 (Ont. C.A.) at paras. 14-15 and para. 19 and *R. v. Swanek*, [2005] O.J. No. 493 (C.A.) at paras. 6-10. But for the efforts of Ms. Colque to photograph the blood in the apartment, there would have been no evidence from the TPS of the blood in the living room and the dining room.

164 Thus, in determining the weight to be given to the testimony of Detective Sobotka and Detective Constables Arulanandam, Singh, Rabbito, Sardella and Brammall, I will take into account the failure of the TPS to photograph the blood in the apartment.

D.4.9.4.10 The Implausibility of the Crown Evidence

165 Let me next deal with some aspects of the case for the Crown that I regard as inherently unlikely in the circumstances of the case.

166 Is it likely that Mr. Almeida and Mr. Ruiz, unarmed, would aggressively approach a police officer

who was pointing his handgun at him, Detective Constable Arulanandam, in the case of Mr. Almeida, and Detective Constable Brammall, in the case of Mr. Ruiz, as the officers testified?

167 Is it likely that an officer, such as Detective Constable Arulanandam, would reholster his handgun if he honestly believed a man approaching him, such as Mr. Almeida or Mr. Ruiz when they re-entered the apartment from the balcony, might have possession of a handgun and use it to resist him, such as the handgun allegedly thrown to the balcony by Mr. Fisher?

168 Is it likely that Mr. Ruiz, Mr. Fisher and Mr. Almeida would not be arrested for, or charged with, assault with intent to resist arrest in the circumstances as alleged by the TPS?

169 Given their knowledge of the significant injuries to Mr. Almeida and Mr. Fisher, is it likely that material aspects of the events leading to those injuries that might justify the use of force on them would be omitted from the notes of the notes of the officers who caused those injuries, such as Detective Constable Rabbito and Detective Constable Singh omitting from their notes the allegedly spontaneous utterance by Detective Constable Arulanandam of "... gun, gun, gun ..."?

170 Is it likely that all of the officers in the apartment, in effect, saw nothing about the altercations between other suspects and other officers?

171 Is it likely that all of the officers would have no evidence of the events in the apartment after the arrests of Mr. Ruiz, Mr. Fisher and Mr. Almeida until they were escorted out of the apartment, given the sounds heard coming from within the apartment by the independent witnesses, Mr. Trzollo and Ms. Garcia?

172 Each, and all, of these rhetorical questions relates to an aspect of the case that tends to, but does not necessarily, undermine the reliability of the evidence of the pertinent officers. The implausibility of the evidence is but one factor to consider, in the context of the evidence as a whole, in my determination of this matter.

D.4.9.4.11 The Criminal Records of the Defence Witnesses

173 All of the most important witnesses for the defence, with the exception of Mr. Fisher but including Mr. Ruiz, Mr. Perea, Mr. Yu and Mr. Almeida, have significant criminal records. Mr. Fisher does not have a criminal record and had never been arrested before June 7, 2006.

174 The criminal records of the other men tend against their credibility. The significance of their criminal records will be assessed in the context of the evidence as a whole. I do not disbelieve them merely because of their criminal records.

175 In the case of Mr. Ruiz, Mr. Perea and Mr. Yu I am mindful of the value of confirmatory evidence and, further, that confirmatory evidence is not to be required, as a matter of law, for defence witnesses who may be witnesses of unsavoury character.

D.4.9.4.12 The Testimony of Ruiz

176 Dealing with the testimony of Mr. Ruiz, it is to be recalled that he testified he threw the three handguns over the balcony, after he heard the police banging on the door to Apartment 305, for the purpose of preventing the police from seizing them. The task was completed before the police entered the apartment. Neither Mr. Fisher nor Mr. Almeida assisted him. It was a decision made by him as soon as he realized the police were about to enter the apartment, without any input by Mr. Fisher or Mr. Almeida. After he threw the third gun over the balcony, he saw the first officer entering the apartment. Mr. Ruiz, Mr. Fisher and Mr. Almeida all went to the floor, complying with the directions of the police, but were physically abused by them.

177 To what extent am I prepared to accept this evidence?

178 Mr. Ruiz has a significant criminal record, a record that includes convictions for possession of narcotics for the purpose of trafficking and crimes of dishonesty. He plead guilty to the charges arising from the events of June 7, 2006.

179 However, parts of Mr. Ruiz's evidence are confirmed by other evidence. Three guns were found below the balcony by Detective Sobotka and Detective Brammall. Mr. Fisher testified that he heard the shuffling of Mr. Ruiz's feet, towards the balcony or dining room, a quick shuffling as the banging at the door continued. Mr. Almeida testified that Mr. Ruiz was shuffling around the whole apartment, the living room, the dining room and the kitchen, and went to the Rubbermaid container in the living room. He bent over with two hands and picked up something, with two hands. Although Mr. Almeida did not see a second gun in Mr. Ruiz's hands, Mr. Almeida did run towards the balcony. Contrary to the submission of the Crown, there is no inconsistency between Mr. Ruiz's testimony at trial and the facts he agreed to when he entered his plea of guilty, where he admitted possession of one gun and throwing it over the balcony without commenting on the other factual allegations made by the Crown Attorney in those proceedings, that is, Mr. Almeida and Mr. Fisher also threw handguns over the balcony. Lastly, as the stash house operated from the apartment was the business of Mr. Ruiz, he had a motive to remove from the apartment any incriminating evidence from the apartment.

180 For these reasons, I decline to reject Mr. Ruiz's testimony as false evidence.

181 Later, I will comment on his testimony in the context of the evidence as a whole, including the testimony of the defendants, under *R. v. W. (D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.).

D.4.9.4.13 The Failure to Call McCallum

182 Moreover, Detective McCallum was not called as a witness by the Crown. As he was situated on the grass below the balcony to Apartment 305, he was in a position to describe who, if anyone, was on the balcony when the three handguns were thrown over the balcony. The failure to call a witness can, in the absence of an acceptable explanation for the failure to call the witness, be considered by the Court in determining the weight to be given to the rest of the evidence.

183 The failure to call Detective McCallum tends against the case for the Crown in the circumstances of this case.

D.4.9.4.14 The Motivation of the Defendants

184 Both of the defendants testified that they, in effect, were casual or infrequent acquaintances of Mr. Ruiz. Mr. Fisher smoked a joint with him occasionally, sometimes in exchange for a cd of music downloaded from the internet, having met him in 1550 Lawrence Avenue West. Mr. Almeida also smoked a joint with Mr. Ruiz, but did go to his apartment to purchase some marijuana for personal use. Neither Mr. Fisher nor Mr. Almeida was associated with Mr. Ruiz in the operation of the stash house.

185 Thus, although both of them had a prior relationship with Mr. Ruiz, it was not a relationship that amounted to a motive to assist him in the destruction of evidence as the TPS entered the apartment to execute the search warrant. This proved absence of such a motive on the part of Mr. Fisher and Mr. Almeida tends to exculpate them in the circumstances of this case.

D.4.9.4.15 The Absence of Sounds in the Apartment

186 Moreover, in my view, the absence of sounds within the apartment as the TPS was about to enter, having announced "police search warrant", is another pertinent circumstance. Granted, the banging on the door with the ram by Detective Constable Arulanandam and Detective Constable Brammall may have made it difficult to hear any sounds of movement in the apartment by the occupants, conversation between the occupants or opening of the balcony door by an occupant. Any such movement, conversation or opening may have been incidental to a common enterprise amongst Mr. Ruiz, Mr. Fisher and Mr. Almeida to interfere with the execution of the search warrant and to assist one another by each taking possession of a handgun and throwing it over the balcony. Two guns were likely in the living room and the third gun was in the kitchen. No sounds indicative of the involvement of more than one person in such a common enterprise were heard by any of the officers from the hallway as the door was rammed.

187 This factor is one of many to be considered by the Court in its determination of this matter. It is probably not a significant one, by itself, except that it is consistent with the testimony of Mr. Ruiz, Mr. Fisher and Mr. Almeida concerning the shuffling by Mr. Ruiz and the absence of conversation among them concerning the removal of the handguns from the apartment.

D.4.9.4.16 The Observation of a Gun by Arulanandam

188 Let me, next, deal with the testimony of Detective Constable Arulanandam that he, as he entered the living room, saw Mr. Almeida, Mr. Ruiz and Mr. Fisher run towards the balcony, Mr. Almeida and Mr. Ruiz go onto the balcony and Mr. Fisher toss a shiny silver handgun towards the balcony. He immediately yelled "police ... don't move ... gun ... gun ... gun ...", as he drew his handgun and pointed it at Fisher. This evidence was summarized at some length earlier in this judgement, together with the relevant evidence of the other officers, and will not be repeated now.

189 There are a number of observations to be made about the reliability of this evidence.

190 Detective Constable Arulanandam was the first officer to enter the apartment.

191 All of the other officers followed him in rapid succession, with the exception of Detective Constable

Tavares and Constable Zver who maintained custody of Mr. Yu and Mr. Perea in the hallway. Detective Constable Brammall was the last officer to enter. Detective Sobotka was the second to last officer. The sequence of Detective Constables Sardella, Rabbito and Singh is not clear on the evidence.

192 If Mr. Almeida and Mr. Ruiz were on the balcony and if Mr. Fisher threw a gun towards the balcony, as described by Detective Constable Arulanandam, it is likely that some other officer(s) would have seen something like that, or something consistent with that.

193 No other officer saw Mr. Almeida or Mr. Ruiz on the balcony. However, Detective Constable Rabbito and Detective Constable Sardella saw three persons near the balcony.

194 No other officer saw a shiny object, or handgun, thrown towards the balcony by Mr. Fisher.

195 Detective Constables Rabbito, Sardella and Singh all testified they heard Detective Constable Arulanandam say "... gun, gun, gun ...". However, Detective Constables Rabbito and Singh had no note of hearing such a remark. Both of them, like all of the other officers, have a note "IR man throw gun over balcony". Detective Constable Rabbito and Detective Constable Sardella regarded their note of "IR man throw gun over balcony" as a note of receiving that information and, further, as a note of the spontaneous utterance of "... gun, gun, gun ..." by Detective Constable Arulanandam. The difference between such a spontaneous utterance and such receipt of information later in the events in the apartment is an important one. The inconsistency between the testimony of Detective Constable Rabbito and Detective Constable Singh and their notes is troublesome because of the opportunity to collaborate provided by the debriefing at 11:10 p.m. to 11:25 p.m. The CNT's notes make no reference to "gun, gun, gun". The absence of a note of "gun, gun, gun" is particularly significant because all of the officers knew of the serious injuries suffered by Mr. Fisher and Mr. Almeida and, thus, would likely include it as potential justification for the use of force in this case, if it was uttered. Detective Constable Arulanandam and Detective Sobotka made a note of the spontaneous utterance "gun, gun, gun", but no other officer did. The reliance by Detective Constable Rabbito and Detective Constable Singh on the note "IR man throw gun over balcony" to jog their memories of the spontaneous utterance, and their evidence of the utterance, is rejected by the Court as unreliable evidence.

196 Moreover, Detective Sobotka testified he heard the remark by Detective Constable Arulanandam "... gun, gun, gun ..." after he went through the living room and into the hallway of Apartment 305 to clear the apartment of other persons. He was the second last officer to enter the apartment after the door was breached. He was near the closet in the hallway, near the living room, when he heard the words "... gun, gun, gun ...". If Detective Constable Arulanandam's version of the events is a reliable one, the words "... gun, gun, gun ..." were likely uttered before Detective Sobotka entered the hallway. On the other hand, if Detective Sobotka is reliable on this point, why did Detective Constable Brammall, who was immediately behind Detective Sobotka and, thus, likely in the living room then, not hear the words "... gun, gun, gun ..."? Detective Constable Brammall testified that, as he entered the living room, Mr. Ruiz came towards him. Detective Constable Brammall had drawn his handgun and pointed it at Mr. Ruiz. He said "police ... don't move ..." but Mr. Ruiz did not stop. Detective Constable Brammall reholstered his gun and grabbed Mr. Ruiz by the upper body, telling him he was under arrest for possession of cocaine for the purpose of trafficking. An altercation followed. Sometime during the altercation, Detective Constable Brammall heard someone say guns had been thrown off the balcony. Detective Sobotka went to the balcony at this

stage of the incident and observed Detective McCallum and three handguns below the balcony. Detective Constable Brammall did not hear any other reference to a gun.

197 With those observations in mind and looking at the evidence as a whole, I reject as unreliable the testimony of Detective Constable Arulanandam that he saw Mr. Fisher with a shiny silver handgun, throwing it towards the balcony where Mr. Almeida and Mr. Ruiz were situated, and all of the related evidence by the other officers. The absence of any handgun in the possession of Mr. Ruiz, Mr. Fisher and Mr. Almeida when the TPS entered the apartment explains to my satisfaction why the officers who had drawn their handguns to ensure a safe, controlled entry of the apartment reholstered them and became involved in the physical altercation with Mr. Ruiz, Mr. Fisher and Mr. Almeida. None of them had a handgun in their possession when they were searched incidental to arrest and in the apartment.

D.4.9.4.17 Other Pertinent Factors

198 There are several other factors that have been significant to me, in the context of the case as a whole.

199 First, the injuries to Mr. Fisher's head, as described by the medical witnesses, were right-sided, that is, to his right eye and his right ear. This is consistent with the position of his head on the floor, as described by Mr. Fisher in his testimony, that is, with his left eye towards the ground to protect it, the eye without any visual impairment. The disability in his right eye, a degenerative nerve disorder, was confirmed by his mother in her testimony.

200 Second, Dr. Goldman's opinion that, at a minimum, four blows caused the injuries to Mr. Fisher, and likely more, given the extensive bruising to the area of his ribs, is consistent with Mr. Fisher's version of the incident. However, it is not sufficiently probative to clearly prove or disprove the descriptions of the incident by Detective Constable Rabbito and Detective Constable Sardella, by itself.

201 Third, the existence of the dog food on the floor as seen by Victor Medina proves the means for an officer to kick dog food towards the arrestees, as described by Mr. Yu.

202 Fourth, the testimony of Mr. Ruiz concerning his removal of the handguns from the apartment tends to confirm the reliability of the testimony of Mr. Fisher and Mr. Almeida describing Mr. Ruiz's movements at that stage of the incident, given my finding that neither of the defendants collaborated with anyone in the giving of their evidence. Both of them saw some movements of Mr. Ruiz towards the gun on the Rubbermaid container in the living room, and heard shuffling, or saw movement, towards the balcony. Both of them denied any complicity with Mr. Ruiz in the throwing of the handguns over the balcony.

203 Fifth, Mr. Fisher testified that he was moved from the living room to the dining room by Detective Constable Arulanandam, returned to the living room and then, at two subsequent points in time, taken by him down the hallway. Mr. Yu did not see any such movements, even though he was in a position to see them. During one of the movements down the hallway, it is alleged by Mr. Fisher that Detective Constable Arulanandam threatened him with further bodily harm if he requested medical attention when he arrived at the station. I accept this portion of Mr. Fisher's testimony because it explains why he declined the offer by Staff Sergeant Hurley to provide him with hospital care when Mr. Fisher was clearly in need of such care. This alleged threat by Detective Constable Arulanandam, accepted by me for this

reason, leads me to accept the testimony by Mr. Ruiz that he, too, received such a threat, probably from Detective Constable Brammall.

204 Sixth, there is no evidence that the fingerprints of Mr. Almeida or Mr. Fisher were found on the handguns, the scales or the bags containing the drugs. The surfaces of those items may not have been conducive to any such impressions. No evidence was called by the Crown to explain the absence of any such fingerprints on the handguns, a circumstance of some importance given the allegation that each of the defendants and Mr. Ruiz threw one gun over the balcony.

205 Seventh, in my view, the arrests of Mr. Yu and Mr. Perea, as directed by Detective Sobotka, were unlawful arrests. There were no reasonable grounds, objectively viewed, to believe they, or either of them, were in "possession" of the drugs in Apartment 305. Mere presence in the apartment, by itself, does not implicate Mr. Yu or Mr. Perea in the knowledge or control of those drugs. No information implicating Mr. Yu or Mr. Perea in the sale or purchase of drugs in the apartment was known by the TPS. Nor did the TPS have any information that the cocaine was in plain view in the apartment, or otherwise linking them to Sean Noseworthy. See *R. v. Storrey* (1990), 53 C.C.C. (3d) 316 (S.C.C.) for a statement that the grounds for the subjective belief in the commission of the offence must be objectively justifiable. See also *Chartier v. Quebec (A.G.)* (1979), 9 C.R. (3d) 97 (S.C.C.) as authority for the principle that reasonable grounds must take into account all of the information an officer has available to him and, further, that an officer is entitled to disregard only the information he has good reason to believe is not reliable. This latter principle has application to this case in that Detective Sobotka interpreted the presence of Mr. Yu and Mr. Perea on the balcony as evidence of them acting as a lookout for the police or watching for the arrival of a person delivering drugs to the apartment. Looking at the traffic on Lawrence Avenue West, in the context of the rest of the information known by Detective Sobotka, none of which incriminated Mr. Yu or Mr. Perea, could not be disregarded as an innocent circumstance.

206 Eighth, there was an undue delay in providing Mr. Fisher and Mr. Perea access to counsel. Detective Constable Sardella did not arrange contact with duty counsel for Mr. Fisher until 2:10 a.m. on June 8, 2006, with Mr. Fisher arriving at No. 22 Division around 9:15 p.m. on June 7, 2006. Similarly, Mr. Perea was not provided access to counsel by Detective Constable Singh until approximately 4 a.m. on June 8, 2006, although efforts to provide such access to counsel began around 2:30 a.m. He arrived at the station at approximately 9:15 p.m. on June 7, 2006.

207 Ninth, Mr. Fisher testified about the physical abuse he received at the hands of the TPS including six blows on the right side of his face, the use of a metallic device on his ribs about one dozen times and seven or eight slaps on his face. He also described an officer putting one hand over one of Mr. Fisher's ears and, with the other hand, striking Mr. Fisher's other ear. It is likely that Mr. Fisher has overstated some of the physical abuse he suffered at the hands of the TPS. However, the striking of his ears likely led to the perforation of his eardrum. In the opinion of Dr. Goldman the perforation of an eardrum can be caused by an acoustic or blunt trauma to the ear.

208 Tenth, Mr. Yu testified that, when he was on the floor face down handcuffed to the rear of his body, Detective Constable Arulanandam stepped on his left wrist and caused him significant pain. This lasted for about two to three minutes. Mr. Yu screamed "My wrist is hurting" and the officer responded "I don't care". The officer then put Mr. Yu in a chair in the living room. Although I accept that Mr. Yu experienced a significant amount of pain in his wrist and expressed it to several officers, I reject his

evidence insofar as it describes Detective Constable Arulanandam causing the pain in this manner. It is unlikely that an officer would deliberately step on a person's wrist, on the one hand, and, on the other hand, immediately move him to a chair, apparently to provide some comfort. The pain was likely referable to the removal of the cast on Mr. Yu's broken wrist and the position of his hands, to the rear of his body, and all of the related movement of, and stress to, the wrist.

209 Eleventh, Mr. Perea testified that he observed blood on Mr. Fisher's face and shirt when they were at the station. There was blood on his lip and nose. I reject this as unreliable evidence. While there may have been traces of blood on Mr. Fisher, there was no significant loss of blood by Mr. Fisher. Therefore, I reject this part of Mr. Perea's evidence as unreliable.

D.4.9.4.18 Conclusion

210 This, then, completes my comments on the credibility of the witnesses and the reliability of their evidence.

D.4.9.5 The Facts as Found by the Court

211 What, then, are the facts as found by the Court relating to the removal of the loaded firearms from the apartment?

212 Looking at the evidence as a whole I am satisfied that Detective Constable Arulanandam, Detective Constable Singh and Detective Constable Brammall removed their handguns as they entered the apartment. All of the officers were concerned firearms might be in the apartment and might be used against them by an occupant of the apartment. It was a very tense and stressful situation for all of them. It was imperative for them to quickly gain control of the apartment to ensure the safety of the officers, the arrest of any occupant and the search of the apartment. The entry of the apartment by breaching the door increased the risks otherwise extant in this case. It provided any occupant with an opportunity to prepare and use a handgun against the police. All of the officers knew and appreciated these circumstances.

213 When the officers entered the living room, in rapid succession, one after the other, none of them observed any handguns in the possession of any of the occupants. Consequently, the officers carrying their handguns reholstered them. Mr. Ruiz, Mr. Fisher and Mr. Almeida were then grabbed by one or more officers, for the purpose of arresting them in connection with the possession of the cocaine in the apartment. While Mr. Ruiz, Mr. Fisher and Mr. Almeida initially were compliant with the directions of the officers they did, with the exception of Mr. Fisher, resist the officers physically when the officers arrested them. Some of the officers said "Stop resisting" and some or all of the occupants said "I'm not resisting ... stop hitting me ...", or words to that effect. All of the occupants suffered significant injuries, during this incident as a result of the excessive force used during the arrests and at subsequent times before they were escorted from the apartment. At some time during these altercations Detective McCallum likely yelled that three handguns had been thrown over the balcony. The firearms were likely thrown by Mr. Ruiz, without any complicity by Mr. Fisher and Mr. Almeida. These, then, are the circumstances that led to the arrests of Mr. Fisher and Mr. Almeida on weapons and drug charges.

214 Regrettably, I am satisfied that there was an attempt by the TPS to justify the use of force by alleging the presence of a handgun in the possession of Mr. Fisher as Detective Constable Arulanandam entered

the living room, the presence of Mr. Ruiz and Mr. Almeida on the balcony and the throwing by Mr. Fisher of the handgun towards the balcony, apparently acting in concert with one another. This allegation is, at best, unreliable and likely false. This version of the incident complemented the information subsequently received from Detective McCallum during the altercation that three handguns were thrown over the balcony. What Detective McCallum saw, if anything, as he waited below the balcony, has not been proven - he was not called as a witness. The failure to call Detective McCallum as a witness, the failure of Detective McLeod to photograph the blood in the apartment, the failure of some of the officers to make notes of the alleged spontaneous utterance by Detective Constable Arulanandam of "gun, gun, gun" and then rely upon another part of their notes as a note of the spontaneous utterance when it related to a declaration of a gun thrown over the balcony, the evidence of the independent witnesses and the medical evidence of the severity of the injuries are the principal factors leading to these findings of fact by the Court.

D.4.9.6 Conclusion

215 These, then, are the circumstances leading to the removal of the firearms, as found by the Court.

D.5 Conclusion

216 This completes my findings of fact concerning all the circumstances of the case.

E. The Legal Significance of the Facts

E.1 Introduction

217 What then is the legal significance of the circumstances of the case?

E.2 The Application to Stay

218 The application to stay the prosecution is dismissed.

219 Clearly, the defendants were physically abused by the TPS when they were arrested on June 7, 2006, contrary to s. 7 and s. 12 of the *Charter*. Other legal rights, such as the right of Mr. Fisher to retain and instruct counsel, were also infringed. Mr. Yu and Mr. Perea were unlawfully arrested. Detective Sobotka did not have a warrant to search the car in the underground parking facility around 9:55 p.m. The search of Apartment 305 was conducted, in part, after 9 p.m. when the warrant expired. The right of Mr. Perea to counsel was likely infringed by the delay in providing access to duty counsel. Important parts of the evidence tendered against the defendants, at the preliminary hearing and at trial, have been found by the Court to be unreliable, likely false. This is a case where the prejudice caused by the physical and other abuse of the defendants may be perpetuated or aggravated by the conduct of a trial, with no other remedy reasonably capable of removing that prejudice. The filing of a complaint against the appropriate officers, the laying of criminal charges against them through a private information or the commencement of civil proceedings to obtain damages would be very expensive, time consuming and frustrating for Mr. Fisher and Mr. Almeida. The results of any such proceeding may or may not satisfy them.

220 However, this is also a case where the defendant's right to a fair trial was not adversely affected by

the breach of s. 7 and s. 12 of the *Charter* or the other legal rights of the suspects. It is also a case where the public had a legitimate interest in a trial on the merits. Three loaded firearms were removed from an apartment that was a stash house for crack cocaine, as the police were about to enter and search it under the authority of a warrant. The presence and use of firearms in Toronto can, and does, have tragic consequences for many people, innocent or otherwise. The preparation and distribution of crack cocaine is also without any social utility, a crime that often leads to severe addiction, and its consequential devastation of the lives of the users and others close to them, and other criminal activity. Although the policing of such criminal activity must be within the rule of law, in its letter and spirit, and was not in this case, the public interest in proceeding with the trial on the merits was a compelling, and preponderating, one in my view. The drastic remedy of a stay is not appropriate in this case because the integrity of the administration of justice would not be unduly compromised by a trial on the merits.

E.3 The Trial on the Merits

221 However, looking at the evidence as a whole, including the testimony of Mr. Fisher and Mr. Almeida, I am not satisfied beyond a reasonable doubt that they, together with Mr. Ruiz, formed an intention in common to interfere with the execution of the search warrant and to assist one another therein, knowing that a probable consequence of carrying out that common purpose would be the possession by each of them of one of the three loaded firearms in the apartment. Given the frailty of the case for the Crown, as elaborated upon in these reasons, Mr. Ruiz, Mr. Fisher and Mr. Almeida are sufficiently credible to raise a reasonable doubt, as elaborated upon in these reasons.

222 Accordingly, Mr. Fisher and Mr. Almeida are found "Not Guilty" on each and all of the counts on the indictment.

E.4 Conclusion

223 That completes my analysis of the legal significance of the circumstances of the case.

F. Conclusion

224 It also completes the reasons for judgement in this matter.

W.B. TRAFFORD J.