NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Thompson*, 2015 NSCA 51

Date: 20150529
Docket: CAC 418027
Registry: Halifax

Between:

Ivan Santell Thompson

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Farrar and Bourgeois, JJ.A.
Appeal Heard:	March 30, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; Fichaud and Bourgeois, JJ.A. concurring.
Counsel:	Appellant in person Marian Fortune-Stone, Q.C., for the respondent

Reasons for judgment:

Overview

[1] On January 31, 2013, the appellant was convicted by Provincial Court Judge Flora I. Buchan of the following **Criminal Code of Canada**, R.S.C. 1985, c. C-46 offences:

i. careless use of a firearm (s. 86(1));

ii. contravening regulation (among other things), storing, handling, transporting of a firearm (s. 86(2));

iii. possession of a firearm for a dangerous purpose (s. 88(1));

iv. carrying a concealed weapon (s. 90(1));

v. possession of a firearm knowing possession was unauthorized (s. 92(1));

vi. unauthorized possession of a firearm in a motor vehicle (s. 94(1)(a)(i)(B);

vii. possession of a restricted firearm (s. 96(a));

viii. possession of a restricted firearm when prohibited by a firearms prohibition order (s. 117.01(1)).

[2] He was found not guilty of possessing a loaded firearm together with readily accessible ammunition, contrary to s. 95(1)(a) of the **Criminal Code**.

[3] On June 14, 2013, Judge Buchan sentenced Mr. Thompson to a total of three years in federal custody. She also issued supplemental orders relating to DNA, weapons prohibition and forfeiture.

[4] On July 24, 2013, the appellant, self-represented, filed a Notice of Appeal from conviction. The appeal was heard on Monday, March 30, 2015. Mr. Thompson did not file a factum in support of his appeal. However, he did appear by videoconference to present oral argument.

[5] After hearing argument from Mr. Thompson and the Crown, the Court reserved decision. For the reasons that follow I would dismiss the appeal.

Background

[6] The appellant's grounds of appeal essentially argue that the verdict is unreasonable or not supported by the evidence. As a result, I will review the evidence that was before the trial judge in some detail.

[7] On May 21, 2011 at approximately 12:03 a.m. Cst. Jason Wilson observed a purple Chevrolet Malibu without a license plate on Main Street in Dartmouth. He stopped this vehicle. He observed two males in the vehicle, the driver and a person in the front passenger's seat. While speaking to the driver, Cst. Wilson smelled alcohol coming from the vehicle and observed signs of impairment with respect to the driver. During the stop, Cst. Wilson shined his flashlight into the vehicle's cab. He observed the passenger, who, while falling asleep, would open and close his eyes and turn his head very slightly toward him so more of his face could be seen. The driver leaned forward and the passenger was sitting back in his seat. Cst. Wilson could see the left side of the passenger's face, side of his nose, left eye and very slightly the middle of his nose. Based on his observations, he also believed the passenger was impaired.

[8] As a result of his suspicions about impairment, Cst. Wilson returned to his vehicle, conducted a computer check and contacted Cst. Gilles Boudreau, a qualified roadside screening device operator, to come to the site of the stop to conduct a roadside screening test. Cst. Boudreau arrived a short time later.

[9] Cst. Wilson then returned to the Malibu and gave the driver the roadside screening demand. The driver then accompanied Cst. Wilson to the patrol car.

[10] Cst. Wilson described the passenger as a black male between the ages of 23 and 26, with "glossy" "bloodshot" eyes, very large eyelids and eyes which were "very distinctive" and wearing dark clothing, a blue baseball cap with a straight rim worn in front, "high" on his forehead.

[11] While the police were completing the roadside screening test on the driver, the passenger fled the Chevrolet Malibou running across Main Street toward Lakecrest Drive.

[12] Cst. Wilson immediately pursued him across the street. The passenger ran to the west side of 105 Lakecrest Drive disappearing into the dark backyard. As the passenger ran, his baseball cap fell off.

[13] Within seconds of chasing and losing sight of the passenger, Cst. Wilson heard a single gunshot. He retreated and, while returning to the police vehicle, he seized the baseball cap.

[14] Cst. Wilson said the gunshot he heard was "strikingly similar" to his own handgun, a .9 millimeter semi-automatic.

[15] Within minutes of the shot being heard, numerous police officers arrived to set up containment around the immediate area of Helene Avenue, Main Street and Lakecrest Drive.

[16] Around this time, Cst. Wilson began to overhear police officers on his radio and in proximity to him discussing names of persons. He immediately started conducting computer checks on several of the names he had heard. One of the names he heard was Ivan Thompson, a person unknown to him. The computer check disclosed information including Mr. Thompson's date of birth and place of residence and a "digital mugshot".

[17] Upon viewing the photo, Cst. Wilson identified Mr. Thompson, the appellant, as the fleeing passenger. At trial, he testified that the "mugshot" corresponded to physical characteristics of Mr. Thompson, those being a black male with very distinct eyes and large eyelids. He also testified he accessed Mr. Thompson's computerized picture prior to learning that Mr. Thompson had been admitted to the Dartmouth General Hospital with a gunshot wound. I will discuss the hospital admission in more detail later.

[18] At some point, the registered owner of the Malibu arrived wanting to get into her car and search it. After repeated warnings to remain away from the area of the vehicle, she was arrested. She was the only civilian identified as being in the area of the traffic stop before containment of the area ceased that evening.

[19] Cst. Boudreau testified that he arrived within minutes of Cst. Wilson's request for a roadside screening test. While outside Cst. Wilson's vehicle, he saw a passenger in the Malibu wearing a ball cap. While in his police vehicle with the driver, Cst. Boudreau saw the passenger leave the vehicle running north across to Lakecrest Drive, described as parallel to Main Street The passenger fled across an open grassy, green space separating Main Street and Lakecrest and while doing so, his cap fell off.

[20] Cst. Boudreau described the person as a black male between the ages of 20 to 25, tall, slim, wearing long pants, a dark coloured ball hat with a straight brim and a long sleeved outer garment predominately white with a pattern of black through it. He estimated the appellant's age based on build, agility, and clothing.

[21] He saw Cst. Wilson running after the individual but by then the passenger had already fled into the back yard. He saw Cst. Wilson pick up the cap as he returned to the police vehicle. Cst. Boudreau did not hear a gunshot.

[22] Cst. James Cooke, a K-9 officer with his police dog Vinnie, and Cst. Joey Malcolm were among the officers who arrived within minutes of the passenger fleeing and the gunshot being heard by Cst. Wilson. Constables Malcolm and Boudreau accompanied Cst. Cooke while he and Vinnie tracked the path of the fleeing suspect. The three officers and Vinnie were in a triangle type formation. A harnessed Vinnie was in the lead followed by Cst. Cooke holding the 30 foot harness leash. Constables Boudreau and Malcolm were behind Cst. Cooke to his left and right side.

[23] Cst. Cooke testified about human scent tracking and the indicators that allow a handler to know when the dog has picked up and is following the scent or when he has lost the scent. The dog follows the freshest scent from the place where the person was last known to be. When there is a scent track, Vinnie indicates by wagging his tail and giving a "hard head snap". While following or tracking the scent, the leash is taut. The dog runs with his head down, ears back and tail wagging.

[24] Cst. Cooke testified that Vinnie follows the scent of bacteria on skin rafts (scent carrying skin cells) that humans shed, a scent unique to each person, "much like a fingerprint". He smells, for example, ground disturbances and crushed grass and for certain things, such as shoes. He smells the totality of a person's "scent picture" and once established, he stays on that person.

[25] If the scent track turns, Vinnie's head comes up and he stops moving signaling to the handler that the person has turned. Cst. Cooke circles the dog 360 degrees to re-establish the track. Vinnie then resumes his indicators of having located the track or does nothing if the track is lost. When Vinnie loses the scent picture or the scent track ends, he will bring his head up, puts his tail down and he starts to circle by walking very slowly attempting to re-establish the track.

[26] Cst. Cooke testified the terrain they tracked the suspect through was "opportune" for scent tracking. He described it as a wooded area with high and low grass surfaces and fences. Also, it was not usually travelled by humans. Scent sticks to grassy ground and tree disturbances for example, creating the scent picture. Hard surfaces such as sidewalks decrease the opportunity for tracking because there are less things to which a scent can adhere. When the track goes from grassy areas to hard surfaces such as road and parking lot pavement and the scent picture is not as strong, then the dog will change his speed and the ease with which he is tracking.

[27] Cst. Wilson described to Cst. Cooke that he observed the passenger running from the Malibu between 103 and 105 Lakecrest Drive on to the west side of 105 Lakecrest Drive and that he heard a gunshot believed to have come from the backyard of 105 Lakecrest Drive.

[28] As a result of that information, Cst. Cooke took Vinnie to the area where Cst. Wilson last saw the fleeing passenger. On the west side of 105 Lakecrest Drive, Vinnie gave him a triple indication that he had a scent track – head snap, tail wagging and a "real big pull" on the harness.

[29] Vinnie followed the scent track north behind 105 Lakecrest Drive through two back yards with wooded areas, hedges and brush, an area where people would not normally travel. Vinnie then jumped up on a chain link fence about 4 feet high behind the residence at 7 Mountain Avenue indicating to Cst. Cooke that the person had gone over the fence.

[30] Cst. Cooke threw Vinnie over the fence. He landed 3 to 4 feet away from the fence on the other side. He continued tracking northbound through rocky backyards with thick brush and thorns until coming out from the wooded area behind 13 Mountain Avenue From then onward the terrain was residential with manicured lawns. The area, until they reached 13 Mountain Avenue, was not a common area of travel.

[31] At 13 Mountain Avenue Vinnie indicated the track had turned and Cst. Cooke circled the dog who immediately picked up the track, crossing Mountain Avenue, into the back yard of the house directly across the street. That property had a 6 foot chain link fence which bordered apartment buildings at 79 and 81 Lakecrest Drive The dog jumped onto the fence signaling that the person had gone over the fence.

[32] Cst. Cooke got Vinnie over the fence and continued tracking north to the two apartment buildings located on the same property. They tracked first behind 81 Lakecrest Drive and then behind 79 Lakecrest Drive from the east side to the north side at the opposite end of the front entrance. On the west side there was a parking lot with people coming and going from the building. The dog stopped the track just into the parking lot. Where the track ended there were cars and a doorway to 79 Lakecrest Drive.

[33] Cst. Cooke searched for an escape route from where the track ended, circling with the dog into a wooded area that skirted 79 Lakecrest to the west and north. A short time after checking the wooded area, Cst. Cooke "called off the track".

[34] Cst. Cooke testified that the track had been lost at the back of 79 Lakecrest Drive and as a result, police containment of the area ended.

[35] Confident that the track had ended at 79 Lakecrest Drive, Cst. Cooke deployed Vinnie into evidence search mode looking for articles and retraced the same track back. The dog travelled slowly and more thoroughly. In the back yard of 7 Mountain Avenue, Vinnie became excited, moving and sniffing more quickly, moving back and forth which led him to a firearm located 3 to 5 feet from the 4 foot chain link fence. The dog pawed at some leaves and brush and Cst. Cooke saw a plastic bag. Vinnie went into a down position and briefly put his mouth on the firearm moving it slightly. The area where the gun was found was pitch black, unkempt, thorny, uneven with rocks.

[36] Cst. Cooke testified that when he threw Vinnie over that fence earlier in the night, the dog would have gone over the top of the gun, landing ahead of it.

[37] Cst. Cooke described the tracking distance from 105 Lakecrest Drive to 79 Lakecrest Drive as being, at most, three quarters of a kilometer to a kilometer. He deployed his dog at 12:24 a.m. and the track ended at 1:00 a.m. The actual tracking lasted only about 10 to 15 minutes during which they moved at a brisk walking pace.

[38] Because of the thorny bushes and thick brush that they went through while tracking, Constables Cooke and Malcolm testified they had scratches on their faces as did Vinnie. During the suspect tracking and evidence search, no blood was seen and no clothes or bullet cartridge located. No DNA or fingerprints were found on the firearm.

[39] Cst. Brock Brooks also gave evidence. He was one of the officers who set up the containment area. He heard, over the radio, that officers had stopped a vehicle which was believed to have dropped off an injured person at the Dartmouth General Hospital. He went to the location of the vehicle. While there, he spoke to Dale Thomas, one of the persons in the vehicle.

[40] Mr. Thomas resided at apartment 307, 79 Lakecrest Drive. Cst. Brooks accompanied Mr. Thomas to his apartment. Mr. Thomas told Cst. Brooks that Mr. Thompson came into his apartment saying he was hurt and fell in the corridor outside his apartment.

[41] Cst. Brooks looked around the apartment, with Mr. Thomas' consent, and could not see blood nor any indication that blood had been cleaned up. He took from the apartment a blue towel with a small amount of blood on it found near the door to the apartment. Mr. Thomas said he had wiped Mr. Thomson's forehead with the towel. I will discuss the events at Mr. Thomas' apartment in more detail later.

[42] Cst. David Gallivan also testified. He said, as a result of hearing from dispatch that the Dartmouth General Hospital was in lockdown because a male had come in at 12:44 a.m. with a gunshot wound, he and Cst. Donny Buell went to the hospital getting there at 12:55 a.m. When they arrived they observed two men coming out of the hospital who "stopped hesitatingly, looked back at us", got into a white Grand Am and drove off. Believing the men could have information concerning the lockdown, he requested that the Grand Am be stopped. As noted earlier, Cst. Brooks attended that traffic stop and spoke to Dale Thomas.

[43] At the hospital, Cst. Gallivan learned that Mr. Thompson was in the hospital with a gunshot wound and would be transferred to the QEII Hospital in Halifax. He accompanied Mr. Thompson to that hospital in the ambulance. When he saw the appellant, he described him as having a fresh cut with blood above his right eye. He remained at the QEII while Mr. Thompson had surgery.

[44] At the Dartmouth General Hospital, Cst. Buell took possession of a white t-shirt with blood on it that the appellant was wearing when he arrived at the hospital

[45] Dale Thomas testified. On May 21, 2011 he was at home in his apartment with his girlfriend at 79 Lakecrest Drive when Mr. Thompson banged on his door late at night. He had known the appellant for over 20 years. Mr. Thompson attended school with and was a friend of Mr. Thomas' son. Mr. Thompson told

Mr. Thomas he was hurt and Mr. Thomas laid him on the floor. He testified Mr. Thompson was bleeding from a place "low by his stomach" but there wasn't a lot of blood.

[46] He and Terrance Brooks, who also lived at 79 Lakecrest Drive, took Mr. Thompson to the hospital in Mr. Thomas' vehicle. He estimated that it took 10 to 15 minutes to get to the hospital. When he parked his car after dropping off Mr. Thompson, he could not get back into the hospital so he left. He went to a gas station at which time police vehicles surrounded his car. The officer who stopped him checked for blood all through the car and there was none. He told that officer that Mr. Thompson was bleeding from the stomach.

[47] Dr. Sam Campbell gave evidence. He was qualified as an expert on injuries to the human body requiring emergency treatment. He was chief of emergency medicine at the QEII Emergency Department in Halifax with about 27 years of experience dealing with penetrating injuries to the human body. He had dealt with hundreds of such injuries. On May 21, 2011 he treated a person identified on a hospital chart as Ivan Thompson and prepared a medical report.

[48] He described the appellant as a young man with a bullet wound just to the right of his midline. By the time Dr. Campbell saw Mr. Thompson, his vital signs had stabilized. An x-ray showed an object consistent with a smaller caliber bullet in the upper left part of his abdomen, to the left of the midline. He was transferred to surgery and had his vital organs checked for damage.

[49] Based on his experience of seeing "very many bullets", he described it as looking like a smaller type bullet.

[50] Dr. Campbell testified that the appellant had some bruises on the side of his face and a small laceration around the right eye. He had alcohol in his blood recorded as having been drawn at 12:50 a.m. at the Dartmouth General Hospital. A person who drank regularly and was used to drinking would unlikely be legally impaired from the amount of alcohol found in his system.

[51] Jacques Rioux, a forensics specialist with the RCMP, was qualified as an expert in the operation and identification of firearms and the theory and practice of ballistic assessment. He testified that he took possession of a blood stained white t-shirt and a semi-automatic .22 calibre pistol. The t-shirt came from the appellant and the firearm was the one located by the police dog. Semi-automatic meant that when a bullet was fired, the energy generated by discharging the bullet ejects the

cartridge (spent casing) and another cartridge automatically enters the chamber. He examined the firearm and conducted various tests on it. The firearm was a properly functioning restricted weapon which met the requisite requirements of the **Criminal Code** definitions and the offences for which Mr. Thompson was charged.

[52] Mr. Rioux testified that the firearm was prone to "shock discharge" meaning if the rear receiver end of the firearm received a sharp blow or was dropped or fell on the ground a distance of approximately 4 feet, the firearm would discharge.

[53] The t-shirt had visible bullet damage, described as one small hole .4 centimetres in diameter (approximately one-quarter of an inch) in the front lower portion of the shirt. The size of the hole appeared to have been made from a small caliber firearm. Lead residue around the hole was consistent with having been caused by a bullet and one that moved from the front to back. No gunshot residue was detected. When the gun was fired at a target 4 feet away, no gunshot residue was produced. The absence of residue meant that the firearm was fired either at a distance greater than 1.2 metres (almost 4 feet) or fired through an intermediate target which could be anything between the t-shirt and the bullet, for example, a shirt or jacket in front of the t-shirt that stopped the residue from attaching to it.

[54] The appellant did not testify and the defence called no evidence.

[55] The trial judge, over a period of four days, heard extensive cross-examination and lengthy submissions of Crown and defence counsel. On January 31, 2013, she convicted the appellant of the eight firearms-related offences set out in ¶1 above.

[56] She acquitted the appellant on possessing a loaded firearm together with readily accessible ammunition contrary to s. 95(1)(a) of the **Criminal Code**.

Issue

[57] In the appellant's Notice of Appeal his grounds of appeal are as follows:

1. The Learned Trial Judge failed to properly apply the law surrounding circumstantial evidence;
2. The Learned Trial Judge failed to properly apply the law relating to witness identification;

3. The Learned Trial Judge failed to consider significant inconsistencies contained in the evidence of numerous Crown witnesses; and
4. Any other grounds that The Honourable Court deems just.

I would restate and summarise the issue as follows:

> On the whole of the evidence, is the verdict unreasonable or unsupported by the evidence?

Standard of Review

[58] Mr. Thompson challenges the reasonableness of the verdict relating to the judge's treatment of the circumstantial evidence, identity evidence and inconsistent evidence.

[59] The standard of review is as set out in **R. v. Henderson**, 2012 NSCA 53:

> [17] The standard of appellate review on a question of law is correctness. Factual issues are reviewed for any palpable and overriding error. A trial judge's application of the law to the facts is reviewed as a question of fact unless an extricable error of law is identified. See for example, **R. v. J.(C.)**, 2011 NSCA 77.
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> [18] The standard of review of verdicts based on circumstantial evidence is whether a properly instructed jury, acting judicially, could have reasonably concluded that the guilt of the accused is the only rational conclusion to be reached from the whole of the evidence. Within such an inquiry, the standard of review for error is correctness. The standard of review of possible inferences that may be drawn from the evidence is palpable and overriding error. See, for example, **R. v. Shea**, 2011 NSCA 107.

[60] In assessing whether a verdict is unreasonable, an appellate court must:

i. determine whether the verdict is one that a properly instructed jury or a judge could reasonably have made; or
ii. find the trial judge has drawn an inference or made a finding of fact essential to the verdict that:
    a. is plainly contradicted by the evidence relied on by the trial judge in support of that inference; or

b. is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (**R. v. Sykes**, 2014 NSCA 57, ¶39).

[61] In reviewing the trial judge's assessment of credibility in order to determine, for example, whether the verdict is reasonable, an appellate court cannot interfere with the credibility assessment unless it is established that such findings cannot be supported on any reasonable view of the evidence (**R. v. Burke**, [1996] 1 S.C.R. 474, ¶7).

[62] Applying the standard of review to the evidence in this case, was the verdict unreasonable or unsupported by the evidence? I find it was not. The trial judge's findings of fact and inferences drawn were logical and reasonable. Further, she did not misapprehend of the evidence on material issues.

Analysis

i. *Circumstantial and Identity Evidence*

[63] A critical issue at trial was the identity of the appellant as the person who committed the firearms offences as charged. To reach a conclusion on this issue, the trial judge had to find that the appellant was the passenger in the vehicle stopped by Cst. Jason Wilson on May 21, 2011 and that he was carrying a loaded weapon. The Crown's evidence of identity, as characterized by the trial judge, was primarily circumstantial. The balance of the Crown's case relating to the appellant's possession of a loaded handgun was circumstantial.

[64] In assessing the reasonableness of the trial judge's verdict, this Court is called upon to determine whether a jury, properly instructed and acting judicially, could find that guilt was the only rational conclusion on the whole of the evidence (**Henderson, supra; Shea, supra; R. v. Barrett,** 2004 NSCA 38).

[65] The trial judge self-instructed on the circumstantial nature of the evidence, burden of proof, reasonable doubt and on the frailties of eye witness evidence:

> The Crown's evidence with respect to identity in this case is primarily circumstantial. Therefore, Mr. Thompson should only be found guilty if the court finds that the only reasonable conclusion to draw from all of the admissible evidence is that he was the person who committed each of the offences for which he stands charged. (Decision, p. 1)
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> …

> The burden of proof rests on the Crown to prove the elements of each charge beyond a reasonable doubt. Mr. Thompson is presumed to be innocent of the crimes with which he has been charged. He has no obligation to prove his innocence and is not required to testify or present evidence. (Decision, pp. 20-21)
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> …
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> While I have found as fact that Mr. Thompson was the passenger who fled from the Malibu and who Constable Wilson was pursuing until he heard a gunshot, the balance of the matter is based on circumstantial evidence. As such, I must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts. There's no direct evidence with respect to the charges laid. The Crown can prove its case based on inferences if the guilt of the accused is a reasonable inference beyond a reasonable doubt and if no other reasonable inference can be sustained. (Decision, p. 26)
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> …

[66] Buchan, P.C.J. specifically referred to the Supreme Court of Canada's decision in **R. v. Lifchus**, [1997] 3 S.C.R. 320, ¶39 when identifying the burden on the Crown and the concept of reasonable doubt being logically derived from the circumstances based on the evidence or lack thereof.

[67] She correctly identified the law relevant to the issues on appeal: circumstantial evidence and identity, specifically acknowledging the need for judicial caution when considering eye witness identification. She cited the Alberta Court of Appeal in **R. v. Atfield**, 1983 ABCA 44 as follows:

> [3] The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing, and have been responsible for many cases of miscarriages of justice through mistaken identity. The accuracy of this type of evidence cannot be determined by the usual tests of credibility of witnesses, but must be tested by a close scrutiny of other evidence. In cases, where the criminal act is not contested and the identity of the accused as the perpetrator the only issue, identification is determinative of guilt or innocence; its accuracy becomes the focal issue at trial and must itself be put on trial, so to speak. As is said in Turnbull, the jury (or the judge sitting alone) must be satisfied of both the honesty of the witness and the correctness of the identification. Honesty is determined by the jury (or judge sitting alone) by observing and hearing the witness, but correctness of identification must be found from evidence of circumstances in which it has been made or in other supporting evidence. If the accuracy of the identification is left

> in doubt because the circumstances surrounding the identification are unfavorable, or supporting evidence is lacking or weak, honesty of the witnesses will not suffice to raise the case to the requisite standard of proof and a conviction so founded is unsatisfactory and unsafe and will be set aside. It should always be remembered that in the famous Adolph Beck case, twenty seemingly honest witnesses mistakenly identified Beck as the wrongdoer.

[68] **Atfield** considers the dual requirement that the trier of fact consider the credibility of the witness testifying to identification and the accuracy of the identification based on the circumstances within which it was made. Identification made in doubtful circumstances is not compensated by it having been made by an honest witness.

[69] When reaching her conclusion she also referred to **R. v. Yebes**, [1987] 2 S.C.R. 168 and reminded herself that in order to convict on purely circumstantial evidence, the circumstances must be consistent with guilt and inconsistent with innocence.

[70] Having correctly identified the law she was to apply to the issues, the trial judge carefully detailed the evidence at trial. Drawing upon that evidence, she logically road mapped her decision by first determining the identity of the passenger in the vehicle that Cst. Wilson stopped at 12:03 a.m. on May 21, 2011. Having decided that the passenger was the appellant, the trial judge then considered all of the circumstantial evidence and concluded that he was in possession of a loaded firearm when the vehicle stop occurred.

[71] On the issue of identity, she assessed Cst. Wilson's evidence bearing in mind the issues associated to such evidence and was alive to the concern that his evidence, as a police officer, did not carry any more weight than any other. She found him "credible and forthright" and that his practice of paying particular attention during traffic stops in this high crime area allowed him to provide "a lot of detail about his observations of the passenger". She described his identification evidence as "not problematic" stating that he was "able to describe an important distinguishing feature, that is heavy eyelids and prominent large eyes, which the defendant clearly possesses" (p. 23). She also referenced Cst. Boudreau's testimony about "other identification features that the appellant possessed" those being that he was a tall, slim black male in his mid-twenties (p. 23).

[72] The trial judge accepted that Cst. Wilson "readily identified" the passenger as Ivan Thompson on May 21, 2011 from his digital mugshot (p. 24). On the question of when Cst. Wilson made his identification, she found, on the whole of the evidence, that he viewed the mugshot prior to being aware that Mr. Thompson had been admitted to hospital with a gunshot wound less than an hour after the traffic stop.

[73] As is apparent from her decision, the trial judge had ample opportunity to see the appellant in court, view the digital mugshot and observe the physical characteristics to which the witnesses referred (**Sykes, supra**, ¶62; **R. v. Weagle**, 2008 NSCA 122, ¶31). She specifically referenced the "important distinguishing feature, that is heavy eyelids and prominent large eyes, which the defendant clearly possesses" (Decision, p. 23). She then states that "Mr. Thompson also possesses other identification features that were noted in the testimony of Constable Boudreau, …" (Decision, p. 23).

[74] She concluded by saying that she was satisfied that "Mr. Thompson was the passenger who ran from the traffic stop on the night in question to 79 Lakecrest Drive, as tracked by Vinnie in ideal tracking circumstances" (Decision, p. 24).

[75] Identity is a question of fact. There was evidence upon which the trial judge could logically and reasonably draw the inference that it was the appellant who fled the traffic stop and went to 79 Lakecrest Drive (**R. v. Hoben,** 2009 NSCA 27, ¶18-20); **Henderson, supra**, ¶32).

[76] Having been satisfied that Mr. Thompson was the person who fled from the vehicle, the trial judge moved on to consider whether he was "carrying a loaded weapon "at the time" and somehow shot himself during his run from Main Street to 79 Lakecrest" (Decision, p. 24).

[77] She accepted the expert evidence of the dog handler, Cst. Jamie Cooke, whom she also found to be credible. He testified that the track started where the appellant was last seen by Cst. Wilson and that actual tracking time took 12 minutes (Decision, pp. 24-25).

[78] The trial judge also accepted the evidence that while tracking with the police dog, Vinnie, the officers did not see any other person until they arrived at 79 Lakecrest. She was satisfied, on the whole of the evidence, that the police dog "… correctly picked up the track of Mr. Thompson and followed his scent right to 79 Lakecrest" (Decision, p. 25). Once at 79 Lakecrest the track ended. "At this

moment in time Mr. Thompson had been taken from 79 Lakecrest by Mr. Thomas to the Dartmouth General Hospital for a gunshot wound" (Decision, p. 25).

[79] On the backtrack, Vinnie found a .22 calibre gun near the fence that he had been thrown over by Cst. Cooke. She accepted his explanation that the dog "had landed past the gun … and it was simply missed". As she observed, the gun was found "within a short period of time thereafter" (Decision, p. 26).

[80] As stated in **R. v. R.P.**, 2012 SCC 22, ¶10, an appellate court should not interfere with a trial judge's credibility assessments except in very particular circumstances.

[81] While the question of whether a verdict is reasonable is one in law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility to determine, for example, whether the verdict is reasonable, cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (**R. v. Burke**, **supra** at ¶7).

[82] The trial judge's assessment of Constables Wilson and Cooke's credibility is entitled to deference given the advantage she had in seeing and hearing the witnesses' evidence. She made no palpable and overriding error in her analysis of identity or credibility, both questions of fact.

[83] The trial judge, having found as a fact that the appellant was the passenger that Cst. Wilson pursued, again set out the proper test in law for circumstantial evidence:

> … the balance of the matter is based on circumstantial evidence. As such, I must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts. There's no direct evidence with respect to the charges laid. The Crown can prove its case based on inferences if the guilt of the accused is a reasonable inference beyond a reasonable doubt and if no other reasonable inference can be sustained.
>
> (Decision, p. 26)

[84] She then summarized the evidence that led to the appellant's conviction on the firearm charges. She began by stating that within moments of the Malibu passenger disappearing around the corner of 105 Lakecrest Drive, Cst. Wilson heard a gunshot. The dog, tracking in ideal terrain, went from that location to 79 Lakecrest Drive where the appellant had arrived at Mr. Thomas' door bleeding

from a gunshot wound to his abdomen. He had a laceration over his right eye and bruising on his face. Only a .22 calibre gun was found on the back track where the appellant had run. The firearms expert's opinion was that the bullet hole in the appellant's white t-shirt was likely caused by a .22 calibre gun (Decision, pp. 26-27).

[85] Stating that this evidence was not contradicted, she went on to conclude:

> My review of the whole of the evidence leaves me with no other rational explanation but that Mr. Thompson, becoming concerned that he had a gun in a car which had been stopped by the police, chose to bolt from the car with the gun on his person, and that, while fleeing from the police along a slippery, treacherous terrain, the gun, prone to shock discharge, went off in some manner, causing the injury to Mr. Thompson. Alternative explanations, such as a shooter appearing out of the blue, are not based on evidence but based on conjecture and speculation. It is not for the court to make such speculation. From the time of Mr. Thompson bolting from the car at 12:13 to the time he had been taken to the hospital by Mr. Thomas and blood taken at 12:50 is a matter of less than 45 minutes. The time lines are all in sync. (Decision, pp. 27-28)

[86] Judge Buchan's findings of fact and inferences are supported on the evidence and entitled to deference. I would not disturb them.

ii. *Alternate Inferences*

[87] At trial, the appellant offered two alternate explanations for the evidence that maybe: (i) the person running was someone different who, in the course of running, shot the appellant; or (ii) the appellant jumped the fence and landed on the gun and it went off.

[88] The appellant's position was, in effect, that the passenger, with the same distinguishing features and other physical characteristics as the appellant, fled the vehicle and was tracked through a normally untraveled terrain, in the dark and fog, late that night when the appellant also happened to be in that very place at that very time. For some inexplicable reason that unknown person shot the appellant.

[89] Alternatively, the appellant, while on that same track, also jumped the fence proximate in time to when the passenger lost the firearm he had in his possession when he jumped the same fence. The appellant having jumped that fence was then shot when he fell on the gun left behind moments before by the fleeing passenger.

Both the appellant and this unknown person then continued on the same way to Lakecrest Drive.

[90] The trial judge referred to the argument and viewed the position as inviting the Court to engage in speculation and conjecture which was not open to her to do. She rightly rejected the appellant's theories, finding instead that, on all of the evidence, the only rational inference was that the passenger at the traffic stop was the appellant who, while fleeing, accidentally shot himself with the loaded weapon found on the track leading to 79 Lakecrest where the appellant sought help from Mr. Thomas.

[91] The appellant did not testify nor did he call evidence. It is a factor this Court can consider on appeal. Choosing not to testify cannot be a basis to infer or confirm guilt. However, it does mean that when faced with strong evidence, "he failed to provide the trier of fact with any basis for concluding otherwise" (**Henderson, supra**, ¶38-40).

[92] A reasonable doubt cannot be based on speculation or conjecture (**Henderson, supra**, ¶40; **R. v. White,** 1994 NSCA 77). In **Henderson**, Saunders J.A., while considering a speculative explanation advanced at trial, cited **R. v. Eastgaard**, 2011 ABCA 152 at ¶22 ; aff'd 2012 SCC 11).

> 22 On appeal, we can take into account the appellant's failure to testify; however, this is not to add to the weight of the Crown's evidence in proving his guilt. It is just one factor, together with the uncontradicted evidence and admitted facts noted earlier, in our conclusion that the guilty verdict on Count 1 was reasonable. Given the appellant's failure to testify, any suggestion that the driver gave the appellant the firearm and instructed him to hide it is mere speculation. The appellant could have testified to this effect if this indeed happened but he chose not to. Consequently, the only evidence regarding possession of the gun is that the appellant had it and hid it when he had to know he was being pursued by police.

[93] In **R. v. Tahirsylaj**, 2015 BCCA 7 at ¶39, the British Colombia Court of Appeal cited **Paul v. The Quee**n, [1977] 1 S.C.R. 181 on this point:

> 39 As was said by Ritchie J. (for the majority) in *R. v. Paul* (1975), 27 C.C.C. (2d) 1 (S.C.C.), at 6, (1975), [1977] 1 S.C.R. 181, 64 D.L.R. (3d) 491 (S.C.C.):
>
> > I do not think that the burden resting on the Crown to establish the guilt of the accused beyond a reasonable doubt includes the added burden of negativing every conjecture to which circumstantial evidence might be consistent with the innocence of the accused.

[94] In conclusion on this point, the trial judge committed no error in rejecting the appellant's alternate explanations for the evidence.

iii. *Inconsistencies*

[95] The appellant says the trial judge failed to consider significant inconsistencies in the evidence. With respect, the trial judge dealt specifically with inconsistencies in the evidence, identifying three that were raised at trial.

(a) Baseball Cap

[96] Cst. Wilson testified that the appellant was wearing a baseball cap when he stopped the vehicle. It fell from his head while fleeing the scene and Cst. Wilson seized the cap shortly after. While testifying he said the cap was blue. The seized cap was black with a black and white logo. The trial judge properly concluded that he recalled the cap as a baseball cap and that his mistake in identifying the colour of the baseball cap did not undermine the balance of his testimony and leave her in doubt. (Decision, p. 23)

(b) Start Location of the Track

[97] Some confusion arose among counsel and the officers by the use of the words "track" and "tracking" The confusion did not, however, undermine Cst. Cooke's evidence.

[98] The trial judge recognized the inconsistency in testimony and the map prepared by Cst. Cooke about the location of the start of the "track". She was satisfied, from the whole of the evidence, that the police dog correctly picked up the track of Mr. Thompson and followed his scent to 79 Lakecrest Drive, the location of Mr. Thomas' residence where the appellant went, after he had suffered a gunshot wound. (Decision, p. 25)

(c) Tracking time of the Appellant

[99] Although acknowledging there was some inconsistency in the evidence about the time the track took, the trial judge found the track from beginning to end took about 12 minutes. On the whole of the evidence, she determined that the police dog correctly picked up the scent of the appellant and followed it to 79 Lakecrest Drive where the track ended. As she found, at that point in time, Mr.

Thompson had been taken from that location to the Dartmouth General Hospital with a gunshot wound.

[100] Cst. Cooke gave evidence twice on this matter, once saying that his track, which he described as point A to point B, didn't take very long…."my track only lasted 10, 15 minutes". At another point he testified that "it was a short track". … "ten, twelve minutes. It wasn't a very long track at all in terms of time." Although Cst. Cooke's second answer was in response to a somewhat unclear question, his responses were consistently about the time it took to follow the actual track of the appellant versus the total time from deploying the dog to when the track ended and he searched for an escape route. The total of that time was thirty-six (36) minutes based on his evidence.

[101] The trial judge's finding that the actual tracking took 12 minutes was consistent with the evidence. It was not an error for her to have accepted Cst. Cooke's evidence.

DNA and Fingerprints

[102] The appellant, at trial and in oral submissions on appeal, focused on the lack of DNA and fingerprints on the firearm as being significant. Similarly, he argued that the failure to locate blood and the spent cartridge was an important consideration.

[103] With respect, the lack of DNA and fingerprints is, in these circumstances, at best, a neutral factor.

[104] As stated in **Sykes** (¶56), following this argument to its logical conclusion, if Mr. Thompson's DNA and fingerprints were not on the firearm, then someone else's should have been. There was no DNA or fingerprints found on the firearm.

[105] As for the lack of blood, Cst. Malcolm testified the ground was wet and slippery and it was very dark. As a result it would have been difficult to see blood.

[106] Mr. Thomas testified there was no blood in his car or apartment. At his apartment he said "there wasn't a lot of blood" when speaking of Mr. Thompson's wound.

[107] Similarly, given the terrain described by the officers, finding the spent cartridge would have been more surprising than not finding it.

[108] As for Mr. Thompson arriving at Mr. Thomas' residence wearing a white t-shirt, Cst. Boudreau testified that there were dumpsters on the wooded line area of 79 Lakecrest Drive A reasonable inference was that Mr. Thompson discarded the outer garment that Cst. Boudreau saw him wearing.

[109] There was a considerable chain of evidence that the trial judge detailed in reaching her verdict. She was not obliged to address every inconsistency or deal with every piece of evidence in arriving at her factual conclusions. As the trier of fact, she was entitled to decide the weight to be given to any particular piece of evidence (**R. v. R.S.**, 2014 NSCA 105, ¶24; **Sykes**, ¶53).

[110] She did not err in finding that these minor inconsistencies did not raise a reasonable doubt .

Conclusion

[111] The trial judge's reasons, when viewed in their entire context, are responsive to the evidentiary record, the submissions of counsel and the live issues at trial. She addressed all of the critical issues and recognized and dealt with contradictions (**R. v. R.E. M.,** 2008 SCC 51, ¶55-57).

[112] She concluded that, from the time the appellant fled the car to the time he was taken to the hospital by Mr. Thomas and had blood taken at 12:50 a.m., the timelines were all in sync. These were findings available to her on the evidence. In reaching her decision, her reasons do not reflect any misapprehension of the relevant evidence on material issues nor do her findings reveal any palpable or overriding error which would make the verdicts unreasonable or on "unsteady ground" (**R. v. Dow**, 2013 NSCA 111, ¶10-11).

[113] The trial judge clearly understood that her decision had to be grounded in the context of all admissible evidence. As she navigated through the evidence she made specific references to that responsibility when she found:

i. the appellant suffered a single gunshot wound to his abdomen at approximately 12:14 a.m. on May 21, 2011;

ii. the fleeing passenger was tracked by the police dog from the last place he was seen between 103 and 105 Lakecrest Drive to the back of the apartment building at 79 Lakecrest Drive;

iii. the appellant was the passenger in the vehicle at the traffic stop who fled and was tracked to 79 Lakecrest Drive;

iv. the appellant, being concerned he had a gun in the car that had been stopped by the police, fled through slippery, treacherous terrain with the gun that was prone to shock discharge and while doing so, the gun went off and injured the appellant.

[114] The trial judge did not fail to consider, mistake the substance of or fail to give proper effect to the evidence. She just did not agree with the appellant's view of the evidence. As Bryson J.A. concluded in **Dow, supra**, it is not the role of this Court to re-visit her assessments of the evidence including discrepancies and then "cherry pick" bits and pieces that may be favourable to the accused. (**Dow**,¶8, 12).

[115] The strong circumstantial evidence did not leave Judge Buchan with a reasonable doubt when convicting the appellant. As such, she did not render unreasonable verdicts so as to invite intervention by this Court.

[116] I would dismiss the appeal.

Farrar, J.A.

Concurred in:

Fichaud, J.A.

Bourgeois, J.A.