C.A.C. No. 112157

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Chipman and Roscoe, JJ.A.

Cite as: R. v. Shermetta, 1995 NSCA 86

BETWEEN:	)	
	)	
MICHAEL FREDERICK SHERMETTA	)	Appellant appeared
	)	in Person
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	Robert E. Lutes, Q.C.
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	April 4, 1995
	)	
	)	
	)	Judgment Delivered:
	)	May 11, 1995

THE COURT: The appeal is dismissed as per reasons for judgment of Roscoe, J.A.; Clarke, C.J.N.S. and Chipman, J.A., concurring.

ROSCOE, J.A.:

The appellant, Michael Frederick Shermetta, appeals from his convictions on three counts of attempted robbery contrary to Sections 344 and 463 of the **Criminal Code**. On November 15, 1994, following two days of trial before a judge and jury, he was found guilty of all counts and later sentenced to three years incarceration on each offence to run concurrently. Although he was represented by counsel at the trial, he represented himself on the appeal.

The evidence presented through the Crown witnesses was to the effect that late in the evening of Saturday, July 16, 1994 a man entered the McDonald's restaurant on Kempt Road in Halifax, and approached the order counter where Craig MacLaren, the manager, was removing a till from a cash register. Mr. MacLaren directed the man to the next register where they were serving people and went to the back of the restaurant. The man did as directed, moved along the counter in front of Keera Dore and said: "Give me the money. This is a robbery. Give me the money.", (the first count). Ms. Dore, who was new to the job, was "confused and shocked" and as a result could not open her till. Her trainer, Julie Macdonald came to her assistance. The demand for the money was repeated to Ms. Macdonald, (the second count), who indicated she had to get the keys, and then went to the back of the restaurant to advise the manager of the robbery in progress. At that point another employee, Derek Royal, observed the difficulty Ms. Dore was having with her till and asked her what was wrong. The robber then proceeded to Mr. Royal's position and told him to open his till "or I'll stab you.", (the third count). Mr. Royal said he observed a butter knife in the hand of the perpetrator. Mr. Royal shouted to the manager at which point the man left the restaurant. A "kitchen" or "butter" knife was later discovered in the playground area of the premises.

The employees who observed the robber gave separate descriptions to the police. Although there were differences between the four reports, the descriptions were generally that the perpetrator was a white male, in his 40's, who was of stocky build, had greying longish hair, a round face, a beard and was wearing a red jacket and baseball cap. All four

employees indicated that the man wore an open shirt and that he had a tattoo on his "stomach". Ms. Dore thought the tattoo contained numbers or letters, Mr. MacLaren and Mr. Royal described it as a fanned out deck of cards and Ms. Macdonald could not describe the pattern of the tattoo.

No progress was made in the investigation of the robbery attempt until the 31st of July when Constable Robert Pembroke happened to observe Mr. Shermetta and noticed a tattoo of a fanned deck of cards on his arm and another tattoo on his chest. He passed this information, that is the name and physical description of Mr. Shermetta, along to the officer investigating the attempted robbery, Constable Scott MacDonald.

Constable MacDonald procured a photograph of Mr. Shermetta and arranged for a photo lineu p consisting of twelve photographs. On August 26, 1994 Derek Royal picked the appellant as the perpetrator from the photographic lineup without reservation, as did Mr. MacLaren on August 27, 1994 and Ms. Dore on September 5, 1994. Ms. Macdonald was unable to positively choose the robber from the photographs. She chose three photographs, one of which was Mr. Shermetta. As a result of these identifications the charges were laid. Constable MacDonald testified that prior to showing the employees the lineup he told them "if they found the responsible party to point him out". He indicated that there were no markings on the lineup, each employee was alone when shown the photographs and each was asked not to discuss anything about the process with the other witnesses. He also testified that he did not make any comment respecting the choices they made.

Each of the four McDonald's employees identified Mr. Shermetta in court as the person who attempted the robberies.

The appellant presented the evidence of two witnesses, one, his parole officer and the other a City Social

Services worker who had contact with the appellant before and after the date of the offences. The parole officer saw him on July 11 and July 18, the Monday before and the Monday after the incident. He testified that Mr. Shermetta was clean shaven on both occasions. The other Defence witness testified that Mr. Shermetta did not, to her recollection, have a "full beard" when she saw him on July 14, 1994. On cross-examination she indicated that she would not have noticed if he had "a couple days of growth on his face."

Mr. Shermetta did not testify. The position of the Defence was that the Crown did not prove the identity of the robber beyond a reasonable doubt and that there were so many inconsistencies in the evidence of the eye witnesses that the witnesses may have been mistaken as to the identity of the offender.

In the notice of appeal, the appellant set out four grounds of appeal but in his written argument he listed eight different grounds of appeal, some with several sub-sections. During oral argument he abandoned two of the previously cited grounds. It is convenient, in order to address the various grounds of appeal to group them into three main categories of concern:

1. THE CONDUCT OF THE DEFENCE - NEW EVIDENCE
2. THE POLICE INVESTIGATION - THE PHOTO LINEUP
3. THE CHARGE TO THE JURY

1. <u>THE CONDUCT OF THE DEFENCE - NEW EVIDENCE</u>

The appellant contends that his trial counsel failed to give him an adequate defence. He claims that his counsel should have put forward evidence to prove that he did not have a tattoo of a deck of cards on his stomach and that if such evidence had been introduced, a reasonable doubt as to his guilt would have been raised. The appellant does not suggest

that he should have taken the stand, rather he says his lawyer should have employed one of three possible methods: had a photograph of his stomach introduced, had a person look at his stomach, then take the stand to describe what he saw or have the jury "view" his stomach. In support of his contention, the appellant requested that fresh evidence be introduced on the appeal. The panel agreed to look at his stomach, as requested, and reserved decision as to whether the evidence meets the requirements for fresh evidence. The appellant removed his shirt and displayed a tattoo consisting of the word "B E E R" in blue letters approximately one inch high, spread out over approximately ten to twelve inches of his protruding belly. He also pointed out a tattoo of fanned-out playing cards on the back of his hand and several other tattoos on his forearms.

The powers of a court of appeal on an application to receive fresh evidence are set forth in s. 683 of the **Criminal Code of Canada**, R.S.C. 1985, Chapter C-46 as follows:

> "683 (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,
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> (a) order the production of any writing, exhibit, or other thing connected with the proceedings;
>
> (b) order any witness who could have been a compellable witness at the trial, whether or not he was called at the trial,
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> (i) to attend and be examined before the court of appeal, or
>
> (ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose;
>
> (c) admit, as evidence, an examination that is taken under subparagraph (b)(ii);

(d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;"

The Supreme Court of Canada in **Palmer and Palmer v. The Queen** (1980), 50 C.C.C. (2d) 193 interpreted this section as follows at p. 204:

> "Parliament has given the Court of Appeal a broad discretion . . . The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and Courts of Appeal in various Provinces have pronounced upon them: see for example **R. v. Stewart** (1972), 8 C.C.C. (2d) 137 (B.C.C.A.); **R. v. Foster** (1978), 8 A.R. 1 (Alta. C.A.); **R. v. McDonald**, [1970] 3 C.C.C. 426, [1970] 2 O.R. 114, 9 C.R.N.S. 202 (Ont. C.A.); **R. v. Demeter** (1975), 25 C.C.C. (2d) 417, 10 O.R. (2d) 321 (Ont. C.A .) [affirmed 34 C.C.C. (2d) 137, 75 D.L.R. (3d) 251, [1978] 1 S.C.R. 538]. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
>
> (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see **McMartin v. The Queen**, [1965] 1 C.C.C. 142, 46 D.L.R. (2d) 372, [1964] S.C.R. 484;
>
> (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
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> (3) the evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."

In **R. v. Stolar** (1988), 40 C.C.C. (3d) 1 (S.C.C.) McIntyre J., in delivering the judgment of the Supreme Court of Canada stated at p. 10:

> "The procedure which should be followed when an application is made to the Court of Appeal for the admission of fresh evidence is that the motion should be heard and, if not dismissed, judgment should be reserved and the appeal heard. In this way, the Court of Appeal has the opportunity to consider the question of fresh evidence against the whole background of the case and all the other evidence in the case. It is then in a position where it can decide realistically whether the proffered evidence could reasonably have been expected to affect the result of the case. If, then, having heard the appeal, the court should be of the opinion that the evidence could not reasonably have affected the result, it would dismiss the application for the introduction of fresh evidence and proceed to a disposition of the appeal. On the other hand, if it should be of the view that the fresh evidence is of such nature and effect that, taken with the other evidence, it would be conclusive of the issues in the case, the Court of Appeal could dispose of the matter then and there. Where, however, the fresh evidence does not possess that decisive character which would allow an immediate disposition of the appeal but, nevertheless, has sufficient weight or probative force that if accepted by the trier of fact, when considered with the other evidence in the case, it might have altered the result at trial, the Court of Appeal should admit the proffered evidence and direct a new trial where the evidence could be heard and the issues determined by the trier of fact."

As indicated, this Court reserved judgment on the motion and heard the appeal. Applying the principles in **Palmer**, the evidence was obviously available at the time of the trial but not introduced. Although the evidence is probably relevant and capable of belief, it cannot, in my opinion, when considered with all the other evidence, be expected to have affected the result.

The evidence of all four of the eye witnesses was to the effect that the perpetrator had **a** tattoo on his stomach, the new evidence supports the identification of the appellant in this respect. The evidence of one of the witnesses was that the tattoo was of numbers or letters. The new evidence confirms that evidence. The evidence of the other two witnesses was that there was a tattoo of a deck of cards on the stomach of the robber, the new evidence indicates that there is a tattoo of a fanned deck of cards, but that it is on the back of the hand, not on the stomach. In other words, the new evidence

confirms the depiction but contradicts the evidence of its location given by those witnesses. Given that the new evidence is supportive in some respects of the identification of the appellant as the robber, the fact that it is contradictory in others, does not give the new evidence sufficient probative force so that taken with the other evidence that it might have affected the result if it had been introduced at the trial. In addition to the restaurant employees, Constable Pembroke testified that he thought the tattoo of a deck of cards was on the appellant's arm, so there was already considerable contradictory evidence before the jury on the question of the tattoo. The witnesses were each thoroughly cross-examined regarding their descriptions and recollections and the jury was warned of the frailties of eye witness testimony. Accordingly, I would dismiss the application for the introduction of the fresh evidence.

The appellant's contention that his trial counsel did not perform satisfactorily has no merit in my view. There is nothing on the record which indicates lack of competency of the Defence counsel. The appellant's position was put forth vigorously through the cross-examination of the Crown witnesses, the presentation of Defence witnesses and a thorough closing address that emphasized all the discrepancies and inconsistencies in the eye witness testimony, the possibility of the lineup identification being tainted by the police procedure or the witnesses discussing it among themselves and other weaknesses in the evidence against the appellant. In my view the appellant has not shown that there were any errors by his counsel that call for intervention by this Court.

2. <u>THE POLICE INVESTIGATION - THE LINEUP</u>

In the grounds of appeal dealing with this topic, the appellant contends that the photographic lineup was unfair and improper because too many of the photographs bore no resemblance to him, that the police officer told the witnesses that a photograph of the person who committed the crime was included in the lineup and after choosing a

photograph the witnesses were told that they picked the right person. In addition, the appellant submits that the trial judge should have warned the jury that the lineup identification was faulty.

Constable MacDonald testified that when he received the information from Constable Pembroke regarding Mr. Shermetta and the tattoo, he arranged for a photographic lineup to be prepared. He testified as follows:

> ". . . I went through books containing white males of the same general age group trying to keep similar features such as hair colour, hair style, length...another...One of the difficulties I had, being that the photograph that I could obtain of Mr. Shermetta, his eyes were closed. I had to take into account that I had to have some pictures of other people with their eyes closed and in various stages of the same so that they wouldn't trigger somebody to look at one in particular.
>
> **Q.** Once you compiled this photographic lineup, what did you do with it?
>
> **A.** I took the photo lineup...I took it to the witnesses to determine if they could identify Mr. Shermetta as the party."

The lineup contains twelve black and white photographs of white males. Six of the people depicted, including Mr. Shermetta, have their eyes either closed or downcast; five of them, including Mr. Shermetta have untidy, longish hair and all of them appear to be close in age. In my opinion, three of the photographs of men with their eyes closed do not remotely resemble the appellant because of either hair colour or the shape of face, but the other eight all have similar features, some remarkably alike. It should be noted that Ms. Macdonald picked three from the lineup, one of whom was Mr. Shermetta, the other two in my opinion are the two who most resemble him. It is also significant that the other three eye witnesses picked the same photograph without hesitation.

The basic rule in respect of photographic lineups is that the procedure be fair. See **R. v. Cormier** (1990), 95

N.S.R.(2d) 62 (N.S.C.A.). In order to ensure that the lineup is fair and that it adequately tests the ability of the witness to recognize the suspect, there must be several photographs and the suspect must not be markedly different from the others in the lineup in respect of age and physical appearance. See Ewaschuk, **Criminal Pleadings and Practice in Canada**, 2nd Edition, paragraph 16:7170 and the cases cited therein. In this case the lineup met the requirements of fairness in my view.

The appellant also challenges the procedure used by Constable MacDonald with the lineup and alleges that he told the witnesses that a photograph of the person who committed the robbery was included in the array and after they chose that they had picked correctly. If the officer in fact made either suggestion, I agree it would have constituted improper procedure. In **R. v. Smierciak** (1946), 87 C.C.C. 175, Laidlaw J.A. for the Ontario Court of Appeal said at page 177:

> ". . . If a witness has no previous knowledge of the accused person so as to make him familiar with that person's appearance, the greatest care ought to be used to ensure the absolute independence and freedom of judgment of the witness. His recognition ought to proceed without suggestion, assistance or bias created directly or indirectly. Conversely, if the means employed to obtain evidence of identification involve any acts which might reasonably prejudice the accused, the value of the evidence may be partially or wholly destroyed. Anything which tends to convey to a witness that a person is suspected by the authorities, or is charged with an offence, is obviously prejudicial and wrongful."

Constable MacDonald denied that he proceeded as suggested by the appellant. The evidence of Keera Dore on cross examination on this point is as follows:

> "**Q.** Okay. Did he indicate anything or say anything to you prior to looking at the lineup? Did he advise you that they had a suspect?
>
> **A.** Um...I really can't remember.
>
> **Q.** Okay. Is it possible that he said that to you?

A. Yeah.

Q. Okay. Did you ask him after you picked out this person that you picked out...did you ask him whether or not you made the right choice or anything like that?

A. Uh, huh. Yes.

Q. And what was his response?

A. He said, yes."

Julie Ann Macdonald testified on cross examination as follows:

"**Q.** Alright. Now when Mr. MacDonald showed you this lineup did he indicate to you that they had a suspect and that's why they were bringing the lineup to you?

A. I don't remember.

Q. Okay. Is it possible that he told you that?

A. Ah, yes.

Q. Alright. Did you have discussions with any of the other employees at the store about seeing the lineup?

A. No.

Q. Alright. They hadn't mentioned anything to you?

A. Ah...I was told not to mention it to anybody.

Q. Okay. Had they mentioned anything to you prior to...?

A. No.

Q. Okay. And after...now you said you chose three individuals.

A. Uh, huh.

Q. That's correct isn't it?

A. Uh, huh.

Q. So you weren't sure of the individual at the time when you were looking at that photo lineup.

A. No.

Q. Alright. Did the officer indicate to you that one of the choices you made was the right choice or anything like that?

A. He said he it was one of the three.

Q. Did he tell you which one?

A. I don't remember.

Q. Is it possible he told you?
A. It's possible."

Craig MacLaren's evidence on this point was:

"**Q.** Now when Constable MacDonald brought his photo lineup to your residence he indicated to you that there was a suspect they were looking at?

A. Yes.

Q. And he asked you to look at the photo and then to pick out an individual who you thought might be this suspect or person who committed this robbery?

A. Yes.

Q. Alright. And after you picked a person out did he indicate to you that you'd made the right choice? Did he say, "This is the guy."?

A. Yes."

And finally the evidence of Derek Royal on this point:

"**Q.** Okay. And at that time, the officer, did he indicate to you that he had a suspect that he was hoping you'd identify?

A. No, he didn't say anything, he just...well, he just came up and he said, pick a picture out of here if you find the person.

Q. Alright, now. You indicated that you picked somebody out at that time.

A. Yes.

Q. And did you tell the officer...did you ask the officer whether this was the right choice or whether this was a suspect or anything like that?

A. No, I just looked and I said, that's him right there.

Q. Okay and what did the officer say to you? Did he say anything to you?

A. He said, "Great. We'll get back to you." "

So there was conflicting evidence on whether the officer said anything to the witnesses before looking at the photographs and afterwards. Defence counsel in his closing argument ably stressed the fact that the witnesses may have been influenced by Constable MacDonald and that their in-court identification was less reliable because the officer told them they picked the right person. Crown counsel emphasized that the witnesses were not definite about this point and that the officer denied that any suggestions or comments following the choices were made. He also correctly pointed out that the questions on cross-examination set out above were suggestive of an answer, in other words leading questions and therefore

the answers were not deserving of much weight.

The trial judge as part of a lengthy special warning to the jury on the frailties of eye witness testimony charged them as follows:

> "Now in this case there is evidence that three of the witnesses positively identified Mr. Shermetta in a photo lineup and the other witness, Miss Macdonald, picked Mr. Shermetta out as one of three in the photo lineups. Now when you're looking at this type of identification you should consider whether anything which was done might have suggested to the witness that Mr. Shermetta was a suspect in the case. You should ask yourself the following questions - Did anyone show a photograph to [sic] Mr. Shermetta to the eye witness before he or she identified him in the photo lineup? There did not appear to be any evidence of that. Secondly, did anyone indicate the position of Mr. Shermetta in the photo lineup before the eye witnesses identified Mr. Shermetta? There does not appear to be any evidence before you of that. Three, look at the photograph of the photo lineup. Did Mr. Shermetta look conspicuously different from the other people in the lineup, and I say conspicuously different, because we have the evidence of the police officer, Constable MacDonald, indicates the matter in which the photo lineup should be prepared and it is very clear that a photo lineup should be prepared as reasonably as possible with people of the same age, race, ethnic origin, features, as far as possible.
>
> Generally, you must be satisfied that the procedure used in the photo lineup was fair to Mr. Shermetta. If you are not satisfied that the procedure was fair to him then you shouldn't attach much weight to the identification of that photo lineup. On the other hand, if you were satisfied that the procedure was fair to Mr. Shermetta you must decide how much weight to attach the photo lineup identification, bearing in mind what I told you about eye witness evidence in general."

The appellant has not, in my opinion, established that there was any error here either in the police procedure or in the charge to the jury on this point. There was a conflict in the evidence on the subject; it was clearly pu t to the jury for their decision. The trial judge gave a proper warning, advising the jury not to place much weight on the identification in the lineup if they found there was anything unfair about it. These grounds of appeal should therefore be

dismissed.

3. **THE CHARGE TO THE JURY**

The appellant makes seven separate complaints regarding the charge to the jury which must be addressed individually. However, the charge should initially be assessed in its totality bearing in mind the following guidance of Just ice Cory in **R. v. Cooper**, [1993] 1 S.C.R. 146 at page 163:

> ". . . It has been said before but it bears repeating that it would be difficult if not impossible to find a perfect charge. Directions to the jury need not, as a general rule, be endlessly dissected and subjected to minute scrutiny and criticism. Rather the charge must be read as a whole. The directions to the jury must, of course, set out the position of the Crown and defence, the legal issues involved and the evidence that may be applied in resolving the legal issues and ultimately in determining the guilt or innocence of the accused. At the end of the day, the question must be whether an appellate court is satisfied that the jurors would adequately understand the issues involved, the law relating to the charge the accused is facing, and the evidence they should consider in resolving the issues. "

In this case, the charge must also be evaluated in light of the fact that all the evidence was presented in less than a day and a half and there were no complex issues. There really was only one issue, that of identification.

When looking at the judge's charge to the jury as a whole it is clear that the trial judge directed the jury to focus on the issue of identity; in the second paragraph of the charge he said:

> "It is really a very simple case and the bottom line basically is identification. It may be that you will have very little difficulty coming to the conclusion that there was an attempted robbery here of the three individuals, but of course the important thing is was the attempt made by the accused, Mr. Shermetta?"

Additionally, it is clear that proper instructions were given on the presumption of innocence, the burden of proof and the meaning of reasonable doubt.

The appellant's first and fourth submissions can be dealt with together. It is submitted that the trial judge should have reviewed and enumerated for the jury all of the discrepancies in the descriptions given by the eye witnesses, for example that one witness said the robber was wearing long pants and another said he was wearing short pants, and that two said he had a full beard while another said he had a scruffy face. In addition, he says the trial judge gave the impression to the jury that differences in the descriptions were immaterial by giving the following instruction:

> "You must weigh the evidence of all of the witnesses you have heard and determine the credibility and truthfulness of those witnesses, for witnesses see and hear things differently. Discrepancies do not necessarily mean that the testimony should be discredited. Discrepancies in trivial matters may and usually are unimportant. You must determine if there are discrepancies in this matter and then look at the discrepancies and say, are they major or minor discrepancies? As counsel have indicated to you, quite fairly, in considering the evidence you may have to decide which witnesses you believe in whole, in part or not at all and what weight you should give to any particular piece of evidence."

This passage does not mean, as suggested by the appellant, that the opinion of the trial judge is that differences or contradictions in the evidence on identification are immaterial. On the contrary, the message is that there are discrepancies, it is up to the jury to determine if they are major or minor, and then determine the weight to give to any particular piece of evidence. In my opinion it was not necessary for the trial judge to review the evidence of the discrepancies in detail. They had been listed by Defence counsel and the trial judge made reference to the fact that there were differences and in addition gave a lengthy warning regarding the frailties of eye witness testimony, about which more will be said later. These grounds of appeal should be dismissed.

The second complaint about the jury charge is that the trial judge told the jury that he believed the witnesses in the following passage:

> "Now a witness may give some testimony which is true and then by reason of poor powers of observation or faulty recollection or poor memory, or in some cases from a desire to hide the truth, may give other testimony which is false. In my opinion, none of the witnesses attempted to hide the truth in this particular case. I think the witnesses were truthful and you may come to that same conclusion."

In my opinion, in the context of this instruction, the trial judge is merely saying that in his view none of the witnesses were deliberately trying to hide the truth. But in any event the trial judge is entitled to express an opinion on the evidence. In **R. Kitching and Adams** (1976), 32 C.C.C.(2d) 159 (leave to appeal to S.C.C. denied) Matas, J.A. for the Manitoba Court of Appeal expressed the principle as follows:(at page 166)

> "Objection was made to opinions which the learned trial Judge expressed in respect to aspects of the evidence. In my opinion, the learned trial Judge did not exceed his authority in making these comments. It was made quite clear to the jury that questions of fact were for them to decide. It is not the law in Canada that a trial Judge is prohibited from expressing his opinions where he makes it clear to the jury that the decision on the facts is for them: **R. v. Newell** (1942), 77 C.C.C 81, [1942] 1 D.L.R. 747, [1941] O.W.N. 465 (Ont.C.A.)."

In this case the trial judge did make it clear to the jury that they were the judges of the facts and that if he expressed any opinion they were not bound by it:

> "I'll be dealing with some of the evidence to attempt to assist you in coming to a proper conclusion. However, I'm not going to be dealing with a lot of the evidence because it's fresh in your minds. Counsel have indicated the evidence to you. I may express an opinion on the evidence, but you are not bound...and I am entitled to do so, however, but you are not bound to follow my opinion, nor my recollection of certain testimony and indeed you must not do so unless your own recollection is the same as the opinion or statement that I give. It doesn't follow that the evidence to which I refer either is the most important evidence. It is for you to say what evidence is the most important and weighty in this matter.

> As I said before, if in your opinion I state any evidence incorrectly or if either counsel has stated any evidence incorrectly, you must taken [sic] your own recollection. As the facts are for you to determine, so are inferences from the facts. You may draw inferences if they are founded upon the evidence and are the logical result of the evidence. You should not draw any inference against Mr. Shermetta unless it is the only reasonable inference open for you to draw from the proven facts. "

In my opinion it would have been clear to the jury from this instruction and the portions of the charge previously quoted, that it was their function to decide issues of credibility and the opinion expressed by the trial judge was of little consequence. I would dismiss this ground of appeal.

In his third and seventh grounds of appeal in respect of the charge, the appellant alleges that the trial judge erred by using his name when describing each of the elements of the offence, and that he therefore seemed to be saying that the Crown had proved its case, with no mention of the Defence theory at the relevant times. For example:

> "The second part of this ingredient is that the taking would be without . . . or the intended taking would be without colour of right. A person acts with colour of right when he or she has a legal right to take something or honestly believes that he or she has a legal right to take something. On the other hand, a person acts without colour of right if he or she takes something knowing that he or she does not have a legal right to take it. In this case, there was no evidence to suggest that Mr. Shermetta had a legal right to take the property that he may be attempting to take or that he believed that he had a legal right. **Therefore, you should have no trouble deciding that Mr. Shermetta acted without colour of right,** if in fact you find Mr. Shermetta was the individual who attempted the robbery. However, please remember that it is up to you to decide whether or not the Crown has proven this ingredient. You can only return a verdict of guilty if you are satisfied beyond a reasonable doubt that Mr. Shermetta intended to take the property fraudulently and without colour of right."
>
> (emphasis added)

The appellant argues that by using his name in this manner the jury may have had the impression that the

question of identity had already been decided, or that they should have no difficulty in finding him guilty. The balance of the sentence he objected to however, says: "if you find that Mr. Shermetta was the individual who attempted the robbery". In other words if they resolve the first issue of identification, and find that Mr. Shermetta was the person who entered McDonald's with the knife that night, then in that event and only in that event, they probably would not have trouble determining the colour of right element.

While I agree that generally it would be preferable where specific elements are not in issue, not to use the accused's name in explaining them, I think that in this case there were enough references to the fact that identity was the only issue and passages where the trial judge said "or whoever did this" for example, that there was no error in law in this respect. See for example the instruction on ownership where in one paragraph there are three such references:

> "The next sub-ingredient is that the property, or the money, was not owned by Mr. Shermetta **or the person who attempted to take it,** when he intended to take it. You should have very little difficulty with that. The money certainly was not owned by **the person who intended to take it**. I think the evidence is clear that the accused did not own the property when he intended to take it, **if in fact you find it was the accused who did the attempt**."
>
> (emphasis added)

The defence to the charges of attempted robbery had nothing to do with whether, for example the accused had a colour of right, so there was no Defence evidence to review when explaining the elements of the offences. The very last thing the trial judge put before the jury was the theory of the Defence:

> "The position of the defence is the Crown has failed to prove the identity of the robber in this case beyond a reasonable doubt. It is our contention that the evidence of the four eye witnesses to the robbery has not proven beyond a reasonable doubt that Mr. Shermetta was the perpetrator of the offence. The totality of the evidence is

> inconsistent with regard to identify and therefore shows that the eye witness es may be mistaken as to the identity of the offender."

Again, when the charge is read as a whole, it is abundantly clear that the main issue is identification. There was no question that robberies were attempted, the issue was who did it. It was also cle ar, in my opinion, that unless the jury was convinced beyond a reasonable doubt of the identity of Mr. Shermetta, that they did not have to consider the remaining ingredients of the offences. I would therefore dismiss these grounds of appeal.

The fifth and sixth grounds of appeal regarding the charge to the jury concern the police procedure in using the photo lineup and the whole question of the adequacy of the charge on the main issue of identification. The appellant submits that the trial judge should have indicated to the jury that the eye witnesses were not absolutely certain when they picked his photograph in the lineup and that he erred in his instruction on reasonable doubt as it applies to the issue of identification. As indicated above, the trial judge gave a very lengthy special warning to the jury on the question of eye witness testimony as follows:

> "Now I mentioned the bottom line in this particular case is basically identification and I'm going to give you a special warning now about the evidence of eye witnesses. Every once in awhile in our courts a person is convicted of an offence even though he or she may be innocent. When this does happen it is often because of a mistake made by one or more eye witnesses and it's easy to see how this can happen. An eye witness can be a very convincing witness when that witness honestly believes that the accused person is the one he or she saw committing the offence. In this case your decision will depend entirely on whether you find that the eye witnesses correctly identified Michael Shermetta as the person they saw committing the offenses charged.
>
> You must therefore understand that observation and memory are often unreliable when it comes to the identification of people. In other words, this is an area where people often make honest mistakes.

When you consider the evidence of the various eye witnesses and we have four in this case, you should use the following guidelines, paying particular attention to each eye witness's opportunity to observe the person he or she says is Mr. Shermetta.

First, how long was the eye witness looking at the person he or she saw? In some cases it was only a short time. In other cases the evidence would indicate a minute up to five minutes, whatever you believe.

Secondly, how far away was the eye witness?

Three, was there anything which might have obstructed the view of the eye witness?

Four, was there anything else happening at the same time which might have distracted the eye witness?

Five, what were the lighting conditions at the time?

Did the witnesses appear to have good eyesight?

Seven, did the eye witnesses appear to have a good memory?

Eight, how long was it between the time when the eye witness saw the event and the time when he or she identified the accused? Was it a matter of hours or was it several days or even months? That's something you must take into consideration.

Nine, was the eye witness able to give a good description of the person he or she saw? Has the eye witness made any significant change to that description and did other eye witnesses give a different description?

Ten, did the eye witness explain how he or she was able to identify Mr. Shermetta as the person he or she saw? Did he or she mention specific features about the person he or she saw which helped them make the identification?

Eleven, were other eye witnesses unable to identify Mr. Shermetta as the person they saw?

Twelve, was there any other evidence which appeared to support the identification by

the eye witnesses? Keep in mind that although identification by one witness can support that of another, even a number of honest witnesses can be mistaken. And in this particular case three witnesses identified Mr. Shermetta in a photo lineup. One witness identified Mr. Shermetta, who was one of three possible in the photo lineup and you must bear in mind that all four identified Mr. Shermetta in court to several degrees and certainty. And of course that, standing alone, of course has some difficulty because of course they had seen pictures of Mr. Shermetta before and you know Mr. Donahoe has given you a pretty good indication that you must be careful. But I say again, merely because they have identified him in court and nothing else that's a question of weight. If you accept the fact that they've identified him and they have good reason for identifying him then you must place weight on it. If you don't feel that then you place less weight on their testimony.

Thirteen, was Mr. Shermetta someone who was known to the eye witness before all this took place or was he or she a stranger? Well, I think here he was a stranger. If the eye witness knew Mr. Shermetta before you could probably attach more weight to the identification because certainly there would be other factors that the witness could take into consideration. Please bear in mind however that we sometimes make mistakes when we try and recognize people we know very well and I'm not going to get into that, but we've all made the mistake when we think we know someone and say hello to find out it was somebody else. It's rather embarrassing, but this is not the case here.

Fourteen, did the eye witness see a photograph of Mr. Shermetta before he or she made the identification? If the eye witness did see a photograph beforehand you should consider the possibility that he or she identified Mr. Shermetta from the memory of the photograph instead of memory of the person saw at the scene of the accident (sic). Now that would only be in regard to the identification here in court because there was no evidence that there was any photograph shown prior to the photo lineup per se. There were mug shots shown, but the evidence would indicate that there was no photograph of Mr. Shermetta among the mug shots.
But remember that witnesses may differ on minor points and there may be discrepancies between witnesses, but this again does not necessarily mean that their evidence is reliable in identifying the same person as the accused. It's for you to decide the weight, the major part of any inconsistencies.

Now there are several eye witnesses in this case - namely, Miss Dore, Miss Macdonald,

> Mr. MacLaren and Mr. Royal. In order to convict you do not have to be satisfied beyond a reasonable doubt that all of them correctly identified the accused. It is the totality of the evidence that must prove to you beyond a reasonable doubt that Mr. Shermetta is guilty of the offences charged. The totality of the evidence. The evidence as a whole."

In the next paragraph the trial judge provided instruction regarding the photo lineup which is quoted above in the section dealing with the police procedure. He then concluded the warning as follows:

> "All witnesses identified Mr. Shermetta in court. Miss Dore was positive. Miss Macdonald was positive, although she only identified one out of three in the photo lineup. Mr. MacLaren was fairly positive, as was Mr. Royal. Mr. Donahoe has of course indicated to you the frailties in identifying people in court and you've got to take that into consideration. Take a reasonable view as to what weight you have to give to the evidence of the various witnesses.
>
> Now as you can see, ladies and gentlemen, direct identification of another person is really more complicated than we might think it is. Usually we do not have to think about recognizing people we've seen before. We take it for granted that we can tell the difference between one person and another, but I caution you in a criminal case we can't afford to be casual about the identification of one person by another. I urge you to consider carefully what I have said to you about the evidence of eye witnesses because you cannot return a verdict of guilty based on the eye witness evidence alone unless you are satisfied beyond a reasonable doubt that the eye witnesses correctly identified Mr. Shermetta as the person who committed the offence. The totality of the evidence on the eye witnesses. However, if you are satisfied beyond a reasonable doubt that the guilt of Mr. Shermetta on the basis . . . excuse me, if you are satisfied beyond a reasonable doubt of the guilt of Mr. Shermetta on the basis of the visual identification, when considered together with the other evidence in this case, then you are bound to act upon it.
>
> Now there is very little evidence, no other evidence really in this case, other than the eye witnesses, so that's what you're basically bound to consider."

The instruction is substantially that which is recommended in **CRIMJI - Canadian Criminal Jury**

Instructions, Second Edition and is based on the guidelines listed by the Manitoba Court of Appeal in **R. v. Sophonow (No.2)** (1986), 25 C.C.C. (3d) 415 (leave to appeal refused, [1986] 1 S.C.R. xiii) at page 438:

> " The guidelines may be stated thus:
>
> (i) the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification;
>
> (ii) he should instruct them as to the reasons for the need for such a warning and make some reference to the possibility that a mistaken witness could be a convincing one and that a number of such witnesses could all be mistaken;
>
> (iii) he should point out that although identification by one witness can support that of another, even a number of honest witnesses can be mistaken;
>
> (iv) he should direct them to examine closely the circumstances in which the identification by each witness came to be made;
>
> (v) he should remind the jury of any specific weaknesses which had appeared in the identification evidence.
>
> These guidelines are adapted from those expressed by the English Court of Appeal (Criminal Division) in **R.v. Turnbull et al.** (1976), 63 Cr. App. R. 132, as adopted and amplified by Canadian courts in **R. v. Duhamel** (1980), 56 C.C.C (2d) 46, [1981] 1 W.W.R. 22, 24 A.R. 215, and **R. v. Atfield** (1983), 25 Alta. L.R. (2d) 97, 42 A.R. 294."

The guidelines as stated by Twaddle, J.A. in **Sophonow** have recently been adopted in **R. v. Fegstad** (1994), 27 C.R. (4th) 383 (B.C.C.A.) and **R. v. Requina**, unreported, May 27, 1994, Action No. C14103 (Ont.C.A.). In my view the trial judge here did exactly what was required in respect to a special warning on the frailties of eye witness testimony. These two grounds of appeal should likewise be dismissed.

In conclusion, I have carefully reviewed the charge to the jury and am satisfied that the trial judge

committed no error of law, and that the charge contains no misdirection or non-direction capable of affecting the verdict of the jury. I would dismiss the appeal.

Roscoe, J.A.

Concurred in:

Clarke, C.J.N.S.

Chipman, J.A.