<div align="center">

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Marong*, 2025 NSCA 1

</div>

<div align="right">

Date: 20250108
Docket: CAC 528482
Registry: Halifax

</div>

Between:

<div align="center">

Modou Marong

</div>

<div align="right">

Appellant

</div>

<div align="center">

v.

His Majesty the King

</div>

<div align="right">

Respondent

</div>

Judge:	The Honourable Justice J. Edward (Ted) Scanlan
Appeal Heard:	November 26, 2024, in Halifax, Nova Scotia
Facts:	On June 14, 2022, an incident occurred at the main bus terminal in Dartmouth, Nova Scotia, where a black man approached another individual, challenged him to a fight, and subsequently threw a rock at him, causing serious injury. CCTV footage captured the event. The appellant was later arrested and charged with aggravated assault in connection with this incident (paras 4-5).
Procedural History:	Provincial Court, August 11, 2023: The appellant was convicted of aggravated assault based on recognition evidence provided by a police officer (para 7).
Parties Submissions:	Appellant: Argued that the trial judge misapplied the law related to recognition evidence by relying on

unreliable evidence, preferring the evidence of a police officer over her own observations, and inadequately addressing cross-racial identification issues (para 1).

Respondent: Contended that the appellant's argument was essentially an unreasonable verdict claim disguised as a legal error, and that the trial judge correctly applied the law (para 10).

Legal Issues: Did the trial judge err in her application of the law related to recognition evidence?

Was the trial judge's reliance on recognition evidence sufficient to establish the appellant's identity beyond a reasonable doubt?

Did the trial judge adequately address the risks associated with cross-racial identification?

Disposition: The appeal was dismissed.

Reasons: Per Scanlan J.A. (Wood C.J.N.S. and Derrick J.A. concurring):

The Court found that the trial judge correctly applied the law regarding recognition evidence, as outlined in *R. v. Downey*, and did not err in her reliance on the police officer's testimony. The officer's familiarity with the appellant, based on prior interactions, placed his recognition evidence at a mid-range or higher level of reliability. The trial judge was aware of the frailties of identification evidence and considered the issue of cross-racial identification. The trial judge's decision was supported by the evidence, and there was no palpable and overriding error in her findings of fact (paras 3, 11-16, 37).

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 40 paragraphs.

Date: 20250108
Docket: CAC 528482
Registry: Halifax

Between:

Modou Marong

Appellant

v.

His Majesty the King

Respondent

Judges:	Wood, C.J.N.S., Scanlan and Derrick, JJ.A.
Appeal Heard:	November 26, 2024, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Scanlan, J.A.; Wood, C.J.N.S. and Derrick, J.A. concurring
Counsel:	Lee Seshagiri and Drew Rogers, for the appellant Mark Scott, K.C., for the respondent

Reasons for judgment:

Introduction

[1] In this appeal the appellant argues the trial judge misapplied the law related to recognition evidence in three ways: first, by relying upon unreliable evidence; second, by preferring the evidence of Constable Campbell, who testified as to the identity of the person shown in photographs before the court, over the judge's own observations and conclusion as to who was shown in the photographs; third, the trial judge's treatment of cross-racial identification issues.

[2] The appellant relied substantially on the law as set forth in *R. v. Downey*, 2018 NSCA 33. That appeal involved four individuals breaking into a private dwelling to commit a robbery. One of the four perpetrators, Mr. Downey, had a gun and shot the three occupants, seriously wounding one of them. That victim had extensive interactions with Mr. Downey at school during the years prior to the break-in. She recognized him from both the small exposed part of his masked face, and from his voice. Saunders J.A., writing for the Court discussed the law related to recognition evidence, which is a subset of identification evidence. A witness' familiarity with an accused is a factor which renders that evidence more reliable than a witness identifying a stranger.

[3] Below I will discuss the application of *Downey*, and the cases referred to therein, in greater detail. For now, I say I am not convinced the trial judge made any errors in her application of the law and the appeal should be dismissed.

Summary of the facts

[4] On June 14, 2022, Chriszantio Davis was at the main bus terminal in Dartmouth, Nova Scotia. CCTV footage captured an incident on video showing a black man approach Mr. Davis and challenge him to a fight. Mr. Davis agreed. Both removed shoes and some clothing in anticipation of the brawl. The black man could be seen going into the brush. He came out with a rock in hand and threw it at Mr. Davis. The rock struck Mr. Davis in the head, rendering him unconscious. Mr. Davis sustained serious injury including a fractured skull and brain bleed.

[5] The appellant was arrested and charged in relation to the incident on November 29, 2022.

[6]   The video from the bus terminal cameras was entered as an exhibit at trial. In addition, still photographs extracted from the video were entered as exhibits. There were only two witness at the trial. First, a police officer through whom the various photographs and video were tendered. A second officer, Constable Campbell, testified as a recognition witness. He was referred to the still photographs and said he had viewed them prior to the arrest of the appellant. He said he recognized the appellant as the person in the photos. The Constable testified he had prior memorable encounters with the appellant. The victim did not testify as he was no longer in the country at the time of the trial. The appellant did not testify.

[7]   On August 11, 2023, Provincial Court Judge Bronwyn Duffy, in an unreported decision, accepted Constable Campbell's recognition evidence and found she was satisfied beyond a reasonable doubt the appellant had thrown the rock injuring the victim. She convicted the appellant of having committed the offence of aggravated assault contrary to s. 268(1) of the *Criminal Code*.

[8]   The appellant appeals the conviction, arguing the trial judge erred in her reliance on the recognition evidence to convict the appellant.

Standard of review

[9]   The appellant argues the trial judge erred both in her application of the law related to recognition evidence, and in downplaying the risks of cross-racial identification. The standard of review related to an error in law is correctness.

[10]   However, I agree with the respondent: what the court here is dealing with is an argument by the appellant which amounts to "[…] an unreasonable verdict masquerading as a purported error in law." The standard for this type of error is whether no trier of fact, properly instructed and acting judicially, could have come to the same conclusion. In other words, is the verdict unsupported by any reasonable view of the evidence such that a conviction should be precluded (*R. v. W.H.*, 2013 SCC 22 at paras. 2, 28) ?

Analysis

[11]   Counsel agree the only issue at trial was identity based on the still photographs extracted from the CCTV video. Constable Campbell had dealings with the appellant on two occasions prior to the incident captured on the CCTV. The Constable recalled those incidents because he arrested the appellant for violent

offences and he was very violent and vocal during the arrests. These arrests were on April 11, 2022 and June 4, 2022, just ten days before the incident at the bus terminal. Constable Campbell said the June 4 incident involved a foot chase. As the appellant tried to climb a fence to escape capture, Constable Campbell caught him and pulled him down. During this encounter Constable Campbell noticed the appellant had a cut above his lip.

[12]   Constable Campbell viewed the photographs from the bus terminal approximately five months after the rock throwing incident. He said the person in the photographs was known to him, and it was the appellant. It was this identification which led to the arrest and charge of the appellant. The appellant argues the approximately five-month interval renders Constable Campbell's evidence less reliable. That is a matter going to weight.

[13]   Constable Campbell's evidence as to identification is opinion evidence. Normally this subcategory of opinion evidence is not admissible. That is so because in most cases the trial judge can decide for themselves whether an accused before the court is the person in a photograph. Before evidence from the police officer in this case was admitted, the trial judge conducted a *Leaney voir dire* (*R. v. Leaney*, [1989] 2 S.C.R. 393). She concluded Constable Campbell's previous dealings with the appellant placed him in a better position than she was when identifying the appellant using the photos. The prior interactions elevated Constable Campbell's evidence to recognition evidence going to the issue of identity.

[14]   The record shows that throughout the trial the judge was alive to the frailties of identification evidence. The trial judge considered the issue of cross-racial identification. Defence counsel at trial argued that even though the court admitted Constable Campbell's recognition evidence, in the end it was not reliable and did not prove the identity of the accused beyond a reasonable doubt.

[15]   I agree that the evidence of Constable Campbell is properly classified as recognition evidence. Recognition evidence is but a subset of identification evidence. It is differentiated from the case of a stranger observing a crime and later pointing out a person in a police lineup. Recognition evidence draws upon the witness' familiarity with a person. The reliability of that identification may be enhanced based on the degree of familiarity. This is so whether the evidence relates to voice or appearance. As with any other evidence, a trial judge must consider all the circumstances affecting reliability. Absent a palpable and

overriding error, the trial judge's decision on the issue of reliability is entitled to a high degree of deference.

[16]   The trial judge found the recognition evidence of Constable Campbell to be reliable. She said Constable Campbell's familiarity with the appellant fell at the mid-range or higher in the Downey spectrum. That spectrum recognizes that identification by a total stranger can be dangerously unreliable. Reliability is enhanced with familiarity. A total stranger may well be credible but unreliable in their testimony identifying a person, but a long time friend or acquaintance has a familiarity that makes their identification more reliable. Witnesses fall someplace between total stranger and life long friend or acquaintance. The trial judge found Constable Campbell was not a stranger nor life long acquaintance. He was someplace in between. That familiarity, the trial judge found, made the Constable's evidence as to identity more reliable. She was satisfied the appellant was the person in the photographs. That was a finding of fact.

[17]   *Housen v. Nikolaisen*, 2002 SCC 33, discusses the standard of review when a finding of fact is appealed, at para. 10:

> The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd.,* 2000 S.C.R 12, at para. 42; *Ryan v. Victoria (City),* [1999] 1 S.C.R. 201, at para. 57. […]

[18]   In *Laframboise v. Millington*, 2019 NSCA 43, Saunders, J.A. (as he then was) elaborated on the meaning of "palpable and overriding error", at para. 14:

> […] On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. […]

[19]   The Ontario Court of Appeal in *R. v. Goran*, 2008 ONCA 195, commented on this standard in relation to identification evidence. At para. 20 it observed that: "[…] although identification is a matter of fact, appellate courts will subject such findings to closer scrutiny than is generally the case with findings of fact […]", given the primacy of the reliability considerations and the potential for injustice.

[20]   As I mentioned above, on two separate occasions Constable Campbell had extended interactions with the appellant, both not long before the rock throwing incident at the bus station. On April 11, 2022, he was involved in the arrest and processing of the appellant for violent offences. On June 4, 2022, just ten days before the incident at the bus terminal, he was involved in a foot chase and arrest of the appellant for a second violent offence. He said that as a result of these encounters he spent, in total, about three hours observing the appellant in the weeks prior to the rock throwing incident.

[21]   Constable Campbell's evidence was unequivocal: the person in the still photographs extracted from the CCTV was the appellant. There was a question on cross-examination about how long it took for the officer to conclude it was the appellant in the photo. His answer was somewhat flippant, to the effect that it took him somewhere between three seconds and three days. In the end the Constable admitted he simply could not remember how long it took for him to realize it was the appellant in the photo. Despite the apparent flippancy, the trial judge accepted that Constable Campbell recognized the appellant and, based on all the evidence, she was satisfied beyond a reasonable doubt as to the identity of the appellant.

[22]   There was an issue as to whether the still photographs Constable Campbell reviewed showed the cut above the lip, or if the mark was only a pixel remnant in the enlarged photo. Recall the officer testified the appellant had a cut above his lip only ten days before the photo. The officer referenced what he thought was the cut in the photo. The issue then became: was that a cut or a pixelation remnant in the photograph. The judge said she could not tell if it was "a cut or a birth mark, or something else, but it is certainly a visible mark." The officer said it was a cut, but that it didn't matter as it was not the cut that he was relying on to identify the accused — it was the appellant's face.

[23]   The Constable, when asked if there was anything distinctive about the appellant, said:

> No. I mean, looking at the picture, I can say it's him from those interactions, but there's no tattoo or anything of that nature that shows that.
>
> […]
>
> Well, I, I just want to be clear, it's not just the dot. That's something I saw, but the picture of him, or who I say is him, that's, that's how I'm identifying him. It's not based on this one dot. I just know that – I know that he had a cut, and it looks like that's the same cut in the picture, but that is not exactly how I'm identifying him. It's just based on the face. Yeah.

[24] Constable Campbell did not mention any distinguishing features he could reference in the photos. The appellant says, absent evidence as to idiosyncrasies, the recognition evidence is not enough to prove guilt. I am satisfied the trial judge did not err in rejecting that argument. Saunders J.A. in *Downey* refers to the analysis of Paciocco, J. (as he then was) in *R. v. Ambrose*, 2015 ONCJ 813 at para. 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 sighting. 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 description alone.

[25] The appellant says the trial judge erred in the application of *Downey*. *Downey*, he says, confirms recognition evidence is assessed on a spectrum and highlights the importance of the articulation of distinguishing features or idiosyncrasies, depending on the level of familiarity the witness has with the person being identified. In this case Constable Campbell did not identify any in the photographs. In *R. v. Berhe*, 2012 ONCA 716, Blair, J.A., said at para. 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 ultimately reliability of the evidence. There are many ordinary people who do not have any particular identifiable features of idiosyncrasies differentiating them from the normal crowd; people familiar with them may well be able to identify their photograph however. […]

[26] As noted above, Blair, J.A., said the issue of reliability was best left to the ultimate reliability stage in a trial. In *Downey* at para. 68, Saunders, J.A., specifically incorporated those comments related to idiosyncrasies into the ultimate

fact finding process saying: "[…] I accept them as equally pertinent when considering ultimate reliability […]."

[27]   While reference to distinguishing features may bolster the recognition evidence, ultimately it is for the trial judge to satisfy themselves as to reliability of the evidence. The trial judge said she would not be distracted by an unnecessary search for idiosyncrasies: "My focus will, instead, be on the evidence that is relevant to the reliability of Constable Campbell's testimony."

[28]   The trial judge had the video and photographs and the appellant was present in court, yet she declined to say it was the accused. She stated:

> **It looks like Mr. Marong**, but for me, as the trier of fact, to use it as the sole basis for identifying the accused would be folly, **as I am not devoid of reasonable doubt**.

> **(emphasis added)**

[29]   The trial judge did not have to resolve the issue of identity based only upon her own observation. The fact she thought the individual depicted in the photographs looked like the accused did not detract from her ultimate finding. This is because evidence in trials is often layered. Here, one layer was the trial judge's own observation. To her, as a stranger to the appellant, she thought the individual in the photographs looked like him. A second layer was the evidence of Constable Campbell, a person familiar with the appellant. The comments of the trial judge are an example of the operation of the standard of proof beyond a reasonable doubt. If there had been no other evidence, based on her observations alone the trial judge would have acquitted even though the photos looked like the appellant. However, that was not the end of the evidence. Constable Campbell's recognition evidence was layered upon the judge's observations and any reasonable doubt the trial judge had was removed.

[30]   The trial judge was alert to the difficulties with the pixelation depicted in the still photographs provided to Constable Campbell. As contemplated in *R. v. Nikolovski,* [1996] 3 S.C.R. 1197, [1996] S.C.J. No. 122 (Q.L.), she considered whether the photographs were of sufficient quality to assist Constable Campbell, and determined that:

> While there is some pixelation in the close up photos, 5 and 6, which is a deficiency, in reviewing the three clearest pictures, they are of sufficient quality to assist the witness in my view.

[31]   The trial judge was not able to discern whether the photographs showed a cut in the area where the officer said the appellant had a cut above his lip. She had access to the flash drive containing the CCTV video as well. She did not dismiss the mark on his face as simply being a pixel remnant. In the end it did not matter. The trial judge accepted the evidence of the officer who had spent a total of three hours with the appellant prior to the rock throwing incident. The last interaction was for about one and one-half hour, ten days prior to the incident. He said he was not relying on the cut, he recognized the face, and he was certain it was the appellant in the photographs.

[32]   The trial judge positioned Constable Campbell's familiarity with the appellant as at least mid-range or above in terms of closeness, recency and substance on the *Downey* continuum. The appellant argues some form of corroboration was required due to the judge's own doubt about the identity of the accused. The appellant's factum captures the essence of this argument at para. 8, where he says:

> Instead of heeding these concerns, and the cautions of judicial experience, the Judge deferred to the bare recognition evidence of a single sincere witness. She thereby misapplied the law and committed reversable error.

[33]   I disagree. This judge appropriately supplemented what she thought looked like the appellant in the photo and considered the balance of the evidence at trial, and only then was she convinced beyond a reasonable doubt. That is the layering to which I refer.

[34]   The appellant relies on a number of cases in which recognition evidence was considered. The facts in those cases were different than here. For example:

- *R. v. Bao,* 2019 ONCA 458: an officer saw a person for a few seconds as they sped past him at fifty kilometers per hour at a distance of fifteen feet. The officer could offer only a generic description.

- *R. v. Sparks*, 2022 NSPC 51: a police officer recognized a vehicle driven by a Black male and followed it, suspecting Mr. Sparks was in the vehicle. He eventually stopped the vehicle and asked Mr. Sparks his name. He had observed the accused for less than one hour over four years, and identified him from a moving vehicle. They were essentially strangers. The officer offered no identifying features, and the details of his limited interactions were remarkably vague.

- In *R. v. M.B.,* 2017 ONCA 653: where video quality was so poor the judge could not see what the witnesses were supposedly seeing in the videos.

- *R. v. Mathias*, 2018 ONSC 221: the evidence was inadmissible as surveillance was from a distance, fleeting and not close-up.

These were stranger identification cases and they do not assist the appellant.

[35]   As in *R. v Smith*, 2011 BCCA 362, the appellant here was known to Constable Campbell. That familiarity was enough to satisfy the trial judge as to the identity of the appellant as the offender. In *Smith*, the Court of Appeal found the arguments about cross-racial identification were largely speculative because of the witness's familiarity with the appellant. In this case, in addition to the familiarity, the witness had the benefit of photographs of sufficient quality, and he had time to review, so as to assist in the identification of the appellant. All of those factors added to the reliability of the officer's evidence.

[36]   As the respondent suggests in its factum, the trial judge homed in on the crux of the case, citing *Downey* as instructive on the law regarding recognition evidence verses stranger identification. The trial judge was aware of the frailties of eyewitness identification, citing *M.B.*

[37]   I am not satisfied the trial judge erred in any aspect of her decision. Instead, I am satisfied the trial judge correctly instructed herself on the law at every step in the proceeding. The decision is a model of clarity in its expression of the applicable law, and it provides a roadmap clearly outlining how she reached her conclusions. The record shows that, from the beginning to the end of the trial, she was aware of the distinction between identity and recognition evidence. She held the *Leaney voir dire* and, as noted above, was not satisfied beyond a reasonable doubt as to the identity of the appellant based on her own observations of the photographs, the video and the accused. She focused directly on the extent of Constable Campbell's familiarity with the accused. The trial judge accounted for the extent of that familiarity. The officer's evidence was clear and unequivocal. He knew the appellant from his two previous dynamic interactions. He was certain it was the appellant in the photographs and he was present in court. Of his evidence the judge said:

> In this case, after assessing each of these indices of reliability, I am compelled by the evidence of Constable Campbell. I am satisfied that Constable Campbell

> recognized [the appellant], and I am not left with a reasonable doubt about his identity based on this evidence.

[38]   Constable Campbell only viewed the photographs, not the video, but as noted in *M.B.* identification based on video (and I suggest photographs) is a more reliable form of identification than the situation where a person drives by the witness. This was noted by the trial judge as well.

[39]   The decision of the trial judge is amply supported by the evidence at trial. Her verdict is consistent with her findings of fact based on the evidence. The trial judge's findings of fact should not be disturbed absent a palpable overriding error. I find no such error. There is no error of law. There is no unreasonable verdict.

Disposition

[40]   The appeal should be dismissed.

<div align="center">Scanlan, J.A.</div>

Concurred in:

Wood, C.J.N.S

Derrick, J.A.