NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Downey*, 2018 NSCA 33

Date: 20180418
Docket: CAC 461097
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Markel Jason Downey

Respondent

Restriction on Publication: pursuant to s. 110(1) of the *Youth Criminal Justice Act*

Judges:	Farrar, Saunders and Bourgeois, JJ.A.
Appeal Heard:	February 14, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed and a new trial ordered per reasons for judgment of Saunders, J.A.; Farrar and Bourgeois, JJ.A. concurring.
Counsel:	Mark Scott, Q.C., for the appellant Patrick MacEwen, for the respondent

<u>PUBLISHERS OF THIS CASE PLEASE TAKE NOTE</u> THAT s. 110 (1) OF THE *YOUTH CRIMINAL JUSTICE ACT*, S.C. 2002, c. 1 APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

110. (1) – Identity of offender not to be published – Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

Reasons for judgment:

[1] In the early evening hours of November 30, 2014, three teenagers, Logan Starr, Jordan Langworthy and Ashley MacLean were playing video games at a home in Dartmouth, Nova Scotia. Suddenly, four masked assailants entered the house – at least one armed with bear spray and another with a handgun. They demanded money and weed. They forced Messrs. Starr and Langworthy into the bedroom where Ms. MacLean had been playing games by herself. While one assailant rifled through the bedroom belongings, Ms. MacLean and the gunman exchanged words. She told the intruders to leave.

[2] The man holding the gun said no one was going to report the incident because nobody would make it out alive. He opened fire and struck all three occupants. Fortunately, Mr. Starr and Mr. Langworthy recovered from their injuries. However, a bullet severed Ms. MacLean's spine and left her paralyzed, requiring care for the rest of her life.

[3] Following a police investigation, three youths and one adult were arrested and charged. The Crown alleged that the person who fired the gun was the respondent, Markel Jason Downey, he being the adult among the four assailants. He was named in a 28-count Indictment which included charges of attempted murder, robbery, various firearms offences and breaching the terms of a Recognizance.

[4] The case was tried by Nova Scotia Supreme Court Justice Michael J. Wood, sitting without a jury. The respondent elected not to call evidence. In closing submissions, Crown counsel conceded that seven of the less serious counts had not been made out and acquittals should be entered. For clarity, those seven counts are Counts #20, 21 and 24-28 of the Indictment dated February 24, 2016. On appeal, the Crown does not seek a retrial on those seven counts.

[5] The principal issue at trial was whether the Crown had proven beyond a reasonable doubt that Mr. Downey was the shooter. In a decision now reported *R. v. Downey*, 2017 NSSC 39, the judge was not satisfied that the respondent was the masked intruder who shot the occupants and he acquitted Mr. Downey on all of the remaining charges against him.

[6] The Crown appeals that verdict saying the trial judge erred in law by applying the wrong "test" to the visual and voice recognition evidence proffered to establish the respondent's identity as the shooter; by ignoring relevant evidence and using irrelevant evidence in his analysis; and by "piecemealing" the evidence, the effect of which was to impose an impossibly high burden of proof upon the Crown.

[7] With great respect to the trial judge, I agree. For the reasons that follow I would allow the appeal, set aside the acquittals, and order a new trial on Counts #1-19, 22 and 23 in the Indictment dated February 24, 2016.

[8] To set the stage for the reasons that follow I will begin by providing a summary of the material facts. Greater detail will be added as required. Much of my summary is taken from the Crown's factum and relates to facts that, in my view, were either found by the trial judge or are not in dispute.

Background

[9] On November 30, 2014, Logan Starr and Jordan Langworthy were playing video games in the living room at 52 Arklow Drive in Dartmouth, a home owned by Logan Starr's father. Ashley MacLean was in a bedroom playing video games by herself. All three were friends, attending Cole Harbour High School at the time. The evidence disclosed that the house was a popular drop-in spot where they and their friends would "hang out" to "chill", play video games, drink beer, smoke dope and sleep over if they wished.

[10] At approximately 6:30 p.m. four male intruders came through the front door. They were all dressed in dark clothing and had either bandanas or masks partially covering their faces. They first entered the living room demanding money and "the shit" (interpreted to mean marihuana).

[11] By all accounts the living room was dimly lit. Both Mr. Langworthy and Mr. Starr could see the number of people, their dark clothing, masks and gloves, and the fact that one had a gun and at least one other carried bear spray.

[12] After a few minutes the assailants corralled Langworthy and Starr into the bedroom where Ms. MacLean was playing video games. The bedroom was small. The preponderance of evidence revealed that the bedroom was better lit than the

living room. Langworthy, Starr and MacLean were all seated on the bed. The gunman stood at the doorway, about six feet from Ms. MacLean.

[13] The three youths arrested along with the respondent shortly after the incident were identified as ES, Z and DB (initials will be used in compliance with s. 110 of the *Youth Criminal Justice Act*, S.C. 2002, c. 1). Z is the respondent's _____. (The exact nature of their relationship has been omitted for statutory reasons).

[14] While one intruder identified later as ES rifled through the drawers in the bedroom, Ms. MacLean tried to convince the intruders to leave. She told them they would all be caught. The gunman said something to the effect: "Who's going to snitch on us?" He then said no one would snitch on them because they were all going to die. Ms. MacLean began "freaking out". The gunman then told Z and DB to turn off the lights. Ms. MacLean freaked out even more, and they turned the lights back on whereupon the gunman fired nine shots from a .22-calibre snub-nosed revolver. All three of the occupants were struck by bullets. Ms. MacLean's spine was severed by one bullet and she was paralyzed.

[15] The four intruders fled, taking with them various items including electronic devices and cigarettes.

[16] Logan Starr raced to the phone to call 9-1-1. The police and medical assistance arrived promptly. Paramedics were able to stabilize Ms. MacLean and rush her to hospital. It was undisputed that without this treatment she may have died. A police officer accompanied her in the ambulance. When asked by the officer if she knew who shot her, Ms. MacLean at first said she did not know. After a few minutes she told the police officer it was "Baby Jason". When the officer asked her if she knew his real name, Ms. MacLean replied: "Jason Downey, it's Z's ____". Later, she repeated this to the officer, saying "Jason Downey is the one who shot me." The officer immediately relayed this information to other police units at the scene.

[17] At trial Ms. MacLean indicated that there is a "no snitching" mentality in her generation, but that she ultimately chose to tell the officer in the ambulance who the shooter was so her Mom would know. Despite the fact that part of their faces were covered, Ms. MacLean said she knew the four assailants having gone to school with them all. She said she recognized the respondent as soon as she saw him come into the bedroom.

[18] Ms. MacLean described the handgun used by the assailant as a small, silver/grey revolver "like a cap gun". She testified the assailants were all in dark clothing, except the shooter who was wearing red. In its closing arguments the Crown acknowledged that the preponderance of evidence suggested the assailants all wore dark or black clothes. Counsel added, however, that one of the bandanas seized by the police was black on one side and red on the other and that this might have been the source of Ms. MacLean's confusion.

[19] Jordon Langworthy and Logan Starr did not know the respondent. But, Mr. Langworthy did know the other three assailants and said he recognized them as soon as he saw them. In fact, he said these youths were the same three individuals who had robbed him two or three weeks earlier, allegedly in retaliation for Langworthy having "stiffed" somebody by selling a "fake gram of weed".

[20] Mr. Langworthy had gone to high school with all three youths. He said that they and the respondent were all "African American". He said he was able to recognize ES by the way he walked, and stood in a certain way and his voice which was "squeaky, annoying, irritating". He recognized Z's voice from the conversation they had had two or three weeks earlier when Z accused him of selling him a fake gram of weed. In relation to DB, Mr. Langworthy said that he had the same eyes and face as at school and that his mask did nothing to conceal his identity.

[21] Mr. Logan Starr could not tell who the assailants were and his evidence was of little value in identifying those persons responsible for the home invasion and shooting.

[22] The police investigation began immediately. The K-9 Unit and police search tracked a path that led to the Forest Hills Parkway. A number of items the K-9 dog handler assumed were connected to the crime scene were recovered along the path, including masks, gloves, toques and hoodies. A few days later a gun and bear spray were found along the same path.

[23] The gun was a silver/grey snub-nosed .22 revolver. Forensic analysis ultimately confirmed that the nine shell casings found at the residence, when compared to the firing characteristics of the seized revolver, indicated that either that gun, or one like it, was used in the home invasion.

[24] At approximately 7:45 p.m. an Emergency Response Team secured the perimeter of the respondent's residence at 266 Caldwell Drive in Cole Harbour. The dome light of the red Honda Civic typically operated by the respondent was still on. The respondent and his ____, Z were arrested together and taken into custody.

[25] Approximately 3½ hours after the shooting, the respondent and his ____, Z were swabbed for gunshot residue. Forensic testing revealed that one particle of gunshot residue was found on the respondent's right hand. One particle of gunshot residue was also found on Z's right and left hands. In the opinion of the gunshot residue expert, this meant that both young men either fired a gun or were near a gun when it was fired. A number of other means by which these particles could possibly find their way on to someone's body were fully canvassed at trial.

[26] Ashley MacLean testified she had known Markel Jason Downey since they were in Grade 10. They were familiar enough that she knew him as "Baby Jason" and he called her his "Home Girl". She described them as acquaintances – they saw each other regularly at school, had small talk under the stairwell, and often saw each other when they lived ____ from one another, some five months before the home invasion (exact location omitted for statutory reasons). She said she knew the respondent well enough that he would often take off his hat and put it on her head when they were at school.

[27] In Grade 11 they shared Phys-Ed class together. Ms. MacLean said she dropped out of that class because of a "heated" dispute she had had with the respondent. They were "at each other's throats" all the time. She explained that they reconciled once she became friendly with the respondent's ____, Z, and that they began to talk more as friends. She said Z called her his "wifey".

[28] In the year leading up to the home invasion Ms. MacLean was working regularly and not often attending school. However, she said that when she was at school visiting friends she would still see the respondent and they would engage in small talk. She would often see the respondent and his friends playing basketball at a neighbour's house.

[29] Ms. MacLean testified that she was able to identify all four intruders the "exact second they walked into the bedroom". With regards to the respondent, Jason Downey, she said he was standing about six feet away, right in front of the

bed and holding a gun in his right hand. She said she knew it was him before he even started speaking. She told him there wasn't any reason to shoot, that they didn't have anything in the house, but that they could take whatever they wanted and just leave them alone. She said the respondent was the only one who spoke. She testified he said:

> Who's this white girl trying to tell me to leave?

and that when she shouted there was no reason to shoot them, and they could get caught for it, the respondent replied:

> How am I going to get caught … Nobody's going to get caught because none of you guys are going to make it out of here alive.

[30] When she "started freaking out" Ashley MacLean said the respondent pointed the gun at her and:

> "started telling me to shut up. And then he just shot me …and then he continued to shoot me… I thought I was dead … I couldn't move, like, I couldn't feel anything … I was on that bed, like, I couldn't breathe, like, it was really hard to breathe … so it kind of felt like I was kind of suffocating … And Logan got up and, like, ran out of the room. And I remember just hearing him on the phone out in the living room with the cops and he was kind of screeching on the phone, freaking out.
>
> And Jordan was in the room and he – he just kind of looked at me. And Jordan was in the room and he -- I remember he just kind of looked at me. He was telling me that they were just blanks, that they weren't real, that -- like, we were going to be fine.…when I opened it, like, a mouthful of blood just, like, came piling out of my mouth. I remember I told him that I needed him to help me roll over because I couldn't breathe … And I told that, if he didn't roll me over, that I was going to die, because …I couldn't take a breath at all.

[31] During the entire incident she said the respondent was the only one who spoke, but that ES joined the respondent in laughing at her when she asked them all to leave.

[32] Ms. MacLean said she was "100 percent positive" in identifying ES, Z, DB and Markel Jason Downey as the four intruders and Markel Downey as being the man who shot her. When asked whether there was anything distinct about the respondent's voice, Ms. MacLean said:

> It's not really distinct, it's just I'm so used to hearing -- like, hearing his voice, that I just knew it by sound. Kind of like anybody else's voice. Nobody sounds the exact same, everybody has a different kind of voice, so I can't really tell you the distinction.I would just say that I know his voice from my recollection of all the times that I have talked to him, so it wasn't hard to know it was him the second he started speaking.

[33] Later, in her direct examination, Ms. MacLean was asked by Crown counsel:

> Q. Was there anything about the content of the conversation you had with the shooter that made you think – led you to know or think you know who you're talking to?
>
> A. It wasn't really about what we were talking about, it was just more I recognized his voice from all the other times I talked to him, so it's like I don't really see anybody else sounding exactly like him. So when I was talking to him, I did recognize his voice from previous conversations I've had with him in the past.

[34] When asked whether there was anything distinguishing about the respondent's eyes, Ms. MacLean testified:

> A. He kind of reminds me of a pit bull, so I don't know, just kind of like, when I look at him and stuff, it's just he, like -- it's kind of hard to explain, but he kind of reminds me of a pit bull when I look at him. So that was a weird, like, explanation, but that's -- that's...
>
> Q. That's okay. This is your chance to explain what you mean by that, that's all.
>
> A. That's what I mean is, like, that's how I could distinguish him, which is -- that's how I see him, so...

[35] There was nothing else distinct about him. Ms. MacLean said she recognized the respondent's voice and that it had not changed in the time she had last spoken with him.

[36] Like Ms. MacLean, Messrs. Starr and Langworthy confirmed that the shooter was average height, average build and that there was nothing distinct about him.

[37] The police investigation resulted in charges laid against three young persons, Z, ES and DB, under the *Youth Criminal Justice Act*. They were tried separately

from the adult respondent. During the respondent's trial it was stated on the record that the three youth co-accused had all pleaded guilty to their roles in the home invasion. However, the degree to which that "fact" was proven, or is a matter we are entitled to take into account on appeal, will be addressed later during my analysis of the issues that arise on appeal. That said, it is not disputed that the DNA of DB and ES were found on some articles seized during the tracking search by the K-9 Unit. Further, a fingerprint of ES was found on the rear inside window of the red Honda Civic that belonged to the respondent and was seized from 266 Caldwell Road at the time Mr. Downey and his ____, Z were arrested.

[38] I will conclude this summary by quickly outlining the respective positions adopted by the Crown and the defence at trial, as well as describing the basis for the trial judge's decision to acquit the respondent.

[39] From the beginning the Crown took the view that the sole issue in the case was the identity of the gunman. The Crown submitted that Ashley MacLean was sufficiently familiar with Mr. Downey to be able to positively identify him as the gunman, notwithstanding his use of a mask. The Crown said her visual confirmation was corroborated by her ability to recognize his voice. Further, the Crown argued that Ashley's ability to correctly identify the other three assailants was an important and relevant factor in determining the reliability of her identifying the respondent as the shooter.

[40] Finally, the fact that the respondent and his ____, Z were arrested so soon after the incident, each with gunshot residue on their hands, provided strong corroborative evidence of their complicity.

[41] The defence argued that the various inconsistencies between witnesses, as well as within the testimony of Ashley MacLean herself, together with the highly charged circumstances of the home invasion, and the fact that the assailants were masked, all led to the conclusion that the Crown had failed to meet its burden. Further, counsel minimized the importance of the gunshot residue by pointing to other possible causes for it having been found on the respondent's right hand. Finally, defence counsel suggested that Ms. MacLean had embellished her evidence and that her identification of the respondent was tainted by the fact that she had acquired other missing details of the ongoing police investigation from her friends, her family, and reports in the media.

[42] After canvassing the testimony of the three victims, including an assessment of Ms. MacLean's identification evidence as well as her prior contact with the respondent, the trial judge outlined the concerns he had regarding the reliability of Ms. MacLean's identification. He said:

> [39] I have a number of concerns with respect to the reliability of Ms. MacLean's identification evidence and these include the following:
>
> 1. The identification was immediate and based only on a very brief observation of a masked individual. She had no prior indication that a home invasion was underway and was surprised by their appearance in the bedroom. Her only explanation for the visual identification was to say that there was something about the gunman's eyes that made her think it was Mr. Downey, but she could not elaborate.
>
> 2. Ms. MacLean's evidence that the gunman was dressed entirely in red conflicts with the testimony of Mr. Starr and Mr. Langworthy, as well as other witnesses who apparently observed the intruders running from the scene. I believe she is mistaken in this recollection which calls into question the reliability of her memory of other details.
>
> 3. She had not seen Mr. Downey in more than five months and had very little contact in the prior year. There were no conversations beyond brief exchanges of pleasantries for many months prior to the shooting.
>
> 4. The atmosphere in the bedroom was highly charged. Ms. MacLean said her attention was focused on the gun. There were death threats and yelling, and Ms. MacLean says she was freaking out. If Mr. Downey was the gunman, I would not expect his tone of voice to be the same as when he was engaged in chitchat in the stairwell at Cole Harbour High. Trying to recognize voices in such dramatically different circumstances is problematic.
>
> 5. Ms. MacLean's voice identification evidence carries a risk of confirmatory bias. Once she had decided the gunman was Mr. Downey, her recognition of the voice may have been an unintentional confirmation of the visual identification already made. In addition, she first raised this as a basis for recognition after Mr. Downey was arrested and charged. She did not mention his voice in her initial police statement even though she said she recognized the voice of one of the other intruders.

[43] After finding that Ms. MacLean's evidence alone did not meet the criminal burden of proof, the trial judge turned to the only forensic evidence linking the respondent to the shooting, namely, the gunshot residue. He concluded that the various possible ways a single particle of GSR could have "innocently" found its way onto the respondent's hand before the swab was taken, meant that its probity

was not sufficient to overcome the difficulties with Ms. MacLean's identification. Accordingly, the judge acquitted the respondent on all outstanding charges against him.

Issues

[44] In its factum the Crown lists the following grounds of appeal:

> 1. The Supreme Court Judge erred in law by concluding the evidence of identification in the ambulance was only relevant to recent fabrication rather than to identification overall.
> 2. The Supreme Court Judge erred in law in finding the identification of the other three assailants was irrelevant to the reliability analysis.
> 3. The Supreme Court Judge erred in law by considering irrelevant evidence in assessing the reliability of the evidence of identification of Ashley MacLean.
> 4. The Supreme Court Judge erred in law by considering the wrong legal test regarding voice recognition.
> 5. The Supreme Court Judge erred in law by misapprehending the evidence of a connection between the respondent and one of the other assailants.
> 6. The Supreme Court Judge erred in law by failing to consider the whole of the evidence related to identification.
> 7. Such other grounds as may appear from a review of the record under appeal.

[45] These grounds were re-organized and presented in a different sequence in both the Crown's written and oral submissions on appeal. In the analysis that follows I prefer to consider the merits of the Crown's appeal by addressing three discrete errors. In my respectful opinion, the trial judge erred by:

> (i) failing to apply the proper "test" in his assessment of the reliability of the so-called identification evidence;
>
> (ii) ignoring relevant evidence and considering irrelevant evidence in his reasoning; and

(iii) subjecting the evidence to a piecemeal assessment, the effect of which was to impose an impossibly high burden of proof upon the Crown.

Standard of Review

[46] This is a Crown appeal from acquittal. Therefore, the Crown is limited in its right to appeal to questions of law alone. Each of the three errors I have described involves a question of law alone, and each will be examined on a correctness standard of review (*R. v. H.(J.M.)*, 2011 SCC 45).

[47] Of course, in order to succeed in any remedy sought, the Crown's task is not limited to identifying legal error. Rather, the Crown must demonstrate that the legal error(s) "might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on acquittal" (*R. v. Graveline,* 2006 SCC 16).

[48] In. *H.(J.M.)*, Justice Cromwell, writing for a unanimous Court, addressed what he described in the first paragraph of his judgment as:

> …the broader question… under what circumstances a trial judge's alleged mishandling of the evidence gives rise to an error of law alone which justifies appellate intervention on a Crown appeal from an acquittal.

[49] He went on to explain that based on current authorities there are four such situations. He said:

> [24] The Crown's right of appeal from an acquittal of an indictable offence is limited to "any ground of appeal that involves a question of law alone": *Criminal Code,* s. 676(1) (a). This limited right of appeal engages the vexed question of what constitutes, for jurisdictional purposes, an error of law alone. This appeal raises once again the issue of when the trial judge's alleged shortcomings in assessing the evidence constitute an error of law giving rise to a Crown appeal of an acquittal. The jurisprudence currently recognizes four such situations. While this may not be an exhaustive list, it will be helpful to review these four situations briefly.
>
> (1) <u>It Is an Error of Law to Make a Finding of Fact for Which There Is No Evidence — However, a Conclusion That the Trier of Fact Has a Reasonable Doubt Is Not a Finding of Fact for the Purposes of This Rule</u>
>
> …

> (2) The Legal Effect of Findings of Fact or of Undisputed Facts Raises a Question of Law
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> …
>
> (3) An Assessment of the Evidence Based on a Wrong Legal Principle Is an Error of Law
>
> …
>
> (4) The Trial Judge's Failure to Consider All of the Evidence in Relation to the Ultimate Issue of Guilt or Innocence Is an Error of Law
>
> …

[Underlining in original]

[50] I see the trial judge's missteps in this case as falling into the third and fourth categories of reversible error.

Analysis

[51] Before turning to the specific errors which tainted the trial judge's decision-making in this case, I will start by explaining the proper legal principles that ought to be applied in an "identification" case such as this. Moreover, it is important to emphasize that the circumstances surrounding this tragic home invasion and attempted murder are more properly characterized as a "recognition" case, which tends to be treated as a separate, sub-set of the broader commentaries seen in the identification jurisprudence. This is an important distinction and one which appears to have been overlooked by the trial judge in his analysis.

[52] Ordinarily, "identification evidence" is used to describe the kind of evidence offered by eyewitnesses who are strangers to an accused but who later testify that the person on trial is the individual they observed at the scene of the crime, and which eyewitness reporting is perhaps later confirmed after pointing out that same individual in a police photo line-up during the course of the investigation.

[53] That kind of eyewitness identification evidence offered by strangers is to be distinguished from voice or visual identification evidence offered by witnesses who are "familiar" with the accused. Such evidence is properly characterized as "recognition evidence" because the witness is able to verify their identification of

the accused from *recognizing* the voice and/or appearance of the accused based on their familiarity and interaction one with the other.

[54] A helpful explanation of this distinction can be found in the decision of the British Columbia Court of Appeal in *R. v. Bob*, 2008 BCCA 485 where Neilson, J.A., writing for a unanimous court said:

> [13] … this was a case of recognition, rather than identification. There is a significant difference between cases in which a witness is asked to identify a stranger never seen by him before the offence, and cases in which a witness recognizes a person previously known to her. While caution must still be taken to ensure that the evidence is sufficient to prove identity, recognition evidence is generally considered to be more reliable and to carry more weight than identification evidence: *R. v. Aburto*, 2008 BCCA 78; *R. v. Bardales* (1995), 101 C.C.C. (3d) 289 (B.C.C.A.), aff'd [1996] 2 S.C.R 461, 107 C.C.C. (3d) 194.
>
> [Underlining mine]

[55] Recent observations by the Ontario Court of Appeal, per curiam, in *R. v. Campbell*, 2017 ONCA 65, are equally apt:

> [10] This court has confirmed that "recognition evidence is merely a form of identification evidence" and, as such, "[t]he same concerns apply and the same caution must be taken in considering its reliability as in dealing with any other identification evidence": *R. v. Olliffe*, 2015 ONCA 242, 322 C.C.C. (3d) 501, at para. 39. This court also noted in that paragraph, however, that "[t]he level of familiarity between the accused and the witness may serve to enhance the reliability of the evidence." Unlike cases involving the identification of a stranger, the reliability of recognition evidence depends heavily on the extent of the previous acquaintanceship and the opportunity for observation during the incident: *R. v. Miaponoose* (1996), 30 O.R. (3d) 419 (C.A.), at p. 424, citing *R. v. Smierciak* (1946), 87 C.C.C. 175, at p. 177. Recently, in *R. v. Charles*, 2016 ONCA 892, at paras. 50-51, this court noted the "critical difference" between recognition cases and cases involving identification by a witness of a complete stranger, and referred to the relevance of the "timeline of the identification narrative". See also *R. v. Peterpaul* (2001), 52 O.R. (3d) 631 (C.A.), at p. 638.

[56] The frailties of eyewitness testimony and the cautious careful scrutiny which must be given to it as a consequence, have long been understood. Identification experiments have demonstrated the fallibility of powers of observation, as have

examples of wrongful convictions and imprisonment based on eyewitness testimony later shown to have been wrong.

[57] Our law recognizes the inherent dangers of identification evidence, especially where the witness appears both honest and convincing. Consequently, fact-finders (whether trial judges or juries) must be satisfied as to both the credibility and the reliability of the eyewitness testimony. As the Alberta Court of Appeal observed in *R. v. Atfield*, 1983 ABCA 44 at ¶ 3:

> [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.

[58] Paciocco, J. (as he then was) makes the same point very well in *R. v. Ambrose*, 2015 ONCJ 813:

> [4] The law is cautious with identification evidence, particularly when, as here, it is offered by strangers to the person being identified. Mistaken identification is known to have caused wrongful convictions and so decision-makers are required to exercise great care before acting on eyewitness opinions that the accused is the perpetrator: *R. v. Goran* 2008 ONCA 195; R. v. Quercia (1990), 60 C.C.C. (3d) 380 (Ont. C.A.), and see *R. v. Bigsky* (2006), 45 C.R. (6th) 69 (Sask C.A.). In dealing with identification evidence, it is imperative that judges not focus solely

> or unduly on the credibility of identification witnesses, since neither their honesty nor confidence ensures accuracy: *R. v. Candir* [2009] O.J. No. 5485. Most inaccurate identifications occur because honest identification witnesses are wrong. The reliability of identification evidence is therefore of deep concern, and deserves emphasis: *R. v. Oliffe* 2015 ONCA 242. A judge must recognize and allow for the fact that case-specific problems with the opportunity to observe the identified individual, as well as variable limits in the ability of witnesses to discriminate between individuals, or to recall details, contribute together to the risk that honest identification witnesses will be mistaken*: R. v. Jack* (2013) 294 C.C.C. (3d) 163 (Ont. C.A), Peter DeCarteret Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001). In addition, the quality of description of the suspect by the witness requires attention: *R. v. Jack*, supra at para 14. If there are notable dissimilarities between features of the description and the accused, the identification will have no probative value without other evidential support: *R. v. Bennett* (2003), 19 C.R. (6th) 109 (Ont. C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 534, 2004 CarswellOnt 1325. …

[59] I endorse these statements of principle and will apply them in my consideration of the trial judge's reasoning in this case.

(i) The trial judge erred by failing to apply the proper "test" in his assessment of the reliability of the so-called identification evidence

[60] In my respectful view, the trial judge ignored the fact that Ashley MacLean *knew* all four intruders through her contact and relationships with each one of them at their high school. She recognized and positively identified Markel Jason Downey as the man who opened fire, and his ____, Z, and DB, and ES, as being his three accomplices.

[61] Jordan Langworthy did not recognize the person with the gun but that was because he had never met the respondent. However, he recognized and positively identified Z, DB and ES as being the same people who had entered his house and robbed him two or three weeks earlier, apparently because he had "stiffed" one of them by selling a fake gram of weed.

[62] In my opinion, the trial judge erred by undermining and undervaluing the reliability of Ashley MacLean's testimony when he searched the record for <u>both</u> significant connections establishing Ms. MacLean's familiarity with the respondent <u>as well as</u> distinguishing features which would serve to demonstrate the

respondent's "peculiarity" or uniqueness. In doing so the trial judge employed an incorrect test for determining the reliability of Ms. MacLean's testimony which had the effect of imposing an impossibly high burden of proof upon the Crown.

[63] A decision of the Court of Appeals of Michigan, Division No. 1 in the case of *People of the State of Michigan v. Bozzi*, 36 Mich. App. 15 (1971), 193 N.W. 2d 373 serves as a useful illustration of the trial judge's error in this case. There, Bozzi appealed his conviction for assault with intent to commit rape, arguing the complainant's identification was insufficient to establish his guilt beyond a reasonable doubt. The Court rejected the appellant's submission:

> There is a host of circumstantial evidence tending to incriminate the defendant in addition to his knowledge of the girl's presence in the house, his familiarity with the house and nearness to it. Among the circumstances are flight from custody, inconsistent statements, an admission that he left the bar to drive by the house, several absences from the bar, a pointed statement to a waitress observing his return that he 'had been there all the time,' a phone call to the home after the crime in which defendant asked to speak to the baby-sitter, and 'alibi' testimony that was consistent with the possibility that he could have committed the offense and in conflict with his own testimony.

Referring, in particular, to the appellant's submission that the complainant's voice recognition testimony was "insufficient to go to a jury", the Court rejected the argument that in order to be reliable, voice recognition depended upon <u>both</u> familiarity between the witness and the accused <u>and</u> some peculiar characteristic of the person's voice. The Court said this duality of requirements was wrong and stemmed from a misreading of a leading American text on criminal evidence. The Court quoted from *Wharton's Criminal Evidence*:

> Wharton's statement is as follows:
>
> 'The qualification of the witness to express an opinion as to the identity of the voice must be shown as based either on familiarity with the speaker, or upon some peculiarity in the voice which would make it likely that the witness could distinguish and identify the voice in question. 1 *Wharton's Criminal Evidence*, s. 183, p. 365.

and then rejected other cases where:

> The Court commented on the lack of testimony establishing any peculiarity in the voice of either defendant, and appears to have misread Wharton to require both peculiarity of voice and familiarity as a basis for identification. …

The Court went on to quote with approval other decisions where it was held that:

> …The voice is one means of recognition and identification. The degree of certainty of identification by that means does not depend upon the ability of the witness to describe its peculiarities. …

leading the Court to ultimately affirm the conviction, saying:

> [1] …that identification testimony by voice, as otherwise, must be reasonably positive and certain. Obviously that certainty must be shown to exist in the mind of the identifying witness by testimony that is, in form, positive and unequivocal … but it must also appear by the existence of some reason to which the witness can attribute his ability to make the voice identification, of which familiarity **or** peculiarity are the most common example. Modern scientific voice analysis suggests that there may be others.
>
> [2] Here, we believe that test has been met. The complainant was positive in her testimony. She had the opportunity to become familiar with the voice of defendant by past meetings and by conversation of some duration at a point in time proximate to the crime. There was sufficient evidence to go to the jury which, being found credible, supports a finding of guilt beyond a reasonable doubt.

[Emphasis mine]

[64] Respectfully, a careful review of the judge's decision in this case shows the same misstep. For example, at paragraph [5], he begins his analysis by referring to certain statements of Laskin, J.A. of the Ontario Court of Appeal (as he then was) in *R. v. Spatola*, 1970 O.J. No. 1502:

> [5] …
>
> > [22] Bare recognition unsupported by reference to <u>distinguishing marks</u>, and standing alone, is a risky foundation for conviction even when made by a witness who has seen or met the accused before. Of course, the extent of their previous acquaintanceship must have a very important bearing on the cogency of the identification evidence, as will the circumstances in which the alleged recognition occurred. Where <u>some distinguishing marks</u> are noticed and later verified, there is a strengthening of credibility according to the nature of such marks. But the initial issue of the caution

> with which identification evidence must be received, particularly where it is the unsupported evidence of one witness, remains; all of this is, in a jury trial, for the jury to evaluate on proper direction. If that direction should embrace an admonition of caution where there is questioned identification evidence, and such a direction is not given, an appellate Court cannot say that a conviction in such a situation must be sustained.

[Underlining mine]

[65] We see this search for "distinctiveness" repeated in the judge's analysis. For example:

> [10] …Is there something about their appearance, voice, what they said or did, their posture or manner of moving? …
>
> [20] Ms. MacLean did not explain what it was about Mr. Downey's physical appearance that allowed her to identify him immediately. The only part of his face she could see were his eyes and cheekbones. In her cross-examination she agreed she couldn't really describe anything distinctive about Mr. Downey's eyes, however in redirect she said they reminded her of a pit bull.
>
> [21] Ms. MacLean indicated that once the person with the gun began to speak she recognized the voice as being that of Jason Downey, although she could not describe anything distinctive about it. She said she recognized it because of her prior conversations with Mr. Downey. The first time she mentioned that she knew it was Mr. Downey's voice was at the preliminary inquiry. She did not tell this to the police in her statement given five weeks after the shooting although she did tell them she recognized the voice of one of the other intruders.
>
> …
>
> [35] None of the three occupants of 52 Arklow Drive noticed anything distinctive about the body shape or size of the gunman. None of them commented on anything unique about the way he stood or moved. …
>
> 36 In Ms. MacLean's direct examination she never explained how she was able to immediately identify Mr. Downey as the gunman when he entered the bedroom. In cross-examination she said there was nothing really distinctive about the partial facial features she could see on any of the intruders. …
>
> 39 I have a number of concerns with respect to the reliability of Ms. MacLean's identification evidence and these include the following:
>
> 1. The identification was immediate and based only on a very brief observation of a masked individual. She had no prior indication that a home invasion was underway and was surprised by their appearance in the bedroom. Her only explanation for the visual identification was to

> say that there was something about the gunman's eyes that made her think it was Mr. Downey, but she could not elaborate.
>
> [Underlining mine]

[66] These few examples serve to illustrate the trial judge's mistake when he effectively faulted Ashley MacLean for her "failure" to articulate any special features which would distinguish the respondent from other people. This was an error in law because he applied the wrong test when evaluating the reliability and probative value of this evidence. The trial judge ought to have recognized that based upon the preponderance of evidence, there was nothing unique about the respondent. He was described by his victims as "average" and that there was really nothing (except seeing his eyes and cheekbones reminding Ms. MacLean of a pit bull) to set him apart from other people. Accordingly, the reliability of Ashley's testimony regarding the appearance and voice of the shooter would depend upon her familiarity with the respondent based on the extent of their relationship (which could be gauged by the quality and/or the quantity of their interactions with one another) during the years they knew one another at school, and as neighbours. To insist upon some form of additional elaboration and articulation of things which were "distinctive" about the shooter ignored Ms. MacLean's positive identification based upon her familiarity with the respondent and imposed an impossibly high and unattainable burden of proof upon the Crown.

[67] The expectations and search for proof by the trial judge in this case were unrealistic and incorrect. Again, the observations of Justice Paciocco in *Ambrose*, *supra* are instructive:

> [29] Moreover, while courts should not accept an assertion that the accused is the suspect where that assertion is bald, or unsupported by any characteristics, courts have to be realistic in the degree of description that can be supplied. The reason lay witnesses are permitted to provide a conclusion about identification is that the human capacity for recognition, while imperfect, outstrips the human ability to describe what has been observed. Not only is language inadequate to articulate and communicate ordinary facial observations in a discriminating way, the human memory can capture details unconsciously that can appropriately inform conclusions, including about identification: *R. v. Graat* [1982] 2 S.C.R. 819. I can faithfully recognize my wife, but I would be incompetent to describe her with sufficient precision to enable someone who does not know her, to picture her well enough to identify her on a random citing. I am not suggesting that a court's confidence in a particular identification should not be more guarded in the

> absence of a detailed facial description, but I am explaining why identification evidence is not defeated by incomplete or imprecise facial descriptions alone.
>
> …
>
> [32] While none of this is sufficient alone to give confidence in Ms. Antoine's identification, particularly not in the face of her abridged opportunity to observe, her uncertainty about the glasses and hat, and the suggestive influence she was subjected to, it does provide a platform that can enable a finding that Mr. Ambrose is the suspect, provided that identification is sufficiently supported by other evidence. Indeed, as a matter of law even with no "reference to characteristics which can be described by the witness" to support an identification, identification evidence should not be dismissed out of hand as "little more than speculative opinion or unsubstantiated conjecture" unless that identification is "unsupported and alone": *R. v. Smith* (1952), 103 C.C.C. 58 (Ont.C.A.). It is to be evaluated, in context, for its sufficiency.

[Underlining mine]

[68] So too the comments of Blair, J.A., writing for a unanimous court in *R. v. Berhe*, 2012 ONCA 716. While his remarks at ¶22 were made in the context of threshold admissibility, I accept them as equally pertinent when considering ultimate reliability:

> [22] In my view, however, it is going beyond what is necessary for threshold admissibility to add another layer to the test requiring the recognition evidence witness to show that he or she can point to some unique identifiable feature or idiosyncrasy of the person to be identified. Such concerns are better resolved in determining the ultimate reliability of the evidence. <u>There are many ordinary people who do not have any particular identifiable features or idiosyncrasies differentiating them from the normal crowd; people familiar with them may well be able to identify</u> their photograph, however. In that respect, I think the following comment by Holmes J. in *R. v. Panghali*, 2010 BCSC 1710, [2010] B.C.J. No. 2729, at para. 42, is apt:
>
> > Common experience teaches that people have vastly different abilities to identify and articulate the particular features of the people in their lives that they know, recognize, and distinguish on a regular basis. Where a witness has but little acquaintanceship with the accused, his or her recognition evidence may be of little value unless the witness can explain its basis in some considerable detail. But at the other end of the spectrum, <u>the bare conclusory recognition evidence of a person long and closely familiar with the accused may have substantial value, even where the</u>

> witness does not articulate the particular features or idiosyncrasies that underlie the recognition.
>
> [Underlining mine]

[69] To summarize then, the importance of articulating identifiable features or idiosyncrasies will vary depending upon the level of familiarity the witness has with the person to be identified. In some cases a witness may be sufficiently familiar with the person, so as to render the identification by the witness of any unique identifiable feature unnecessary, in order for a court to properly assign substantial value to that evidence. Common sense and one's life experience reminds us that people have vastly different abilities when it comes to identifying or expressing the particular features of people they know and recognize, through their contact with one another. Where contact is fleeting, a person's recognition evidence may be of little value unless the witness can explain its basis in some detail. On the other hand, a simple conclusory recognition without additional elaboration of any points of distinctiveness, may still be highly probative in the case of a person who is closely familiar with the accused. See for example *R. v. Panghali*, [2010] B.C.J. No. 2729; *R. v. Benson*, 2015 ONCA 827; and *R. v. M.B.*, 2017 ONCA 653.

[70] The judge's demanding search for markers of peculiarity and distinctiveness when they did not exist, caused him to downplay or ignore the highly probative value of Ms. MacLean's positive identification of the respondent based on their familiarity with one another and her immediate recognition of his appearance and his voice. What the judge perceived as a "failure" on Ms. MacLean's part skewed the judge's analysis and caused him to ignore the force of her testimony and its corroboration by other significant evidence.

[71] Ms. MacLean said the respondent's eyes reminded her of a pit bull. Otherwise, she and the other witnesses said he was average and there was nothing special about him which would distinguish him from other people. They were sure it was him because they knew him. In the face of that evidence the judge should not have allowed himself to become distracted by an unnecessary search for idiosyncrasies. His focus instead should have been limited to the evidence that was relevant to the reliability of their testimony, both in terms of positively identifying him as the shooter, as well as the other direct and circumstantial evidence which bolstered their testimony.

[72] The assessment of threshold reliability and ultimate reliability of the identification evidence will be for the judge to decide at the re-trial. But this time it should be conducted through a lens of recognition based on the relationship and familiarity between the respondent and the eyewitnesses, unburdened by any search for features of uniqueness or idiosyncrasies that do not exist.

[73] I will turn now to a consideration of the trial judge's second error when he ignored relevant evidence and applied irrelevant evidence in his analysis.

(ii) The trial judge erred by ignoring relevant evidence and considering irrelevant evidence in his reasoning

[74] To provide context for my analysis I will add further detail as to what occurred when Ms. MacLean was transported to hospital after the shooting. In the ambulance Ms. MacLean told the paramedic, Mr. Hector, that it was "Baby Jason" who shot her, and then repeated this to Constable Pike. When the officer asked her if she knew his real name, Ms. MacLean replied: "Jason Downey, it's Z's ____". Later, she repeated this to the officer, saying "Jason Downey is the one who shot me".

[75] At the trial, both Mr. Hector and Constable Pike testified to Ms. MacLean's identification of Mr. Downey while she was in the back of the ambulance. Ms. MacLean also testified at trial about her identification of Mr. Downey, adopting and confirming that she made the identification and that Mr. Downey was the person who shot her.

[76] Had Ms. MacLean died en route to the hospital, the Crown would most certainly have sought to have her statements in the ambulance introduced as a dying declaration, based on necessity and the reliability of what she told the paramedic and the police officer.

[77] The fact that she survived does not diminish the highly probative value of her identification of the respondent as the man who shot her. All it does is change the basis for admitting her evidence.

[78] To illustrate the significance of the trial judge's error, I will refer to two paragraphs in his decision. He said:

> [33] When she was in the ambulance on the way to the hospital Ms. MacLean told Cst. Pike that she did not know who shot her. A few minutes later she said it was "Baby Jason" which, according to Mr. Downey's father, is a nickname used by his close friends. This statement by Ms. MacLean cannot be used to make her identification of Mr. Downey more reliable; saying the same thing more than once does not make it more or less accurate. However, this evidence can be used to show that her opinion that Mr. Downey was the gunman did not arise because of hearing about his arrest or reading discussions on social media about the incident.

[79] Respectfully, this extract reveals several serious problems with the judge's reasoning. He limits the probative value of Ms. MacLean's positive identification of the respondent as the gunman who shot her, to simply rebut the allegation of recent fabrication or embellishment due to media attention or collusion. He says:

> [33] …this evidence can be used to show that her opinion that Mr. Downey was the gunman did not arise because of hearing about his arrest or reading discussions on social media …

[80] The judge refused to consider Ms. MacLean's repeated declaration to the police officer in the ambulance as having any probative value in determining the reliability of that identification. He said:

> [33] This statement … cannot be used to make her identification of Mr. Downey more reliable; saying the same thing more than once does not make it more or less accurate.

[81] Respectfully, such reasoning is wrong in law.

[82] Her clear and unambiguous identification of the respondent, repeated twice to the police officer in the ambulance, was highly relevant in determining the reliability of Ms. MacLean's testimony. That evidence should not have been limited to simply rebutting any defence suggestion of her having fabricated or embellished her evidence. By restricting her testimony to such a narrow purpose, the judge virtually ignored and gave no weight to Ms. MacLean's eyewitness testimony which clearly identified the respondent as the man who shot her. This is a serious error, which warrants our intervention.

[83] Respectfully, the trial judge's reasoning in ¶41 is equally problematic:

> The Crown called a large amount of evidence about the other three individuals alleged to have participated in the home invasion. They said that Ms. MacLean was correct in her identification of those people and this supports her evidence that Mr. Downey was the shooter. I disagree. Whether her belief in the identity of the others turns out to be true does not impact on my assessment of her credibility and reliability in relation to Mr. Downey. That will depend on her prior contact with them as well as her observations on November 30th. She could very well be correct for three of the intruders and wrong with respect to the fourth. The Crown has not argued that there is any evidence connecting Mr. Downey to the other three people alleged to be involved on the evening of the shooting. As a result their identities are irrelevant.

From this we can see that as far as the judge was concerned, if Ms. MacLean correctly identified the three youths who broke into the home, such an accurate identification was irrelevant to determining the reliability of her repeated declaration that Mr. Downey shot her. On the contrary, I believe the accuracy of her identification of the other three intruders was very relevant in determining the reliability of her having identified Jason Downey as the man who shot her.

[84] Ms. MacLean's statement in the ambulance that it was "Baby Jason" who shot her is an out-of-court statement. Because Ms. MacLean adopted that statement during her testimony in court and further identified Mr. Downey as the person who shot her, her statement to the police officer in the ambulance would be classified as a prior consistent statement. Typically, prior consistent statements are inadmissible because they lack probative value and are seen as self-serving. See for example, *R. v. Stirling*, 2008 SCC 10, and *R. v. Dinardo*, 2008 SCC 24. However, this presumption can be rebutted in certain circumstances. And this case is one of those. That is because here, Ms. MacLean's prior consistent statement relates to her identification of the accused. As noted in E.G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, loose-leaf (consulted on 12 March 2018), (Toronto, Ont.: Thomson Reuters, 2017) Ch. 16, pp. 16-196-197:

> A prior statement *identifying* or "describing the accused" is admissible as *original evidence* where the identifying witness identifies the accused at trial as the person in question.

[Emphasis in original]

[85] To similar effect, David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law, 2015) at p. 146:

> The courts have long recognized that witnesses should be asked to identify an accused at the earliest opportunity and under the fairest of circumstances. The identifications are the far better test of the witness's evidence. Therefore, as a matter of common sense, courts readily admit prior identifications to give credence to the in-court identifications.
>
> [Emphasis added]

[86] This issue arose in *R. v. Tat*, [1997] O.J. No. 3579. After canvassing the Canadian authorities, Justice Doherty concluded that confirmed or adopted prior identifications are not dealt with as exceptions to the hearsay rule, but rather, are dealt with as non-hearsay. The evidence is admitted to help the trier of fact "assess and corroborate" the witness's in-dock identification. This is because identification evidence is unique. As Doherty, J.A. explained:

> [35] My review of the Canadian case law reveals two situations in which out-of-court statements of identification may be admitted. Firstly, prior statements identifying or describing the accused are admissible where the identifying witness identifies the accused at trial. The identifying witness can testify to prior descriptions given and prior identifications made. Others who heard the description and saw the identification may also be allowed to testify to the descriptions given and the identifications made by the identifying witness: *R. v. Christie*, [1914] A.C. 545, per Viscount Haldane at 551, per Lord Atkinson and Lord Parker at 554 (H.L.); *R. v. Langille, supra*; *R. v. Birkby, supra*, at 44; R. v. *Alexander, supra*, per Gibbs C.J. at 403-404, per Mason J. at 426-427 (H.C.); *Cross and Tapper on Evidence, supra*, at 307-308; *Wigmore on Evidence* Vol. IV, Chadbourne Revision (1972) at pp. 237-78. In *Langille, supra*, (the authority relied on by the trial judge), the identifying witnesses identified the accused at trial. Osborne J.A. held that prior statements of that witness identifying or describing the perpetrator were admissible. He said at p. 556:
>
> > ... Evidence of descriptions given before an in-court identification, and particulars of an identification made before trial are admissible as original evidence going to the issue of identification.
>
> [36] Clearly, the evidence of the prior descriptions given and the prior identifications made by the identifying witness constitute prior consistent statements made by that witness. Generally speaking, evidence that a witness made prior consistent statements is excluded as irrelevant and self-serving. However, where identification evidence is involved, it is the in-court identification of the accused which has little or no probative value standing alone. The probative force of identification evidence is best measured by a consideration of the entire identification process which culminates with an in-court

identification: e.g. *R. v. Langille, supra*, at 555; *DiCarlo v. The U.S.*, 6 F.(2d) 364 at 369, per Hough J., concurring, (2d cir. 1925); *Clemons v. The U.S.*, 408 F. (2d) 1230 at 1243 (D.C. cir. 1968). The central importance of the pre-trial identification process in the assessment of the weight to be given to identification evidence is apparent upon a review of cases which have considered the reasonableness of verdicts based upon identification evidence: e.g. see *R. v. Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.).

[37] If a witness identifies an accused at trial, evidence of previous identifications made and descriptions given is admissible to allow the trier of fact to make an informed determination of the probative value of the purported identification. The trier of fact will consider the entirety of the identification process as revealed by the evidence before deciding what weight should be given to the identification made by the identifying witness. Evidence of the circumstances surrounding any prior identifications and the details of prior descriptions given will be central to that assessment.4

[38] Where a witness identifies the accused at trial, evidence of prior identifications made and prior descriptions given by that witness do not have a hearsay purpose. In his influential article, *Evidence of Past Identification, supra*, Professor Libling explains the admissibility of the out-of-court statements where the witness makes an in-court identification in this way, at pp. 271-72.

> There is no hearsay problem with this kind of evidence. It is not admitted to prove the truth of the earlier identification, but to add cogency to the identification performed in court. As a general rule, a witness is not permitted to testify as to his own previous consistent statements because they add nothing to the in-court testimony. But evidence of previous identification strengthens the value of the identification in court by showing that the witness identified the accused before the sharpness of his recollection was dimmed by time. Furthermore it is important, in assessing the weight of the identification in Court, to know whether the identifying witness was able to identify the accused before he was aware that the accused was the person under suspicion by the police.

[39] I agree with Professor Libling's analysis. When such evidence is tendered, the trier of fact is not asked to accept the out-of-court statements as independent evidence of identification, but is told to look to the entirety of the identification process before deciding what weight should be given to the identifying witness' testimony. In this respect, evidence that the witness previously gave a description which matched the accused or previously selected the accused in a line-up serves no different evidentiary purpose than would evidence showing that the identifying witness had an ideal vantage point from which to observe the perpetrator of the offence. Both are factors which will assist in weighing the witness' in-court testimony.

[87] I adopt Justice Doherty's analysis as a correct statement of the law and one which ought to have been applied by the trial judge in this case. Limiting the impact of Ms. MacLean's testimony in the way he did had the effect of giving no weight whatsoever to the reliability of her identification of Mr. Downey as being the shooter, as well as the accuracy of her identification of the other three young men who participated in the home invasion.

[88] Ms. MacLean's statement to the paramedic and the police officer in the ambulance fits squarely within the first situation in which out-of-court identification evidence is admissible as substantive identification evidence described in *Tat, supra*. This evidence should have been considered in assessing the reliability of Ms. MacLean's identification of Mr. Downey. It should not have been limited to only "show[ing] that her opinion that Mr. Downey as the gunman did not arise because of hearing about his arrest or reading discussions on social media about the incident", as the trial judge found in ¶33 of his decision.

[89] Just as serious is the judge's misapprehension of the Crown's position regarding the facts connecting the respondent to the other intruders. The trial judge said:

> [41] … The Crown has not argued that there is any evidence connecting Mr. Downey to the other three people alleged to be involved on the evening of the shooting. …

In effect, the judge assumed that there was "no evidence" connecting the respondent to the other three home invaders. A finding of "no evidence" is a question of law alone. See for example, *R. v.Al-Rawi*, 2018 NSCA 10 and *R. v. Feeley*, [1953] 1 S.C.R. 59. He overlooked the considerable body of corroborative evidence linking all four to the crime scene, which was highly probative in assessing the reliability of both Ashley MacLean's and Jordan Langworthy's eyewitness testimony.

[90] Whether it is "true" that Z, ES and DB – the three youths arrested and charged along with the respondent – later pleaded guilty to their involvement in the incident is not critical to our disposition. In other words, our allowing the Crown's appeal and ordering a new trial does <u>not</u> depend upon their having been convicted. Should the Crown seek to introduce such evidence at the retrial, it will have the opportunity to persuade the judge presiding over the matter that such evidence is

relevant, probative and admissible. But for the purposes of this appeal, I agree with Mr. Scott's able submissions that such evidence is not required to support our decision.

[91] Jordan Langworthy's positive identification of these three youths as being the same three individuals who robbed him two or three weeks earlier, as well as the items found during the course of the investigation which linked those youths to the scene of the crime provided ample evidence of their complicity and further served to enhance the reliability of both Mr. Langworthy's and Ms. MacLean's testimony. Obviously, the importance of this evidence was lost upon the trial judge when he said in ¶41 of his reasons that Ms. MacLean's identification of the three youths was "irrelevant". Furthermore, as noted earlier, he was obviously mistaken when he said in the same paragraph that the:

> …Crown has not argued that there is any evidence connecting Mr. Downey to the other three alleged to be involved on the evening of the shooting …

[92] The fact that the trial judge missed this "connection" is also revealed in ¶45 of his decision where he said:

> …Despite a thorough investigation the only evidence the police found, which potentially connected Mr. Downey to the shooting, was the gunshot residue on Mr. Downey's right hand. …

Respectfully, as I will now show, the judge appears to have forgotten the other direct and circumstantial evidence led by the Crown which tied the respondent to the other three intruders, and connected them all to the crime scene.

[93] Clearly, the Crown presented and relied upon important evidence tying these three youths to the respondent, including the fact that the respondent: Markel Jason Downey and Z are ____; they were arrested together at their home less than 90 minutes after the shooting, each with gunshot residue on their hands; the DNA of DB and ES were found on some articles recovered during the police K-9 tracking at the scene; and ES's fingerprint was found on the rear inside window of the red Honda Civic driven by the respondent and impounded at his home.

[94] Ashley MacLean's description of the handgun held by the man who shot her, matched the weapon found by the police K-9 unit and later testing confirmed that it, or a similar model, fired the bullets into the bodies of the victims in the

bedroom. So did Jordan Langworthy's account to the police. This was important evidence when considering the reliability of each of their positive identifications of the perpetrators. Yet it was overlooked by the trial judge.

[95] I am satisfied the trial judge erred by ignoring or failing to recognize the obvious relevance and significance of such evidence in both strengthening the reliability of Ms. MacLean's testimony and "connecting" the respondent to the crime.

[96] The trial judge also considered irrelevant evidence as it related to the reliability of Ashley MacLean's recognition of the respondent as the gunman.

[97] The trial judge contrasted Logan Starr's and Jordan Langworthy's inability to identify the gunman with Ashley MacLean's ability to do so. He added, among other things, that they had more time in which to observe the gunman, as compared to Ms. MacLean. With respect, this is irrelevant to Ms. MacLean's immediate recognition of the respondent because:

- The preponderance of evidence established that the lighting in the living room was very dim – therefore, any added opportunity to observe was diminished, and
- More importantly, neither Logan Starr nor Jordan Langworthy knew the respondent before this event.

[98] The examples I have given serve to illustrate how the judge's treatment of the evidence flawed his analysis in ultimately deciding to acquit the respondent.

(iii) The trial judge erred by subjecting the evidence to a piecemeal assessment, the effect of which was to impose an impossibly high burden of proof upon the Crown

[99] The durability of a structure undoubtedly depends upon the strength of its foundation, walls and roof. However, that does not mean that every nail, brick or length of rebar is subjected to a rigid level of quality control and discarded if it doesn't meet the highest standard of design and fabrication.

[100] So too with any criminal prosecution. Proof to the requisite criminal standard does not require that every piece of evidence is subjected to a standard of

proof beyond a reasonable doubt. On the contrary. What the trier of fact (whether judge or jury) is obliged to do is have regard to the whole body of evidence in its totality and decide whether the essential elements of the offence have been proven beyond a reasonable doubt. It is a serious error of law for the decision-maker to isolate every particular piece of evidence and examine it forensically through the lens of criminal proof beyond a reasonable doubt.

[101] The prohibition against "piecemealing" the evidence by the trier of fact is settled law, long established in a legion of cases. I will simply refer to three. In *R. v. Morin*, [1988] 2 S.C.R. 345, Sopinka, J. said at p. 359:

> The authorities reviewed above are clear that the jury is not to examine the evidence piecemeal by reference to the criminal standard. Otherwise, there is virtually no guidance in previous cases as to what legal rules, if any, apply to the process of weighing the evidence. Attempts to formulate such rules have been frowned upon. Thus, in *R. v. Van Beelen* (1973), 4 S.A.S.R. 353 (S.C. in banco), a case heavily relied on by the appellant, the full Court of South Australia held that in finding the facts the jury could not draw an inference of guilt from several facts whose existence was in doubt. The learned author of *Cross on Evidence* (6th ed. 1985), in referring to this case characterizes this as an esoteric question and concludes (at p. 146):
>
> > Whatever may be the proper direction in the circumstances of a particular case, it is to be hoped that questions such as those which have just been raised will never be allowed to become the basis of prescribed rules.
>
> [Underlining mine]

[102] In *R. v. B.(G.)*, [1990] 2 S.C.R. 57, Wilson, J. observed:

> I believe that *Morin* highlights the fact that the approach taken by the trial judge to the evidence must be correct in law so as to ensure that the final step in the process, the weighing of the evidence, is not flawed. In this case, even although the trial judge was sitting alone, he was wearing two "hats" at different stages. He was both the trier of law and had to direct himself as to the proper approach to the evidence and then, having done so, he became the trier of fact in weighing it.
>
> A review of the trial judge's decision in this case makes it clear that he failed to consider the evidence in its totality. This was the result of misdirection and brought the matter within the jurisdiction of the Court of Appeal.
>
> While Chorneyko Prov. Ct. J. did outline the evidence of both key Crown witnesses, he considered their evidence separately and failed to consider their

evidence as a whole. He first considered the evidence of the complainant in isolation and rejected it as unreliable. He then moved on to the evidence of the accomplice, stating that, having found the evidence of the complainant unreliable, all he had left was the evidence of C.Z. Further, he looked only for discrepancies as to details in the evidence presented and did not consider the corroborative aspects of the evidence and the numerous elements of the alleged offence which were testified to by both witnesses capable of substantiating each other's story. The trial judge also did not consider the corroborative aspects of the evidence relating to the complainant's broken glasses. There was evidence of a breakage at the time of the alleged assault and this evidence would have been capable of corroborating the child's testimony so as to enhance its reliability and should have been viewed together with the rest of the Crown's evidence. I do not believe that the trial judge considered the individual pieces of evidence "in the context of all of the evidence". Rather, the evidence was viewed "without the support of other evidence". According to Morin this amounts to serious misdirection.

[Underlining mine]

I find the words of the High Court of Australia in *Chamberlain v. The Queen* (1984), 58 A.L.J.R. 133, which was referred to in *Morin*, very much on point. Chief Justice Gibbs and Justice Mason stated at p. 139:

> We have no doubt that the position is correctly stated in the following passage in *R. v. Beble* [1979] Qd. R. 278 at 289, that "It is not the law that a jury should examine separately each item of evidence adduced by the prosecution, apply the onus of proof beyond reasonable doubt as to that evidence and reject it if they are not so satisfied." <u>At the end of the trial the jury must consider all the evidence, and in doing so they may find that one piece of evidence resolves their doubts as to another. For example, the jury, considering the evidence of one witness by itself, may doubt whether it is truthful, but other evidence may provide corroboration, and when the jury considers the evidence as a whole they may decide that the witness should be believed</u>. Again, the quality of evidence of identification may be poor, but other evidence may support its correctness; in such a case the jury should not be told to look at the evidence of each witness "separately in, so to speak, a hermetically sealed compartment"; they should consider the accumulation of the evidence . . . . [Emphasis in original.]

[103] In *R. v. H.(J.M.), supra*, Cromwell, J. said:

> (4) <u>*The Trial Judge's Failure to Consider All of the Evidence in Relation to the Ultimate Issue of Guilt or Innocence Is an Error of Law*</u>

> [31] This was Sopinka J.'s last category in *Morin* (pp. 295-96). The underlying legal principle is set out in another decision called *R. v. Morin*, [1988] 2 S.C.R. 345. The principle is that it is an error of law to subject individual pieces of evidence to the standard of proof beyond a reasonable doubt; the evidence must be looked at as a whole: see, e.g., *B. (G.)*, at pp. 75-77 and 79. However, Sopinka J. sounded an important warning about how this error may be identified. It is a misapplication of the *Morin* principle to apply it whenever a trial judge fails to deal with each piece of evidence or record each piece of evidence and his or her assessment of it. As noted in *Morin* (1992), at p. 296, "A trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in this respect." This was the basis of intervention relied on by the Court of Appeal, but as noted earlier, a fair reading of the trial judge's reasons does not support this finding of legal error.

[Underlining mine]

[104] I will now provide a few examples of how the trial judge came to "piecemeal" Ashley MacLean's evidence and overlook its relevance and significant probative value in evaluating the reliability of her testimony.

[105] As I have mentioned, the judge held that Ashley MacLean's immediate recognition of the respondent detracted from the reliability of her identification evidence.

[106] Generally, the ability to identify without hesitation enhances the reliability in identification cases. See for example, *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont.C.A.), at ¶18, ¶21; *R. v. Keenan* (1993), 22 B.C.A.C. 72, at ¶20; *R. v. Roach*, 2011 NSCA 95 at ¶40; *R. v. MacKinaw*, 2010 ABCA 359 at ¶9; *R. v. Coutu*, 2008 MBCA 141 at ¶87; *Berhe*, *supra*, at ¶11.

[107] In my opinion, the trial judge erred in principle when he gave this evidence the opposite effect. As well, the judge treated Ms. MacLean's evidence in isolation, and ignored the evidence of Messrs. Starr and Langworthy.

[108] First, Ms. MacLean's immediate recognition was explained. It was based on the amalgam of the evidence regarding her familiarity, the lighting and her opportunity to observe.

[109] Second, as I have already discussed, Ms. MacLean's inability to articulate distinct features should not have come as a surprise. Except for her description of his eyes reminding her of a pit bull, there was no evidence of anything distinctive about the respondent at all. Messrs. Langworthy and Starr both testified that the gunman was of average height and of average build and otherwise non-descript.

[110] Added to this are the facts that Mr. Langworthy said the masks or bandanas only covered the tip of the nose downwards, as Ms. MacLean had said and, Mr. Langworthy's having immediately recognized the three intruders as being the people who had robbed him earlier, coupled with his testimony that DB's mask did nothing to disguise his identity.

[111] All of these factors inform Ms. MacLean's ability to reliably recognize the respondent, immediately. His mask did nothing to conceal his identity. His voice was recognized by Ms. MacLean. She knew her assailant from the two years they had spent together in school, and as neighbours.

[112] The failure to consider the evidence of Messrs. Starr and Langworthy in this way deprived the trial judge of appreciating that Ms. MacLean's recognition of an otherwise non-descript person carried significant weight, because of her familiarity with him.

[113] Finally, the trial judge failed to consider the context of the dispute between Ashley MacLean and the respondent, which led to her quitting gym class in Grade 11. The dispute and her later reconciliation with the respondent were relevant to a number of issues:

- Ms. MacLean testified that the respondent became quite heated during their dispute – this may well have provided her with the ability to recognize his elevated voice in the bedroom, whereas the trial judge only considered their conversations in the school stairwell, on this point, and
- Their eventual reconciliation, by virtue of her friendship with his ____, Z, caused Ms. MacLean to consider the respondent as more of a friend, thereafter. This provides a qualitative context to her familiarity with him.

[114] In sum, the effect of the trial judge's assessment of the evidence was to silo Ms. MacLean's testimony and subject pieces of it to the overall Crown burden. This stripped the persuasive value of the whole of the Crown's case and constitutes an error in law.

[115] I have already provided examples of the trial judge's erroneous piecemealing of evidence in this case, any one of which could have had a material impact upon the acquittal, whether standing alone or in cumulation.

[116] To them I would add the judge's consideration of the gunshot residue. He concluded that the gunshot residue evidence was incapable of raising Ms. MacLean's identification evidence to the Crown's criminal burden. Indeed, he clearly subjected the gunshot residue evidence to piecemealing by considering all of the alternate potential sources of the particles. This had the effect of elevating the requirements of the source of the gunshot residue to the Crown's overall criminal burden of proof beyond a reasonable doubt. In my view, that approach also constitutes a serious error in law and had a material bearing on the acquittals.

[117] In conclusion, the judge's piecemealing of Ms. MacLean's evidence and the gunshot residue evidence materially affected the judge's evaluation of the reliability of Ms. MacLean's eyewitness recognition of "Baby Jason". Her ability to correctly identify the other three assailants was directly responsive to how well the bedroom was lit, and her opportunity to observe in these highly charged circumstances. Her ability to correctly identify all four, coupled with Jordan Langworthy's similar ability to name the three young men he knew, support her immediate recognition of Markel Jason Downey, and overcome the cautious scrutiny that must always be applied to identification evidence. Ms. MacLean's familiarity made her recognition reliable, and required no additional or more specific articulation.

[118] The judge's flawed analysis meant that the whole of the evidence was never fully considered.

Conclusion

[119] Respectfully, the trial judge erred by applying the wrong legal test to his analysis of the identification evidence. He ignored highly relevant evidence, and considered irrelevant evidence in his reasoning. He misconstrued the Crown's

position concerning significant corroborative evidence connecting the respondent to the shooting. He separated Ashley MacLean's evidence from the other evidence, and subjected hers to a criminal standard review instead of asking himself if he were left with a reasonable doubt about the respondent's guilt, based on the whole of the evidence.

[120] I am satisfied these serious errors materially affected the outcome. I would allow the appeal, set aside the verdicts, and order a new trial on Counts #1-19, 22 and 23 in the Indictment dated February 24, 2016.

Saunders, J.A.

Concurred in:

Farrar, J.A.

Bourgeois, J.A.