

**SUPREME COURT OF NOVA SCOTIA**

**Citation: *R. v. Roach*, 2010 NSSC 342**

**Date:** (20100909)

**Docket:** CRH 324726

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Barry Andrew Roach

**Judge:** The Honourable Justice Peter Bryson

**Heard:** August 10, 11, 12, 13, 16, 19, 2010 in Halifax

**Decision:** September 9, 2010 (**Orally**)

**Written Release:** September 17, 2010

**Counsel:** E. Jane Greig, for the Crown  
Kelly J. Serbu, for the Accused

**By the Court:**

**INTRODUCTION**

[1] Barry Andrew Roach faces a 9 count indictment related to what is colloquially called a “home invasion”. The Crown alleges that on July 22, 2009 Mr. Roach went to the home of Douglas Arthur Casey Senior, threatened him, unlawfully confined him, and assaulted him with a weapon, amongst other things.

[2] On July 22, 2009, RCMP officers responded to a 911 phone call placed by Kelly MacKenzie, the common law partner of Mr. Casey’s son. The officers went to the Casey home. Shortly thereafter, Ms. MacKenzie arrived and removed Mr. Casey from the premises. Neither she nor Mr. Casey cooperated with police at that time.

[3] On the following day, the RCMP received a call from Mr. Casey indicating that he wanted to meet with them. RCMP officers met Mr. Casey at his home and ultimately took a KGB statement at the Sackville RCMP Detachment. They then reattended at Mr. Casey’s home with him and seized a number of exhibits. Photographs were taken of Mr. Casey’s injuries and parts of his home. The exhibits were secured and ultimately transferred to safe keeping with the Halifax Regional Municipal police.

[4] On July 24, 2009 Mr. Casey attended at HRM police headquarters to view a photo lineup. He identified the accused, Barry Andrew Roach who was later arrested in Toronto where he was residing.

[5] On July 27, 2009 an RCMP forensic officer took photographs of Mr. Casey at his home. He also obtained the exhibits from the Halifax Police for the purpose of forensic examination which ultimately proved inconclusive. Both the photographs taken on July 23<sup>rd</sup> and 27<sup>th</sup> disclose burn marks on Mr. Casey’s upper left arm and shoulder, and left side of his back.

[6] The Defence called no evidence and argued that the Crown failed to prove its case beyond a reasonable doubt. Specifically, the Defence argues that there is no reliable or credible evidence linking Mr. Roach to the events at the Casey residence on July 22, 2009. Both the Crown and Defence agree that the identity of

Mr. Casey's assailant is the key issue. It goes without saying that the accused has no obligation to lead any evidence and is presumed innocent. The Crown must prove its case beyond a reasonable doubt.

## **FACTS**

### **July 22, 2009**

[7] The principal evidence against Mr. Roach comes from Mr. Casey Sr., a 66 year-old retired shipyard worker with modest formal education. Mr. Casey testified that around "dinner time" (ie. noon) on July 22, 2009 a car pulled up in front of his house and three people came to his front door. He recognized one of them as "Skinner", who had come to his home on other occasions to see his son, Doug Casey Jr. (he did not know if "Skinner" was a first or last name). He described Skinner as a "friend" of his son. Mr. Casey says Skinner was accompanied by a man he introduced as "Roach" (Mr. Casey also did not know whether "Roach" was a first or last name). I accept Mr. Casey's evidence that this is the name he was given. He later learned that the accused's first name was Barry - but he did not say that Skinner used the name Barry on July 22, 2009.

[8] I received Mr. Casey's evidence that his assailant was introduced to him by Skinner as Roach, not for the truth of that statement, but as evidence that the statement had been made. Based on evidence from Mr. Casey and the police, it is clear that Mr. Casey passed on the name "Roach" to police who used it to assemble a photo lineup.

[9] An unidentified woman accompanied Skinner and the man introduced as Roach. She played no role in the events that unfolded. Mr. Casey let the three visitors in and invited them to help themselves to a drink. He sat in his livingroom and was joined by the other three. He believes he said something to Roach who replied "I don't want to know you or know anything about you". He says that Roach offered him a bottle of whiskey and told him to drink it because "you are going to need it". Mr. Casey testified that Roach pulled up a chair very close to him, looked him in the face and told him what he was going to do to him. Mr. Casey said that Roach told him how he was going to "torture me" and how he (Roach) enjoyed it; that this was "his thing". He said Roach expressed the hope that he (Casey) didn't know anything, so he had reason to torture him more.

Roach threatened to heat up a steak knife and “gut him”; that he would enjoy that. Mr. Casey says that Roach had him go to the kitchen at least three times where Roach heated a steak knife and two spoons on a large burner on the stove. On each visit to the kitchen, Roach rubbed Mr. Casey with the heated knife or spoons, obliterating in part a tattoo on Mr. Casey’s upper left arm and leaving other burn scars on his left arm and back. Mr. Casey says that Roach threatened to tie him up. At one point when he was moving toward another room Roach said “where do you think you are going” and “now get over here”. Mr. Casey testified that “he had no legs and couldn’t run”. He said that Roach was always “by him”. He clearly felt that he could not leave. Roach taunted Mr. Casey with phrases such as “anticipation is the nice part”, referring to a heated spoon.

[10] Mr. Casey said that Skinner went into the bedroom that was habitually used by his son. He could hear noises coming from the bedroom. He thought that they were the sounds of a search. Skinner came back from the bedroom, and confronted Mr. Casey with some baggies and a pill bottle. Mr. Casey believed the baggies came from one of his son’s bureaus. The pill bottle contained pain killers that Mr. Casey had previously taken for his back. In response to something said to him by Skinner, Mr. Casey said “there are no guns or dope in this house.” RCMP Constables Campbell and Manuel confirmed that when they attended the Casey residence on July 22 and 23, the bedroom was in a state of disarray and in the words of one had been “tossed”. The bed was thrown off its frame. This evidence and Constable Manuel’s photos taken on July 23 are all consistent with a search of the room by Skinner, and I so find.

[11] Mr. Casey’s ordeal was interrupted by others. He says that two men showed up at some point. He described the face of one of the men as “white as a ghost”. At one point he characterized this face as “angry” and at another time as “scared”. After an exchange with Skinner and Roach, the newcomers left. Soon thereafter, so did Skinner, Roach and the unidentified woman.

[12] Mr. Casey gave different estimates of how long Skinner and Roach were in his house. At trial he said “between an hour or two” but that he didn’t really know. In cross examination, he conceded that he had given a prior statement with an estimate of 30 to 45 minutes before the man with the “white face” showed up. In the circumstances, it is unsurprising that Mr. Casey has only an approximate idea of the time that passed. But I am satisfied on the basis of what transpired that it was not brief. Constable Campbell said that he arrived at the Casey home at

1:36 pm on July 22. Accepting Mr. Casey's evidence that the trio came around noon, and considering Mr. Casey's description of what happened to him, which I accept, I find that Skinner and Roach must have been in the Casey house for 45 minutes to an hour.

[13] At some point during his ordeal, Mr. Casey spoke to his son Doug Casey Jr., by telephone. Mr. Casey said he thought that he had placed the call. He asked his son to come right away. Skinner then spoke to Mr. Casey's son and argued with him, after which Skinner threw the phone at the wall, disabling it for a time. Mr. Casey also spoke to Kelly MacKenzie. She confirmed that she called. She asked him questions to which Mr. Casey said he replied "yes, yes, yes". She testified that she asked him whether someone was hurting him. She also asked whether he wanted her to call 911. He denies this. But in any event, I find that Ms. MacKenzie made the call. The recorded 911 conversation was made an exhibit.

[14] Three RCMP officers responded to the 911 call. Based on their evidence and that of Ms. MacKenzie, I find that they arrived before her. They elicited little information from Mr. Casey. Constable Campbell said that he searched the home and then remained at the head of the stairs, where he could see the livingroom, the kitchen and part of the diningroom. While there, he said he noticed one of the burners on the stove was "cherry red". At some point he observed Mr. Casey turn the burner off.

[15] Constable Curran also attended and took the lead in questioning Mr. Casey. Constable Curran says that Mr. Casey informed him that four men and two women had been at his house. Otherwise, he said little. Constable Curran observed Mr. Casey while he was sitting in an easy chair (a lazyboy). Mr. Casey was shirtless. At some point, he put on a shirt. He went to the kitchen and Constable Curran noticed Mr. Casey taking a knife from the stove and throwing it into the sink which had dirty water in it. Constable Curran wasn't sure but thought the knife was a butter knife.

[16] Shortly after the police arrived, Kelly MacKenzie appeared. She says that Mr. Casey had deep burn wounds on him and that he was behaving "scared". He was in pain and afraid. The police evidence is that she was uncooperative and confrontational. She left with Mr. Casey. She took him to her mother's home.

Arrangements were made to bandage the burn wounds. Mr. Casey eventually visited a hospital, but he is vague on when.

[17] The police did not take extensive notes. They were not sure what they were investigating. Both officers Curran and Campbell thought Mr. Casey was intoxicated. Constable Curran described his speech as “erratic” and “stuttering”. Mr. Casey himself confirms that Roach demanded that he drink. He says he refused the whiskey offered to him, but he had at least two double rums. In direct examination, Mr. Casey disclosed that he was an alcoholic, although he deferred his first drink until late afternoon because he said he cannot afford to drink earlier in the day. He says that after he left with Ms. MacKenzie, he got drunk that night. He denies drinking before Roach and Skinner showed up.

[18] Following the departure of Mr. Casey and Ms. MacKenzie, the RCMP officers left. They had nothing further to do at that point; no names of any perpetrators were given to them. Indeed, they did not know what had taken place that day.

[19] Although the police noticed no injuries on Mr. Casey, that is not altogether surprising. They had no idea what happened or what to look for. When Constable Curran first saw Mr. Casey, he was seated in his lazyboy. The burns on his back would not have been visible and those on the outside of his upper left arm, only obliquely so. Later, when Constables Curran and Campbell saw Mr. Casey in the kitchen, he was wearing a shirt. Defence counsel referred Constable Curran to his “can say statement” - not entered into evidence - in which Constable Curran said he noticed no marks on Mr. Casey. But this is not a contemporary record of what he observed or didn’t observe - it is a statement that he did not notice any marks.

[20] While there are problems with Mr. Casey’s recollection of some details, which I will discuss later, I accept his uncontradicted evidence that he was confined, threatened and burned on July 22, 2009 as he describes. I accept Mr. Casey’s evidence that he was not drinking prior to the arrival of Skinner and his companions. He may have been affected by the drinks he subsequently took. But that did not significantly impair his recollection of the assaults, threat and confinement themselves. It may have affected his recollection of later events. Mr. Casey’s burn wounds were confirmed by Ms. MacKenzie, whose evidence on this point I accept. I do not mean to suggest that Ms. MacKenzie was otherwise a

model witness. Her sparring with counsel and obvious reluctance to answer certain questions, compromised her credibility on other issues.

[21] Having viewed the photographs exhibited in evidence, and particularly those taken by Constable Manuel, the burns certainly have the appearance of being inflicted alternately by slim and spatula shaped instruments, consistent with a knife and spoon. A steak knife and spoon were later recovered by police from the home and entered as exhibits. I accept Mr. Casey's evidence that the knife in question was a steak knife and that Constable Curran's impression that it was a butter knife, was mistaken.

[22] The knife on the stove noticed by Constable Curran and the "cherry red" burner described by officer Campbell, are consistent with Mr. Casey's evidence of how he acquired his burn injuries. I accept this evidence. When Curran saw Mr. Casey remove the knife from the stove, he said the burner was black. But he also said that this was the second time he was in the residence (he had been out to see Constable Manuel who had remained in his vehicle). Curran said he was not sure where Constable Campbell was when he saw Mr. Casey take the knife from the stove. This is consistent with Constable Campbell's evidence. He says he has no recollection of Constable Curran being in the kitchen. This suggests that the removal of the knife from the stove by Mr. Casey, and his turning off the burner, were separate and that the turning off of the stove occurred first. There was a period when Constable Curran was outside while Constable Campbell remained in the house; there was also a time when Constable Campbell was checking the house while Constable Curran remained with Mr. Casey. I accept the evidence of Constable Curran concerning the removal of a knife from the stove and Constable Campbell's evidence that the burner was "cherry red" before Mr. Casey turned it off. I find that they were separate events.

### July 23, 2009

[23] On July 23, 2009 Mr. Casey contacted the RCMP and met with them at his home. Initially Mr. Casey's son Doug Casey Jr. and Ms. MacKenzie were present. She was obstructive and police asked her to wait outside. Mr. Casey Sr. described what had happened to him and provided them with the names of Skinner and Roach. I am satisfied on the evidence that he did not have other names. He is not sure how he first heard the name "Barry" but he recalled something about "Barry Roach" and "Steve Skinner" in discussions with police. I accept this evidence.

But based on the testimony of Constable Manuel, I find that the names “Barry” and “Steve” were actually provided to the police by Casey’s son, Doug Casey Jr.

[24] The RCMP officers took Mr. Casey to the Sackville detachment where he gave a KGB statement. Constable Jefferies of the HRM police explained that a KGB statement is typically taken when the police are concerned that a witness may flee, change his evidence or not be truthful. Mr. Casey testified that he was - and remains - fearful for his safety. He declined to say where he was now living. Constable Campbell described Mr. Casey as agitated but relieved to be speaking to police.

[25] The police returned with Mr. Casey to his home where they seized a spoon, steak knife, and whiskey bottle which Mr. Casey pointed out to them. The steak knife was located in the sink. The water was drained but it is not clear by whom. The end of the steak knife and spoon were discoloured and scored consistent with exposure to high heat. A second spoon was not found.

### July 24, 2009

[26] The next day, HRM police arranged to take Mr. Casey Sr. to the HRM police station for the purposes of viewing photo lineups. Constables Fraser and Fairbairn drove Mr. Casey. They described him as nervous and frightened. Mr. Casey confirms this. They had to show him their badges, business cards and firearms to reassure him that they were police. The photo lineup process will be addressed further below. As a result in part of information obtained from Mr. Casey during the photo lineups, Halifax police contacted Toronto police, who arrested the accused, Barry Andrew Roach and a Mr. Steve Skinner.

[27] It was also on this day that Constable Fairbairn picked up the pill bottle from the Casey home. This was the bottle that Mr. Casey identified as his “pain pills” and about which he said he had been confronted by Skinner on July 22. It was identified by Mr. Casey in Court and entered into evidence.

[28] The Crown also led evidence from a Westjet employee that a Barry Roach and a Steve Skinner flew to Toronto from Halifax early July 24. I address this evidence further below.



**July 27, 2009**

[29] On July 27, at the request of Constable Jefferies, RCMP Constable McKenna met Mr. Casey Sr. in his home. He is a forensics specialist. He described Mr. Casey as nervous and visibly shaken. Constable McKenna took photographs of Mr. Casey and his home (exhibit 2). He took possession of the knife, spoon, whiskey and pill bottles from HRM police for the purposes of finger print and DNA analysis. No useful results were obtained.

**FINDINGS**

[30] To be clear, I am satisfied beyond a reasonable doubt and find as facts on all the evidence that on July 22, 2009:

1. Three people attended Mr. Casey Sr.'s home at approximately noon and remained for between 45 minutes to an hour;
2. The three people were a man known to Mr. Casey as "Skinner"; a man introduced to him that day by Skinner as "Roach"; and an unidentified woman;
3. Mr. Casey was confined in the sense that he could not move about the home freely or leave without the permission of the man identified to him as Roach;
4. Mr. Casey was assaulted at least three times with a heated knife and spoon or spoons, resulting in the burn marks apparent in the photographs (Exhibit 2 and 3);
5. It was the man identified to Mr. Casey as Roach who committed the assaults;
6. The knife and spoon identified as Exhibits 5 and 6 were used to assault Mr. Casey;
7. Mr. Casey was also threatened by the man known to him as Roach that he would be "gutted" with a knife.

## **IDENTIFICATION ISSUES IN THIS CASE**

[31] The Crown takes the position that Douglas Casey Sr. clearly identified the accused, Barry Andrew Roach and had reason to do so given the circumstances of what he endured on July 22, 2009.

[32] In response, the Defence raises numerous issues concerning both the credibility and reliability of Mr. Casey's evidence.

## **LAW - IDENTIFICATION EVIDENCE**

[33] Legal history is replete with examples of innocent people who have been convicted on the basis of eye witness identification evidence. The frailty of such evidence has received extensive and repeated judicial comment. The following caution from the Alberta Court of Appeal merits repetition here:

The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing, and have been responsible for many cases of miscarriages of justice through mistaken identity. The accuracy of this type of evidence cannot be determined by the usual tests of credibility of witnesses, but must be tested by a close scrutiny of other evidence. In cases, where the criminal act is not contested and the identity of the accused as the perpetrator the only issue, identification is determinative of guilt or innocence; its accuracy becomes the focal issue at trial and must itself be put on trial, so to speak. As is said in *Turnbull*, the jury (or the judge sitting alone) must be satisfied of both the honesty of the witness and the correctness of identification. Honesty is determined by the jury (or judge sitting alone) by observing and hearing the witness, but correctness of identification must be found from evidence of circumstances in which it has been made or in other supporting evidence. If the accuracy of the identification is left in doubt because the circumstances surrounding the identification are unfavourable, or supporting evidence is lacking or weak, honesty of the witnesses will not suffice to raise the case to the requisite standard of proof and a conviction so founded is unsatisfactory and unsafe and will be set aside. It should always be remembered that in the famous Adolph Beck case, twenty seemingly honest witnesses mistakenly identified Beck as the wrongdoer. (*R. v. Atfield* (1983) 42 A.R. 294 (Alta. C.A.), para. 3)

[34] From *Atfield*, two general principles emerge: eyewitness evidence must not only be credible (in the sense that the witnesses are honest) but also the evidence must be reliable (in the sense that it is objectively accurate).

[35] It is incumbent on a trial court to be especially cautious of identification evidence because of its frailty which has resulted in many wrongful convictions. Such evidence is frail in at least two senses. First, it has been amply demonstrated that human powers of observation and recollection are fallible. Secondly, the circumstances in which identification of an accused is made can compromise the accuracy and reliability of such identification. Circumstances such as how long a witness was able to view an accused; from what position; from what distance and with what lighting, are all important. Whether the witness was personally acquainted with the accused can be a factor. What description the witness gives and whether the witness is able to identify the accused from a lineup can be critical. How much time passes between the event described and the identification to police is important.

[36] In addressing the eyewitness testimony in this case, the following helpful reminder from the Saskatchewan Court of Appeal in *R. v. Bigsky* [2007] S.J. No. 801, at para. 70 (Sask. C.A.) should be borne in mind:

In my respectful view, in the context of this case, resting entirely on eyewitness testimony, it was incumbent upon the trial judge to do more than he did. More specifically, in addition to applying the appropriate standard of proof, he was required to:

1. recognize the danger of convicting based on eyewitness identification only;
2. note the significant factors which may have affected the identification of Mr. Bigsky by Constable Lorence; and
3. address those factors.

## **CREDIBILITY/RELIABILITY**

[37] Keeping the criteria in para. 70 of *Bigsky*, *supra* in mind, the court must not only instruct itself on the frailties of identification evidence in general, but must

also consider the factors which might have affected the identification of Mr. Roach by Mr. Casey in this case. The Court also needs to be mindful that Mr. Casey is the only eye witness, which requires especially careful scrutiny of his evidence.

[38] The Defence began its argument by emphasizing that Mr. Casey is a “terrible historian”. It was conceded - at least initially - that Mr. Casey appears to be convinced that he had identified the “right man”. However, counsel correctly argued that credibility and reliability are not the same thing. To be clear, having watched Mr. Casey on the witness stand in direct and cross-examination, I am satisfied that he believes that the accused was his assailant, but that does not address the reliability argument. The Defence approached the reliability argument under various categories as follows:

1. Mr. Casey’s evidence was not reliable because his memory of many of the surrounding circumstances was poor or inconsistent or wrong.
2. The 24 hour delay in reporting and investigating added to the general unreliability of the evidence.
3. The photo lineup process was flawed and therefore, unreliable.
4. Mr. Casey’s comments during the photo lineup called into question the accuracy and reliability of that process.
5. The evidence of a Mr. Roach and a Mr. Skinner flying to Toronto on July 24, 2009 has no probative value.
6. Police evidence of the events of July 22, 2009 were “internally inconsistent” and raised concerns about what really happened.

### **Mr. Casey as “Historian”**

[39] The Defence pointed to the numerous errors, omissions or vagueness in Mr. Casey’s testimony that related to events following the arrival of the police and Ms. MacKenzie on July 22, 2009 and the ensuing few days. Mr. Casey was vague on whether he was wearing pants or shorts. He wasn’t sure what exactly happened after the police arrived and whether they preceded Ms. MacKenzie. He did not know why they were there and whether they were RCMP or HRM police. He was

not sure with whom he left although he believes it was Ms. MacKenzie. He was not perfectly clear about what he took out of the house but he believes he took some rum. He thought he went to the home of Ms. MacKenzie's mother but was not certain. Mr. Casey admitted that he is an alcoholic. He conceded that he had memory problems. He conceded that he was in shock. He provided virtually no information to police on July 22 about what happened in his home on that day. He could not say how many police came to his home on the 23<sup>rd</sup> or who was there. He could not recall how he got to the police station that day. He was not clear about whether he gave his statement to police before or after he identified Mr. Roach in the photo lineup. Moreover, he was under the impression that Constable Jefferies had driven him to the police station with a female officer.

[40] With respect to the events following the arrival of the police, Mr. Casey himself admitted that he had two double shots of rum by that time. The police thought that Mr. Casey was intoxicated. By his own admission, he got drunk that night. Under these circumstances, it is not surprising that he has no clear recollection of what happened to him as and after he left his home on the 22<sup>nd</sup>. This does not necessarily mean that his recollection of his ordeal itself is therefore unreliable.

[41] On the 23<sup>rd</sup> and 24<sup>th</sup> respectively, Mr. Casey gave a statement to RCMP and attended photo lineup identifications of Mr. Roach and Mr. Skinner. The officer with whom he had most contact during this process or certainly with whom he connected best was Constable Jefferies. He said at one point, "the only one I really remember is Jonathan", referring to Constable Jefferies. He thought Constable Jefferies drove him to the police station. He is wrong. It was Constable Fairbairn (whom Mr. Casey had not seen before or since), together with a female detective. But on July 23 and 24, Mr. Casey was doing unfamiliar things with unfamiliar people in unfamiliar places. He would have no particular reason to remember these sorts of details, and he would have no experience or history to draw upon to remind him of such details. None of these details relate to the actual events at Mr. Casey's home on the afternoon of July 22, 2009 before the police arrived. In my view they are entirely collateral and much less significant, and do not in themselves impair the accuracy of Mr. Casey's account of what transpired before his assailant left his home that day.

[42] It is said on behalf of the Defence that Mr. Casey was as sure that Constable Jefferies drove him to the police station as he was that Mr. Roach was his assailant.

This traditional cross examination tactic can be especially effective with unsophisticated witnesses. But it really compares apples to oranges. Who drove Mr. Casey to the police station is a matter of recalling (or not) a transient and unimportant detail. It is not the same thing as recognizing one's assailant over a period of at least 45 minutes or more.

[43] The police evidence that Mr. Casey had said there were four men and two women in his house, was denied by Mr. Casey. He was not confronted by any prior inconsistent statement on this point. I accept his evidence.

[44] Mr. Casey also conceded in cross examination that in July of 2009, he was taking various medications for various ailments which he should not mix with alcohol. However, there was no specific evidence of what impact if any, these medications would have on Mr. Casey's recall.

### **Delay**

[45] The Defence says that initially Mr. Casey and Ms. MacKenzie were uncooperative. That is true. Mr. Casey did not come forward until the next day. He gave his statement to police. Exhibits were gathered. On the 24<sup>th</sup> he viewed the photo lineups. In and of itself, I do not consider a 48 hour delay to be a serious impediment to Mr. Casey's identification of Mr. Roach. It is not ideal, but it is not lengthy. It must be weighed against the quality of the identification itself, which I will address further below.

[46] Moreover, although there was opportunity, there is no evidence that Mr. Casey's evidence was influenced in any way owing to the 24 hour delay in cooperating with police. The Defence asked the rhetorical question, "was he fed this stuff" and referred to Mr. Casey's denial that the name "Barry" came from his son, rather than police. The police confirm that Doug Casey Jr. supplied the name "Barry". But if there was an attempt to "feed" Mr. Casey a name, why not the full name? And how did Mr. Casey identify Mr. Roach from a lineup which of course had no names attached? There simply is no evidence to sustain the Defence argument here.

### **Description of Mr. Casey's Assailant**

[47] Mr. Casey's description of the man introduced to him as Roach on July 22, was relatively generic. He said that Roach was "six foot something" and had a "big head and eyes". In cross examination, he said that Mr. Roach had only a little hair. He agreed that he did not notice clothing but insisted that he "won't forget his face". Defence counsel pointed out that some people are just not good at providing descriptions. He noted Mr. Casey's obvious difficulty in describing his own juke box in his living room. But it is important not to confuse poor articulation with poor recollection. Mr. Casey has a grade 8 education. He worked in the Shipyards. He is not by nature, inclination, training or experience, a good communicator. But that does not necessarily mean he cannot recognize someone when he sees them. This brings us to the photo lineup itself.

### **Photo Lineup**

[48] Constable Jefferies prepared the photo lineups on July 24. Defence counsel complains that not a lot of care and attention went into preparation of the lineups. Constable Jefferies said it took perhaps an hour. He reviewed the police reports on file in the computer from Constables Manuel, Campbell and Curran. He said the names "Barry" and "Steve" came from Mr. Casey's son. Based on his review of the file and the police database, Constable Jefferies felt that Steve Skinner and Barry Andrew Roach were suspects. He included photos of them in the two lineups prepared. He explained what he did and what comparators he used for the lineup that contained a photo of Mr. Roach. He admitted that the choice of comparators is somewhat subjective, and that in this case comparators were not easy to find. He explained how the software is used to assist in putting together the lineup. The software user guide was entered into evidence as Exhibit 11.

[49] In the case of Mr. Roach, Constable Jefferies looked for comparators with close cropped hair, prominent forehead, and ears. He kept in mind nose, eyes and shape of the face. Since his photographs were black and white, he did not attend to eye colour. Since they did not show height, he did not take that into account. Three of the photos, including that of Barry Roach, have different backgrounds than the others. Constable Jefferies said this was a function of how the photos were originally taken. I accept this evidence. Mr. Casey was shown 12 photos. They are not all similar. But there are many similarities as well. In my view the photo lineup itself was not unfair. I am not persuaded that there was anything inappropriate about the manner in which Constable Jefferies compiled the photo lineup which included Mr. Roach.

[50] The actual photo lineup interview was conducted by a Constable Brien at Constable Jefferies' request. Constable Brien was selected because he knew nothing of the case. He met with Mr. Casey. He had two unsealed envelopes with him, one relevant to Roach and the other to Skinner. Constable Brien read standard printed instructions which appear to derive from judicial comment in *Sophonow* (25 C.C.C. (3d) 415, (Man. C.A.)) and the 2003 B.C. decision in *R. v. Miller* 2003 BCSC 118, amongst other things. After reading the standard printed instructions, Constable Brien showed 12 photos to Mr. Casey who identified Barry Andrew Roach as his assailant. The photo lineup video discloses that Mr. Casey's identification of Mr. Roach was instantaneous and emphatic. Mr. Casey was visibly excited and swore with emotion. The video conveys no doubt about Mr. Casey's conviction.

[51] Defence counsel correctly argues that Constable Brien did not completely follow police policy when administering the lineup. Amongst other things, photos were not shown in perfect sequence. They were not in separate envelopes. The photos were not all kept out of Mr. Casey's view. There was some discussion with Mr. Casey at the conclusion of the viewing. Constable Brien did not take complete note of all comments. But the question is whether the failure to follow policy compromises Mr. Casey's evidence in any material respect.

[52] During the photo lineup session itself, Mr. Casey identified Mr. Roach with 100% certainty. Defence counsel argues that the "100%" came from the mouth of Constable Brien, not Mr. Casey. That is literally true, but the actual exchange went as follows:

(Mr. Casey) That's him.

(Constable Brien) Are you sure?

(Mr. Casey) Positive.

(Constable Brien) 100%?

(Mr. Casey) 100%.



[53] When placed in the context of the exchange between Mr. Casey and Constable Brien, and viewing both Constable Brien, Mr. Casey and the video in question, I am satisfied that Mr. Casey had no doubt that he had correctly identified Mr. Roach to Constable Brien. Constable Brien should not have asked the question “100%?”, but Mr. Casey’s identification of Mr. Roach was virtually instantaneous and his words, timing, body language and behaviour projected the certainty which the word “positive” implies.

[54] The foregoing occurred when Constable Brien was noting the back of photo #6, which was that of Barry Andrew Roach. It should be considered as well in light of Mr. Casey’s initial identification. When first shown photo #6, Mr. Casey said “that’s him”. He said it immediately and repeated it at least once. Constable Brien said “How sure are you?” to which Mr. Casey replied “Bet on it”. Constable Brien then asked “How much would you bet on it?” to which he received the colourful reply “fuck near anything”. He then went on to comment on Mr. Roach using forceful language.

[55] The Defence says that the 100% certainty was impaired because Mr Casey used the language “95 to 99%” at trial. During direct examination, Mr. Casey was asked about his photo lineup identification of Barry Roach. He said in relation to Mr. Roach’s photo: “I knew for sure who it was”. He was then asked how much confidence he had in that photo identification and he said “95 - 99%”. He was then asked who it was that he had identified. He replied that he thought he identified “both of them”, referring to Mr. Skinner and Mr. Roach. When asked to comment on the disparity between 100% and 95 - 99% he said, referring to the latter percentage, “I knew that if it was that high, that I would not have been wrong”. It was clear from this and other evidence that Mr. Casey perceived no meaningful difference between 95 - 99% or 100%. To him, each meant certainty that he was right. In my view, this discrepancy in the language used by Mr. Casey does not compromise the photo identification of Mr. Roach.

[56] Then the Defence argues that on the video Mr. Casey paused at photo #4 saying “Jesus ”. He asked to keep photo #4 to one side. But he did not identify that person as his assailant. He said “I don’t think that’s him...his eyes don’t look bad enough”. He explained at trial that he set it aside because he thought it was someone he recognized. He said he was mistaken and that he did not recognize the person in this photo. He had been asked to identify anyone he recognized, regardless of whether that person was his assailant. That is what the instructions

asked him to do. In my view, Mr. Casey is wrong on this. The video suggests and I find that Mr. Casey set photo #4 aside in the context of identifying his assailant. But importantly, he did not suggest that the man shown in photo #4 was his assailant. In my view, this did not compromise his subsequent identification of Mr. Roach.

[57] It is also argued that Mr. Casey's identification of Mr. Roach was impaired because before he saw the Roach photo, he said "I seen him before.....when you dropped the photos". The Defence suggests this means that Mr. Casey expected to see Mr. Roach in the lineup, although this would contradict the opening instructions read by Constable Brien. The Defence argues that it was impossible for Mr. Casey to have seen the photo of Roach at the time the lineup was viewed. But the video does disclose that when Constable Brien was showing Mr. Casey photo #3, he inadvertently handed more than one photo to Mr. Casey, although they are stuck together. It is not clear how many photos were stuck together, but the photo left in front of Constable Brien was face up and visible. The video is not clear enough to tell whether it was photo #6 which was that of Mr. Roach. But it would have been visible to Mr. Casey, and it was immediately after this that Mr. Casey said "I already seen him before." It would explain his comment that he had "seen him before". When cross examined on this, Mr. Casey was adamant that he had seen Roach when Constable Brien "flipped the papers". I accept Mr. Casey's evidence that he saw a photo of Roach while Constable Brien was administering the photo lineup but before photo #6 (the Roach photo) was formally submitted to him. In other words, it was not something he knew or saw prior to the lineup process itself.

[58] Criticism was also directed at the police regarding post identification investigative questions. For the most part, these questions were unobjectionable. But at one point, a police remark was made that was improper. Constable Brien commented on Mr. Casey's obvious emotional response when he made his identification. This may have encouraged Mr. Casey to believe that he had been somehow "correct" to identify Mr. Roach. But that did not impair the quality of the identification itself. That identification was immediate and Mr. Casey was visibly moved. He did react emotionally. Constable Brien should not have commented on Mr. Casey's reaction - but his remark did not prompt or influence that reaction or the identification that had already been made.

[59] The Defence also argues that Mr. Casey is unreliable because during the photo lineup he tentatively identified one of the individuals as Jimmy Melvin Junior, or at least he “thought it was Melvin”; he wasn’t sure. Mr. Casey has met Mr. Melvin in person. He says he has seen him more often in the paper or on TV. There is no evidence of how similar that photograph may be to the gentleman in question, but it was not Jimmy Melvin Junior. However, Mr. Casey was not there to identify Mr. Melvin, but rather his assailant, and he did so without hesitation and instantly.

[60] The Defence also argues that the photos were not shown “sequentially”. Reference was made to Mr. Casey holding on to photo #4 while he viewed the next one. But because Mr. Casey did not identify the people in either photo as his assailant, I find this procedural irregularity to be immaterial. There is no indication that this had any impact on his identification of Mr. Roach.

[61] Other alleged failures to follow photo lineup policy were mentioned. But how these had compromised Mr. Casey’s evidence was not clear. I am satisfied that they did not affect Mr. Casey’s identification of Mr. Roach.

### **Intoxication**

[62] The Defence also argues that Mr. Casey’s evidence lacks reliability because he was intoxicated on July 22 when the police arrived. Certainly, Constables Curran and Campbell believed that Mr. Casey had been drinking and may have been intoxicated. They described his conduct as consistent with that. Constable Curran indicated that Mr. Casey appeared to have been drinking and he was stuttering. He did not agree with the question in cross-examination that Mr. Casey “was confused” but said he was “kind of all over the place” and “did not seem to know what was going on”. That is equally consistent with him initially not wanting to cooperate with police. But Mr. Casey did confirm that he was forced to drink and that he did drink two double shot glasses of rum. He had not been drinking until forced to do so during his ordeal. The question is whether and to what extent Mr. Casey’s drinking calls into question his evidence of what happened and who did what. I address this further below.

### **Eye Glasses**

[63] It is also a fact that Mr. Casey uses eye glasses. They appear in the video in which he examined the police photo lineup. Mr. Casey said that he only uses eye glasses for reading, because print is small. There is no reason to doubt this explanation. I accept Mr. Casey's evidence in this regard. He says and I accept that he does not otherwise require glasses.

### **WestJet Evidence**

[64] The Crown led evidence that a Mr. Steve Skinner and a Mr. Barry Roach took a WestJet flight to Toronto at approximately 6:30 am on July 24, 2009. That evidence showed that Messrs. Skinner and Roach sat in the same row and that Mr. Roach's Visa paid for the flight. It is a reasonable inference that they were travelling together. It was Mr. Casey's understanding that Mr. Skinner lived in Toronto. Constable Jefferies testified that he understood the accused to reside there as well. But there was no evidence that these individuals were the same two people who were in Mr. Casey's home on July 22, 2009. Nor was there any evidence that the Mr. Roach who purchased the tickets was the accused in this case, although presumably that could have been established through the Visa account records.

[65] In and of itself this evidence is not compelling. But I have accepted that a man known to Mr. Casey as "Skinner" was at the Casey home on July 22 and introduced his companion as "Roach". Two days later, Mr. Casey identified Barry Andrew Roach as his assailant - in other words, as the man who was with Skinner in Mr. Casey's home. This does put a Skinner and a Roach in one another's company. Taken together, these facts increase the likelihood that the Skinner and Roach on the Westjet flight two days later, were also at Mr. Casey's residence two days earlier. In the end, however, while I do not ignore the Westjet evidence, I have not given it much weight.

### **Police "Inconsistencies"**

[66] It is true that there are differences in some of the police evidence especially with respect to their observations on July 22. But the police did not have much information to work with on that day. I have addressed their failure to notice Mr. Casey's burns. I have accepted the evidence regarding the knife on the stove and

the hot burner. In my view there are no material discrepancies in the police evidence.

## **SUMMARY ON MR. CASEY'S RELIABILITY**

[67] The Defence has strenuously argued that Mr. Casey is an unreliable witness and that it would be unsafe to find Mr. Roach guilty on the basis of this evidence. It is quite true that, as a general proposition, Mr. Casey is a poor historian. But common sense tells us that the reliability of memory is affected by many things, including interest and attention. On July 22, 2009, Mr. Casey had very good reason to be interested and attentive. He was confined in his own home, in challenging circumstances. But those circumstances afforded him an excellent opportunity to remember and recognize his assailant. The evidence of those circumstances which I accept were:

1. Time - Mr. Casey was in the immediate company of his assailant over a period of at least 45 minutes. He had ample time to take note of Mr. Roach;
2. Lighting - It was around noon on a mid-summer's day, lighting was good, nothing obstructed Mr. Casey's view;
3. Proximity - Mr. Roach was in the same room with Mr. Casey virtually throughout Mr. Casey's ordeal; On some occasions, Mr. Roach was within a foot or two of Mr. Casey's face, particularly when Mr. Roach told him what he was going to do to him;
4. Although the circumstances were traumatic, Mr. Casey had a unique opportunity to connect with Mr. Roach. Certainly he gave a vivid description of things said and done to him by Mr. Roach which do not suggest memory impairment *at the time he was enduring his ordeal*. The intensity of the experience itself clearly imprinted on Mr. Casey things that were said and done to him. It makes sense that the person doing and saying these things would also make a strong impression;
5. Mr. Casey had no difficulty recognizing the man named "Skinner" and recalling his presence and activities on July 22.

[68] The importance of the foregoing factors needs also to be considered in light of the video-taped identification of Mr. Roach by Mr. Casey while viewing the photo lineup. Mr. Casey's identification of Mr. Roach was instantaneous, dramatic and emphatic. He did not hesitate. He reacted visibly and strongly to the photograph of Mr. Roach. He testified as to his degree of certainty. He had no doubt in the court room and he conveys no doubt on the video.

[69] Mr. Casey's in court identification of Mr. Roach - which is of very little probative value in and of itself - was supplemented by Mr. Casey's observation that Mr. Roach's face was bigger in July of 2009, and that he was "skinnier" in Court, which accords with a difference noticed by Constable Manuel, who said that he knew Mr. Roach from a couple of years ago and that Mr. Roach had since lost weight. Mr. Casey also noted that Mr. Roach formerly had hardly any hair, whereas he had a full head of hair in Court.

[70] While Mr. Casey's "historical" evidence was successfully challenged on a number of points by the Defence, he was not shaken on the events of the assaults themselves and his identification of Mr. Roach. Although he had given both a prior statement and testified at a preliminary inquiry, Mr. Casey was not contradicted on anything significant that was said or done by Mr. Skinner or Mr. Roach from any prior and inconsistent statement. He gave fairly detailed evidence of what was said and done to him. In particular, he was not shaken on what was said or done to him by Mr. Roach.

[71] While I have not accepted the Skinner introduction of "Roach" on July 22 as evidence of its truth, nevertheless it is consistent with Mr. Casey's subsequent identification of a photograph of the accused, Barry Andrew Roach, 48 hours later.

[72] Mr. Casey was pressed in cross examination about his inability to give more details to police, particularly a more detailed description of his assailant. It was put to him that he told police he was "too fucked up" to remember details and that he was too scared to pay attention. He acknowledged using these words but said he was talking about what Skinner and Roach were wearing, not about what Mr. Roach's face looked like. No prior inconsistent statement was put to him on this. When further pressed that he was "too fucked up and didn't pay attention," Mr. Casey emphatically objected and said "No that's how I knew him so fast in the

lineup.” The video confirms the speed with which Mr. Casey identified Mr. Roach.

[73] In addition to the evidence in this case, I have given very careful consideration to the cases cited to me, especially on behalf of the Defence. I certainly endorse the many warnings about identification evidence, so eloquently expressed in the jurisprudence. I am especially mindful of the remarks of the English Court of Criminal Appeal in *Turnball*, at pp. 137-138 of the *Criminal Appeal Reports*, as well as those of Twaddle, J.A. in *Sophonow* at pp. 440 - 441 of the *Canadian Criminal Cases Report*. Last, but not least, I am mindful of the cautions and recommendations of Justice Cory in his report on *Sophonow*. Most of the cases which criticize or overturn convictions based on identification evidence, turned on surrounding circumstances (timing, light, distance, obstruction), highly objectionable police lineup procedure, which affected the integrity of the identification, or no lineups of any kind. In my view, those factors do not obtain here.

[74] Having considered all the evidence, and the arguments of counsel concerning alleged frailties in the evidence, and also taking into account the law regarding the care that must be taken regarding identification evidence, I am satisfied beyond a reasonable doubt that the accused, Barry Andrew Roach was the man introduced to Mr. Casey as “Roach” on July 22, 2009 in Mr. Casey’s home, and who confined, threatened and assaulted him, as previously described.

## **DISPOSITION**

### **Count 1 - S. 268 Aggravated Assault**

The definition of aggravated assault includes a wounding which has been held to require breaking of the skin. Part of Mr. Casey’s tattoo on his left upper arm was obliterated by burning. So the actus reus in my view is made out. The intent necessary is to apply force coupled with objective foresight of risk of bodily harm. In my view, the mens rea aspect of this charge is made out and a guilty verdict will be entered.

### **Counts 2 & 3 - S. 267(a) Assault with a Weapon**

A knife and a spoon were used as instruments of the assault. In this case, this is not an included offence under S. 268 aggravated assault because the S. 268 charge does not particularize the means of the assault. Authority for this proposition is *R. v. St. Clair* which is a 1994 decision of the Ontario Court of Appeal, and a guilty verdict will be entered on these two Counts.

**Counts 4 & 5 - S. 88 Carrying a Weapon for the purpose of committing an offence (knife and spoon)**

In light of the findings of guilt on Counts 2 and 3 - assault with a weapon - these charges offend the rule against multiple convictions and on the *Kienapple* principle, they should be stayed.

**Count 6 - S. 279(2) Unlawful confinement**

Mr. Casey clearly unwillingly submitted to a physical confinement. No use of force is required to make out the actus reus of this offence, and a guilty verdict will be entered.

**Count 7 - S. 264.1(1)(a) Uttering Threat**

A threat to gut with a knife is made out. It is not necessary to threaten death to make out this charge. The words have to be viewed objectively in all the circumstances, and a verdict of guilty will be entered.

**Count 8 - S. 264.1(1)(c) Uttering Threat to kill an animal**

The evidence did not make out this Count as I think the Crown agreed and an acquittal will be entered.

**Count 9 - S. 145(3) A failure to keep the peace**



Failure to keep the peace, breach of S. 145(3), a guilty verdict will be entered.

Bryson, J.