PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Dorrington*, 2017 NSPC 40

Date: 2017-08-02
Docket: 3019282, 3019283
Registry: Pictou

Between:

Her Majesty the Queen

v.

Thomas Derrell Dorrington

VERDICT

Judge:	The Honourable Judge Del W. Atwood
Heard:	2017: 20 April, 2 August in Pictou, Nova Scotia
Charge:	Para. 249(2)(a), para. 249.1(2)(a) *Criminal Code*
Counsel:	Patrick Young for the Nova Scotia Public Prosecution Service Stephen Robertson, Nova Scotia Legal Aid, for Thomas Derrell Dorrington

By the Court:

Introduction

[1] This case is a whodunnit. The early morning of 19 July 2016, a motorist in a compact sedan led three police cars on a wild chase through the east side of New Glasgow. No one was hurt. The motorist got away. Thomas Derrell Dorrington was identified as the motorist by two of the officers involved in the pursuit, and was arrested some time later. In the result, Mr. Dorrington was charged with dangerous driving and evading police. The prosecution proceeded indictably. Mr. Dorrington elected to have his trial heard in this court and pleaded not guilty. The court heard from three police officers called by the prosecution; Mr. Dorrington elected not to call evidence.

[2] The evidence satisfies me beyond a reasonable doubt that the fleeing motorist drove dangerously, and was trying to evade police. However, the evidence does not satisfy me beyond a reasonable me that Mr. Dorrington was that motorist, and I find Mr. Dorrington not guilty. My reasons will focus on that latter point.

Evidence for the prosecution

[3] The prosecution called three witnesses: Csts. Fulton, Reid and Heighton. With the consent of defence, the prosecution tendered as Exhibit 1 a disk that contained three digital-video-recording files. These video recordings were made by dash cameras installed in the three police cruisers that were engaged in chasing the vehicle driven allegedly by Mr. Dorrington. The video channels included time, date, GPS and vehicle-velocity text-overlays. The videos were synchronized with each other; they were somewhat grainy and pixelated.

[4] Each recording included an audio channel that made audible during replay utterances made by police in their cruisers as well as received radiocommunication. Most of the chatter had to do with officers' whereabouts, pursuit plans and directions of pursuit; that much of what was said was not offered in proof of anything at all. However, there were points when two of the officers—Csts. Reid and Heighton—made extemporaneous statements regarding their recognition of the driver they were pursuing. While those out-of-court statements were presented to prove Mr. Dorrington was the driver of the car that the police were chasing—in that they circumstantially supported the officers' in-court identification of Mr. Dorrington—they constitute original evidence falling under the well established exception to the prohibition against reception of prior-

consistent statements, pertinent to out-of-court statements regarding identification: *R. v. Langille*, (1990) 59 C.C.C. (3d) 544 at 556 (Ont.C.A.); *R. v. Tat*, [1997] O.J. No. 3579 (C.A.) at paras. 35 *et seq*. *See* M. T. MacCrimmon, "Consistent Statements of a Witness" (1979) 17:2 Osgoode Hall L.J. 285 at 314-330 and D. F. Libling, "Evidence of Past Identification" (1977), Crim. L. Rev. 268.

[5] The first prosecution witness was Cst. Fulton of the New Glasgow Regional Police Service. Cst. Fulton testified that he was on routine mobile patrol early in the morning of 19 July 2016. At around 0210 hrs, he spotted a black Toyota Tercel sedan at the corner of George St. and Mountain Rd. There was no licence plate or temporary permit affixed to this vehicle. Cst. Fulton observed that the Tercel had an after-market paint job. The driver was the only occupant. The Tercel headed westward, and Cst. Fulton followed; the targeted vehicle turned onto Provost Street, bearing north toward a convenience store.

[6] Cst. Fulton decided to stop the Tercel as it was unlicensed.

[7] The officer activated his cruiser's emergency lights. The Tercel did not stop. The officer activated a siren. The Tercel continued onward. Cst. Fulton called for assistance. Two more police cruisers showed up to try to get the Tercel to stop. The driver of the Tercel led police on an18-minute chase through commercial and

residential streets of the east side of New Glasgow, trying clearly to evade capture. The driver blew through approximately twenty stop signs and two red lights, barely decelerating at any of them; he entered the wrong way on a one-way street. Cst. Fulton observed the that the Tercel did not go much over the posted 50-km-per-hour speed limit on side streets; however, once it hit East River Road, the Tercel sped up into the high 80's—more than 30 km-per-hour over the posted speed limit. The Tercel drove around two police motor vehicles that officers had posted perpendicular to the roadway as a barricade. This conduct falls well within the scope of dangerous driving: *R. v. Hecimovic* 2015 SCC 54, *aff'g*. 2014 BCCA 483.

[8] Cst. Fulton was not able to get a look at the driver of the Tercel.

[9] The prosecution called two other officers who had assisted Cst. Fulton: Cst. Kelly Reid and Cst. Rebecca Heighton; both officers identified Mr. Dorrington in court as the driver of the Tercel, and said they had known him prior to the morning of the chase. Cst. Heighton testified that she had been able to get a good look at Mr. Dorrington on two occasions during her pursuit. Cst. Reid said she had seen him clearly once.

[10] Each officer was shown the dash cam recording made in the officer's cruiser. Each officer verified the recording as an accurate representation of what

the officer observed during the chase. The officers were careful to point out to the court that their cameras were fixed statically and could record only what was directly in front of them. Furthermore, the officers pointed out that the video images were quite pixilated. The officers noted that their viewing range and resolution of observation were greater than the cameras'.

Eyewitness identification evidence

[11] An observer sees someone doing something. The thing done and the identity of the person who did it come to be of moment legally. There might not be much dispute about what happened: a bank got robbed, someone was struck a blow, a car was driven wildly. Everyone might agree on the "what", "when", "where" and "how"—the controversy is over the "who". The observer morphs into a forensic witness, and the key point becomes whether the witness is able to answer that remaining key question: "who?" Such is the gist of eyewitness identification. This case adds the element of digital technology

[12] Identification used to be—and still is, occasionally—considered to be a throwaway proof. At one time, it was believed it was enough to have the observer witness come into court and single out as the perpetrator the only person in court not part of the court party or in uniform. Although still encountered intermittently, dock identification has been recognized for many years as almost totally

unreliable, especially in cases of first-time dock identification: *R. v. Zurowski*, 2004 SCC 72, *rev'g* 2003 ABCA 315; *R. v. Hibbert*, 2002 SCC 39 at para. 50; *R v. Sykes* 2014 NSSC 320 at paras. 43-60; *see R. v. Martin* 2007 NSCA 121 at para. 18. Similarly problematic is out-of-court identification based on the old show-up policing practice of lugging a single suspect before a witness and asking, "Is this the guy?" It still happens. It should not. *See, e.g.*, *R. v. Canning*, [1986] S.C.J. No. 37, *rev'g* (1984), 65 N.S.R. (2d) 326 (C.A.); *R. v. Sutton*, [1970] 3 C.C.C. 152 (Ont. C.A.); *Proulx v. Quebec (Attorney General)* 2001 SCC 66; *Zurowski, supra*; *R. v. Dhillon* (2002), 166 C.C.C. (3d) 262 (Ont. C.A.); *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.); *R. v. Mezzo*, [1986] S.C.J. No. 40; *R. v. Biddle* (1993), 84 C.C.C. (3d) 430 (Ont. C.A.), *rev'd* on other grounds [1995] S.C.J. No. 22.

[13] But this is not a dock-identification or show-up case. Two officers testified they recognized Mr. Dorrington as the driver of the Tercel as they were familiar with him from earlier experiences.

Analysis

[14] First of all, I am cautious in my reliance upon cases dealing with the sufficiency of eyewitness-identification evidence. They are driven largely by the evidence or the records before those courts—all of which would be extraneous to

this trial. Accordingly, it would be erroneous legally for me to conclude that, because a certain array of eyewitness and circumstantial evidence in another case before another court was found to have constituted sufficient proof of identification, I ought to treat a similar—or even qualitatively superior—array as similarly probative in this case.

[15] Csts. Heighton and Reid professed in court a high level of confidence in their identification of Mr. Dorrington. However, as Arbour J. stated in *R. v. Hibbert*, 2002 SCC 39 at para. 52, there is a weak link between witness confidence and witness accuracy. Assessing credibility and accuracy based on the apparent confidence of a witness in recounting testimony is to give in to a genetic fallacy not amenable to objective verification. Rather than the self-confidence of a witness in giving testimony, it is the constitution of confirming evidence that matters more.

[16] That common-sense principle is applicable even in this case, when the identification evidence was offered by witnesses who claim to know Mr. Dorrington.

[17] Certainly, there is a qualitative difference between, on the one hand, identification of someone who is unknown to the observer, and, on the other hand, the recognition of someone whom the observer knows from past encounters.

[18] Nevertheless, I agree with the proposition advanced in *R. v. Olliffe*, 2015 ONCA 242 at paras. 39-40:

> 39 The level of familiarity between the accused and the witness may serve to enhance the reliability of the evidence. It must be remembered, however, that recognition evidence is merely a form of identification evidence. The same concerns apply and the same caution must be taken in considering its reliability as in dealing with any other identification evidence: *R. v. Spatola*, [1970] 3 O.R. 74 (C.A.), at p. 82; *R. v. Turnbull*, [1977] Q.B. 224 (Eng. C.A.), at pp. 228-229.
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> 40 In the context of jury trials, courts in this province have consistently ruled that the jury must be warned of the frailties of eyewitness identification even in cases of recognition evidence: *R. v. Curran*, 2004 CanLII 10434 (Ont. C.A.), at para. 26; *R. v. Miller* (1998), 131 C.C.C. (3d) 141 (Ont. C.A.), at pp. 150-151; *R. v. Brown* (2006), 215 C.C.C. (3d) 330 (Ont. C.A.), at para. 42.

[19] The court heard more than eyewitness evidence; the court observed three dash-cam recordings. Video-recorded evidence may be highly probative evidence. Cory J. explained the forensic significance of video recordings in *R. v. Nikolovski* [1996] S.C.J. No. 122, an armed-robbery case in which the victim was unable to identify his assailant, but the trial judge found that a CCTV recording of the offence captured the facial features of the perpetrator clearly enough that the judge was able to identify Nikolovski as the robber:

> 19 Thus the importance and usefulness of videotapes have been recognized. This is as it should be. The courts have long recognized the frailties of

identification evidence given by independent, honest and well-meaning eyewitnesses. This recognized frailty served to emphasize the essential need to cross-examine eyewitnesses. So many factors come into play with the human identification witness. As a minimum it must be determined whether the witness was physically in a position to see the accused and, if so, whether that witness had sound vision, good hearing, intelligence and the ability to communicate what was seen and heard. Did the witness have the ability to understand and recount what had been perceived? Did the witness have a sound memory? What was the effect of fear or excitement on the ability of the witness to perceive clearly and to later recount the events accurately? Did the witness have a bias or at least a biased perception of the event or the parties involved? This foreshortened list of the frailties of eyewitness identification may serve as a basis for considering the comparative strengths of videotape evidence.

20 It cannot be forgotten that a robbery can be a terrifyingly traumatic event for the victim and witnesses. Not every witness can have the fictional James Bond's cool and unflinching ability to act and observe in the face of flying bullets and flashing knives. Even Bond might have difficulty accurately describing his would be assassin. He certainly might earnestly desire his attacker's conviction and be biased in that direction.

21 The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.

22 So long as the videotape is of good quality and gives a clear picture of events and the perpetrator, it may provide the best evidence of the identity of the perpetrator. It is relevant and admissible evidence that can by itself be cogent and convincing evidence on the issue of identity. Indeed, it may be the only evidence available. For example, in the course of a robbery, every eyewitness may be killed yet the video camera will steadfastly continue to impassively record the robbery and the actions of the robbers. Should a trier of fact be denied the use of the videotape because there is no intermediary in the form of a human witness to make some identification of the accused? Such a conclusion would be contrary to common sense and a totally unacceptable result. It would deny the trier of fact the use of clear, accurate and convincing evidence readily available by modern technology. The powerful and probative record provided by the videotape should not be excluded when it can provide such valuable assistance in the search for truth. In the course of their deliberations, triers of fact will make their assessment of the weight that should be accorded the evidence of the videotape just as they assess the weight of the evidence given by viva voce testimony.

23 It is precisely because videotape evidence can present such very clear and convincing evidence of identification that triers of fact can use it as the sole basis

> for the identification of the accused before them as the perpetrator of the crime. It is clear that a trier of fact may, despite all the potential frailties, find an accused guilty beyond a reasonable doubt on the basis of the testimony of a single eyewitness. It follows that the same result may be reached with even greater certainty upon the basis of good quality video evidence. Surely, if a jury had only the videotape and the accused before them, they would be at liberty to find that the accused they see in the box was the person shown in the videotape at the scene of the crime committing the offence. If an appellate court, upon a review of the tape, is satisfied that it is of sufficient clarity and quality that it would be reasonable for the trier of fact to identify the accused as the person in the tape beyond any reasonable doubt then that decision should not be disturbed. *Similarly, a judge sitting alone can identify the accused as the person depicted in the videotape.* [Emphasis added]

[20] But if a trier is able to rely solely on a video recording in identifying an accused as the offender, does this mean that the video recording would operate to oust evidence of human observers? Or, put another way, does the proposition that a video recording may be the sole source of identification evidence in a trial mean that it must be the sole source? The answer, clearly, is "no". To suggest otherwise would be an association fallacy.

[21] *R. v. Rae,* 2013 ONCA 556 is a good case in point.

[22] Just as *Nikolovski, Rae* was an appeal from a robbery conviction. The trial judge had been presented with a video recording of the crime, as well as the eyewitness testimony of two witnesses who were well acquainted with Rae. The Court of Appeal held that the trial judge was entitled to rely on the strong identification evidence of the two witnesses, without supplementing it with his

own opinion based on his viewing of the video and comparison with the appellant's appearance in the courtroom.

[23] Clearly, it is important not to elevate the video camera to the status of an all-seeing Eye of Providence. Video surveillance might be quite ubiquitous, but we still depend a lot on our sense of sight. That goes for police work, too.

[24] Indeed, in this case, the video camera was not all seeing. This is because that, at the three points in time when the driver of the Tercel came into the video view plane, the graininess of the recording and the washing-out effect of vehicle headlighting rendered the driver unrecognizable.

[25] In evaluating the evidence presented by the police witnesses called by the prosecution, it is important that the court keep in mind the principle that witnesses are not presumed to tell the truth or to be accurate: *R. v. S.O.D.*, 2013 NSCA 101 at paras. 15-20; *and see R. v. E.C.M.*, 2013 NSPC 86 at para. 24 and *R. v. Pettipas*, 2016 NSPC 62 at para. 50. Furthermore, there is no witness classification or category that comes into court with an inherent degree of credibility or testimonial accuracy: *see R. v. Bonang*, 2016 NSPC 73 at para. 147; this includes police appearing as witnesses.

[26] Here are the issues as I see them with respect to the identification evidence offered by Csts. Reid and Heighton.

[27] First off, the officers made their observations at around 2 a.m. They testified that the weather was favourable; the officers' ability to make observations was assisted to some extent by static roadway lighting as well as vehicle-mounted headlights. However, it remains the fact that it was nighttime.

[28] This was a pursuit that was carried out through residential neighbourhoods and commercial areas. The officers were concerned with public safety and their own safety, which required that their attention be divided among a number of tasks. They were not focussed solely on the fleeing driver.

[29] I turn now Cst. Reid's evidence in particular. Cst. Reid testified that her recognition of Mr. Dorrington was based on her teaching classes at the local Y where Mr. Dorrington had completed a work term; however, the direct examination of Cst. Heighton left the record bereft of much detail about how much the two of them had encountered each other. How long ago was it? How frequently did Cst. Reid see Mr. Dorrington and of what duration was the contact? Under what circumstances did the contact occur? To state that one is acquainted with another is, in essence, a conclusion. What are the objective circumstances of

one person's contact with another that would allow a court to confirm that two people are acquaintances. Furthermore, of those with whom we are acquainted, we will know some better than others. The court was not presented with evidence describing how well Cst. Reid knew Mr. Dorrington. To employ the terminology in *Olliffe*, I do not know Cst. Reid's level of familiarity with Mr. Dorrington.

[30] Cst. Reid was not driving the police cruiser in which she was travelling. Yet, it is clear from the audio channel of the dash-cam recording that she was not concentrated entirely on the fleeing vehicle. Cst. Reid was also providing directions to the officer cadet who was the one at the wheel of the cruiser; and she was listening to radio traffic, monitoring the communication from the two other teams involved in the pursuit. On cross-examination, Cst. Reid described the operation as "high stress".

[31] From the 2:14:45 time marker to the 2:25:44 time marker of the dash-cam video in Cst. Reid's cruiser—which was the duration of Cst. Reid's pursuit—the officer had one opportunity only to catch a glimpse of the fleeing motorist: it was at the 2:15:40 time marker. It was then that the fleeing vehicle turned onto Marsh Street at the intersection with Albert Street. Cst. Reid had instructed the officer cadet who was driving the cruiser to block the intersection. The target vehicle approached the intersection, drew very close to the passenger side of the police

cruiser, and made a right-hand turn; this situated the driver's side of the target vehicle close to Cst. Reid's passenger side of the cruiser. This gave Cst. Reid a good vantage point to observe the fleeing driver; but the duration of that opportunity was brief—Cst. Reid conceded on cross-examination that it was only one to two seconds. The audio channel records Cst. Reid as describing the motorist in generic terms as a "Caucasian male".

[32] The chase continued apace.

[33] The target vehicle can then be seen on video heading back to Washington Street, running a red light on East River Road, heading in the direction of the old Y building and the John Brother MacDonald Stadium. Between the 2:20:30 and 2:21:50 time markers, the audio channel of Cst. Reid's dashcam picks up transmissions from Cst. Heighton. Cst. Reid states that she can see that Cst. Heighton has the target vehicle almost blocked on Frederick Street. Cst. Heighton can be heard stating that she has identified the motorist as "Dorrington", at which point Cst. Reid exclaims, "Darrell Dorrington . . . that's who I thought it was, too." Significantly, at the 2:21:50 time marker, Cst. Reid states, "I know who it is, I know who it is, why continue, we know who it is—call it off." This is about five minutes after Cst. Reid's utterance of seeing a "Caucasian male."

[34] It is comparatively easy for a witness giving testimony to time stamp an event or a transaction if the witness has access to, yes, a time-stamped image or other record which depicts that transaction. But what about pinpointing in time abstract, intangible or impalpable things such as sensations, feelings, perception, or recognition?

[35] At trial, Cst. Reid testified that she recognized Mr. Dorrington as the motorist at the time of the close call at the Marsh-Albert intersection. She testified that she was unable to recall Mr. Dorrington's name immediately, but it came to her once she heard Cst. Heighton mentioning the name of "Dorrington". I do not doubt Cst. Reid's testimonial credibility on this point. But I must ask whether her recollection is accurate when she pinpointed the time she recognized Mr. Dorrington? Back at the intersection, Cst. Reid uttered no words of recognition; rather, she described the motorist in the generic terms of "Caucasian male."

[36] At the 2:20:30-40 time marker, after hearing Cst. Heighton, Cst. Reid states, "That's who I thought it was." But only a minute later, she questions why the other officers are continuing the pursuit, as police had identified the fleeing driver.

[37] I will observe at once that it is clear that Cst. Reid is an officer with very good police-operations judgment. Car chases can expose the public to danger, and

it is appropriate that they be terminated once public-safety and investigative-integrity criteria have been addressed satisfactorily. In this case, police had no evidence implicating the fleeing motorist in anything other than driving an unlicensed vehicle; yes, flight from police attracted additional liability, but the key policing operation that morning was identifying the driver. Once the driver had been identified, the need to continue the pursuit was diminished substantially. An arrest could follow.

[38] But if Cst. Reid was accurate in her testimony that she had Mr. Dorrington nailed back at the Marsh-Albert intersection, why had she not urged the pursuit called off at that point? The officer understood the link between the pursuit and the need to identify the motorist. If she had recognized Mr. Dorrington back at the intersection, why did she not mention anything about calling off the chase until over five minutes later?

[39] Between the 2:24:12 and 2:24:20 time markers, Cst. Reid can be heard commenting on overhearing Cst. Heighton referring to the motorist as "Darnell [*sic*] Dorrington"; Cst. Reid states in response to hearing Cst. Heighton that "it's Derrell Dorrington . . . Darnell Dorrington is his father . . . he's dead." I will address this piece of evidence in my analysis of the testimony of Cst. Heighton.

[40] Cst. Heighton stated on direct examination that she has known Mr. Dorrington for ten years in her work as a police officer. The court was provided with no information as to the nature of that knowledge. Has she arrested Mr. Dorrington? Interviewed him? Performed criminal ident upon him? I acknowledge that the prosecution must tread carefully in eliciting this sort of information; however, in cases when identification is in issue and it is asserted that an officer might know an accused, it would seem to me that the probative value of the officer's historical dealings with that accused—even if that entail hearing about an accused's earlier bad conduct—would overcome any prejudicial effect.

[41] The dash-cam recording taken from Cst. Heighton's vehicle was of the same grainy quality as the others; the audio channel recorded a very high volume of mechanical noise, due to the fact that Cst. Heighton was driving a police van which seemed to have a lot of things inside it rattling about. Voices were pretty much inaudible.

[42] The video showed two close encounters between Cst. Heighton and the fleeing vehicle: one at the 2:20:25-27 time marker, which appeared to be at the intersection of Washington and McColl Streets: Cst. Heighton would have had a brief view of the left profile of the driver as the driver dodged the officer's

blocking manoeuvre; it was after this close call that Cst. Heighton can be heard in Cst. Reid's recording referring to the motorist as "Darnell Dorrington".

[43] Cst. Heighton's second brush with the driver was recorded at the 2:23:12 time marker, when Cst. Heighton would have had another view of the driver's left profile; this was next to what used to be Mel MacLean's at the old V Filling Station.

[44] Cst. Heighton did not offer an explanation in court why she had identified the driver as "Darnell Dorrington"; in fairness to the officer, I would observe that she was not questioned on that point.

[45] I do not consider the issue of the motorist's name to be irrelevant.

[46] The names we receive at birth have legal significance as our lives intersect with the state and with commerce.

[47] But a name is also an identifying memory aid, as we seek to situate people whom we know in place and in time.

[48] Cst. Reid heard Cst. Heighton name the suspect as "Darnell Dorrington"; Cst. Reid knew Darnell Dorrington to have been a real person, whom she believed to be deceased. Is there a Darnell Dorrington? Is he alive or dead?

[49] I do not share the concerns raised by defence counsel about Cst. Reid and Cst. Heighton having influenced each other in resolving the identification of the fleeing motorist. Police ought to collaborate in their work, and identifying a perpetrator of a crime is part of that. Evidence of that sort is admissible in court. Even if a discussion about identification might go beyond constituting original evidence, it would likely fall within the identification-evidence hearsay exception as in *R. v. Toten* (1993), 83 C.C.C. (3d) 5 at 27; and see Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *The Law of Evidence in Canada* 4th (Markham: LexisNexis, 2014) at para. 7.25.

[50] But what precisely was it that led Cst. Heighton to identify Darrell Dorrington in court as the person whom she named as Darnell Dorrington in the field? Did she sort that out with Cst. Reid? If so, how? I do not know the answer to those questions.

[51] There is even more uncertainty. Did anyone check to see whether Darrell Dorrington owns or had access to a vehicle similar to the one police were chasing? Was anything done to try to track down the vehicle later on? I recognize the difficulty in doing so, as the vehicle did not display a marker, but "difficult" does not mean "impossible"; according to Cst. Fulton, the Tercel had a distinguishing

feature—an after-market paint job. Finding the vehicle might have provided information on ownership and point-in-time control.

[52] Does Mr. Dorrington have a connection with any of the areas where the chase seemed to be centred? At the 2:22:10 time stamp of Cst. Fulton's dash-cam recording, one of the officers can be heard saying, "I think he's trying to make it to the trailer park." That would be Green's trailer park, and a good part of the driving seemed to take place in that area. Does Mr. Dorrington live in that area or does he have family there?

[53] Finally, was consideration given to showing Csts. Reid and Heighton Sophonow-compliant photo-pack arrays to try to ensure that the person they believed to have been the fleeing motorist was one and the same?

[54] Mr. Dorrington did not call evidence. The effect of that strategic choice was described by Sopinka J. in *R. v. LePage*, [1995] S.C.J. No. 15 at para. 29:

> Although I have concluded above that Pardu J. did not draw any adverse inference from the respondent's failure to offer an explanation for the presence of his fingerprints, I note that once the Crown had proved a prima facie case, the trial judge would be entitled to draw such an inference in any event. The following passage from *R. v. Johnson* (1993), 12 O.R. (3d) 340 (C.A.), at pp. 347-48, is on point:
>
> > No adverse inference can be drawn if there is no case to answer. A weak prosecution's case cannot be strengthened by the failure of the accused to testify. But there seems to come a time, where, in the words of Irving J.A. in *R. v. Jenkins* (1908), 14 C.C.C. 221 at p. 230, 14 B.C.R. 61 (C.A.),

> "circumstantial evidence having enveloped a man in a strong and cogent network of inculpatory facts, that man is bound to make some explanation or stand condemned". That point, it seems to me, can only be the point where the prosecution's evidence, standing alone, is such that it would support a conclusion of guilt beyond a reasonable doubt. Viewed that way, it would be better said that the absence of defence evidence, including the failure of the accused to testify, justifies the conclusion that no foundation for a reasonable doubt could be found on the evidence. It is not so much that the failure to testify justifies an inference of guilt; it is rather that it fails to provide any basis to conclude otherwise. When linked in that fashion to the strength of the Crown's case, the failure to testify is no different than the failure to call other defence evidence. . . . If the Crown's case cries out for an explanation, an accused must be prepared to accept the adverse consequences of his decision to remain silent: *R. v. Boss* (1988), 46 C.C.C. (3d) 523, 68 C.R. (3d) 123 (C.A.), at p. 542 C.C.C., p. 42 [*sic*] C.R. But the failure to testify cannot be used as simply one of the circumstances from which the guilt of the accused can be inferred: *R. v. Armstrong* (1989), 52 C.C.C. (2d) 190 . . . As Doherty J. pointed out in *R. v. Manchev*, an unreported judgment of the Ontario High Court, August 23, 1990, the accused's failure to testify is not an independent piece of evidence, to be placed on the evidentiary scale. It is rather a feature of the trial which may assist in deciding what inferences should be drawn from the evidence adduced.

[55] So very many doubts remain in my mind about the identity of the driver of the vehicle that fled police that there is ample foundation—based on the evidence and lack of evidence—for a reasonable doubt. Mr. Dorrington need not have testified.

[56] Reasonable doubt may arise from the evidence, or absence of evidence. My analysis of the evidence leaves me in a state of reasonable doubt whether Mr. Dorrington drove the Tercel that night and I find Mr. Dorrington not guilty.

[57] I am indebted to counsel for the thorough argument that they presented to the court.

JPC