

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Grantmyre*, 2021 NSPC 61

Date: 20211112

Docket: 8500229, 8500230, 8500231, 8500232

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Colton Grantmyre

Judge:	The Honourable Judge Theodore Tax,
Heard:	September 14, 2021 and September 15, 2021, in Dartmouth, Nova Scotia
Decision	November 12, 2021
Charge:	Sections 239, 88(1), 733.1(1)(a) x2 of the Criminal Code of Canada
Counsel:	Gayle Karding, for the Public Prosecution Service of Nova Scotia Allan MacDonald, for the Defence Counsel

By the Court:

[1] Mr. Colton Grantmyre faces charges of unlawfully attempting to murder D'Angelo Bundy, contrary to section 239 of the **Criminal Code** as well as unlawfully having in his possession a weapon or an imitation of a weapon, to wit a knife, for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to section 88(1) of the **Criminal Code**. He also faces two additional charges of having failed to comply with a term in a Probation Order issued on December 6, 2018, and a Probation Order issued on November 18, 2019, which required him to “keep the peace and be of good behaviour” contrary to section 733.1(1)(a) of the **Criminal Code**.

[2] The Information, which was sworn on March 29, 2021, alleged that those four offences had occurred on or about February 22, 2020, at or near Dartmouth, Nova Scotia. The Crown had proceeded by Indictment on all four charges. Mr. Grantmyre elected to have his trial in the Provincial Court.

[3] Trial evidence was heard on September 14 and 15, 2021. In addition to the issue of whether the Crown had established the offences of attempted murder and possession of a weapon for purpose dangerous to the public peace beyond a reasonable doubt, Defence Counsel had also made a **Charter** Application that there had been an infringement of Mr. Grantmyre’s section 7 **Charter** rights and that the Court should either order a stay of proceedings pursuant to section 24(1) of the **Charter** or the exclusion of evidence pursuant to section 24(2) of the **Charter**.

[4] At the conclusion of the trial evidence on September 15, 2021, the parties made their closing submissions in the trial and on the **Charter** application and the Court reserved its decision until today’s date.

Positions of the Parties:

[5] Defence Counsel submits, based upon comments made by the Supreme Court of Canada in **R. v. La**, [1997] 2 SCR 680, that the failure of the Halifax Regional Police to preserve additional video surveillance footage was due to unacceptable negligence and therefore constituted a breach of Mr. Grantmyre’s rights under section 7 of the **Charter**. The Crown has a duty to disclose relevant information in its possession, whether inculpatory or exculpatory and whether or not the Crown intends to rely on that information. It is the position of the defence

that the police did not take reasonable steps in the circumstances to preserve relevant evidence for disclosure.

[6] Furthermore, the screenshots or still images from the surveillance video which were made by the building manager of persons of interest in this trial were grainy and blurry photos. Those still images only depicted the most basic features of an unknown male assailant. Defence Counsel submits that the police were negligent in not obtaining the video and making high-quality still images themselves, when they knew that all potential witnesses, including the victim, were totally uncooperative with the police and no Halifax Regional Police officer was able to positively identify the assailant from the blurry photographs.

[7] Defence Counsel submits, based upon the comments of the Court in **R. v. Osman**, 2020 ONSC 1830, that the fact that the building manager obtained poor quality screenshot or still images from the video surveillance while it existed equates to the police being in “constructive possession” of that additional video evidence and that they failed to take the appropriate steps to preserve and protect as well as disclose clearly relevant evidence to the defence.

[8] It is the position of the defence that they have established, on a balance of probabilities, that the inexplicable negligence of the police has caused severe prejudice to the defence from the loss of that evidence which warrants a stay of proceedings in this case. Based upon the principles established in **R. v. Carosella**, [1997] 1SCR 80, Defence Counsel submits that Mr. Grantmyre does not have to establish that the failure to disclose constituted “actual prejudice in making full answer and defence”, rather the accused must show on a balance of probabilities that he lost “a realistic opportunity” or a “realistic possibility” to garner evidence or to make decisions as part of his right to a full answer and defence.

[9] In the alternative, Defence Counsel submits that if the proceedings are not stayed, then, the still images created from the video surveillance footage which was deleted by the program utilized to obtain those images, then those “grainy and blurry” images should be excluded from the evidence pursuant to section 24(2) of the **Charter**.

[10] The Crown Attorney submits that the police did not have a duty to seize the surveillance video of the apartment building from which the screenshot still images were obtained by the building manager. Even if the police had a general duty to do so, their actions or inactions were not negligent, nor did it have any impact on Mr. Grantmyre’s ability to make full answer and defence. In those circumstances, the

overwritten and deleted video surveillance never became the part of “fruit of the investigation” and therefore, there was no obligation of disclosure.

[11] The Crown Attorney notes that a similar argument for a stay of proceedings or exclusion of the evidence was made in the case of **R. v. Burns**, 2014 NSSC 436. In **Burns**, Justice Rosinski stated, at para. 122, that he was unaware of any reported decisions in which the police have been found to be “unacceptably negligent” in similar circumstances to the present case.

[12] Furthermore, the Crown Attorney relies upon **R. v. Boliver**, 2014 NSCA 99 at para. 32 where the Court stated that not every loss of relevant evidence will necessarily infringe an accused’s right to make full answer and defence. When evidence is lost or missing, the Crown has obligation to explain that loss and satisfy the trial judge that it was not due to “unacceptable negligence” or an abuse of process. Where the Crown has explained the loss, the onus shifts to the accused, who “must establish actual prejudice to his or her right to make full answer and defence.”

[13] It is the position of the Crown that the screenshot still images are sufficiently clear and accurate enough for someone familiar with Mr. Grantmyre to recognize him. As the Court of Appeal stated in **Boliver**, supra, at para. 33, the accused is not prejudiced by the loss of that additional surveillance video or the possibility of clearer, screenshot still images as it is just as likely to have made the Court even more sure that he was the assailant.

[14] The Crown Attorney submits that the **Charter** application should be dismissed, but even if the Court was to conclude that there was a breach of Mr. Grantmyre’s section 7 **Charter** right, this is not one of those “clearest of cases” where a stay of proceedings or the exclusion of the “still images” from the video surveillance would be an appropriate remedy under section 24 **Charter**.

[15] Defence Counsel and the Crown Attorney agree that the Court must address the **Charter** application before proceeding to determine whether the Crown has established all the essential elements of the attempted murder charge contrary to section 239 of the **Criminal Code** and possession of a weapon dangerous to the public peace charge contrary to section 88(1) of the **Criminal Code**.

[16] With respect to the trial issues, both counsel agree that, if the Court dismisses the section 7 **Charter** application made by Mr. Grantmyre, the key trial issues are whether the Crown has established, beyond reasonable doubt, that:

1. Mr. Colton Grantmyre was identified as the male assailant who thrust a knife at the neck of D'Angelo Bundy causing a severe gash, the loss of blood and necessitated several stitches to address that significant injury;
2. the actions of the assailant constituted the specific intent offence of the attempted murder of Mr. Bundy, or in the alternative, the incident involved a lesser included offence, such as an aggravated assault or an assault with a weapon.

[17] Defence Counsel submits that the Crown has not established the identity of the male assailant beyond reasonable doubt, nor did they establish any evidence of a specific intention for that male assailant to attempt to kill Mr. Bundy.

[18] It is the position of the Crown that the Court may conclude, based upon reasonable inferences from the circumstantial evidence, that specific intention from the assailant brandishing a knife with a relatively long blade during an argument with Mr. Bundy as they exited from the apartment building and then wielding of the knife in a violent manner causing a significant gash in a location of the vital anatomy of the victim. The Crown Attorney submits that the Court may conclude that there was a specific intention through the assailant's actions without the necessity for any contemporaneous or prior utterances to indicate an *animus* between the assailant and the victim.

Trial Evidence:

[19] Mr. Magid Latif stated that on February 22nd, 2020, around 2:00 AM, he was working for Casino Taxi as a driver and received a request made through their App to pick up "Rae" at 17 Highfield Park Dr. Mr. Latif stopped at the side of the apartment building near a walkway from the front entrance and he saw people come out of the building and start walking towards his cab. Although it was dark at about 2:00 AM, he said that there was lighting at the entrance to the building and there were some streetlights in the area as well.

[20] He recalled that a dark-skinned young lady, wearing blue jeans, average height with dark hair came out of the building, got in the backseat, and stated that she was waiting for another passenger to come. She had a cell phone in her hand, and she held it up, as if she was recording something as the two "guys" came out of the building. Mr. Latif felt that the female was waiting for one of those two men. One of the two men was dark in colour while the other was a white male who

initially had his back to him, but Mr. Latif could see that he was wearing a white jersey and white shorts. Both men appeared to be about the same build and of average height.

[21] Although Mr. Latif was not concentrating on the two men who were on the sidewalk, he felt that there was an argument between them. The male with the white jersey had his back to him and then he went towards the dark-skinned male who backed away from the other person. From those movements, he could tell that there was an argument going on between them.

[22] As he was watching, Mr. Latif said that, the white male pulled something out and made a slashing movement as he moved forward towards the other person. The female in the back of the cab screamed and jumped out of the cab. The dark-skinned male jumped off the stairs in front of the apartment building and ran off while the lady and the man with the white jersey ran off around the building. Mr. Latif believed that the male dressed in the white clothes had something like a knife in his hand as he saw a slashing movement go downward from above the shoulder to the area of the neck of the dark-skinned man. The white male had used his right hand when he made that slashing motion.

[23] At this point in Mr. Latif's testimony, the Crown Attorney played a video which was filed by consent which is the video surveillance images of the front step area of the apartment building located at 17 Highfield Park Dr. in Dartmouth, NS. The parties confirmed that the time stamp on the video was not accurate, however, they confirmed, as an agreed fact, that there was an 11-hour difference between the time stamp on the video and the real-time of the day. As a result of that agreed fact, the parties agree that the video surveillance in Exhibit 1 starts at 2:09:42 AM on February 22, 2020.

[24] As the video played, Mr. Latif pointed out where his car was parked on True North Street next to Highfield Park Drive and he pointed to the woman and two males coming out of the building, as he had previously stated. He acknowledged that he did not get a look at the face of the white male wearing the white jacket before he went into the blind spot of his rear-view mirror and left the area. Mr. Latif pointed out that he moved his cab forward a short distance and immediately called the police.

[25] The video showed the white male exiting the apartment building first followed by the female and then the dark-skinned man wearing a brown jacket. After the two males turned left as they exited from the building and walked along

the sidewalk, the white male stopped and then went back towards the black male wearing the brown jacket. The gestures made by the white male, without any sound being recorded, appeared to indicate that he was arguing with or in heated discussion with the black male as the white male approached the black male who moves back and away from the white male. After a few seconds, the video clearly shows the white male making a slashing motion with his right hand above the left shoulder on the side of his neck. Immediately after that slashing motion, the black male runs down the front steps of the building, while the white male goes down the path and around the building. Then, the cab is seen driving forward.

[26] On cross-examination, Mr. Latif estimated that the white male was of average build and about 5'8" or 5'9" in height. He believed, based upon the slashing motion made by the white male, that he had pulled a knife or something out of his pocket, but he confirmed that he never saw a knife in his hand. Mr. Latif also drew a diagram [Exhibit 1] of where his car was parked in relation to the front door of the apartment building located at 17 Highfield Park Drive.

[27] After the video was viewed by Mr. Latif, by consent, that video and a second short video were marked as Exhibit 2. The second video clip is from a camera which views the interior entry lobby of the apartment building, but there is a brief view of the two males outside the building on the front step starting at 2:11:55 AM [the agreed corrected time of the video]. The short video shows the white male in the white clothing going toward the black male in the brown jacket in front of the exterior entry door to the apartment building.

[28] Sgt. Terry Faulkner of the RCMP stated that a couple of days after this incident, he was asked to obtain a witness statement from D'Angelo Bundy by Det/Const. Sean Arsenault. He had also been informed that a tenant at the apartment might be able to provide a statement. On February 25th, 2020, around 1:40 PM, he went to Mr. Grant's apartment at 17 Highfield Park Dr. and when he got there, Mr. D'Angelo Bundy happened to be there. Mr. Bundy agreed to permit Sgt. Faulkner to take a photograph of the gash on his neck. The photograph was filed as Exhibit 3. Mr. Bundy advised Sgt. Faulkner that it took 14 stitches to close the wound on the left side of his neck.

[29] On cross-examination, Sgt. Faulkner confirmed that he had approached Mr. Bundy's mother to provide information which might identify the suspect viewed on the video, but she did not provide any information to the officer. The police officer also spoke with Mr. D'Angelo Bundy about the incident and it was made

very clear to him that he did not wish to provide any statement. Mr. Bundy also added that he would not provide a description of the suspect or his name. After Sgt. Faulkner spoke with Det/Const. Arsenault, he confirmed that no one was prepared to provide any details to assist the police with a positive identification of the person who slashed Mr. Bundy's neck.

[30] Const. Brad Taylor stated that he was on duty during the early morning hours of February 22nd, 2020, when he heard over the radio that there had been an incident with a knife on Highfield Park Drive. He immediately went to that area and was advised over the radio to be on the lookout for a white male wearing white shorts who might be with a black female as well as a black male wearing a brown jacket. As he arrived in front of 17 Highfield Park Dr., Const. Taylor observed a car which was about to leave the parking area in front of the building.

[31] He went over to the car and noted that one of the individuals in the car whom he had met on prior occasions was D'Angelo Bundy. Mr. Bundy was wearing a brown jacket with the black shirt, and he had a towel held against the left side of his neck. When asked if he was injured, Mr. Bundy pulled the towel away from his neck and Const. Taylor saw a 4 to 5 inch cut there.

[32] On cross-examination, Const. Taylor confirmed that he and Const. Clark had very limited details of what had transpired at 17 Highfield Park Dr. and that they were simply trying to locate people who matched the descriptions which had been provided over the radio. He agreed that when he first approached the red car in the parking lot, he did not know that Mr. Bundy was injured, but after making some other inquiries, he came back to the car and that is when he saw the 4-to-5-inch gash on his neck. Const. Taylor estimated that he met with Mr. Bundy sometime between 2 AM and 2:30 AM on February 22, 2020.

[33] Prior to the next witness testifying, the parties agreed to file Exhibit 4 by consent which is a Facebook, profile page of Colton Grantmyre, which had the date of February 28, 2020, on the page. The second page of the Exhibit states that Colton Grantmyre "updated his profile picture" on February 9, at 5:19 PM.

[34] Peggy Barnes, an employee of Westdale Properties, was the maintenance coordinator for the Highfield Park Drive apartment. She assisted the police in getting the surveillance video from 17 Highfield Park Dr. which had been filed previously as Exhibits in the trial. The police had contacted her to obtain some surveillance video of the entrance to the building, and she placed the short videos on a memory stick. The videos were provided to the police and Ms. Barnes also

made 4 still images from the surveillance video of the people involved in the incident just outside the 17 Highfield Park Drive apartment building. She sent those 4 still images to Det/Const. Arsenault, in an e-mail dated February 25, 2020, which were filed as Exhibit 5.

[35] Ms. Barnes explained that, once she had the surveillance video, she was able to stop the video at certain times and take a screenshot or still image at that time. She was also able to enlarge or zoom in on the image as she believed that the police would be interested in seeing the zoomed images of the faces of the people who were shown in the surveillance video outside of the building. The “zoomed in” still images made by Ms. Barnes were from the video surveillance of the white male, the black female, and the black male as they entered the building.

[36] Ms. Barnes confirmed that the timestamp when the white male and the black female both entered the building was at 13:47 hrs., on Friday, February 21, 2020. However, based upon the earlier agreed statement of fact related to the timestamp on the surveillance video being off by 11 hours, I find that the white male and the black female entered 17 Highfield Park Drive at about 12:47 AM on Saturday, February 22, 2020. The timestamp on the fourth image shows that the black male with the brown jacket entered the apartment building at 10:42 AM. However, based upon the agreed fact of an 11-hour differential to the actual time, I find that the black male, who was subsequently identified as Mr. D’Angelo Bundy arrived in the apartment building on Friday, February 21, 2020, around 9:42 PM.

[37] Ms. Barnes also reviewed the video of those three people exiting from the apartment building, and she agreed that, as they were walking away from the security video camera, it was difficult to get any images of their faces. The original surveillance video which the police had requested was in relation to the incident which occurred outside the building. Ms. Barnes also watched the video of the entrance to the building from earlier that evening and then captured images of the three people who matched the clothing and images of the three people who exited from the building just prior to the incident outside the building. Ms. Barnes confirmed that she did not know any of the three people shown in those images.

[38] On cross-examination, Ms. Barnes confirmed that their retention policy for surveillance video at Westdale Properties is generally about two weeks, but she did not know the specific time before the video surveillance was overwritten by more recent video images for the building located at 17 Highfield Park Drive. She gave the police the video images of the incident itself which occurred outside the

building, but she did not recall whether the police had asked for video images of the three people entering the building. She confirmed that she used a program on the video, which allows a person to stop the video and then zoom in on the image. However, she agreed that when the image was zoomed in to give more of a close-up look at the people, it did become a bit “grainy.”

[39] Det/Const. Sean Arsenault was the final Crown witness. He stated that he was off duty but returned to work on February 24, 2020, and was assigned to investigate the stabbing of Mr. Bundy by Sgt. Terry Faulkner. He reviewed the information from the patrol officers who were on the scene on February 22nd and called Westdale Properties to see if they had surveillance video for 17 Highfield Park Drive for the date and time in question. After hearing from Ms. Barnes, he obtained the video surveillance from her, and viewed the information on February 25, 2020.

[40] The surveillance video indicated three different camera angles for the entry of the building. One view was inside the building showing the entry area focused on the outside door, while the other two views were outside the building, one facing to the left showing a sidewalk to the street and the other providing a view straight ahead to the parking area in front of the building. In addition, on February 25, 2020, he sent an email with the four photographs provided by Ms. Barnes to all members of the Halifax Regional Police to see if any police officer could identify the people. Det/Const. Arsenault stated that, on February 26, 2020, only one officer said that he recognized Colton Grantmyre in those images.

[41] Det/Const. Arsenault confirmed that he did not ask Ms. Barnes for a video of the people entering the building, because he had the exterior video which clearly showed the incident itself. In his opinion, he “didn’t see the evidentiary value” of the video showing the people entering the building and he did not pursue it any further.

[42] On cross-examination, Det/Const. Arsenault confirmed that Ms. Barnes had the video copied to a disk when he met with her. Unfortunately, he was not able to view the video immediately because of a technical issue but he was able to view the video on February 25, 2020. After that, he sent an email with the still images of the three people entering the building made by Ms. Barnes to see if any police officer could identify the people. He agreed that some of the original images that he sent in his e-mail on February 25, 2020, were “blurry.”

[43] On February 26, 2020, Det/Const. Arsenault spoke with D'Angelo Bundy's stepmother and his father, who said that he would let his son know that the police wanted to talk to him. Det/Const. Arsenault added that he did receive a call from D'Angelo Bundy's father who advised him that his son did not wish to speak to the police and that they were not able to identify anyone on the video except D'Angelo Bundy.

[44] Det/Const. Arsenault confirmed that Sgt. Terry Faulkner had spoken with D'Angelo Bundy's mother and that she did not provide any information which might identify the assailant. He confirmed that Sgt. Faulkner had informed him that when he went to Mr. Grant's apartment at 17 Highfield Park Dr., D'Angelo Bundy happened to be there and had told his colleague that he would not provide any information to the police. Det/Const. Arsenault felt that it would be unlikely that the police would obtain any statements from anyone relating to the incident.

[45] Det/Const. Arsenault confirmed that he first met with Ms. Barnes on February 24, 2020, and after refreshing his memory by reviewing his report, he confirmed that he had viewed the videos with Ms. Barnes on February 25, 2020. At that time, she had also told him that she was not sure if any of the people in the video were tenants of the building. He also stated that he returned to Westdale Properties to see if any of their employees could identify the suspect. He did not recall how many people he spoke to but no one was able to identify the suspect. They did talk about the entrance video, but he did not remember asking for a copy of that video.

[46] Following that visit to Westdale Properties on February 25, 2020, Ms. Barnes sent him the four still images from the video and that he sent pictures out to "all sworn members" of the Halifax Regional Police. With respect to the one officer to who said that he could identify Mr. Grantmyre as the suspect, Det/Const. Arsenault could not recall whether that officer had stated that he was "100%" sure about the identification. The email from that other officer was received at 7:04 AM on February 26, 2020.

[47] Det/Const. Arsenault also stated that when he viewed the surveillance video, he noted the discrepancy between the reported time of the incident to the police and the time stamp, which was off by approximately 11 hours. As a result, he spoke with Mr. Yarick Trebnikov of Westdale Properties about the surveillance video and the time differential. He confirmed the actual time of the incident as well as the integrity of the video surveillance images.

[48] In concluding the cross-examination, Det/Const. Arsenault confirmed that he did not see the relevance of the video of the people entering the building at the time when he met with the employees of Westdale Properties. He confirmed that he had not made any additional efforts to obtain the video from which the additional still images were made by Ms. Barnes because his focus was on the video of the incident itself. However, based upon the fact that none of the principals or anybody else who might have had some information about the identity of the suspect were prepared to cooperate with the police, he stated, in hindsight, that additional video “now appears to be a concern.”

[49] In addition, certified copies of a Probation Order made on December 6, 2018 and on November 18, 2019 which required Mr. Grantmyre “to keep the peace and be of good behaviour” were filed as Exhibit 6 and 7 in the trial.

[50] The Crown also called three police witnesses with respect to Mr. Grantmyre turning himself in at the Halifax Regional Police headquarters in the presence of his lawyer. Those officers indicated that they had not provided any details with respect to these allegations to Mr. Grantmyre either before or during their meeting. In the end, the Crown did not introduce Mr. Grantmyre’s statement nor was there a common-law *voir dire* with respect to the voluntariness of that statement.

[51] By agreement, the Crown Attorney played one further short clip of video surveillance that showed the woman and the two men leaving the lobby of the apartment building and moments later the incident can be seen outside the entry door to the apartment building on the sidewalk.

[52] Following the playing of that short video, which was already recorded as part of the video surveillance Exhibit, the Crown Attorney closed her case.

[53] For the defence case, Mr. Grantmyre did not testify nor were any witnesses called by the defence, however, by agreement, Defence Counsel tendered Exhibit 8 which is a Facebook photo of Mr. Colton Grantmyre posted on his Facebook account on December 25, 2019. In particular, Defence Counsel pointed out the very significant tattoo on the left side of Mr. Grantmyre’s neck which is visible in the photograph. Defence Counsel indicated that the defence would not be tendering any other evidence.

[54] After entering that one exhibit, Defence Counsel closed his case and the Court confirmed that there would not be any rebuttal evidence.

[55] Prior to proceeding with their closing submissions, the Crown Attorney also submitted to the Court that pursuant to section 601(2) of the **Criminal Code** that the Court could amend the indictment to conform with the evidence presented during the trial. She indicated that it was not necessary for the Crown to make application for that amendment as the Court has the ability to amend the information on its own motion or make that finding, if the Court was not satisfied beyond a reasonable doubt with respect to the attempted murder charge.

[56] In the alternative, as there was some discussion as to whether the offence of aggravated assault is an included offence in the offence of attempted murder, the Crown Attorney also stated that Mr. Grantmyre could be found guilty of the included offence of aggravated assault, by amending the indictment to indicate the manner in which the attempted murder had been committed, that is, by cutting Mr. Bundy's neck with a knife and thereby wounding him.

[57] In those circumstances, by adding the manner in which the attempted murder was allegedly committed, then, the offence of "aggravated assault" could be considered as an included offence, if the court concluded that the attempted murder offence had not been established beyond a reasonable doubt. Defence Counsel did not object to that proposed amendment to include the specific manner in which the accused was alleged to have committed the offence of attempted murder contrary to section 239 of the **Criminal Code**.

Analysis:

[58] At the outset of my analysis, it is important to note the general principles which apply in all criminal trials. First, in a criminal trial the burden is on the Crown to prove the charge(s) against any accused beyond a reasonable doubt. Furthermore, Mr. Grantmyre is presumed to be innocent of the charges before the Court unless I conclude that the Crown has proved his guilt beyond a reasonable doubt. The effect of that presumption of innocence means that Mr. Grantmyre was not obligated to testify, present any evidence, or prove anything. The burden of proof is on the Crown, and it never shifts to Mr. Grantmyre.

[59] The presumption of innocence and the requisite standard of proof beyond a reasonable doubt are fundamental principles in our criminal law. The Supreme Court of Canada has established in cases such as **R. v. Lifchus**, [1997] 1 SCR 320 and **R. v. Starr**, [2000] 2 SCR 144 that "reasonable doubt" does not require the Crown to prove the allegations to an absolute certainty. However, the standard of

proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities.

[60] The Supreme Court of Canada has also pointed out in those decisions that a reasonable doubt is not based upon sympathy or prejudice, nor is it an imaginary or frivolous doubt. It is a doubt based upon reason and common sense which is logically connected to the evidence or the lack of evidence. Reasonable doubt may arise through the evidence presented by the Crown, if the Court determines that the evidence was vague, inconsistent, improbable, or lacking in cogency. Of course, reasonable doubt can also arise from testimony of an accused, or any other evidence tendered by the Defence from any other sources. In this case, the Defence did not call any witnesses, but they did tender one photograph as an Exhibit in the trial.

[61] While there is no doubt that the Crown is required to establish all of the essential elements of these offences beyond a reasonable doubt, as I previously indicated, the main issue in this case is whether the Crown has established, beyond a reasonable doubt, that Mr. Colton Grantmyre was identified as the assailant who attacked Mr. D'Angelo Bundy with the knife causing a significant gash on the left side of his neck necessitating 14 stitches to close that wound.

[62] I find that there can be no doubt whatsoever that the video evidence and photograph tendered by the Crown, clearly and conclusively established that the white male assailant slashed the neck of Mr. D'Angelo Bundy with a knife outside the front entry door of the apartment building located at 17 Highfield Park Drive in Dartmouth, Nova Scotia shortly after 2 AM on Saturday, February 22, 2020.

[63] As both counsel have indicated, the critical issue in this trial is whether the Crown has established, beyond a reasonable doubt, the identification of the assailant who attacked Mr. D'Angelo Bundy with a knife, which caused the significant gash on his neck. I find that the video evidence clearly established that a woman leaves the apartment building followed by the assailant at about 2:10 AM on Saturday, February 22, 2020. Moments later, the victim, Mr. D'Angelo Bundy exits from the front door of the apartment building and is a few steps behind the assailant. Then, I find that the video evidence clearly established that the assailant stops walking towards the waiting cab at the end of the walkway, turns and moves toward Mr. Bundy.

[64] I find that it is clear from the video evidence that, at this point, the assailant moves into relatively close quarters with Mr. Bundy, who is facing the assailant,

while the assailant is facing Mr. Bundy with his facial features being somewhat covered by the ball cap that he is wearing, and by the shadow created on his face from the limited lighting in the area. Although there is no sound attached to the video surveillance, I find that, by his gestures and moving into close quarters with Mr. Bundy to essentially be “in his face,” it is reasonable to infer that the assailant has commenced an argument with Mr. Bundy. Shortly after making those gestures indicative of an argument, I find that the assailant slashes Mr. Bundy’s neck with a knife held in his right hand.

[65] I find that the video evidence clearly established that the assailant who attacked Mr. Bundy was a white male dressed in the white track jacket with black shoulders wearing a hood and a blue ballcap, white shorts and black runners. Furthermore, I find that the video evidence established that, as the assailant slashes at Mr. Bundy’s neck with the knife, Mr. Bundy is moving back and away from the assailant.

[66] While I find that the video evidence clearly established the vicious nature of Mr. Bundy being attacked by an assailant wielding a knife, it is important to note that neither the female who entered the building and exited the apartment building at the same time as the assailant, nor Mr. Bundy were called as witnesses during the trial. In those circumstances, two individuals who were obviously present and had observed exactly what the assailant had done were not called as witnesses to describe what occurred that evening.

[67] Most importantly, the female who had walked out with the assailant and according to the cab driver, had apparently filmed the altercation between the white male assailant and Mr. Bundy on the sidewalk, was not called as a witness during the trial to identify the male assailant who wielded the knife in attacking Mr. Bundy. I find that it is reasonable to infer from the proximity in time when those three people left the building during the early morning hours of February 22, 2020, and the ensuing but brief verbal altercation which proceeded the knife attack, that those three people were well-known to each other.

[68] However, based upon the fact that the assailant, the female and Mr. Bundy all left the building at about 2:10 AM on Saturday, February 22, 2020, and almost immediately thereafter, the assailant confronts Mr. Bundy and appears to be in a heated argument with him, I find that it is also reasonable to infer from those proven facts that they had likely spent time together at a tenant’s apartment in the building.

[69] Notwithstanding those proven facts and reasonable inferences which may be drawn from them, the Crown Attorney acknowledged that Mr. Bundy did not cooperate with the investigation except to the extent of allowing a police officer to take photographs of his injury. The evidence in the trial did establish that the police approached other people who were in the apartment where Mr. Bundy and presumably, the assailant had been prior to the incident. However, as stated by police officers during the trial, none of the people who were in the apartment or for that matter anyone else who might have been able to identify the assailant, were willing to provide information to the police. As a result, during the trial, the Crown did not call any civilian witnesses in relation to the identity of the assailant.

[70] Based upon those circumstances and the fact that no one who was called as a witness during the trial could identify or provide recognition evidence of the assailant from the video played in court or the four blurry screenshot images made by the building an employee of Westdale Properties, Defence Counsel filed a motion that his client's section 7 **Charter** rights had been breached. Defence Counsel maintained that the four "grainy and blurry" screenshot images should be excluded because of the "unacceptable negligence" by the police not having made any efforts to secure the original surveillance video from which Ms. Barnes had used a "zoom" feature to enlarge the images of the assailant's face and in doing so, altered the images of the assailant. Ms. Barnes had made those images, based upon her comparison of the same clothes being worn by the assailant when he entered the building as well as when he left the building a few hours later during the attack of Mr. Bundy.

*Has the Defence established a section 7 **Charter** Breach and if so, whether a Remedy Should Be Ordered pursuant to section 24(1) or 24(2) **Charter**?*

[71] Defence Counsel seeks a **Charter** remedy of either a stay of proceedings pursuant to section 24(1) or in the alternative, the exclusion of the still images pursuant to section 24(2) of the **Charter**. He submits that, by not being able to review the entirety of the video surveillance essentially due to the "unacceptable negligence" of the police in not obtaining that video evidence, Mr. Grantmyre's ability to make full answer and defence to very serious charges was impacted.

[72] With respect to this **Charter** application, I agree entirely with the Crown Attorney that the police were not under a duty to seize the surveillance video from which the four still images or screenshots were made by the Westdale employee, Ms. Barnes. She had made "screenshots" or still images of the three key

individuals from the surveillance video and then used the “Zoom” feature on her computer to provide a closer view of their faces.

[73] However, it appears that when Ms. Barnes “zoomed in” to enlarge the view of the assailant’s face in the still image, the clarity of the still image was affected, which resulted in the image appearing to be blurry. Essentially what Ms. Barnes had done was to use the magnification features of the computer on a specific location. The defence contention that Ms. Barnes had “altered” the image might suggest that the alteration was done for an improper purpose, however it is clear from her evidence that she “zoomed in” on the facial features of the assailant to assist the police in identifying him.

[74] I agree with the Crown Attorney that the police were not under any duty to seize the video from which the still images prepared by Ms. Barnes were taken. Furthermore, even if the police were under some general duty to obtain every possible shred of evidence in relation to a crime, which is highly unlikely even in a perfect world, their actions or inaction in this case certainly did not amount to the threshold of “unacceptable negligence” resulting in the loss of relevant and material evidence that could underpin a claim of prejudice to an accused’s right to make full answer and defence.

[75] In **R. v. Boliver**, 2014 NSCA 99 at para. 32, the Nova Scotia Court of Appeal considered the impact of the loss of video evidence and cited with approval the comments of the Manitoba Court of Appeal in **R. v. Kociuk** (RJ), 2011 MBCA 85, aff’d 2012 SCC 15:

“32. The law with respect to a lost evidence motion is uncontroversial. Not every loss of relevant evidence will necessarily infringe on an accused’s right to make full answer and defence. As recognized by the Supreme Court of Canada in **La**, “owing to the frailties of human nature, evidence will occasionally be lost” (para. 20). When evidence is lost or missing, the Crown has to explain that loss and satisfy the trial judge that it was not due to unacceptable negligence or an abuse of process. Where the Crown has satisfactorily explained the loss, the onus shifts to the accused who, in order to be successful, “must establish actual prejudice to his or her right to make full answer and defence” (at para 25).”

[76] In this case, I find that the video itself never became “fruits of the investigation” nor did the police officer ever have constructive possession of the video surveillance of the assailant and the woman entering the apartment building at 17 Highfield Park Drive a few hours before the slashing incident. As a result, the key images with respect to the identification of the assailant are the still images of

that person as he entered the apartment building which were obtained by the police from Ms. Barnes. There is no doubt that those still images made by Ms. Barnes from the entry video, which was subsequently overwritten on a routine basis, are somewhat “grainy” and “blurry,” due to her “zooming in” on the face of the assailant as he entered the building.

[77] However, I find that, even though the clarity of those still images in Exhibit 5 were obviously affected by the enlargement of a “screenshot” from the video, I find that those “blurry” images as well as the video of the attack of Mr. Bundy by the assailant still provided enough detail of the facial and other features of the assailant that anyone familiar with him would have been able to recognize and identify the assailant.

[78] Furthermore, I agree with the Crown Attorney that it is mere speculation on the part of the defence that viewing the surveillance video of the assailant entering the building or other enlarged images of the assailant’s face made by the police which maintained the clarity of his facial features in the lobby would have caused the Court, after viewing the Facebook photographs of Mr. Grantmyre filed in evidence, to conclude that it was not Mr. Grantmyre.

[79] On the other hand, as the Nova Scotia Court of Appeal pointed out in **R. v. Boliver**, *supra*, at para. 33 in concluding that there was no “unacceptable negligence” by the police and that the trial judge had been satisfied that Mr. Boliver was not prejudiced by the loss of the video, as it may have been unhelpful to Mr. Boliver in any event. Likewise in this case, the only reason that the video of the assailant entering the apartment building and the clarity of the still images became relevant is because all potential civilian witnesses, including the victim himself, who I can reasonably infer from all of the surrounding circumstances knows the assailant, were not prepared to provide any information to the police to identify the white male assailant.

[80] In this case, it appears that the video surveillance from which Ms. Barnes created the screenshot “still” images was overwritten before the police realized that it might be important to have that video to create their own “still” images which might have had additional clarity. Having regard to all the relevant facts and circumstances, I find that the surveillance video of key people entering the apartment building was not lost by virtue of any “unacceptable negligence” by the police. Moreover, I find that the absence of the video evidence or clearer still images of the white male assailant and the woman entering the building did not

create any actual prejudice to Mr. Grantmyre's right to make full answer and defence or limit any potential lines of inquiry as part of that full answer and defence.

[81] As the Crown Attorney and Defence Counsel stated, the critical issue in this trial, given the video surveillance which clearly shows the vicious knife attack and the gash on Mr. Bundy's neck, is the identification of the assailant. The Crown has the onus to establish that essential element of the identification of the assailant beyond a reasonable doubt. Given the reluctance of any potential witnesses to provide a statement to the police to identify the assailant, the "blurry" and "grainy" still images and the surveillance video are, for all intents and purposes, the sole basis for the Crown to establish the identification of the assailant. In those circumstances, I cannot conclude that the defence has established any actual prejudice or any realistic possibility of prejudice to his right to make full answer and defence on the key issue of identification or recognition of the white male assailant.

[82] As the Supreme Court of Canada stated in **R. v. Bjelland**, 2009 SCC 38 at para. 20 (CanLII), before being entitled to a remedy under section 24(1), the party seeking such a remedy must establish a breach of his or her **Charter** rights. In order to make full answer and defence, the Crown must provide the accused with complete and timely disclosure. The Supreme Court of Canada agreed with the comments of Rosenberg JA in **R. v. Horan**, 2008 ONCA 589 (CanLII) at para. 26 with respect to the purpose underlying the Crown's obligation to disclose:

"Put simply, disclosure is a means to an end. Full prosecution disclosure is to ensure that the accused receives a fair trial, that the accused has an adequate opportunity to respond to the prosecution case and that, in the result, the verdict is a reliable one."

[83] The Supreme Court of Canada in **Bjelland**, *supra*, also noted at para. 21 that the Crown's failure to disclose does not, in and of itself, constitute a violation of section 7. Rather, an accused must generally show actual prejudice to [his or her] ability to make full answer and defence. The Court continued at para. 22 of **Bjelland**, *supra*, that an accused must receive a fair trial, and that the trial must be fair from both the perspective of the accused and of society more broadly.

[84] In **Bjelland**, *supra*, at para. 22, the Supreme Court of Canada agreed with the comments of McLachlin J. [as she then was] in **R. v. Harrer**, [1995] 3 SCR 562 at para. 45, that a fair trial must not be confused with the most advantageous trial

possible from the accused's point of view. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom obtained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving the basic procedural fairness for the accused.

[85] For the reasons set out above, I find that the Defence has not established, on a balance of probabilities any breach of Mr. Grantmyre's section 7 **Charter** rights. Having come to that conclusion, it is not necessary to determine whether any section 24(1) or section 24(2) **Charter** remedies should be granted. Moreover, in dismissing the Defence's **Charter** application for the reasons outlined above, I have concluded that there was no duty on the police to obtain the video of the assailant entering the building nor were they "unacceptably negligent" in not doing so. Moreover, I find that the absence of that video or clearer still images of the assailant's face did not prejudice Mr. Grantmyre's ability to make full answer and defence in all the circumstances of this case.

Has the Crown Established the Identity of the Assailant Beyond a Reasonable Doubt?

[86] During this trial, the only witness who was in the vicinity of a vicious attack with a knife by a white male assailant on a black male victim, who has been identified as Mr. D'Angelo Bundy, was Mr. Magid Latif. Shortly after 2 AM on Saturday, February 22, 2020, Mr. Latif had arrived at 17 Highfield Park Dr., in Dartmouth, Nova Scotia in his taxicab in response to a call to pick up "Rae" at that location. Shortly after arriving there, Mr. Latif described a black female coming out of the building, getting in his car with a white male wearing a white jacket and white shorts following behind her and behind him a black male wearing a brown jacket.

[87] Mr. Latif acknowledged that, after he parked his cab at the side of the building, he did not get a good view of the white male's face. He said that it was due to the fact that the white male who was walking towards his cab, had then turned around and appeared to be arguing with a black male in a brown jacket who was following him along the sidewalk. As a result, Mr. Latif's view was at some distance with some street lighting to assist his view, but his view was primarily of the white male's back. Then, he saw the white male move forward as the black male moved backward and away from the white male. A few moments later, the white male again moved towards the black male and then made a downward slashing motion, with an object in his right hand. Mr. Latif believed that the object

in his hand was a knife, and that it had gone across the left side of the black male's neck.

[88] After that attack by the white male, Mr. Latif stated that the white male and the black female went behind his parked taxicab and were out of his view. The only other information Mr. Latif was able to provide was that both men appeared to be about the same build and an average height which he described as being about 5'8" or 5'9" in height. Mr. Latif confirmed that he never got a close look at the white male assailant's face.

[89] During the trial, no other witness was called by the Crown to provide any information with respect to their "recognition" of the white male assailant seen in the short video of the vicious attack of Mr. Bundy with a knife, which caused the significant gash on the left side of his neck. However, Det/Const. Arsenault had forwarded the somewhat "blurry" and "grainy" zoomed in images made by Ms. Barnes of Westdale Properties to all Halifax Regional Police officers to see if anyone could recognize and identify the assailant. The images, which were enlarged by Ms. Barnes, provided a view of the white male assailant's face as he arrived at the apartment building at 17 Highfield Park Drive around 12:45 AM on Saturday, February 22, 2020, slightly over an hour before the attack of Mr. Bundy.

[90] Clearly, where a witness knows an accused person from being acquainted with him, her or them on some prior occasion or occasions, the reliability of the identification evidence is often enhanced by the testimony which is often referred to as "recognition evidence." Although none of the potential civilian witnesses were prepared to provide information which might have identified the assailant, Det/Const. Arsenault had sent out the email with the "zoomed in" images of the assailant to "all sworn officers" with the still images to see if any police officer recognized the assailant.

[91] Despite sending those images of the assailant's face out to "all sworn members" in an email, Det/Const. Arsenault only received one response to the effect that the officer was "pretty sure" that the unknown white male assailant was Mr. Colton Grantmyre. However, the Crown Attorney confirmed that the officer who had provided that one response to Det/Const. Arsenault was not available or able to be called as a witness during the trial. In those circumstances, the Court confirmed with the Crown Attorney that the information provided in court by Det/Const. Arsenault was hearsay evidence and as such inadmissible for the purpose of establishing the truth of the contents of that out-of-court statement.

[92] As both counsel have clearly stated, the identification of the assailant is the critical issue in this case and if established, the second critical issue is whether the assailant's vicious attack of Mr. Bundy conforms with the essential elements of the offence of attempted murder or, in the alternative, the offence of aggravated assault.

[93] In this case, the only eyewitness evidence provides, at best, a general description of the body build and height of the white male assailant as well as the clothing that he was wearing, viewed primarily from behind at some distance with the benefit of some streetlighting at about 2:10 AM. Although there was a brief altercation prior to the attack with a knife by the white male assailant, as the cab driver pointed out, when those critical events occurred, his view was of the assailant's back and immediately thereafter the assailant ran off into the cab driver's blind spot and out of his view.

[94] In those circumstances, there is no evidence before the Court that any witness knew the assailant before the attack and the only eyewitness to the attack had a relatively brief view of the assailant's face under less-than-ideal lighting conditions at some distance through the window of his cab, parked on the street. The cab driver was unable to provide any other more specific descriptions of the assailant who was wearing a hood and a blue ball cap. In those circumstances, the cab driver was not able to provide any evidence with respect to the assailant's hair colour, the length of his hair, any facial features or facial hair of the assailant, which could be compared to the Facebook profile pictures of Mr. Grantmyre which had been filed in evidence.

[95] In this case, with the limited eyewitness identification evidence before the Court, the Crown Attorney submits that the still images as well as the videotape of the attack of Mr. Bundy are of reasonably good quality and give a clear picture of the events and relatively clear images of the face of the perpetrator, which provides the best evidence to establish his identity. She submits that, if the Court is satisfied that the still images and the videotape of the attack of Mr. Bundy are deemed to be of sufficient clarity and quality, it would be reasonable for the trial judge to analyse the photographs of the assailant entering the building, the video of the attack and other exhibits filed in the trial to identify the accused as the person entering the building and the person seen on the videotape attacking Mr. Bundy in the video.

[96] Of course, the Crown Attorney also acknowledges that while the trial judge may review all relevant evidence himself or herself, the trial judge must be

satisfied, after his or her own review of all relevant evidence that the evidence tendered during the trial did establish the identity of the white male assailant beyond a reasonable doubt.

[97] As the Supreme Court of Canada pointed out in **R. v. Nikolovski**, [1996] 3 SCR 1197 at para. 22, a videotape 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. The Court concluded that “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.

[98] Having stated in **Nikolovski**, *supra*, that triers of fact are entitled to reach a conclusion as to identification based solely on videotape evidence, the Supreme Court of Canada cautioned at para. 30 that they must exercise care in doing so. The trier of fact should “consider carefully whether the video is of sufficient clarity and quality and shows the accused for a sufficient time to enable them to conclude that identification been proven beyond a reasonable doubt.” This is especially so if the videotape is the only evidence adduced as to identity. The Court went on to say at para. 31 that it is highly likely that the trier of fact would want to review the videotape on more than one occasion.

[99] First, with respect to the identification evidence presented during the trial, the only eyewitness evidence with respect the assailant was Mr. Latif’s estimate of body build and height as well as the video evidence and the still pictures made by Ms. Barnes. However, there was no evidence as to the actual height or body build of Mr. Grantmyre to make any comparisons, but I can certainly see from my own review of the still images as well as the video of the attack that the assailant and Mr. Bundy are relatively the same height, and both appear to be of average build. As a result, while the aspect of average build is certainly consistent with the evidence of Mr. Latif, there is no mark of reference in any of the Facebook images from which I could conclude that Mr. Grantmyre was about 5’8” or 5’9” tall as described by the taxicab driver.

[100] The facial features of Mr. Grantmyre as shown in Exhibit 4, the Facebook profile pictures of Colton Grantmyre updated on February 9, 2020, appear to have

a similar shape of face to the assailant as shown in 'image 3' of Exhibit 5. Likewise, from my comparison of the photographs, it does appear that the assailant and Mr. Grantmyre have the same beginnings of a moustache and what appears to be a closely trimmed beard along the chin area as evident in Ms. Barnes image 3 of Exhibit 5. However, as pointed out by Defence Counsel, there appears to be slight differences in the shape of the nose of the assailant as well as in the fullness and arc of the eyebrows, compared to those features of Mr. Grantmyre as the shown in Exhibit 4.

[101] In addition, there is no way of comparing the length or colour of hair between the Ms. Barnes' images and the video to the Facebook profile of Mr. Grantmyre which shows that shortly before the date of this incident, he had his dark hair cut relatively short on the top of his head. In Ms. Barnes' images of the assailant entering the building, he was wearing a blue baseball cap, which was under the white hood of his jacket. After my viewing of the video of the attack on Mr. Bundy on several occasions, I find that the assailant was not wearing the hood over the blue ballcap, but there were only a couple of very brief views of his face as he confronted Mr. Bundy on the sidewalk.

[102] From my review of the video and taking the shadows into account as well as the fact that the assailant was wearing the ball cap, it does appear that the assailant has dark hair at the specific moment in the videos, where there is a clear view of the knife in his right hand just before slashing the left side of Mr. Bundy's neck. However, since the assailant was wearing the ball cap, there is no way to determine the length of his hair, but it does appear that the colour of the assailant's hair is dark in colour, like the colour of Mr. Grantmyre's hair in the Facebook profile.

[103] Although there is no way of knowing how common the jacket worn by the assailant is, it does appear from my review of the images provided by Ms. Barnes in Exhibit 5 that Mr. Grantmyre is wearing a similar light, track jacket which is primarily white with black shoulder patches extending down almost to the elbow on the left and right arm. In the photographs of the assailant's jacket as he enters the apartment building, the front of the jacket appears to be primarily unzipped and slightly folded over to the right and left midway up the chest. As a result, it is not possible to determine from those photographs whether there is, what appears to be the Nike name with the Nike "swoosh" logo which appears to be on the white jacket with the black shoulder patches worn by Mr. Grantmyre in the Facebook profile picture [Exhibit 4].

[104] However, I should note that, from my review of the video evidence and by stopping the video at a moment when the assailant is confronting Mr. Bundy, as he is facing the surveillance camera, the left side of his white jacket is visible. In looking very closely at what appears to be his white track-type jacket, I find that the assailant's white jacket does appear have the word "Nike" written in black with a black Nike "swoosh" logo beneath it on the left upper chest area. In those circumstances, I find that, without knowing how common that white track-type Nike jacket is, Mr. Grantmyre's Facebook profile picture does appear to show him wearing what I believe to be the same white Nike track-type jacket.

[105] In addition, Defence Counsel filed Exhibit 8 which is a Facebook photograph of Mr. Grantmyre posted on December 25, 2019. In tendering that photograph, Defence Counsel drew the Court's attention to the fact that Mr. Grantmyre had a very significant and visible tattoo on the left side of the neck near his shoulder. He points out, quite accurately, that there are no still or video images that show that the assailant has that significant tattoo on his left side of his neck.

[106] From my review of the photographs provided by Ms. Barnes, when the assailant enters the apartment building, his white track jacket's hood was up and as a result, given the fact that jacket collar was also up, I find that the location of Mr. Grantmyre's tattoo is completely covered by the collar or is in a shadow and, as a result, if there was a tattoo on the neck of the assailant, it is not visible in those images of the assailant. In those circumstances, it is simply not possible to state that those images of the assailant and the photograph of Mr. Grantmyre are the same person based upon the presence or absence of the significant tattoo which was pointed out on the left side of Mr. Grantmyre's neck in the Facebook photo.

[107] Although the assailant is not wearing his hood up during the video of the confrontation and attack of Mr. Bundy, from my review of the video, there are only three relatively brief glimpses of the assailant's face. With respect to the presence or absence of that significant tattoo as an indication that the assailant may or may not be Mr. Grantmyre, the only fairly clear view when stopping the video is of the right side of the assailant's neck and, of course, the Facebook photograph established that Mr. Grantmyre's tattoo is on the other side of his neck. However, I did note that there is one very brief view of the left side of the assailant's neck, but that view was impacted by the lighting conditions on the sidewalk of the building, with the assailant's left side of his neck being entirely in shadows. As a result, I find that it is not possible to determine whether the assailant did or did not have a tattoo in that location.

[108] Coming back to the comments of the Supreme Court of Canada in **R. v. Nikolovski**, *supra*, although the judge himself or herself is entitled to reach a conclusion as to the identification of the accused based solely on videotape evidence, which would obviously include still photographs made from that video evidence, the Supreme Court of Canada has cautioned the trier of fact to exercise care in doing so. The caution includes considering whether the images in the video or still pictures are of “sufficient clarity and quality and show the accused for sufficient time” to enable the trier of fact to conclude that identification has been proven beyond a reasonable doubt.

[109] While I have found that the video evidence was of sufficient clarity and quality, the still images made by Ms. Barnes and “zoomed in” on the face of the assailant are somewhat “blurry” and “grainy” views, which did impact the clarity and quality of those pictures. The still images are certainly not as clear nor are they of the same quality as the video of the assailant’s attack of Mr. Bundy.

[110] The combination of the videos of the attack and the assailant entering the apartment building certainly provided a view of the assailant’s face, and his clothing which provided sufficient time and images to view the assailant, especially for someone familiar with Mr. Grantmyre who could have provided “recognition” evidence.

[111] However, having said that, I was able to make several significant comparisons between the facial shape, facial hair and what appears to be the same white Nike jacket and shorts which were worn by the assailant and appear to have been worn by Mr. Grantmyre within a few days of the incident. Having considered all of the quite significant similarities between the identifying features of the assailant and Mr. Grantmyre, they would certainly, in my opinion, support a conclusion that it is highly probable that the assailant who attacked D’Angelo Bundy on February 22, 2020, was Mr. Colton Grantmyre.

[112] However, the fact that I am only able to conclude that it is highly probable that the assailant who viciously attacked D’Angelo Bundy and slashed his neck with a knife was Mr. Colton Grantmyre, is the result of the few variables between the images of the assailant and Mr. Grantmyre that I have previously mentioned.

[113] In addition, my conclusion is also based upon the fact that there was a complete lack of any information about the incident itself from several possible civilian witnesses who might have provided identification evidence to conclude, beyond a reasonable doubt that the assailant was, in fact, Mr. Colton Grantmyre.

Finally, I also note that, despite the lead investigator sending images of the assailant to “all sworn members” of the Halifax Regional Police, no civilian or police witness was called during the trial, who could provide any admissible “recognition” evidence.

[114] In those circumstances, I find that I am left with a reasonable doubt as to issue of whether the Crown has established the identification of Mr. Colton Grantmyre as the assailant who viciously attacked Mr. D’Angelo Bundy with a knife. Although I have determined, from my detailed review of the photographs and video evidence, that it is highly probable that Mr. Colton Grantmyre was the assailant who attacked Mr. D’Angelo Bundy, for the reasons outlined above, I cannot conclude that the Crown has established that essential element of identification of the assailant, beyond a reasonable doubt.

[115] Having concluded that I am left in reasonable doubt with respect to the critical issue of whether Mr. Grantmyre was identified as the assailant who attacked D’Angelo Bundy on February 22, 2020, in Dartmouth, Nova Scotia, I find him not guilty of the offences which were alleged to have occurred at or near Dartmouth, Nova Scotia, on that date.

Theodore Tax, JPC