

Timothy Hingston was found guilty by a jury of one count of committing an unlawful act intended to cause bodily harm and one count of assault. Subject to the verdict, it is my responsibility to make findings of fact for sentencing purposes. For the purpose of determining the factual issues between the Crown and the defendant, I may only make findings adverse to him if satisfied beyond reasonable doubt they have been proved and I may only make findings of fact in his favour if they are proved on the balance of probabilities.

During the evening of Sunday 13 April 2014 the complainant, Chad Nightingale, then aged 19, went to a unit in Devonport in which his friend Jamie Carrick lived. Apart from Mr Carrick there were six other people there. The defendant and his 16 year old girlfriend, Miss E, were living at the unit at the time as was another young man, Dylan Smith. Two females, Miss L and Miss J, also both 16, and another young man, John Szommer, were visiting. At about 6.30 the following morning, the police were called to the footpath leading up to the Victoria Street Bridge, not far from Mr Carrick's unit. There they found Mr Nightingale lying injured. He was conveyed to the Mersey Community Hospital and then to the Royal Hobart Hospital where he remained an inpatient until 23 April 2014. Mr Nightingale, when admitted in Hobart, had bruises all over his body, in particular to his chest, a couple of bruises on his head, three cigarette burns, one in the centre of his chest over his sternum and one on either side of his neck, obvious sharp linear scratch marks, one running across his upper chest from shoulder to shoulder, underneath a tattoo in that location and others across a smaller tattoo on his upper left chest. Examination and investigations, including a CT scan, at hospital in Hobart excluded any fractures or spinal injury, but disclosed that Mr Nightingale had soft tissue swelling on both sides of his head, more prominent on the left, subgaleal swelling, acute bilateral subdural haematomas, bleeding on both sides of his brain in the space between the brain and the arachnoid membrane, and traumatic subarachnoid haemorrhage on both sides but again more prominent on the left. An experienced neurosurgeon, Mr Mujic, gave evidence that Mr Nightingale's injuries were consistent with repeated severe blunt force blows to the head likely to cause periods of unconsciousness and memory loss. He described the injuries as significant but not life threatening and agreed they may be described as "transient".

The jury must have been satisfied that Mr Nightingale suffered actual bodily harm. I am satisfied beyond reasonable doubt, that all of the injuries I have described were suffered by Mr Nightingale at the unit. I reject the proposition that his injuries, or some of them, may have been caused or contributed to by another incident such as a traffic accident or a fall from a bicycle occurring after he left the unit but before he was found at the bridge. Mr Carrick admitted inflicting violence upon Mr Nightingale. In 2015 he pleaded guilty to committing an unlawful act intended to cause bodily harm, thus admitting that he applied force causing actual bodily harm intending to disable, disfigure or cause grievous bodily harm to Mr Nightingale. For unrelated reasons the trial of Miss E, with whom the defendant was jointly charged, was aborted.

The particulars of the force alleged in the indictment are that Mr Nightingale was punched or slapped to the head and body, kicked and stomped to the body, burned, cut or scratched and had methylated spirits poured on him. All those who were present in the unit on that night, except Miss E, gave evidence during the trial. In May 2012 each of them was interviewed by

the police or made a statement to the police. The jury rejected the defendant's denials of his involvement. I do not accept Mr Carrick as a truthful witness although I am satisfied of the truth of some of the things he told the police. The same applies to Dylan Smith. I find each of Miss L, Miss J and Mr Szommer to be truthful witnesses although I have reservations in varying degrees about their reliability in some respects. I find Miss J and Miss L to have been the most reliable, and although both were clearly mistaken about some things I accept the critical parts of their evidence. There are many inconsistencies between the respective versions but when all of the evidence is considered, many commonalities emerge. I find that the defendant was responsible for the scratches across the small tattoo on Mr Nightingale's left upper chest. Mr Carrick inflicted the other scratch. I find that the defendant is responsible for at least one of the cigarette burns and either Mr Carrick or Miss E was responsible for the others. I find that Mr Carrick applied methylated spirits to Mr Nightingale's chest. He admitted doing so, but that he applied intending to stop infection of the cuts and burns, not to cause pain. What he said is consistent with the evidence of others and I cannot be satisfied to the contrary to the required standard. All of those acts are assaults, but for the following reasons I am satisfied that they could not be the basis of the verdict.

It follows from the verdict that the jury was satisfied beyond reasonable doubt that Mr Hingston either inflicted violence himself or was criminally responsible for violence inflicted by Carrick and/or Miss E. It also follows from the verdict that, whatever the basis of his criminal liability, he either intended to disable, disfigure or cause grievous bodily harm to Mr Nightingale or knowingly helped or encouraged someone with that intent. In my view, the jury could not reasonably have concluded that the infliction of the scratches, the cigarette burns and the application of methylated spirits was with the required intent. No reasonable jury could conclude that any of those acts were committed to disable, disfigure or cause grievous bodily harm because none, as demeaning and cruel as they may be, are reasonably capable of producing that result. In my view the only acts reasonably capable of forming the basis of the intent to produce such a result are punches and kicks to the head and, to a lesser extent, punches or kicks or stomps to the body. I think that it could only be that the jury's finding of guilt is based on its satisfaction that the defendant was criminally responsible for kicks or punches or stomps inflicted with that intent.

The evidence establishes that the conflict between Mr Nightingale and the defendant commenced with a fight between the two. It was not alleged by the Crown that defendant has criminal responsibility for any force applied to Mr Nightingale during that fight. In the course of that physical incident an object of sentimental value to Mr Carrick was threatened. It was this which motivated Carrick to become involved, and at that point the defendant's violent conduct towards Mr Nightingale continued and escalated. It is for the acts after Carrick's intervention that the defendant has criminal responsibility. Although Carrick's evidence cannot be relied on generally he told the police that the defendant, kicked, punched and elbowed Mr Nightingale. I think the circumstances and context in which that statement was made make it likely to be true. It is supported by other evidence. Miss J told the police that the defendant and Mr Carrick both punched Mr Nightingale to the head a lot and they took turns in punching. She also said that during the course of the night the defendant stomped on Mr Nightingale's ribs two or three times. She adhered to that evidence in court and I accept it. Mr Szommer gave evidence that the defendant punched Mr Nightingale after Mr Carrick became involved and it was the defendant who did most of the punching, although his evidence about the number of punches was vague and inconsistent and he later withdrew from his evidence to some extent. Miss L agreed that she told the police that the Carrick kicked and punched Mr Nightingale, that she heard Carrick and the defendant say to each

other that they wanted to teach Mr Nightingale a lesson and the defendant kicked Mr Nightingale in the legs. Dylan Smith gave evidence that Mr Nightingale was "hit a few times" by Carrick, the defendant and Miss E, and that he had told the police that he had seen the defendant lean over Mr Nightingale and punch him a few times to the head and body.

I am satisfied beyond reasonable doubt, accepting Mr Mujic's evidence about the nature and likely cause of the injuries, that Mr Nightingale suffered multiple heavy blows to his head from kicks and punches. I find that both Mr Carrick and Mr Hingston inflicted such blows, each with the intent to inflict bodily injury likely to cause serious injury to health, and that each is criminally responsible for the acts of the other. I also find that Mr Nightingale was repeatedly kicked forcefully to his body by the two men with the same intent and responsibility. I find that the presence and acts of the defendant and Carrick each encouraged the continued infliction of violence by the other. I am also satisfied that, although Carrick's initial involvement was motivated by something else, that the two quickly formed a common intention to inflict violence on Mr Nightingale and that the common intention continued until Nightingale left the unit.

I am also satisfied that, during the course of these events, Miss E kicked Mr Nightingale. The weight of the evidence is that she kicked Mr Nightingale to the legs or body. Carrick told the police that she kicked him to the face but I do not accept his evidence. In any event, I am satisfied that the defendant is responsible for her conduct because he knowingly encouraged her by his presence and by his own acts. There is evidence that Mr Smith kicked Mr Nightingale. He said he did so lightly to see if Mr Nightingale was still alive. Other evidence suggests he kicked more forcefully. The defendant bears no responsibility for the acts of Mr Smith, but there is no evidence that Smith inflicted any blows to Mr Nightingale's head. There was also evidence of Mr Nightingale's head being struck by a bottle thrown by Miss J. She admits it happened but said it occurred by accident when she threw a stubby to Mr Carrick. There is no evidence of the force of the impact. I accept her evidence and reject the proposition that she threw it deliberately at Mr Nightingale or that it caused him any injury of significance. Even if I am wrong about that, it provides no explanation for the repeated blunt force blows to which Mr Nightingale's head was subjected. I find that the injuries to Mr Nightingale's head were caused by blows, either punches or kicks, inflicted by the defendant and Carrick for which each bear equal criminal responsibility. The other acts of violence, the burn and the cuts, which do not form the basis of the verdict are nevertheless assaults and add to his criminality.

The basis of sentence for the assault is straight forward. In the course of the events the defendant removed the clothing from the lower portion of his body exposing his genitals and anus. He took an empty 1.25 litre plastic bottle and placed it between Mr Nightingale's legs. He either pushed or kicked it so that the narrow end of the bottle came into contact with Mr Nightingale's body on or near his anus. I am satisfied that before doing so the defendant applied some type of lubricant, probably Vaseline, to the mouth of the bottle. His intention was to make Mr Nightingale apprehend that the bottle would penetrate his anus although the Crown does not contend that it did so. I am satisfied that Mr Nightingale made clear his fear about what was happening from the noises he made. There is little evidence of the level of force applied, except that it was sufficient to make the bottle make a crinkling noise as if compressed, and no evidence that the assault caused any injury.

The overwhelming weight of the evidence from all of the witnesses is that the attack on Mr Nightingale commenced either late in the evening of 13 April, or in the early hours of 14

April, and continued until he left the unit just before dawn. Throughout that period of hours he was overborne by the defendant and Carrick and completely subject to their will. At times he became either unconscious or semi-conscious. The continuing acts of violence against him while he was in that state are especially cowardly and vindictive. Mr Nightingale was subjected to terrifying, humiliating and degrading violence. At various times he screamed in pain or fear. His ordeal was contributed to by the fact that no-one present came to his aid and, after being shown out of the unit, he was effectively abandoned. In isolation, the assault would not have warranted imprisonment, but it added to the gravity of the defendant's overall criminal conduct.

The consequences of the crime are relevant to sentence. A victim impact statement attests to the ongoing psychological effects Mr Nightingale has had and continues to experience. He feels anxious and has nightmares. He experiences feelings of shame and self-blame, feels fearful and less secure and the relationships with his family and his partner are still affected. It is possible that other factors contribute to his difficulties. He admitted to having had a very considerable problem with abuse of methylamphetamine. However, it is inevitable that persons subjected to an ordeal like this will suffer the type of symptoms he describes, and I accept that the consequences are likely to be long lasting. A report from an acquired brain injury service refers to reduced cognitive function resulting from brain injury. That contention was disputed by the defendant. As it is adverse to the defendant I cannot act on it unless it is proved beyond reasonable doubt. As the Crown does not seek to do so, I must sentence on the basis that Mr Nightingale did not suffer a brain injury with ongoing effects. That is consistent with Mr Mujic's evidence that he expected recovery.

The defendant is now aged 23. He was 21 when the crime was committed. His background is unremarkable. He has a stable and supportive family and was educated to Grade 11. He has a reasonably industrious employment history. He has two children, one aged six who was in his shared care, and one is very young. The only relevant prior conviction is for common assault committed in 2010 for which he was convicted and given probation. In September 2014 he absconded to Queensland, he says because he was in fear of his life because of persons in Devonport with whom he had fallen out. He was arrested in Queensland on 4 November 2015 and has been in custody since then. I must backdate his sentence by that period of 239 days. The defendant is not entitled to the mitigation a plea of guilty would have attracted and displays no remorse.

Sentences for this crime have recently been reviewed by the Court of Criminal Appeal which indicates that sentences ordinarily range between three and seven years. Carrick was sentenced by Wood J on 10 June 2015 to imprisonment for four years. There are a number of reasons for imposing a lesser sentence on the defendant. Carrick had a very bad record for violent offending. Moreover, as her Honour's comments on passing sentence make clear, Carrick was sentenced for different conduct and consequences. I refer in particular to her Honour's comments that Carrick was sentenced on the basis that Mr Nightingale suffered a brain injury, a perforated eardrum and a fractured hand, that Carrick threatened to cut off Mr Nightingale's penis with a knife and that the assaults were filmed, none of which has been proved against the defendant. Carrick was however entitled to mitigation from his plea of guilty. The defendant is to be sentenced as a young offender. He is not beyond redemption by any means. However his criminal conduct is of such gravity that a significant sentence of imprisonment is necessary.

Timothy Hingston, you will pay the victim of crime compensation levy of \$100 within 28 days of your release. You are sentenced to imprisonment for three years from 3 November 2015. I order that you not be eligible for parole until you have served half of that sentence.