NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Hill***, 2005 NSCA 108

Date: 20050722
Docket: CAC 243659
Registry: Halifax

Between:

Jonathan David Hill

Appellant

v.

Her Majesty the Queen

Respondent

Judge(s):	Cromwell, Oland & Hamilton, JJ.A.
Appeal Heard:	June 16, 2005, in Halifax, Nova Scotia
Held:	Appeal allowed, verdicts of guilty set aside and acquittal ordered on each of the three counts, as per reasons for judgment of Hamilton, J.A.; Cromwell & Oland, J.A. concurring.
Counsel:	Jean Morris, for the appellant Peter P. Rosinski, for the respondent

Reasons for judgment:

[1] The appellant, Jonathan David Hill, appeals the February 23, 2002 oral decision of Judge J. H. Burrill of the Provincial Court convicting him of robbery, breach of recognizance and breach of probation. The trial judge also found him guilty of resisting arrest, but he is not appealing that conviction.

[2] The issue on appeal is whether the appellant's robbery conviction is an unreasonable verdict or one that cannot be supported by the evidence pursuant to s.686(1)(a)(i) of the **Criminal Code of Canada**. His convictions for breach of recognizance and breach of probation depend on his robbery conviction. His robbery conviction was based on the evidence of two police officers. Each officer had some prior personal contact with him; viewed eight emailed photographs taken by a security camera; considered the hair, sideburns, ears, eyes, eyebrows and general size of the man shown in the photographs, and determined that the appellant was that man. While the photographs taken by the security camera were of good quality, although grainy when enlarged on the computer, their usefulness for the purpose of identifying the robber is the issue given that the robber covered most of his face with a towel or t-shirt throughout the robbery.

FACTS

[3] It was undisputed at trial that a service station in Halifax was robbed on October 14, 2004 of $482.97 cash and of between 60 and 100 packages of Players Light, Players Light King Size and DuMaurier cigarettes with a value of $655. The cashier working at the time testified that the denominations of the stolen cash were mostly $20's, some $10's and some $5's.

[4] The progress of the robbery was photographed by the station's security camera which took 61 photographs of the robbery, many showing the robber. At trial the appellant admitted the continuity of the photographs. The cashier also testified that the photographs accurately depicted the robbery. In all but one of the photographs in which the robber's face is visible, the robber held what the cashier described as a t-shirt or towel over the whole of his face below his eyes. In the one shot of the robber's face without the shirt or towel over it, he was looking down at the counter so little of his face is visible. The angle of these photographs suggests the camera was located at a higher level than the robber and to his right side.

[5] The cashier was unable to identify the robber from a photo lineup, including a photograph of the appellant, that was later shown to him:

> Q. And were you able to identify anyone from the –
>
> A. I don't believe so.
>
> Q. Okay. And do you remember giving a reason why you couldn't at that time?
>
> A. Because the person who robbed me had his face covered.
>
> (Emphasis mine)

[6] The cashier was not asked if he could identify the appellant at trial.

[7] The cashier testified that the robber was a young black man, about 5'10" with an "Afro" hair style, weighing probably less than 200 pounds. He testified there was nothing distinctive about the robber's voice, walk, smell, height or body type that he noticed and that he did not notice any distinctive tattoos, rings or piercings on the robber. He testified the robbery lasted a few minutes and that he was shocked at first.

[8] Officer Townsend sent an email with a copy of eight photographs from the station's security camera attached to approximately 400 sworn members of the Halifax Police Force the next day, October 15, 2004, at 4:15p.m. Only two officers responded to the email, even though at least two other officers had prior personal contact with the appellant when he was interviewed at the police station on August 27, 2004, for more than two hours.

[9] Officer Graham was one of the officers who testified that he identified the appellant from the emailed photographs. He had personal contact with the appellant three times before he made this identification. This contact resulted from the checking he did in August and September, 2004 to ensure that persons subject to court orders with conditions complied with the conditions. In connection with this checking he had a photograph of the appellant's face that was taken in August of 2004, which he reviewed daily, the "August photograph." The August

photograph appears to have been taken using a camera at eye level, similar to a passport photo except that it is 6 ½" x 8" in size.

[10] Officer Graham's first personal contact with the appellant was for a few minutes on August 26, 2004, approximately one and one-half months before the robbery. This contact occurred when Officer Graham arrested another person at an address where the appellant was. He obtained the appellant's name and address at that time.

[11] His second personal contact with the appellant was the next day, August 27, 2004, when he arrested him at a pub for alleged breaches. He had approximately five minutes contact with the appellant at the scene of the arrest and then he transported him to a nearby patrol wagon. Once the patrol wagon took the appellant to the Halifax police station he was interviewed with respect to the alleged breaches by another officer. Officer Graham watched the interview for a couple of hours on a television monitor located in another room.

[12] Officer Graham's third personal contact with the appellant was for approximately fifteen minutes on September 30, 2004. On this occasion, he and Officer Boon waited at the appellant's home while the appellant looked for a doctor's note in relation to a breach allegation.

[13] Officer Graham testified that shortly before he began his 6:00 p.m. shift on October 15, 2004 he reviewed the email from Officer Townsend with a copy of the eight photographs of the robbery attached. He indicated he identified the man in the photographs as the appellant at that time but did not have time to respond to the email until he was logging off duty at the end of his shift:

> Q. Do you recall approximately when it was that you would have looked at those photographs and determined that the person depicted was Jonathan Hill?
>
> A. That night I was working extra duty, I think I started at 6:00 so it would have been shortly before 6:00 that I would have first viewed the photos and positively identified the person in the photos as Jonathan Hill. I didn't respond to Cst. Townsend's - - send him an email until after I got in from my extra work job. I didn't (sic) time to do it beforehand. When I came back to the station as I logged off duty I responded to Cst. Townsend that the person in the photos was definitely Jonathan Hill.

[14] Officer Graham testified that he did not have a conversation with anyone before he identified the appellant from the emailed photographs. He indicated he did have a conversation with Officer Boon about his identification of the appellant after he replied to the email and that Officer Boon told him that Officer Boon also identified the appellant from the photographs:

> Q. Did you have conversation with anyone else who - - prior to your making this identification confirming that these photographs or request to identify the person depicted in these photographs?
>
> A. No, I didn't.
>
> Q. Did you have a conversation with anyone subsequent to your identification about the identification of Jonathan Hill other than responding to Cst. Shawn Townsend?
>
> A. I had conversation with Cst. Boon.
>
> Q. When would that have been?
>
> A. It would have been sometime after I had replied to Cst. Townsend. Cst. Boon had told me he had viewed photos and it was Jonathan Hill and I told him that I had already sent an email to Cst. Townsend."

[15] When asked what it was about the emailed photographs that led him to the conclusion that it was the appellant in the photographs, Officer Graham stated:

> A. The first photographs - - all the features are identical to Jonathan Hill that are visible in the photographs. What you can see is Jonathan Hill.
>
> Q. Can you tell us anything in particular in any of the photographs that bears a resemblance to your previous dealings with Mr. Hill?
>
> A. <u>The hair, the eyes, the eyebrow, everything in the photos. The ears</u>. What you see in the photo is definitely Jonathan Hill.
>
> Q. Is there anything else about the photographs that – you mentioned facial features, anything else that you relied upon to make this identification of Jonathan Hill?

> A. Yes, my past dealings with Mr. Hill and the fact that what you can see in the photos is him.
>
> . . .
>
> Q. How sure were you at that time that this was Jonathan Hill you were identifying?
>
> A. I was positive it was Jonathan Hill. I wouldn't have told Cst. Townsend it was if it wasn't. There's no room for error.
>
> (Emphasis mine)

[16] When indicating the features he considered in identifying the appellant from the emailed photographs, Officer Graham made no mention of any distinctive marks on the outer edge of the appellant's right eyebrow. The August photograph clearly shows two "lines," as the trial judge described them, in the appellant's right eyebrow. Officer Graham agreed that similar marks could not be seen in any of the emailed photographs.

[17] When asked if the appellant's looks had changed from the date of his arrest, October 20, 2004, to the trial date, February 11, 2005, Officer Graham stated:

> A. He's put on quite a few pounds, I guess, in the range of 30. His hair is a little different [inaudible] he had an Afro before. And his face is fuller [inaudible] weight.

[18] Officer Boon, the other officer who identified the appellant from the emailed photographs, also testified. He had personal contact with the appellant once prior to the robbery for approximately five to ten minutes around September 30, 2004, approximately two weeks before the robbery.

[19] He testified that he identified the appellant from the emailed photographs before he knew anyone else had identified the robber shown in the photographs:

> Q. Were you aware of anyone else when you were making your identification having identified Jonathan Hill as the person in these photographs?
>
> A. No. You go to work and you open your computer do your email and - - I don't know - - I was working with Cst. Graham [inaudible] at the time. After I

> viewed them, I said - - I said to him, "That's Jonathan Hill." I don't recall exactly what I relayed. I didn't send an email to Cst. Townsend. I told him verbally, but I don't - - didn't make no date I told Shawn - -

[20] When asked what he observed from the emailed photographs that led him to the conclusion the robber was the appellant he indicated:

> A. . . . The haircut is similar to – the sideburns, I guess - - I'm going to refer to it as the first photograph I picked out were the same. And the eyebrows - - find them - - Jonathan's were quite distinct, because they trail off. They're kind of thick and shorter, as you can see in photograph number one, the one I chose as photograph number one. That's a picture of his eyebrows. The other two more or less depict the hairstyle and the sideburns coming down. As well as the general physical description, the height, the build, the age - - all that taken in consideration - - my knowledge of Jonathan - - I I.D.'d him in these photographs as being responsible.
>
> (Emphasis mine)

[21] During direct examination Officer Boon was asked how sure he was of the identification of the appellant from the emailed photographs and indicated he was 100% sure.

[22] In cross-examination Officer Boon also referred to the appellant's sideburns as being "pointy" and his face as having a rash.

[23] Again Officer Boon made no mention of any mark on the outer edge of the appellant's right eyebrow when he indicated the features he considered in identifying the appellant from the emailed photographs.

[24] When asked if the appellant's looks had changed from his arrest to the trial Officer Boon stated:

> A. He looks a lot better today. His hairstyle is a bit different and he's put on quite a bit more weight.

[25] Neither police officer was qualified as an identification expert.

[26] There is little, if any, circumstantial evidence. There were no fingerprints, similar clothes or evidence of presence in the area proximate to the time of the

robbery. The only possible circumstantial evidence is that the appellant had 24 $20 bills and 3 $5 bills, totalling $495, rolled up in his pocket and two packages of Players Light cigarettes, one full and one with two cigarettes remaining, when he was arrested six days after the robbery. This amount of cash is near the amount of cash stolen during the robbery and the type of cigarettes are the same as some of those that were stolen. Given the time that had elapsed between the robbery and the arrest and the lack of distinctiveness of the cash and cigarettes found on the appellant at the time of arrest, this is weak corroborative evidence.

[27] No search was conducted of any place where the appellant may have been living. The appellant's sneakers were seized by Officer Boyd after he viewed the sneakers worn by the robber in the emailed photographs. He thought they were the same as the appellant's, which were high top white leather sneakers with a velcro strap at the top. He testified that he took into account photographs showing sneakers taken with respect to another offence in reaching his conclusion.

TRIAL JUDGE'S DECISION

[28] The trial judge took care in making his decision. After reserving, he gave an oral decision in which he stated that the only real issue in the case was identification:

> It is clear from the submissions that I have received from counsel that the real issue in this case is the issue of identity.

[29] He accurately reviewed the evidence of each witness. He rejected Officer Boyd's evidence trying to tie in the appellant's sneakers to those worn by the robber in the emailed photographs:

> I will say at this stage that I have reviewed carefully the exhibits that were presented and I am satisfied that no such identification could be made of those sneakers that were introduced as C-5. Viewing those photographs very carefully, I was unable to see the portion of the sneaker in any of those photographs that would have exposed the leather velcro strap if, in fact, it had been there.
>
> I would say this about the sneakers. What one can see of the sneakers in the photographs that were introduced into evidence of the perpetrator of this crime, they are indeed similar to the sneakers that are in Exhibit C-5, in particular the stitching around the toe is similar, but as was indicated by the officer who

> testified, Cst. Boyd, that the sneakers were of a relatively common design. However, one can say from an examination of those sneakers in Exhibit C-5, which were taken from the accused after his arrest, that there is nothing in those photographs that would indicate that those sneakers are inconsistent with the sneakers worn by the perpetrator.
>
> (Emphasis mine)

[30] The trial judge noted the evidence of Officers Graham and Boon in particular. He accepted Officer Graham's testimony that he made his identification of the appellant without having a conversation with anyone else, which is supported by the record. He noted the cross-examination of Officer Graham concerning the marks shown on the outer edge of the appellant's right eyebrow in the August photograph. He noted Officer Graham's agreement that similar marks could not be seen in the robber's right eyebrow in the emailed photographs.

[31] The trial judge concluded:

> I have reviewed carefully the testimony of all witnesses that have testified in this case. I have reviewed carefully the exhibits that were filed. I have reviewed carefully the surveillance photographs that were entered in digital form and I have concluded beyond a reasonable doubt that those photos are of such a quality that anyone viewing them who knew the person depicted in those digital images would have been, in my view, able to identify that person by viewing those photographs.
>
> . . .
>
> I am satisfied that in view of anyone viewing those photographs could clearly see the hairstyle, the ear shape, the sideburns and the eyes of the individual and if that individual were known to them, I am satisfied that an identification could result. In particular, I have carefully reviewed the evidence of Cst. Gordon Graham and Constable Boon. I have considered the opportunity that they had in the past to meet with the accused.
>
> . . .
>
> I will say that I was particularly impressed with the evidence given by those two officers. Even after specifically cautioning myself about the frailties of identification evidence and that many miscarriages of justice have been the result of honest but mistaken identification by individuals, I have concluded that their

> identification of the accused, Jonathan Hill, by those officers in those photographs from the robbery was accurate and proven beyond a reasonable doubt.
>
> (Emphasis added)

[32] Thus the trial judge relied solely on the identification of the appellant by Officers Graham and Boon from the emailed photographs in finding the appellant guilty. He did not rely on his own comparison of the appellant with the emailed photographs.

GROUNDS OF APPEAL

[33] It is only necessary to deal with one of the appellant's two grounds of appeal, namely:

> Is the verdict unreasonable and not supported by the evidence in that evidence of identification was flawed, and no trier of fact, acting judicially, could reasonably have convicted the appellant?

STANDARD OF REVIEW

[34] A conviction based on eyewitness identification requires close appellate scrutiny as set out in ¶ 14-15 of **R. v. Miaponoose**, (1996) 30 O.R. (3d) 419 (Ont. CA):

> 14 The standard of appellate review mandated by s. 686(1)(a)(i) of the *Criminal Code* and its particular application to identification cases is well summarized by Doherty J.A. in *R. v. Biddle* (1993), 84 C.C.C. (3d) 430 (C.A.) at 434-5 (appeal allowed by the Supreme Court of Canada on other grounds; see [1995] 1 S.C.R. 761):
>
> Section 686(1)(a)(i) of the Criminal Code charges this court with the responsibility of determining whether a conviction is "unreasonable or cannot be supported by the evidence". That statutory obligation requires an independent, albeit restrained, appellate assessment of the totality of the evidence. If on that assessment the court concludes that a properly instructed jury acting judicially could not reasonably have returned a guilty verdict then the verdict must be quashed: *R. v. Yebes* (1987), 36 C.C.C. (3d) 417 at p. 430, 43 D.L.R. (4th) 424, [1987] 2 S.C.R. 168; R. v. W.(R.) (1992), 74 C.C.C. (3d) 134 at pp. 140-2, [1992] 2 S.C.R. 122, 13 C.R. (4th) 257.

> Section 686(1)(a)(i) is often invoked in cases which turn on eyewitness identification evidence: Sopinka and Gelowitz, *The Conduct of An Appeal* (1993), at p. 133. This is particularly so where the potential probative force of the identification evidence is undermined by improper identification procedures. Resort to the jurisdiction bestowed on this court by s. 686(1)(a)(i) in identification cases is a response to the well-recognized danger inherent in convictions based on eyewitness evidence. Furthermore, the assessment of the probative force of eyewitness evidence does not often turn on credibility assessments, but rather on considerations of the totality of the circumstances pertinent to that identification. As such, a verdict based on honest but potentially mistaken eyewitness identification is well suited to appellate review under s. 686(1)(a)(i): *R. v. Quercia* (1990), 60 C.C.C. (3d) 380, 1 C.R. (4th) 385, 75 O.R. (2d) 463 (C.A.); *R. v. Malcolm* (1993), 81 C.C.C. (3d) 196, 21 C.R. (4th) 241, 13 O.R. (3d) 165 (C.A.)."
>
> 15 Since there is no question about the witness's honesty and sincerity in this case, an assessment of the reliability of the identification evidence depends upon a consideration of the basis for the witness's conclusion.
>
> (Emphasis added)

[35] The principles of **Miaponoose** have been recently applied by appellate courts:

> **R. v. Dimitrov** (2003), 68 O.R.(3d) 641 (Ont. C.A.), at ¶ 61:
>
> An appellate court may scrutinize the evidence more closely in a case involving eyewitness identification evidence as opposed to a case that turns on the credibility of the evidence of witnesses. See for example *R. v. Biniaris* [2000] 1 S.C.R. 381, 143 C.C.C. (3d) 1, at pp. 405-11 S.C.R. pp. 20-25 C.C.C.; see also *R. v. G. (A.)* [2000], 1 S.C.R. 439, 143 C.C.C. (3d) 46, at pp. 443-45 S.C.R., p. 51 C.C.C.. In this case, however, the Crown's case against the appellant is dependent on the totality of the circumstantial evidence and does not depend solely on the positive aspects of the identification evidence of a single witness. . . .
>
> **R. v. F.A.** [2004] O.J. 1119 (Ont. C.A.), at ¶ 39:
>
> The inherent frailties of eyewitness identification evidence are well-established and have frequently been commented upon by appellate courts. These frailties can lead to wrongful convictions, even in cases where multiple witnesses have identified the same accused. For that reason, it is essential that identification

> evidence be subject to appropriate scrutiny, especially where, as here, no confirmatory evidence exists that is capable of minimizing the inherent dangers of the eyewitness identification of the accused: *R. v. Miaponoose* (1996), 110 C.C.C. (3d) 445 at 450-51 (Ont. C.A.). See also *R. v. Burke*, supra, at paras. 52-53.

[36] Thus appellate review in eyewitness identification cases may include a consideration by the appellate court of the basis on which the identification is made.

[37] The Supreme Court of Canada in **R. v. Zurowski**, [2004] 3 S.C.R. 509, a failing to remain at the scene of an accident case, allowed an appeal and entered an acquittal on the basis of the frailties of identification evidence. In that case some witnesses with minimal prior contact with the accused at the scene of the accident were able to identify him and others were not.

[38] While the issue in this appeal is identification, the identification of the appellant from emailed photographs by witnesses who had some prior contact with him, it does not involve eyewitness identification. The only eyewitness in this appeal, the cashier, could not identify the robber from the photo lineup. Hence many of the frailties of eyewitness identification are not relevant such as: did the witness have good vision, hearing, intelligence, memory, understanding and the ability to convey what was seen and heard, what was the effect of fear on the witness and did he or she have a bias. **R. v. Nikolovski** (1996), 111 C.C.C. (3d) 403 (S.C.C.) ¶ 19.

[39] However at least one of the frailties of eyewitness identification is relevant here, what opportunity did the witness have to “see” the appellant, i.e. did the emailed photographs provide Officers Graham and Boon with an opportunity to “see” enough of the robber to allow them to make a reliable identification? Given the identification difficulties in this appeal, I am satisfied the standard of review applicable to convictions based on eyewitness identification applies in this case requiring us to consider the basis on which Officers Boon and Graham made their identification, namely the emailed photographs and their relatively minimal prior contact.

ANALYSIS

[40] With great respect to the trial judge, I am satisfied the appellant's conviction is unreasonable and cannot be supported by the evidence.

[41] There is no suggestion that Officers Graham and Boon were anything but honest in their belief that the appellant was the robber shown in the photographs. Their credibility however is not the test. The test is the reliability of their evidence which requires consideration of the objective basis on which they made their identification.

[42] The trial judge relied on the identification that Officers Boon and Graham made from the emailed photographs, despite the covered face of the robber. The only eyewitness, the cashier, could not identify the appellant from a photo lineup because the robber had most of his face covered. The trial judge did not rely on his own comparison of the appellant with the emailed photographs.

[43] The basis of the trial judge's acceptance of the identification by Officers Graham and Boon seems to have been his conclusion that anyone who knew the person depicted in the emailed photographs would have been able to identify him:

> . . . I have reviewed carefully the surveillance photographs that were entered in digital form and I have concluded beyond a reasonable doubt that those photos are of such a quality that anyone viewing them who knew the person depicted in those digital images would have been, in my view, able to identify that person by viewing those photographs.
>
> (Emphasis mine)

[44] The same photographs that the trial judge based this conclusion on are available to this court in digital and print form. While the quality of the photographs themselves is relatively good except when they are enlarged (for instance the image of the robber's right eyebrow is not clear enough to determine if there are any "lines" in it), their usefulness for identification purposes is severely hampered by the t-shirt and towel the robber held over most of his face effectively during the whole robbery.

[45] The small amount of the robber's face that is visible in the emailed photographs causes me a concern similar to the one the trial judge's concern with respect to the seized sneakers referred to earlier in ¶ 29. There are certainly

similarities between what can be seen of the robber in the emailed photographs and the August photograph of the appellant. Both show black males with hairstyles that some of the witnesses described as “Afros” and bushy eyebrows. The danger is that these features are not distinctive to the appellant. They apply to many others. Any distinctiveness of the robber is covered by the t-shirt or towel.

[46] The difficulty of identifying the robber when most of his face is covered is confirmed by the cashier’s testimony to the effect that the reason he could not identify the robber from the photo lineup was because so much of his face was covered during the robbery.

[47] Considering the minimal amount of prior contact the officers had with the appellant, especially Officer Boon; the significant amount of the robber’s face that is covered in the emailed photographs; the different angles from which the August photograph and the emailed photographs seem to have been taken; the fact the cashier could not identify the robber because so much of his face was covered; the fact that, as the trial judge noted, according to Officer Graham there was nothing specific about the appellant’s face that stood out; the fact two other officers who had significant prior personal contact with the appellant did not identify the appellant from the emailed photographs and the fact the quality of the emailed photographs does not permit a close examination of the robber’s right eyebrow, I am satisfied the basis of Officers Graham and Boon’s identification is not reliable making the verdict unreasonable and not supported by the evidence.

[48] In coming to this conclusion I have taken into account the appellant’s failure to testify in his defence as this court is able to do. **R. v. Walsh** (1995), 145 N.S.R. (2d) 77, **R. v. Beals** (1994), 130 N.S.R. (2d) 177 at p. 188. This however is not sufficient to persuade me the verdict in this case is reasonable.

[49] **R. v. Nikolovski** (1996), 111 C.C.C. (3d) 403 is distinguishable. In that case the Supreme Court of Canada upheld a conviction entered on the basis of the trial judge’s identification of the accused from a video tape. It is clear from ¶ 34 of **Nikolovski** that the surveillance video in that case showed the accused without obstruction:

> At one point, it is almost as though there was a close up of the accused taken specifically for identification purposes.

[50] That certainly cannot be said of the emailed photographs in the present appeal where the robber's face is almost completely covered.

[51] Having concluded that the appellant's robbery conviction was unreasonable and not supported by the evidence, the question is whether an acquittal should be entered or a new trial ordered.

[52] The test for this determination is set out in **R v. M.H.M.** (1994), 132 **N.S.R.** (2d) 196:

> [30] By virtue of s. 686 of the **Code**, where this court allows an appeal on the ground of a wrong decision on a question of law, it may either direct a judgment of acquittal or order a new trial. The exercise of the discretion thus conferred was discussed by Bird, J.A., in **R. v. More** (1959), 124 C.C.C. 140 (B.C.C.A.) at pp. 149-150:
>
> > "I think it further appears from these judgments that broadly speaking where a conviction is quashed because of some mistake in the conduct of the trial the court will direct a new trial where there was legal evidence upon which the jury might have convicted on a proper trial. But where the court concludes there is no reasonable evidence of an essential element in the crime charged it will direct a judgment of acquittal to be entered for it is repugnant to our conception of justice that the accused prisoner be again placed in jeopardy after the Crown has failed to prove his guilt in order to give the Crown another opportunity to convict him." (emphasis added)
>
> (Emphasis mine)
>
> [31] Examples of unfairness which would result from a new trial were given by Wood, J.A. in **R. v. Tom (D.B.)** (1992), 21 B.C.A.C. 124; 37 W.A.C. 124; 79 C.C.C. (3d) 84 (C.A.), at p. 95:
>
> > "This court has a discretion to order an acquittal under s. 686(2)(a) of the **Criminal Code**, even though there is evidence upon which a properly instructed jury, acting judicially, could reasonably convict if a new trial were held. That discretion has been exercised in the past where part or all of a fit sentence has been served before a successful appeal from conviction: **R. v. Dillabough** (1975), 28 C.C.C. (2d) 483 (Ont. C.A.), or when it would be unfair, in all of

> the circumstances, to put a successful appellant through the ordeal of another trial; **R. v. Dunlop** (1979), 47 C.C.C. (2d) 93, 99 D.L.R. (3d) 301; [1979] 2 S.C.R. 881."

[53] In **R. v. Tom** (1992), 79 C.C.C. (3d) 84, the British Columbia Court of Appeal found that an acquittal should be entered where a significant amount of the sentence had been served and an important witness had died.

[54] In **R. v. Sophonow** (1986), 83 Man. R. (2d) 198 at ¶ 149 one basis on which the Manitoba Court of Appeal directed an acquittal was that the identification evidence would not be improved by its further repetition.

[55] In this appeal I am satisfied an acquittal should be entered because of the inherent frailty of the emailed photographs due to the significant amount of the robber's face that is covered. On the record before us I am satisfied there is no reliable evidence of the essential element of identity so that a properly instructed jury acting judicially could not reasonably return a guilty verdict. It would not be fair to put the appellant through another trial in light of this.

[56] Accordingly I would allow the appeal, set aside the verdicts of guilty of robbery, breach of recognizance and breach of probation and direct an acquittal on each of those three counts.

Hamilton, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.