

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Leeds, 2013 NSSC 364

Date: 20131115

Docket: CRH 345753

Registry: Halifax

Between:

Her Majesty the Queen

v.

Ryan William Leeds

Judge: The Honourable Justice Felix A. Cacchione

Heard: January 28 - 31, February 1, 4, 7, October 28-31,
November 1, 4, 2013, in Halifax, Nova Scotia

Oral Decision November 15, 2013

Written Decision: November 25, 2013

Counsel: Christopher W. Morris and
Eric R. Woodburn, for the Crown
Geoffrey C. Newton and Sarah Hebb, for the Defendant

By the Court:

[1] Ryan Leeds, the accused, is charged with manslaughter and breach of a recognizance dated April 16th, 2009. This is in connection with the death of Nathanel Welsh (the deceased). The deceased was assaulted outside a New Year's Eve Party (the Hall Party) which was held December 31st, 2009 to January 1st, 2010 at Saint Mark's Anglican Church Hall on Russell Street in Halifax. He died as a result of a subarachnoid haemorrhage after being struck by a blow to the head which caused him to fall backward and strike his head on the pavement.

[2] The case against the accused rests on the direct eye witness identification evidence of one witness, Britney Gautreau, (Ms. Gautreau) girlfriend of the deceased and also on the circumstantial evidence of Mr. Leeds' presence at the Hall Party early the next morning, that is January 1st, 2010.

[3] The burden of proving guilt beyond a reasonable doubt rests with the Crown and never shifts to the accused. An accused, in any criminal proceeding, is presumed innocent and bears no burden to explain away or rebut the Crown's evidence. The burden of proving guilt beyond a reasonable doubt is not discharged if guilt is suspected or if guilt is a probability.

[4] The Crown must prove each essential element of the offence charged beyond a reasonable. In this case the accused is charged with manslaughter. He is alleged to have caused the death of Mr. Welsh as a result of an unlawful act. It is alleged that the accused was the person who punched the deceased thereby causing him to fall backward and strike his head on the pavement. In order for the Crown to succeed it must prove the following essential elements of this offence beyond a reasonable doubt:

1. The time and place as set out in the indictment;
2. The identity of the accused as the perpetrator;
3. That the accused unlawfully assaulted the deceased, that is that the accused was not acting under any legal justification or excuse; and
4. That the accused's unlawful act caused the death of the deceased.

[5] Exhibit 13, the Agreed Statement of Facts, admits that the deceased died as a result of a blow to the head at the time and place set out in the indictment.

[6] Both Crown and defence counsel acknowledged that the sole issue in this case is the identity of the perpetrator.

[7] The decision in this case essentially rests on whether Ms. Gautreau correctly identified the accused as the person she allegedly saw assault the deceased. It is for this reason that her evidence must be scrutinized with the greatest care. Observation and memory are often unreliable when it comes to the identification of people. It is an area where people often make honest mistakes.

[8] In cases where eyewitness identification is the foundation of the prosecution's case, special caution must be paid when relying on such evidence. This is because although an eye witness can be a convincing witness, because the witness honestly believes that the accused is the person that he or she saw committing the offence, the witness may be mistaken. The Court must also be aware that although identification evidence by one witness can support that of another, even a number of honest witnesses can be mistaken. It is incumbent upon the Court to examine closely the circumstances in which the identification by a witness or a number of witnesses came to be made and to take into account any weaknesses which appear in the identification evidence: *Sophonow* (No.2), (1986), 25 C.C.C. (3d) at 438-40 (Man.CA.)

[9] Eye witness identification cases involving the identification of a stranger heighten the alarm as to the well recognized dangers inherent in such evidence and the risk of a miscarriage of justice through wrongful conviction: *R. v. Goran*, [2008] O.J. No. 1069 (C.A.) at para. 19. The Court in *Goran* went so far as to say that "...such evidence is inherently unreliable...": *R. v. Cuming* (2001), 158 C.C.C. (3d) 433 (Ont. C.A.) at para. 20; *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.) at 38. As the trier of fact dealing with eye witness identification evidence regarding a complete stranger I must be mindful that such identification evidence can be notoriously unreliable: *The Queen v. Nikolovski* (1997), 111 C.C.C. (3d) 403 (S.C.C.) at 411-412; *Bardales v. The Queen*, [1996] 2 S.C.R. 461 at 461; *Burke v. The Queen* (1996), 105 C.C.C. (3d) 205 (S.C.C.) at 224.

[10] It is of the utmost importance that the Court be cognizant of the danger of an honest but inaccurate identification especially in cases where the alleged perpetrator is previously unknown to the eye witness. The eye witness may be convincing and convinced of the identity of the perpetrator. That witness, as I have said previously, may also be mistaken. It is important that the Court recognize that it is the reliability and not the credibility of the eye witness which must be established: *R. v. Alphonso*, [2008] O.J. No. 1248 (C.A.) at para. 5: “...certainty cannot be equated with reliability...”; In *R. v. Goran* (supra) at paras 26-27 the Court referred to the fallacy of mistaking certainty for accuracy. In the present case Ms. Gautreau has convinced herself that the accused was the perpetrator as evidenced by her testimony at trial that, “in my mind Ryan Leeds killed my boyfriend”.

[11] A reason why special caution is necessary when examining eye witness identification evidence was aptly expressed by Doherty J.A. in *R. v. Quercia* (supra) at p. 383 where he stated: “...The spectre of erroneous convictions based on honest and convincing, but mistaken, eyewitness identification haunts the criminal law...” This Court is required to assess the quality of the eye witness identification evidence. The poorer the quality of such evidence, the greater the danger of a wrongful conviction: *Mezzo v. The Queen* (1986), 27 C.C.C. (3d) 97 (S.C.C.) at 108.

[12] If a witness has no previous knowledge of the accused person so as to make her or him familiar with that person’s appearance, the greatest care ought to be used to ensure the absolute independence and freedom of judgment of the witness. The witness’ recognition must proceed without suggestion, assistance or bias: *Rex v. Smierciak* (1946), 87 C.C.C. 175 (Ont. C.A.) at 177.

[13] In cases where the eye witness identification evidence is suspect, a Court must look for cogent confirmatory evidence in order to overcome the real risk of a miscarriage of justice taking place: *R. v. Boucher et al.* (2000), 146 C.C.C. (3d) 52 (Ont. C.A.) at 58.

[14] Eye witness identification evidence must be based on the independent recollection of the witness and not recollection arising as the result of discussions with and amongst various people. Such evidence may be compromised where an eye witness has discussed with others his or her recollection of the person’s

appearance before making an identification: *R. v. Holden* (2001), 56 O.R. (3d) 119 (C.A.) at p.136-137. In some cases, the failure to mention distinctive characteristics of a suspect in an initial description to the police may be quite material to the reliability of the identification.

[15] The Supreme Court of Canada has described an in-dock or in-court identification as having an "...almost total absence of value as reliable positive identification...": *R. v. Hibbert* (2002), 163 C.C.C. (3d) 129 (S.C.C.) at p.146-147.

[16] Based on the evidence presented the following facts have been established.

[17] On January 1st, 2010 at 1:11 a.m. an emergency call reporting an assault and an injured party was made by Ms. Gautreau. The injured party was the deceased. The events leading to his death occurred shortly before 1:11 a.m. on January 1st, 2010.

[18] Ms. Gautreau had never been to Halifax before and she did not know many people here including the majority of those persons attending the Hall Party. She had never met the accused prior to this evening.

[19] The area around where the event took place was poorly lit. It was described by Detective Hanson, a very experienced police identification officer and the most reliable of all the officers who testified about the lighting conditions at the scene, as being "pitch black". The nearest light standard was approximately two to four hundred feet away and there was no lighting above the door in the area where Ms. Gautreau stood when she allegedly made her observations.

[20] Although 30-40 people were present at the scene when the police officers arrived, most of these persons were not cooperative with the police. A number of the persons in attendance at the Hall Party were gathered outside the Hall at the time of the occurrence as the Hall Party had essentially ended.

[21] Ms. Gautreau gave conflicting versions about seeing the assault.

[22] Ms. Gautreau, a petite and slender young woman, had been drinking that evening. She described herself, in her direct evidence, as a non-drinker at the time of the incident. Her evidence as to the amount of alcohol she consumed that

evening was inconsistent. She was drinking vodka and beer. She initially told the police that she may have had two or three beers and a half pint of vodka that evening. Her evidence at the Preliminary Inquiry was that she had had a drink or two before going to what was referred to as the “pre-party”, a gathering held before the Hall Party, and also had some drinks at the pre-party. She put that number of drinks at four or five drinks of vodka. She admitted at the Preliminary Inquiry that when she arrived at the Hall Party more drinks were consumed and it was “affecting her”.

[23] That Ms. Gautreau had been drinking was noted by several police officers who dealt with her at the scene and other officers who spoke with her some four hours later at the hospital. Detective Beer, who was one of the first officers on the scene, described her as not being “overly intoxicated”, that is “not falling down drunk”, however it was clear to him that she had been drinking.

[24] Ms. Gautreau’s description of the assailant amplified with the passage of time and after discussion with the deceased’s family.

[25] The descriptions given by Ms. Gautreau to various responders focussed primarily on clothing, age and skin colour as evidenced by the following: The initial description of the assailant given by Ms. Gautreau to the 911 operator was that of a white male, approximately 25, wearing a burgundy and black shirt. The description she provided to the first responding police officer, Detective Beer, was that the assailant was 6' to 6'2" tall, white male, clean cut, clean shaven, wearing a maroon coloured shirt, a black vest, black pants and black shoes. She also told another officer at the scene, Constable Luck, that the assailant was approximately 6' tall, approximately age 25 and was wearing a burgundy black coloured hoodie. Ms. Gautreau provided no distinguishing facial features of the assailant to any of the persons to whom she gave a description at the scene.

[26] Approximately three hours later while at the hospital Ms. Gautreau told another officer, Constable Rogers, that she was new to Halifax and did not know many people, but that others had told her that the assailant’s name was “Stretch”. Ms. Gautreau provided this information to the police after she had received that information from the deceased’s family and friends who were gathered at the hospital.

[27] The first time Ms. Gautreau mentioned any facial features was when she was interviewed at the hospital by Detectives Fox and Fairbairn at approximately 5:30 a.m. on January 1st, 2010. During this interview she added to her previous description by including that the suspect had a big crooked nose and was known as Stretch. Ms. Gautreau stated, “I just remember that crooked nose and that short hair and that ugly look and how he was tall and lanky”. Ms. Gautreau had, by this time, discussed with family members of the deceased her description of the assailant. The evidence of Mrs. Desmond, grandmother of the deceased, and his mother, Mrs. Skinner, confirms that the description and identity of the perpetrator was a topic of discussion among the people who gathered at the hospital.

[28] At trial Ms. Gautreau denied that a description of the accused was provided to her at the hospital by Marquita Welsh, sister of the deceased. Marquita was not at the Hall Party. Ms. Gautreau’s evidence was that Marquita only gave her the nick-name Stretch. However, when questioned by the police in the afternoon of January 1st, 2010 she told the officer the following: “Her (Marquita’s) description of the guy, when she was does he look like this and this and this”. Ms. Gautreau agreed that this conversation with Marquita took place at the hospital and in the presence of others including the deceased’s mother, grandmother and sister. This conversation took place before she viewed any photo lineup or party photos.

[29] Not only was Ms. Gautreau under the influence at the time she allegedly made her observations and subsequently gave her descriptions to the police, she was also upset and distraught.

[30] Ms. Gautreau was asked to view two sets of photographs, one was a photo lineup containing 12 black and white photographs, and the other a series of 34 coloured photographs taken at the Hall Party before and after midnight. Ms. Gautreau was the only witness to be shown the coloured photographs. She viewed the black and white photographs before seeing the coloured ones. From the black and white photographs she selected two persons both of whom were the only ones in the 12 photos wearing what appeared to be hoodies. Ms. Gautreau viewed the photo lineup after it had been shown to Marquita Welsh and after Ms. Welsh had selected with a 99.9% degree of certainty the photograph of the accused.

[31] When Ms. Gautreau viewed the black and white photo lineup, she put aside two photographs numbered 4 and 7. After seeing all 12 photographs she was

shown the two which had been set aside. She excluded number 4 and selected number 7. With respect to photograph 7, she told Detective Fox the following: “I have no clue, I can’t say by these pictures, I just don’t feel comfortable with making a 100% yes on one of those pictures...Because I don’t really remember...his facial features at all...I just remember that nose and that short hair and that ugly look...and how he was tall and white and lanky”.

[32] Detective Fox then asked her if she could attach a percentage of certainty to her selection of photograph 7. Ms. Gautreau told Detective Fox that she was 75% certain that this was the assailant. She, however, also told Detective Fox with respect to that same photograph number 7, “I have no clue if that’s the right one or not but....at least even if it’s not him, it’s a similar look”.

[33] Detective Fox also sequentially showed Ms. Gautreau a series of 34 coloured photographs contained in Exhibit VD8, numbered 1-34. He asked her to identify anyone she knew who was depicted in those photos. When Ms. Gautreau was shown photograph number 11 she stated, “Oh my God, that’s him...that’s him man, that’s his burgundy shirt and black pants. If I see another photo I’ll know. There wasn’t a lot of people wearing burgundy shirts last night”. Ms. Gautreau wrote various things on the back of several photographs that she viewed in Exhibit VD8, such as on number 27 “guy with red shirt, black vest, black pants is 100% the guy who punched Nathanel outside” and on number 34 she wrote “guy circled is murderer”.

[34] Ms. Gautreau wrote nothing on the back of photograph 11. She stated at the time that she viewed that photo, “I don’t want to write anything on that photo just yet. Him as in Sketch, Stretch, whatever the fellow’s name is”.

[35] At trial, on cross-examination Ms. Gautreau stated that her reference “That’s him” regarding photograph 11 was to the puncher. The difficulty with her selection and comments regarding photograph 11 is that the person depicted in that picture wearing a burgundy shirt is not the accused.

[36] The evidence satisfies me that Ms. Gautreau’s identification of the accused as the assailant was based primarily on clothing rather than on her independent recollection of the person she saw that evening. I conclude this based in part on her comments to Detective Fox when she viewed the coloured photographs (VD8)

and stated in reference to photograph 11 “ There wasn’t a lot of people wearing burgundy shirts last night”. Ms. Gautreau did not tell the police that the assailant she saw was the only person wearing a burgundy shirt that night, only that there were not many other people wearing burgundy shirts that evening. Of greater significance, however, is the fact that the person Ms. Gautreau was referring to when she made these comments is not the accused.

[37] Ms. Gautreau was the only witness to be shown coloured photographs which contained photos of the accused and also a black and white photo lineup which also contained a photograph of the accused. Other identification witnesses were only shown the black and white photo lineup and black and white copies of the photos taken at the Hall Party. It is noteworthy that the coloured photographs which Ms. Gautreau viewed were shown to her after she had viewed the black and white photo lineup and after she had set aside two of those black and white photographs. She then selected one of those two photographs with a 75% degree of certainty.

[38] The method used in showing the photo lineup and the coloured photographs requires some comment. Ms. Gautreau was first shown the black and white photo lineup. From this package of 12 photographs she selected and put aside two, one of which was that of the accused. She identified that person with a 75% degree of certainty. Her comments at the time she selected that photograph have already been noted and will not be repeated. Ms. Gautreau then viewed the coloured party photographs. I have already reviewed the comments she made when she saw photograph 11. Her comments clearly show that she was identifying the person that she selected by the colour of the person’s clothing and little else. There is also a concern that her selection of photograph 34 in the coloured photographs was somehow influenced by the fact that she had previously seen a photograph of the accused in the lineup and had selected one of those photos being that of the accused with a 75% degree of certainty. The fact that Ms. Gautreau discussed with others at the hospital the description and identity of the suspected perpetrator is also of concern.

[39] I do not accept that Ms. Gautreau’s identification of the accused was truly her independent recollection of the person she saw. The different descriptions she gave to the first responding police officers: the fact that she was in a room at the hospital with family and friends of the deceased for several hours and discussed

the identity of the assailant with them; the fact that the accused was unknown to her at the time of the incident but that she was nonetheless able to give the police a nickname and that she and another person who had been at the hospital attended the police station together and were kept together before viewing the photo lineup. These factors all speak to the reliability and independence of Ms. Gautreau's recollection.

[40] My conclusion regarding the reliability and independence of Ms. Gautreau's identification evidence is further buttressed by the fact that while viewing the photographs at the police station Ms. Gautreau had her cell phone in hand and appeared to be looking at it while being shown the photographs. This was noted by Detective Fox who was showing her the photographs and at one point he asked her to put the phone away.

[41] Marquita Welsh who was not present at the Hall Party, and also it would appear, not present at the pre-party, viewed the black and white photo lineup before Ms. Gautreau. These two persons had been together at the hospital and discussed the events and who did it. They were also together at the police station before and after each was shown the photo lineup. Ms. Welsh was the first to see the photo lineup. She was also observed by Detective Fox to be looking at her cell phone screen and asked by him to keep off her telephone while in the process of viewing the lineup.

[42] It is important that an officer showing the photo lineup to a witness should not be one of the investigating officers. The Federal/Provincial/Territorial Heads of Prosecution Working Group on Wrongful Convictions in its report on the Prevention of Miscarriages of Justice released January 25th, 2005, almost nine years ago, <http://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/pmj-pej.pdf> (accessed November 14, 2013) set out guidelines for counsel in determining whether an identification process used in a particular case is faulty. Two of those guidelines are relevant to the present case. The first is that, "If possible, an officer who is independent of the investigation should be in charge of the lineup or photo spread. This officer should not know who the suspect is - avoiding the possibility of inadvertent hints or reactions that could lead the witness before identification takes place or increase the witness' degree of confidence afterward".

[43] Detective Fox was one of the primary investigators. He was also the one who showed the lineup and Hall Party photographs to Ms. Gautreau. He and Detective Fairbairn had also interviewed Ms. Gautreau and others at the hospital. Detective Fairbairn was the officer who assembled the photo lineup shown to Ms. Gautreau.

[44] The second guideline states: “If the identification process occurs on police premises, reasonable steps should be taken to remove the witness on completion of the lineup to prevent any potential feedback by other officers involved in the investigation and cross contamination by contact with other witnesses”. These guidelines are over eight years old.

[45] In the present case Ms. Welsh and Ms. Gautreau were transported together to the police station where they sat together before Ms. Welsh viewed the photo lineup. Once Ms. Welsh had completed viewing the lineup it would seem that she and Ms. Gautreau went somewhere together to have a cigarette. When they returned Ms. Gautreau was then shown the photo lineup. I have already reviewed what I have considered to have been the distinct potential for cross contamination: that is the witnesses discussing the case amongst themselves at the hospital; the witnesses being together at the police station before viewing the photo spread and after one of them had viewed that photo spread and made a 99.9% identification; and finally, the very real possibility of electronic contact between those witnesses when they were viewing the photo lineup.

[46] The following comments made by Detective Fox to Ms. Gautreau after she had viewed the photographs and selected one with a 75% degree of certainty offend the guidelines set out by the Federal/ Provincial/ Territorial Heads of Prosecution Working Group on Wrongful Convictions. Detective Fox told Ms. Gautreau after she had viewed the various photographs and selected number 7 with a 75% degree of certainty the following: “Thank you. That was actually a lot of help. I knew you were able to give us the face to a lot of people that we don’t know. It was quite helpful. I am going to talk to my partner one more time to see if there is anything else that we need to ask you, right, because this went really good, okay?” These comments made by Detective Fox reinforce or affirm the witness’ selection of the suspect and thereby affect the witness’ subsequent confidence or certainty in the identification made.

[47] Ms. Gautreau's consumption of alcohol that evening and her distraught condition after the event in question may explain why her evidence even on direct examination was inconsistent both within itself and with other objectively accurate evidence. The evidence of Mr. Logan, the 911 operator, established that the time when a call comes into the 911 operator is automatically entered by a computer. In this case exhibit VD1 shows that the call came in at 1:11 a.m. Ms. Gautreau's evidence was that the deceased went outside the Hall to have a cigarette at 1:30 a.m. and she remained in the Hall for some time. Later on, in her direct evidence, she testified that she went outside at 12:45 a.m. and that her call to 911 was made one or two minutes after the deceased was punched.

[48] The fact that Ms. Gautreau's recall of the events was affected by her alcohol consumption and the anxiety produced by the events was shown by her complete lack of recollection about giving the police a description at the scene or at the hospital. Her evidence at trial was that she believed that she gave the description to the officers at the police station.

[49] Ms. Gautreau's evidence as to why she selected photograph number 7 from the lineup with a 75% degree of certainty confirms that her observations at the scene and description to the police was centred on the assailant's height and colour of clothing. When asked on direct examination about her selection of photograph 7, she stated: "If I had to pick somebody, I could choose this photo, but not 100%.... If it was a full body picture I could identify it 100%, but I couldn't tell his height or weight from just the face shot".

[50] Other inconsistencies in Ms. Gautreau's evidence emerged regarding what she had to drink that evening. She initially told the police that she drank one half pint of vodka and two or three beers that evening. On direct examination at trial she stated that she only had a sip of beer that evening, however, at the Preliminary Inquiry she denied drinking any beer that evening and was 100% certain of this.

[51] At the Preliminary Inquiry her evidence was that she had a drink or two at the residence of the deceased's mother and maybe three or four drinks at the pre-party. Later on in her Preliminary Inquiry evidence she stated that she had four or five drinks at the pre-party. Her evidence at trial, however, was that she only had a couple of drinks at the pre-party.

[52] On cross-examination at trial she agreed that her memory of her alcohol consumption that evening was better at the time of the Preliminary Inquiry in 2011 than it was at trial. She acknowledged and adopted her evidence given at the Preliminary Inquiry that the amount of alcohol she consumed at the pre-party and the Hall Party was “affecting her”. She agreed at trial that she had consumed between five and nine drinks in approximately three hours from 10:00 p.m., December 31st, 2009 to 1:00 a.m January 1st, 2010.

[53] At trial Ms. Gautreau’s evidence was that she met the accused at the pre-party and had an interaction with him when he attempted, in her presence, to take a drink from a bottle of liquor belonging to the deceased. Ms. Gautreau did not tell the 911 operator or the various police officers who spoke with her at the scene and at the hospital about this alleged encounter. Her first mention of this pre-party interaction was in her statement given in the afternoon of January 1st, 2010 and after she had discussed the events with the deceased’s family members.

[54] In that statement of January 1st she referred to her encounter with the accused at the pre-party, however a few minutes later during the same interview when asked if she had seen this fellow again, her answer was “no”. Further on in the interview she stated: “I never saw him all night or talked to him all night at the party (pre-party) or the Hall Party or anything”. Ms. Gautreau agreed that her reference to the party in her statement was a reference to what has been described as the pre-party.

[55] At trial her evidence was that when she was outside the Hall, her boyfriend, the deceased, came over and spoke to her about a girl being upset or mad at him. This information was not given to the police either when she spoke to them at the hospital or later on at the police station. She first mentioned this when she testified at the Preliminary Inquiry, some fourteen months after the event.

[56] Ms. Gautreau gave the police somewhat conflicting versions of her encounter with the accused outside the Hall Party before the occurrence in question. Initially, at the hospital, she told the police that the accused came out of the Hall and asked her who was talking to his girlfriend and mentioned that he did not think he knew Ms. Gautreau or her boyfriend. Her recollection of the same event changed considerably when she was interviewed at the police station on the afternoon of January 1st. That afternoon she referred to the accused coming

outside and threatening to beat her head in and also that of her boyfriend. Her evidence at the Preliminary Inquiry on this point was that the accused told her that “something is going to happen”. Ms. Gautreau agreed in cross-examination that she only referred to being beaten up in her statement given on the afternoon of January 1st. She made no mention of this in her testimony at the Preliminary Inquiry.

[57] Ms. Gautreau’s evidence at trial was that she saw her boyfriend being struck. In her call to 911 she told the operator that she did see the blow and then that she did not see it. She could not explain why she had said this other than to say that she was frantic when she made the call to 911.

[58] In closing argument the Crown submitted that Ms. Gautreau had an unobstructed line of sight when she allegedly viewed the assault. This is questionable given that the Hall Party had ended and people were leaving. Even if Ms. Gautreau had a clear line of sight, the totality of her evidence leads to the conclusion that her powers of observation and recollection were impaired that evening by her alcohol consumption.

[59] The Crown also submitted the fact that Ms. Gautreau was shown coloured Hall Party photos after viewing the black and white photos is a minor problem because the coloured photographs are a fair representation of the party attendees and that the accused is the tallest male shown in those photos. I do not view the showing of the coloured photos as a minor problem because Ms. Gautreau’s description was essentially generic except for clothing, particularly a burgundy shirt or hoodie. When Ms. Gautreau viewed the black and white photographs she selected two, the only two photos showing the person wearing a hoodie. When she viewed the colour photos she initially picked the photo of a male wearing a burgundy shirt. This, however, was not the accused. The fact that Mr. Leeds was the tallest man in the coloured photos is of little significance since Ms. Gautreau’s various descriptions never included any mention of the assailant being the tallest man at the Hall Party.

[60] The fact that Ms. Gautreau’s description became more detailed over time is of concern. It speaks of the tainting which occurred as a result of her discussions with others about the identity of the perpetrator.

[61] Ms. Gautreau's inconsistencies in her recollection of the event and the things leading up to it, her description of the assailant, her alleged prior interactions with the accused including alleged threats he made, and her discussions with the deceased's family, all attest to her impairment that night and its effect on her powers of observation and accurate recollection. Ms. Gautreau was not and is not a reliable witness.

[62] It would be unsafe to base a conviction on her evidence. The mere fact that the accused was at the Hall Party is not sufficient to discharge the Crown's burden of proving beyond a reasonable doubt that the accused was the one who struck the deceased. Accordingly, I find the accused not guilty of both counts on the indictment. Mr. Leeds is free to go.

Felix A. Cacchione