

WARNING

THIS IS AN APPEAL UNDER THE

YOUTH CRIMINAL JUSTICE ACT

AND IS SUBJECT TO:

110(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

(2) Subsection (1) does not apply

(a) in a case where the information relates to a young person who has received an adult sentence;

(b) in a case where the information relates to a young person who has received a youth sentence for a violent offence and the youth justice court has ordered a lifting of the publication ban under subsection 75(2); and

(c) in a case where the publication of the information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.

(3) A young person referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either Act at the time of the publication.

111(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

138(1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published), 118(1) (no access to records unless authorized) or 128(3) (disposal of R.C.M.P. records) or section 129 (no subsequent disclosure) of this Act, or subsection 38(1) (identity not to be published), (1.12) (no subsequent disclosure), (1.14) (no subsequent disclosure by school) or (1.15) (information to be kept separate), 45(2) (destruction of records) or 46(1) (prohibition against disclosure) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. M.B., 2017 ONCA 653

DATE: 20170814

DOCKET: C62637

Juriansz, Pepall and Trotter JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

M.B.

Appellant

Cate S. Martell, for the appellant

Christine L. Tier, for the respondent

Heard: June 2, 2017

On appeal from the conviction entered on September 11, 2015 by Justice John D. Takach of the Ontario Court of Justice.

Juriansz J.A.:

A. OVERVIEW

[1] On October 11, 2014, a group of men gathered outside Sheila's Place/Ellis Kitchen Bar, ("Sheila's Place"), a bar and restaurant in Hamilton. Different factions of the group began fighting. A person then ran up to the group, fired several shots from a handgun at close range, and fled on foot. Three people were seriously injured. The incident was caught on Sheila's Place's video surveillance. The whole incident lasted only a few seconds.

[2] The appellant was charged and found guilty of three counts of each of the following offences: aggravated assault (*Criminal Code*, R.S.C. 1985, c. C-46, s. 268); use of a firearm in the commission of an indictable offence (s. 85(1)(a)); discharge of a firearm with intent (s. 244(1)); and breach of probation (*Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 137). He was also convicted of possession of a prohibited firearm (*Criminal Code*, s. 95(1)); and possession of a firearm while prohibited (s. 117.01(1)).

[3] The only issue at trial was identity. Was the appellant the shooter captured on the video? The only evidence of identity was the testimony of three witnesses who did not see the incident but later watched the video surveillance footage and claimed to recognize the shooter

as the appellant. The shooter's facial features were not visible on any of the videos. Two of the identifying witnesses were police officers who had interacted with the appellant in the past. The third witness worked at Sheila's Place and had served the appellant as a customer. There was no other evidence connecting the appellant to the shooting or even showing he was in the vicinity at the time. The appellant did not testify.

[4] The appellant challenges his conviction on the basis that the trial judge erred in admitting the recognition evidence of the civilian witness, erred in weighing the recognition evidence or, alternatively, that the verdict was unreasonable. For the reasons that follow, I would conclude that the trial judge erred in law by failing to properly scrutinize the reliability of the recognition evidence. I would also conclude that the verdict is unreasonable as the recognition evidence, properly scrutinized, cannot support a finding of guilt. I would set aside the conviction and enter an acquittal.

B. DECISION OF THE TRIAL JUDGE

(1) The trial judge cautioned himself extensively and appropriately

[5] The trial judge cautioned himself appropriately on a number of issues. He reminded himself that he had to render a decision dispassionately and be persuaded of the appellant's guilt beyond a reasonable doubt. He noted that witness demeanour was important to a minimal extent, and that, in the case of police officers, the "contextual completeness" of their note-taking and consistency between their notes and testimony was important.

[6] The trial judge noted that the only issue was the identity of the shooter and instructed himself appropriately and extensively on the dangers of identification evidence. He said: "Shortly stated, there's probably no other area of the law that potentially may be [more] responsible for a miscarriage of justice than that of a well-intentioned but incorrect identification of an accused."

[7] Citing judicial authority, the trial judge said, "any trial judge must instruct himself on the need for caution when dealing with such evidence." He recognized "[i]t is not just an issue of credibility" but "involves the inherent frailties of identification evidence simply because of the unreliability of human observation and recollection."

[8] The trial judge emphasized these principles by remarking that: "Mis-identification has plagued the justice system for years. Courts from Canada, the United States and Great Britain have dealt with these issues from time immemorial." He continued:

It is important to remember the various factors that can affect reliability of eyewitness identification evidence and remember that mistaken identification has been responsible for...the wrongful conviction of persons who have been mistakenly identified by one or more honest witnesses.

[9] The trial judge quoted the Supreme Court of Canada's observation in *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445, at para. 50, that:

...the danger associated with eyewitness in-court identification is that it is deceptively credible, largely because it is honest and sincere. The dramatic impact of the

identification taking place in court, before the jury, can aggravate the distorted value that the jury may place on it.

He recognized that the same applies when the trier of fact is a judge.

[10] The trial judge then noted that this case was somewhat different from a straightforward eyewitness identification case because here, all three witnesses claimed to have known the accused from previous dealings. This was, he said, an important distinction. He explained he had held a *voir dire* and had issued a separate ruling in which he had decided the three witnesses would be permitted “to give opinion evidence as to the identity of the shooter based on the DVD video of the shooting.”

(2) Summary of the evidence

(a) Constable Kay

[11] Constable Amy Kay had arrested the appellant for drug offences approximately 16 days before the shooting incident. She had spoken with him for 35 or 40 minutes at that time. As an undercover officer, she had seen the appellant on the street during the previous 2 months and had observed him at least 15 times, all in relation to drug investigations. She described the appellant as skinny, about 5’8” in height, with freckles and cornrows in his hair; a young black male with light skin. She testified that she had seen him run, walk and ride a bike. She had observed him near Sheila’s Place a number of times. She was not involved in the investigation of the shooting and had been on vacation when it occurred. When she returned to work five days after the shooting she was called in to view the video. She identified the appellant as the shooter in the video. In court, she reviewed channel 13 of the video and identified the appellant as the shooter in the video.

(b) Constable Howard

[12] Constable Howard had stopped the appellant at the end of August 2014. He had been on his way to an investigation when he came upon the appellant and another individual in an alley. Both were on foot. Constable Howard spoke to both individuals for what he described as minutes. He had also seen the appellant on other occasions in the area around Sheila’s Place.

[13] Constable Howard described the appellant as a lighter-skinned black male, 5’7”, very thin build, with longer black hair down his neck in cornrows. The appellant always had the same hairstyle when Constable Howard had seen him.

[14] Constable Howard identified the appellant in a photo lineup as the person in the video. He relied on channel 13 of the video for his opinion, but watched channels 14 and 15 as well. He said he identified the appellant on the video because of his frame, body size, lighter complexion and it appeared to him that the shooter had the same hairstyle as the appellant. He too watched the video in court and identified the appellant as the shooter in the video.

(c) T.C.

[15] T.C. was the third witness to identify the appellant as the shooter in the video. She testified behind a screen that prevented her from seeing the appellant in court. She did not identify him in court. She had worked at Sheila’s Place during the summer and early fall and had been working on the day of the shooting. She did not actually see the shooting.

Afterwards, she heard other employees who were watching the video on the premise's security cameras say "oh, shit ... I can't believe it's him". At that time, she did not see the video and did not know to whom they were referring. After the police arrived, she watched the video with the investigating officer and said words to the effect of: "I know that kid". She did not know his name but later picked him out from a photo lineup, without hesitation.

[16] T.C. was acquainted with the appellant as a customer of Sheila's Place, who came in during the time she worked there. She had no specific conversation with him except when she was serving him. She said he was of medium height with light (black) skin and that he wore his hair in braids/cornrows or a ponytail. In court, when channel 13 was played for her, she said she believed she had seen a different video when she made her initial identification. She said "this doesn't look like the way I watched it". She was then shown channel 14, and agreed this was one of the angles she had seen. The investigating officer testified there was no other video, and the trial judge concluded that T.C. had seen the surveillance video channels played in court and it was from those videos that she had made her identification at the police station.

(d) Jonathan Mack

[17] Jonathan Mack was one of the individuals who was shot during the incident. He did not recognize and could not identify the shooter. He said the shooter was a young black kid with lighter skin. He said the shooter may have had braids or dreadlocks, but he could not tell the shooter's hairstyle because he thought the shooter was wearing a toque. He admitted, "I didn't get a good look at him either". He explained that it all happened fast.

(3) The trial judge's assessment of the evidence and his reasoning

[18] The trial judge reviewed the facts of the altercation and shooting that were apparent on the video surveillance. The video surveillance showed 16 different views of both inside and outside Sheila's Place. Only three of the video views depicted any part of the shooting. The best view was on channel 13.

[19] The trial judge made repeated comments in his reasons about the poor quality of the video. He observed several times that one could not make out the shooter's facial features on the video. He said "Clearly, the facial features of the accused are not visible on the video...". He said, "quite candidly" he could not make out the hair features that both police officers testified they could see. He said, "I have already noted that facial features were not visible in the video". In his reasons, referring to T.C.'s identification of the appellant at the police station, he said, "Again, there were no facial features available in any of the video channels that would have enabled her to recognize the face."

[20] The trial judge was satisfied the appellant met the general description of the shooter in the video. While there was no evidence before the court about the appellant's height, weight, skin colour, hairstyle, build or racial origin, the trial judge said he had observed the appellant during the trial and expressed the view the appellant was "of slim to medium build, between 5'7" and 5'9", black, lighter skin tone, with dark hair, and what I would describe as a higher hairline on his forehead." He added that "that description is consistent with my view of the video", that "his general appearance in the courtroom is at least very similar to the shooter", though he wore glasses in the courtroom.

[21] Despite the absence of any facial features of the shooter on the video, the trial judge was satisfied the witnesses could identify the appellant as the shooter from the way the shooter moved. He reasoned:

There are many individuals who, when they perform various acts, either sporting acts or normal acts involving walking, movement, gestures, that are incapable of significant description unless there's some special characteristic. Nevertheless, even without facial features, one, from a distance, is able to tell who those individuals are, whether it is a walk, a gait that can't really be described or whether the individual is performing some specific act such as running, or as I've indicated, performing a sporting manoeuvre.

He said that in this case "clearly, in the video there are movements by the shooter that may be identified by others". He added "[i]t was only the conduct of the shooter and the physical attributes that could have spawned a recognition of him by any of the three witnesses."

[22] The trial judge recognized that none of the three witnesses identified any special characteristic of the appellant's movement. However, he cited the comments of Blair J.A. in *R. v. Berhe*, 2012 ONCA 716, 113 O.R. (3d) 137 at para. 22 that it is not necessary for a "recognition evidence witness to show that he or she can point to some unique identifiable feature or idiosyncrasy of the person to be identified." He acknowledged that Blair J.A. was in that case addressing threshold admissibility, but reasoned that Blair J.A.'s remarks "are not irrelevant on the ultimate issue, that is, the weight to be given to the witness' testimony that the accused was the shooter."

[23] The trial judge emphasized the confidence with which the recognition witnesses identified the appellant as the shooter. He observed that Constable Kay was "certain and confident" of her identification of the appellant as the shooter "notwithstanding the notation in her book of not being 100% certain". Constable Howard was "very confident" of the identification and "he had no doubt about it". Both relied on their previous knowledge of him in their descriptions of the appellant. According to the trial judge, T.C. "expressed no doubt about the identity of the shooter. As soon as she saw the video channels available to her, she told the police that she knew who the shooter was."

[24] The trial judge found it significant that three witnesses identified the appellant as the shooter. He said that the evidence of one of the police officers or perhaps even two of the identifying witnesses standing alone may not "have been enough to establish culpability beyond a reasonable doubt". However, in considering the totality of the evidence "including the evidence of the three identifying witnesses, as well as the lineup identification...of one of the witnesses" he was persuaded beyond a reasonable doubt that the accused was the shooter and convicted him.

C. DISCUSSION

[25] I have already noted that the trial judge properly instructed himself and cited the appropriate case law. At the same time, his reasons show he did not actively consider the matters about which he initially cautioned himself. In this, he erred in law.

[26] This case is similar to *R. v. Olliffe*, 2015 ONCA 242, 322 C.C.C. (3d) 501. In *Olliffe*, this court found the trial judge had erred in law by failing to critically analyse the problematic

aspects of the recognition evidence led in that case. The court said at para. 43 that the trial judge “was required to approach [the recognition witness]’ testimony with caution and grapple with the problems in her evidence to determine whether it was reliable.”

[27] The trial judge in this case erred in law in the same way. He failed to approach the recognition evidence with caution and to grapple with the evident problems in the evidence.

[28] In *Olliffe*, the court went on to find that in addition to the legal error, the verdict was unreasonable. I would do so in this case as well.

(1) Relevant principles

(a) Frailty of eyewitness identification

[29] Eyewitness identification is inherently unreliable. It is difficult to assess, is often deceptively reliable because it comes from credible and convincing witnesses, and is difficult to discredit on cross-examination for those same reasons. Studies have shown that triers of fact place undue reliance on such testimony when compared to other types of evidence. As a result, many wrongful convictions result from faulty, albeit convincing, eyewitness testimony, even in cases where multiple witnesses identify the same person. See *R. v. Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.), at pp. 450-451, and *R. v. A. (F.)* (2004), 183 C.C.C. (3d) 518 (Ont. C.A.), at para. 39.

[30] For these reasons, although identification is a matter of fact, appellate courts will subject such findings to closer scrutiny than other findings of fact. Justice Doherty summarized this approach in the context of an unreasonable verdict argument in *R. v. Tat* (1997), 117 C.C.C. (3d) 481 (Ont. C.A.), at paras. 99-100, where he said:

While recognizing the limited review permitted under s. 686(1)(a)(i), convictions based on eyewitness identification evidence are particularly well suited to review under that section. This is so because of the well-recognized potential for injustice in such cases and the suitability of the appellate review process to cases which turn primarily on the reliability of eyewitness evidence and not the credibility of the eyewitness.

[31] As stated by Charron J.A. (as she then was) in *Miaponoose*, at p. 422: “Eyewitness testimony is in effect opinion evidence, the basis of which is very difficult to assess. The witness’ opinion when she says ‘that is the man’ is partly based on a host of psychological and physiological factors, many of which are not well understood by jurists.” Justice Charron goes on to quote from the Law Reform Commission of Canada Study Paper on *Pretrial Eyewitness Identification Procedures* (1983), at p. 10:

Simply by way of illustration, psychologists have shown that much of what one thinks one saw is really perpetual filling-in. Contrary to the belief of most laymen, and indeed some judges, the signals received by the sense organs and transmitted to the brain do not constitute photographic representations of reality. The work of psychologists has shown that the process whereby sensory stimuli are converted into conscious experience is prone to error, because it is impossible for the brain to receive a total picture of any event. Since perception and memory are selective processes, viewers are inclined to fill in perceived events with other details, a

process which enables them to create a logical sequence. The details people add to their actual perception of an event are largely governed by past experience and personal expectations. Thus the final recreation of the event in the observer's mind may be quite different from reality.

Witnesses are often completely unaware of the interpretive process whereby they fill in the necessary but missing data. They will relate their testimony in good faith, and as honestly as possible, without realizing the extent to which it has been distorted by their cognitive interpretive processes. Thus, although most eyewitnesses are not dishonest, they may nevertheless be grossly mistaken in their identification. [Emphasis added.]

Justice Charron continues: “While the circumstances surrounding the witness' identification can be subject to scrutiny in cross-examination, many of the more subjective processes that have led to it are impossible to expose in this fashion.”

[32] Witness identification based on video recordings can under certain circumstances be more reliable as it allows repeated and unhurried consideration. For example, *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, at para. 23, contemplates a videotape of “sufficient clarity and quality” that it would be reasonable for the trier of fact to use it as the sole basis for identifying the accused:

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

The kind of clear video recording described in *Nikolovski*, however, sharply contrasts with the video recording in this case. The trier of fact must use greater caution where the video or photo quality is poor: *R. v. Cuming* (2001), 158 C.C.C. (3d) 433 (Ont. C.A.), at para. 19.

(b) Recognition evidence as a subset of eyewitness identification

[33] Recognition evidence is a subset of eyewitness identification evidence, in which the eyewitness' identification is based on prior acquaintance. The recognition witness may, or as in this case may not, have been present at the scene of the crime.

[34] Hourigan J.A. stated in *Olliffe* at para. 39, “recognition evidence is merely a form of identification evidence”. As such, “[t]he same concerns apply and the same caution must be taken in considering its reliability as in dealing with any other identification evidence.”

[35] The test for admitting recognition evidence is established in the Supreme Court of Canada's decision in *R. v. Leaney*, [1989] 2 S.C.R. 393 and re-affirmed by Rosenberg J.A. in *R. v. Brown*, 215 C.C.C. (3d) 330 (Ont. C.A.). At para. 39 of *Brown*, Rosenberg J.A. stated that "this type of non-expert opinion evidence is admissible provided that the witness has a prior acquaintance with the accused and is thus in a better position than the trier of fact to identify the perpetrator".

[36] In *Berhe*, this court considered the proposition that a recognition witness must be able to point to idiosyncrasies of physical appearance or movement peculiar to the person identified in order for his or her opinion to satisfy threshold admissibility. The proposition was asserted by Harradence J.A. in his dissent in *Leaney*, 1987 ABCA 206, 38 C.C.C. (3d) 263, at para. 40:

Notwithstanding this general principle of exclusion, there may be occasions when non-expert opinion evidence will be relevant and admissible. Where a witness is so familiar with the accused that he can identify idiosyncrasies of physical appearance or movement, not apparent to the trier of fact in the courtroom, that witness should be able to give his opinion. Two criteria must be satisfied. First the witness must be sufficiently familiar with the accused so as to be aware of the unique features which form the basis of the opinion. Second, the witness must be able to state with particularity what the idiosyncrasies are and show where and how they are revealed on the videotape. In this way the witness is contributing knowledge not otherwise available to the trier of fact. Consideration of these issues should take place within the context of a *voir dire* so the accused can challenge the evidence before it is admitted.

[37] This court rejected the proposition as a requirement *for threshold admissibility*. The court in *Berhe* instead held at para. 22 that the identification of idiosyncrasies of physical appearance or movement were relevant when considering the ultimate reliability of the evidence. I will expand further on this below.

(2) Application of principles to the trial judge's assessment of the evidence

(a) The only inculpatory evidence was the video

[38] It must be kept in mind that the only evidence tying the appellant to the shooting was the recognition evidence of the three witnesses. There was no evidence that the accused had any reason to run up and shoot the victims that night or even that he knew the victims or anyone else at the scene. There was no other evidence that he was in the area around the time of the incident.

(b) The poor quality of the video

[39] The trial judge made findings of fact that the video was unclear, that facial features were not visible in the video, and that one could not recognize the shooter's face. He repeated these findings several times, as summarized above. The trial judge also made a finding of fact that the shooter's hair features could not be made out on the video. I draw this from his "candid" statement that he could not make out the shooter's hair features.

[40] The trial judge also stated at p. 11 that in observing the accused in court himself, he could say no more than that the accused's appearance was "at least very similar to the

shooter”. That is, the trial judge himself, looking at the accused in court, over several days, could not identify him as the shooter in the video.

[41] At the outset of her argument in this court, appellant counsel insisted on playing the surveillance video to demonstrate its poor quality. Playing the video made counsel’s point clearly. There should be no misunderstanding of the trial judge’s findings that the facial features of the shooter are not visible in the video. This is not the result of the shooter’s face being obscured or turned away from the camera. In fact, on channel 13 the shooter is facing the surveillance camera at times. The facial features of the shooter are not visible on the video because it is of such poor quality that it is blurred and detail is not displayed.

[42] The video’s poor quality was apparent to the witnesses. For example, Officer Kay in cross-examination at trial agreed that she could not see on the video whether the shooter has any facial hair, whether he was wearing glasses (though she noted the absence of any reflection) or even whether he is wearing a sweater or a jacket.

[43] Given the poor quality of the video and the lack of any other evidence connecting the appellant to the shooting, it was imperative that the trial judge exercise the utmost caution in assessing the identification evidence.

(c) Identification from the way the shooter moved

[44] As outlined above, the trial judge found as a fact the appellant’s facial features could not be seen or recognized on the video: “It was only the conduct of the shooter and the physical attributes that could have spawned a recognition of him by any of the three witnesses.” Nevertheless, he was satisfied that the witnesses could identify the appellant as the shooter from the way the shooter moved in the video. The trial judge reasoned “even without facial features, one, from a distance, is able to tell who those individuals are, whether it is a walk, a gait that can’t really be described or whether the individual is performing some specific act such as running, or as I’ve indicated, performing a sporting manoeuvre”. The trial judge said “clearly, in the video, there are movements by the shooter that may be identified by others”.

[45] The trial judge recognized that none of the three witnesses identified any special characteristic of the appellant’s movement. However, as noted above, he relied on *Berhe* for the proposition that it was not necessary for a witness to “point to some unique identifiable feature or idiosyncrasy of the person to be identified”. In my view, he misread *Berhe*.

[46] The issue in *Berhe* was the threshold admissibility of the recognition evidence. *Berhe* also confirmed the continued importance of unique identifiable features in determining the ultimate reliability of the evidence. The importance of unique identifiable features varies with how well the witness knows the person he or she identifies. The court made this clear by endorsing the following comment by Holmes J. in *R. v. Panghali*, [2010] B.C.J. No. 2729 at para. 42:

Common experience teaches that people have vastly different abilities to identify and articulate the particular features of the people in their lives that they know, recognize, and distinguish on a regular basis. Where a witness has but little acquaintanceship with the accused, his or her recognition evidence may be of little value unless the witness can explain its basis in some considerable detail. But at the other end of the spectrum, the bare conclusory recognition evidence of a person long and closely

familiar with the accused may have substantial value, even where the witness does not articulate the particular features or idiosyncrasies that underlie the recognition.

[47] In my view, the trial judge was wrong to interpret *Berhe* as minimizing the importance of unique identifiable features in determining the weight of recognition evidence. Here, none of the witnesses had a “long and closely familiar” relationship with the appellant. Constable Howard had seen the appellant in the neighbourhood and had spoken to him once for minutes at the end of August. T.C. had served the appellant an unspecified number of times in the restaurant and had seen him there, had spoken to him only when taking his order and did not know his name. Constable Kay had the greatest acquaintance with the appellant – having observed him 10 to 15 times as an undercover officer and having spoken with him on one occasion for 35-40 minutes. This was a case in which the inability to “articulate the particular features or idiosyncrasies that underlie the recognition” was important and should have been weighted appropriately.

(d) Problems with the shooter’s movement as the basis for identification

[48] There are additional problems with the trial judge’s acceptance of the way the shooter moved in the video as the basis of the witnesses’ identification of the appellant as the shooter.

[49] First, the trial judge did not differentiate among the three witnesses in his discussion. In fact, only Constable Kay relied on the way the appellant moved in her identification. She said she had seen him walk and run before and that played a part in her identification of him. She could not, however, point to anything distinctive about the way the appellant ran. She also said she knew the way the appellant held his hand on his pants. She agreed that looking at the video one could not tell if the shooter had hair in cornrows, or had regular afro hair, or hair that was braided.

[50] Neither Constable Howard nor T.C. relied on any feature of the appellant’s movement in their identifications. The reasons of the trial judge suggest he was speculating that they must have relied on some aspect of the shooter’s movement to identify him. He seems to have reasoned that it must have been the way the shooter moved because nothing else about him could possibly be discerned on the video.

[51] The Crown submits that although Officer Howard and T.C. may not have seen the appellant run, their previous observations would have made them familiar with the way he moved generally and the trial judge could rely on this familiarity in finding their identifications reliable.

[52] Putting aside that the shooter in the video is not seen sitting at a table, walking, or standing on the street engaged in conversation as Constable Howard and T.C. observed the appellant, and that the trial judge also saw the appellant standing and sitting for several days and could not recognize him on the video, there is a more fundamental error here. Rather than exercising caution in assessing the recognition evidence, the trial judge seems to have actively sought a basis to bolster it. It is one thing to attach weight to a recognition witness’ evidence that relies on the way the accused moves without pointing to anything distinctive. It is quite another to surmise a basis for identification that the witness himself or herself does not claim.

[53] Constable Howard never claimed he recognized the shooter by the way he moved. Constable Howard never even mentioned the way the shooter or the appellant moved. He said he recognized the appellant from his body size, lighter complexion and hair.

[54] T.C. also made no mention of the way the shooter or the appellant moved. T.C. described the appellant as medium height, light-skinned with braids/cornrows (and that he also occasionally wore his hair in a ponytail). Most troubling is that on two occasions she indicated she relied on facial recognition to know the appellant and his friends.

[55] The first time was when T.C. identified the appellant in the photo lineup. Before showing her the photo line-up, Officer Murphy asked her how she would be able to recognize the shooter. T.C. responded “I know exactly who he is by his face”.

[56] The second occasion was in cross-examination:

Q. Did you ever have a conversation with him or talk to him?

A. No.

Q. All right. Were you ever in his presence when you would talk to other people?

A. Well, if I had to help out like serving food or serving drinks like I was around maybe like in the same room, but like I said, I don't associate with the same people.

Q. All right, and did you know some of the people that he associated with?

A. Like knew their face, didn't know them as a person to talk to them.

[TRNS, September 8, 2015, pp. 13-14].

[57] Given his finding that “there was no facial features available in any of the video channels that would have enabled her to recognize the face”, the trial judge should have considered whether T.C. picked the appellant out of a photo lineup (that clearly showed his face) because he was the youth she thought she had recognized in the video.

[58] There is yet another reason that the trial judge should have exercised more caution before accepting T.C.'s identification of the appellant. At trial, after viewing the video, she could not identify the appellant as the shooter. In examination-in-chief, the Crown never asked her to identify the shooter, but relied on reviewing the earlier identification she had made at the police station. Upon viewing channel 13, which displayed the clearest view of the shooter, T.C. said the video footage shown to her at trial was different from what she remembered seeing when she originally made her identification. The trial judge did not mention the fact that on cross-examination at the trial, T.C. said that, from the video she was shown in court, she could not identify the shooter as the man she had served in the restaurant:

Q. Okay. From the video that you saw today, is it fair to say you can't- you can't identify who that is though from the videos that you were shown in, in court today?

A. It's the angles, it's not as – no, 'cause it's not – it's not what I originally saw... (at p. 22, l.3-7).

[59] Rather, upon being satisfied T.C. had seen the same video views at the police station as were shown to her at trial, he did not hesitate in relying on her earlier identification as reliable. He failed to exercise the requisite caution by making nothing of the fact that T.C. could not identify the shooter as the appellant after viewing the video at trial.

[60] Another illustration of the trial judge's failure to exercise the requisite caution is that he left hanging his observation that "both police officers see hair features that quite candidly I cannot make out". Both claimed to see hair turned up at the sides of the shooter's face. Absent an explanation of why he should not trust his own eyes, this observation required some explanation. The trial judge obviously assumed the officers must have had superior visual acuity. This required explanation because the poor-quality video did not display minute detail to be perceived by superior visual acuity. The trial judge failed to consider the other possibility that the officers, when looking at a fuzzy image of someone in fact unknown, unintentionally "filled-in" details of a man familiar to them.

(e) The fallacy of mistaking certainty for accuracy

[61] The trial judge also failed to keep in mind his initial caution about the fallacy of mistaking certainty for accuracy. In his analysis, he emphasized how certain each recognition witness was in his or her identification.

[62] At the outset, the trial judge identified the consistency of police officers' notes with their testimony as an "important issue". However, he was untroubled by the conflict between Officer Kay's notes and her testimony at trial. He said, "In court, Constable Kay was certain and confident of her identification of him notwithstanding the notation in her book of not being 100% certain."

[63] Officer Howard was "very confident" of the identification and "he had no doubt about it".

[64] T.C. "expressed no doubt" about the identity of the shooter. The trial judge emphasized how immediate her identification was: "As soon as she saw the video channels available to her, she told the police she knew who the shooter was." This observation was based on the investigating officer's testimony who showed T.C. the surveillance video footage.

[65] In relying on the witnesses' certainty, there is no echo in the trial judge's reasons of his initial recitation of the caution of the Supreme Court in *Hibbert* that the danger of identification evidence is that "it is deceptively credible largely because it is honest and sincere." The mechanism by which honest and sincere identification testimony is unreliable is explained in The Law Reform Commission Report on Eyewitness Testimony (at p. 10) endorsed in *Miaponoose*:

The details people add to their actual perception of an event are largely governed by past experience and personal expectations. Thus the final recreation of the event in the observer's mind may be quite different from reality

(f) The significance of three identification witnesses

[66] While he did not say so expressly, the trial judge seems to have appreciated the weakness of each recognition witness' identification standing alone. At the end of his analysis, he said the evidence of one of the police officers or perhaps even two of the identifying

witnesses standing alone may not “have been enough to establish culpability beyond a reasonable doubt”. He added however, that when he considered the totality of the evidence “including the evidence of the three identifying witnesses, as well as the lineup identification... of one of the witnesses” he was persuaded beyond a reasonable doubt that the accused was the shooter.

[67] It seems to me this reasoning is not logically sound. The important point is that each of three witnesses’ identification was flawed. The trial judge did not consider the possibility that the same mechanism accounted for the weakness of each identification. Each of the witnesses’ confident identifications might have been mistaken because each of them unintentionally “filled-in” details of a person familiar to them when looking at a fuzzy image of someone in fact unknown. Independent flawed identification evidence from three witnesses is no more persuasive than if from one.

(g) Conclusion

[68] In summary, I am satisfied that the trial judge erred in law in his treatment of the recognition evidence. In my view, this error justifies appellate intervention.[\[1\]](#)

(3) Unreasonable Verdict

[69] I am also satisfied the verdict in this case is unreasonable.

[70] The test for unreasonable verdict is “whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered”: see *Corbett v. The Queen*, [1975] 2 S.C.R. 275, at p. 282; *R. v. Yebe*s, [1987] 2 S.C.R. 168, at pp. 179-80; and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 42.

[71] As Arbour J. says in *Biniaris*, at para. 37:

The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal. The court of appeal will therefore be justified to intervene and set aside a verdict as unreasonable when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached. These discernable defects are themselves sometimes akin to a separate error of law, and therefore easily sustain the conclusion that the unreasonable verdict which rests upon them also raises a question of law.

[72] In my view, the flaws in the trial judge’s evaluation of the evidence and his analysis, both discussed above, render the guilty verdict unreasonable.

[73] The guilty verdict in this case rests entirely on the bald assertions of recognition by three witnesses who had a brief and passing acquaintance with the appellant. All failed to point to some distinctive feature of the appellant’s appearance or manner of moving to explain their recognition. Constable Kay noted she was not 100% certain in her identification the first time

she viewed the video. T.C. could not recognize the shooter as the appellant when she viewed the video in court. Constable Howard had the briefest interaction with the appellant. Their identification evidence is replete with the problems I have discussed above. There is a real possibility that all three recognition witnesses added details to their perception of the blurry video. They might have introduced into the blurry video the details of the appearance of the one person in the neighbourhood who fit the general description of the shooter. The general description of the shooter is one many individuals could satisfy. Crucially, there was no other evidence connecting the appellant to the crime.

[74] The conviction in this case rests on a foundation that is impermissibly delicate. The verdict is unreasonable.

D. CONCLUSION

[75] I would allow the appeal, set aside the conviction, and enter an acquittal.

Released: “RGJ” August 14, 2017

“R.G. Juriansz J.A.”

“I agree. S.E. Pepall J.A.”

“I agree. G.T. Trotter J.A.”

[\[1\]](#) Given this conclusion, it is unnecessary to address the challenge to the initial admissibility of T.C.’s evidence.