NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Brown*, 2024 NSCA 25

Date: 20240306
Docket: CAC 522852
Registry: Halifax

Between:

Thomas Joseph Lyle Brown

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	November 28, 2023, in Halifax, Nova Scotia
Subject:	Recognition evidence; credibility and reliability; unreasonable verdict.
Summary:	The appellant was convicted of offences related to a violent home invasion, including assault bodily harm of the homeowner. The homeowner and his common law partner testified they were familiar with the appellant as an acquaintance and recognized him as the intruder. The appellant said the trial judge erred in finding the eyewitnesses to be credible and reliable. He said the trial judge misapplied the law on recognition evidence. He pointed to frailties in the eyewitnesses' evidence, their limited prior interactions with the appellant, and instances where they had been untruthful. He said the verdicts were unreasonable.
Issue:	(1) Were the verdicts unreasonable?
Result:	Appeal dismissed. The verdicts were not unreasonable. The trial judge correctly applied the law on recognition evidence. The eyewitnesses' familiarity with the appellant was sufficient to enable them to identify him. The trial judge's

credibility and reliability findings were entitled to deference, only to be set aside on appeal if it was established they could not be supported "on any reasonable view of the evidence". The trial judge confronted the issues with the evidence raised by the appellant and reasonably concluded that his identity as the intruder had been proven beyond a reasonable doubt.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 112 paragraphs.

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Judges:	Bryson, Scanlan, Derrick, JJ.A.
Appeal Heard:	November 28, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Derrick, J.A.; Bryson and Scanlan, JJ.A., concurring
Counsel:	Stanley W. MacDonald, K.C., for the appellant Jennifer MacLellan, K.C., for the respondent

Reasons for judgment:

Introduction

[1] This appeal turns on the issue of recognition evidence and the credibility and reliability of eyewitnesses to a violent home invasion.

[2] On October 7, 2022, Thomas Joseph Lyle Brown was convicted by Justice Ann Smith of the Supreme Court of Nova Scotia of multiple offences arising from a home invasion at Anthony Cooper's residence.[1]

[3] The most accessible listing of the offences for which the appellant was convicted is found in his Notice of Appeal:

> Unlawful possession of a firearm without being the holder of a license, contrary to s. 91(1) x 5; Possession of a firearm knowing that he was not a holder of a license, contrary to s. 92(1) x 5; Possession of a firearm knowing that it was obtained by the commission of an offence, contrary to s. 96(1) x 5; Robbery to steal a firearm, contrary to s. 98.1; Break and enter and steal a firearm, contrary to s. 98(1)(b); Assault causing bodily harm, contrary to s. 267(b); Possession of a firearm while prohibited from doing so, contrary to s. 117.01(1) x 5; Breach of probation, contrary to s. 733.1(1)(a); Assault, contrary to s. 266.

[4] The appellant's convictions rested on the evidence of Mr. Cooper and his partner, Meaghan Morris, both of whom testified they were familiar with him and recognized him as the intruder who burst into their bedroom in late December 2020 and brutally assaulted Mr. Cooper.

[5] The Crown also led evidence from two police officers, D/Cst. Chris Graham and D/Cst. Josh McNeil, and Luke Cooper, Anthony Cooper's 18-year-old son.

[6] The appellant called no evidence and did not testify. He put the Crown to its burden of proving beyond a reasonable doubt that he was one of the home invaders.

[7] The fundamental issue in this appeal is whether the appellant's convictions were unreasonable. The trial judge's credibility and reliability findings in relation to Mr. Cooper and Ms. Morris are entitled to significant deference, only to be set aside on appeal if it is established they "cannot be supported on any reasonable

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[1] *R. v. Brown*, 2022 NSSC 284 [*Brown*]. The appellant received a prison term of 48 months, a sentence he is not appealing.

view of the evidence”.[2] Despite harbouring some concerns about the evidence on which the convictions rest, it cannot be said the verdicts are unreasonable. I would dismiss the appeal.

Facts

[8] The basic facts are straightforward.

[9] As Christmas Eve 2020 approached, Mr. Cooper was at home with his common-law partner, Meaghan Morris, and his son, Luke. Close to midnight on December 23, four intruders broke in. Mr. Cooper was punched hard in the face several times and knocked out. The intruders stole his firearms and some marijuana.

[10] Approximately two hours later, Mr. Cooper made a 911 call which resulted in D/Csts. Graham and Murray attending his residence and taking audio statements. The next day D/Cst. McNeil spoke with Mr. Cooper and Ms. Morris in the doorway of the home.

[11] Based on the eyewitness identification provided, the appellant was charged on the 26-count Indictment with three other people: a neighbour, Joshua David (J.D.) Eye, Jeffrey Gordon Hilchie, and Emily Sara Holman.

[12] There is no question that J.D. Eye and Mr. Hilchie broke into Mr. Cooper’s home and that while they were there, a third man assaulted Mr. Cooper by punching him repeatedly in the face. At the start of their joint trial, Mr. Eye and Mr. Hilchie pleaded guilty to break and enter and common assault.[3]

The Case Against the Appellant – Recognition Evidence Only

[13] The recognition evidence of Mr. Cooper and Ms. Morris was the basis for the appellant’s conviction. There was no other evidence tying him to the home invasion:

- No evidence of him being at Mr. Cooper’s home on December 23/24, 2020.

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[2] *R. v. Burke*, [1996] 1 S.C.R. 474 at para. 7.

[3] Ms. Holman was acquitted at the conclusion of the Crown’s case against the appellant when Crown counsel advised the prosecution against her was not being continued.

- No forensic evidence collected by police – no DNA (Mr. Cooper took a shower after being assaulted) and no fingerprints.
- No physical evidence connected the appellant to the offences.
- No photographic line-ups were conducted by police with the witnesses.
- No statements by the appellant connecting him to the offences.

[14] The key evidence identifying the appellant as the third man came from Anthony Cooper and Meaghan Morris. They testified to having an acquaintanceship with the appellant, whom they knew from the community as T.J. The focus of their evidence was the events at the house during the break-in and prior interactions with him.

The Evidence of Anthony Cooper, Meaghan Morris and Luke Cooper

[15] Mr. Cooper's testimony provided the trial judge with the following evidence:

- He saw his assailant for probably two or three seconds after he came into the room, before being punched and knocked out. He said he recognized the intruder as the appellant.
- After coming to for about 20 seconds, he was punched out again.
- After the intruders had left, he texted J.D. Eye demanding his "stuff" back or he was calling the cops.
- He thought he had a better chance of getting his guns and marijuana back if he didn't go through the police.
- He waited two hours to call 911.
- He was not truthful in the 911 call when he claimed not to know the intruders instead saying he could find out their names "through neighbours" and was "pretty sure" he knew "one guy's name".
- During the 911 call he obtained help describing the second male, by asking of others present while he talked to the operator, "What was J.D.

wearing?" Ms. Morris and Luke Cooper were present with Mr. Cooper when he made the 911 call.

- Once the 911 operator noted Mr. Cooper had named one of the intruders—J.D.—he was asked if he knew the names of the others. Mr. Cooper responded: "I don't know". Mr. Cooper testified that answer was untruthful.

- He said on cross-examination that he hadn't revealed he knew his assailant was T.J. Brown because he thought he "might still have a chance of getting my rifles back".

- He said he didn't think the 911 call was very important, he just figured the police would be sent over. He wanted the police to come so he could explain.

- He denied being "pretty drunk" as Ms. Morris had said they were. He denied smoking marijuana that night.

[16] D/Cst. Graham arrived at Mr. Cooper's residence about 20 minutes after the 911 call. In his statement to the officer at 2:30 a.m., Mr. Cooper named the appellant. He admitted he had not been truthful with D/Cst. Graham about how much marijuana was stolen. He had said "a couple of grams". He testified in direct examination at trial that 6000 grams were taken. The trial judge accepted only that the amount of marijuana stolen in the home invasion was "significant".

[17] Meaghan Morris testified that:

- The assailant, whom she identified in her evidence as "T.J.", came into the bedroom yelling. Mr. Cooper stood up, was hit "a bunch of times" and fell back onto the bed. "T.J." kept hitting him. Ms. Morris yelled at him to stop but then "T.J." got "in [her] face for a second" and it scared her and she left the room.

- "T.J." punched Mr. Cooper in the face with his fist. The first hit knocked Mr. Cooper unconscious.

- While she was out of the bedroom she could hear a lot of banging and crashing and things being thrown around.

- She asked “Jeff” to get “T.J.” to stop and he ignored her. She then asked “J.D. and Emily” to get “T.J.” to stop. Eventually “Emily” went in and told “T.J.” to come out. Ms. Morris was very anxious, upset and afraid.

- Ms. Morris had seen Jeff around “a couple times” and “just kind of knew of him”. She knew J.D. Eye who lived across the street.

- She said “T.J.” was T.J. Brown. Although she could not give much of a description, saying maybe he had a hoodie on, might have been wearing a hat, didn’t remember if he had facial hair, she said she recognized it was T.J. Brown, “Pretty much as soon as he started hitting Tony”.

- She didn’t think Mr. Cooper knew who it was at first. He said: “Who are you?”

- Ms. Morris said when T.J., J.D., Jeff and “Emily” left they took guns, a bow and arrow and a bag of “weed”. She watched them through the window as they walked across the street to J.D. Eye’s house.

- When she returned to the bedroom, Mr. Cooper was “sitting up like talking”, asking what just happened and in shock. His face was a mess, with a lot of bruising, his eye was swollen and he was bleeding. The bedroom was a disaster—tables and dressers knocked over, and holes in the wall.

[18] When questioned in direct examination about sobriety that night, Ms. Morris said: “We were pretty drunk”. Asked to explain, she said: “… we were not like incoherent or anything like that…just had a few drinks…just having a couple drinks…it wasn’t like a rowdy party or anything like that…”. She said the drinks did not impair her level of awareness.

[19] Ms. Morris testified she had told Luke Cooper that night the intruders were “T.J., J.D., and Jeff”. She didn’t know the young woman but knew “for sure” who the others were.

[20] Ms. Morris acknowledged on cross-examination she could not provide a detailed description of the assailant but said: “I knew who it was”.

[21] After the intruders left, Ms. Morris said Mr. Cooper took a shower and Luke went to buy cigarettes.

[22] Luke Cooper testified to being present during the home invasion. He knew J.D. Eye and Jeff Hilchie but he had never seen the third man before and did not know his name. The third man slapped him in the face twice before heading into the bedroom where Mr. Cooper and Ms. Morris were. Luke said he didn't see the man's face, which was partially obscured, for very long. He testified that after the intruders had left, Ms. Morris "recognized him" which accords with Ms. Morris' evidence that she told Luke the third man was T.J. Brown.

The Interviews by the Police

[23] D/Cst. Graham was dispatched with his partner, D/Cst. Scott Murray, to investigate the home invasion. They arrived at Mr. Cooper's residence at 2:22 a.m. on December 24 and D/Cst. Graham took an eight-minute audio-recorded statement from him. He testified that Mr. Cooper told him he did not remember a lot as he was knocked out.[4] He saw the person for "like a second" before being punched. Mr. Cooper told D/Cst. Graham it was T.J. Brown who came into the bedroom and assaulted him. He did not remember the intruder coming into the room and was not sure if he saw his face before or after he was knocked unconscious. Mr. Cooper said he did not remember "any hitting whatsoever, like I figured he must have just hit me in the head like that. She said I went down on the bed".

[24] Mr. Cooper was describing Ms. Morris' observation of him being punched. He acknowledged to D/Cst. Graham that he was "not totally clear on everything".

[25] Ms. Morris testified that her statement was taken by D/Cst. Murray in the police car. She was "shocked, like scared" giving it. She did not identify the appellant, referring to the intruder as she described the events that night as "the guy".

[26] A statement was also taken from Luke Cooper. He testified he was tired and shaken up. He acknowledged in cross-examination that he had not provided the appellant's name although he said he knew it by the time the police officers arrived as Ms. Morris had told him it was T.J. Brown after the intruders left.

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[4] As was acknowledged at the appellant's trial, the statements made by Mr. Cooper and Ms. Morris to the police officers were admissible for the purpose of assisting the trial judge in determining the probative force of the identification evidence. See *R. v. Downey*, 2018 NSCA 33 at paras. 84-88.

[27] About nine hours later at 11:30 a.m. on December 24, D/Cst. McNeil drove out to speak with Mr. Cooper and Ms. Morris. He made notes but took no formal statements. The couple gave him “a brief rundown of what happened” from the doorway of the residence. D/Cst. McNeil testified Mr. Cooper identified his assailant as the appellant whom he said he knew from seeing him around, including at J.D. Eye’s house. He recalled Mr. Cooper saying he knew the appellant’s father and that he owned a tow truck company.

[28] Ms. Morris told D/Cst. McNeil the intruder immediately struck Mr. Cooper as he was trying to get up. Mr. Cooper said, “Who are you?” when the intruder came into the room. On cross-examination Ms. Morris agreed she had told police that Mr. Cooper “doesn’t really remember any of what happened at all”.

[29] On re-direct, Ms. Morris qualified her evidence by saying Mr. Cooper had not specifically said to her he didn’t know who had been in the bedroom or that he didn’t remember anything that was happening. She said “obviously, he knew what just happened” but his reaction was “like, why would they have done that?”

[30] As pointed out by the appellant, Ms, Morris’ response on re-direct examination has to be contrasted to what she said under direct examination when asked if she recalled Mr. Cooper saying anything:

> I don’t think he knew who…it was T.J. at first so he was just kind of saying, Who are you, maybe, or like I don’t know.

[31] Ms. Morris was asked on cross-examination about the fact she had not mentioned the appellant’s name to D/Cst. Murray when giving her audio-statement. She agreed she had known he wanted to find out what had happened and who was involved. She agreed that at no point in her police interview did she name T.J. Brown.

[32] Ms. Morris maintained she did not mention the appellant’s name because she was not asked. She only told D/Cst. Murray “somebody” walked into the room. She said in her statement that Mr. Cooper had stood up and “the guy just punched him”. She said J.D. Eye had let her go back into the bedroom only once “the other guy” left.

[33] Ms. Morris testified that when D/Cst. McNeil came to the house she named the appellant as the intruder who had assaulted Mr. Cooper and stolen things. D/Cst. McNeil said he did not believe she had done so.

The Evidence of Familiarity

Anthony Cooper

[34] Mr. Cooper testified he knew the appellant as a "casual acquaintance", having met and talked to him on several occasions previously. He said "It's not like we're strangers".

[35] The trial judge described Mr. Cooper's evidence about how he knew the appellant:

> [275]… He thought that he probably met Mr. Brown years before (as much as fifteen years) when picking his daughter up from school near T.J. Brown's father's house in Old Ham. He said that Mr. Brown and his daughter were about the same age.
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> [276] The next time that Mr. Cooper said that he interacted with T.J. Brown was "three to four summers ago" at J.D. Eye's house, where he gathered with six to ten other people prior to going to a dance at the Waverly firehall. Mr. Cooper described having some pre-dance alcoholic drinks. He denied that he was inebriated. Mr. Cooper said that he knew who T.J. Brown was at the time and said that he remembered saying to Mr. Brown that night, "I hear you're the strongest man in Letterkenny". That, according to Mr. Cooper, was a joke. He said that T.J. Brown just smiled, but he didn't interpret that as Mr. Brown bragging. His evidence was that he spoke to T.J. Brown again at the dance in Waverly, but he didn't know what they talked about.
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> [277] Mr. Cooper described another occasion when he met T.J. Brown at a house party at Grand Lake hosted by a friend of his. He said that he remembered talking to T.J. Brown while Mr. Brown was sitting at a firepit. He thought that Mr. Brown was there talking with his cousin, whose first name he thought was "Frank". He said that he talked to T.J. Brown on this occasion for about ten to fifteen minutes, but he could not recall what they talked about, just that they were having a good time and joking. He said that he had consumed a couple of drinks. His evidence was that T.J. Brown did not have a beard at the time.[5]

[36] Mr. Cooper's description of the appellant's reaction to the Letterkenny remark was that, "He didn't really say much. He might of just smiled...".

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[5] *Brown*.

[37] The trial judge's review of the Letterkenny interaction included her saying the appellant had "just smiled" which is not exactly what Mr. Cooper said. Nothing turns on this very minor misstatement of the evidence.

Meaghan Morris

[38] Ms. Morris was asked to detail how she knew T.J. Brown and what interactions she had had with him prior to the night of the home invasion. She said there had been less than five occasions. She recalled she had first met the appellant about six years earlier when she was renting the top floor of a house and "he just came over one night when there was people over". Someone would have told her his name, although she had no specific recollection of that. She remembered him as skinnier and was "pretty sure" he had a beard. She said she probably learned his name on this occasion.

[39] Otherwise she knew the appellant's name through other people, by "reputation".

[40] Ms. Morris did not have a specific recollection of the next time she met the appellant. She said:

> …I don't remember exactly how many times I've met him. I wasn't friends with him or anything like that, it was just kind of…he might be at a place where I was or…but I'm not a hundred percent sure exactly how many times.

[41] Ms. Morris saw the appellant at J.D. Eye's house one summer night, "just a regular night" with people hanging around a bonfire having some drinks. She said "maybe" she had "a little bit" of conversation with him "but not anything that I remember". She was at the bonfire for an hour or two. She recalled the appellant looking "similar" to how he looked at the trial. She could not pinpoint when the bonfire occurred but she was in a relationship with Mr. Cooper. (When the home invasion occurred, Ms. Morris had been involved with Mr. Cooper for three years).

[42] Ms. Morris' direct examination was interrupted by a day-long break in the trial. When it resumed, the first question she was asked on returning to the witness box was whether at the time of the home invasion she knew the appellant's age. She did. She said he was 33 and had the same birthday as her sister. She testified this information emerged from an exchange with the appellant at the house she was

renting with her sister. Her sister "was always with [her]" and, as a result, the shared birthday was discovered.

[43] Ms. Morris agreed on cross-examination that on past occasions when she had seen the appellant there was a gathering or party of some kind with a lot of other people present. She would have been drinking and possibly using drugs. She also agreed she had no recollection how long her interactions with the appellant were on any of the occasions.

Position of the Defence at Trial

[44] The appellant's defence was that the recognition evidence was flawed and unreliable. His counsel argued that the eyewitnesses, Meaghan Morris and Anthony Cooper, were not credible or reliable in their purported identification. He said they rested their claims of being able to identify the appellant on flimsy and tenuous grounds and urged the trial judge not to believe them.

The Trial Judge's Decision

[45] The trial judge recognized credibility and reliability lay at the heart of the case:

> …this case comes down to whether the eye-witness testimony of Anthony Cooper and that of Meaghan Morris is sufficiently credible and reliable to support a finding of guilt beyond a reasonable doubt for the offences with which Mr. Brown is charged.[6]

[46] There has been no suggestion the trial judge incorrectly stated the law on identification and recognition evidence. She cautioned herself to:

> …carefully focus on the evidence that is relevant to the credibility and reliability of the evidence of each of Anthony Cooper and Meaghan Morris, in terms of their identification of Mr. Brown as the person who came into the bedroom of the home, assaulted Mr. Cooper and stole rifles and marijuana.[7]

[47] The judge added that she had to also consider whether the testimony of Mr. Cooper and Ms. Morris was corroborated by any direct or circumstantial evidence.

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[6] *Brown* at para. 12.
[7] *Brown* at para. 224.

She quoted liberally from this Court's decision in *R. v. Downey*[8], including the cautions about relying on recognition evidence to convict. She noted that:

- "Recognition" witnesses are able to "verify their identification of the accused from recognizing the voice and/or appearance of the accused based on their familiarity and interaction one with the other".[9]

- Recognition evidence is "generally considered to be more reliable and to carry more weight than identification evidence".[10]

- The "level of familiarity between the accused and the witness may serve to enhance the reliability of the evidence".[11]

- She had to be satisfied as to the credibility and reliability of the eyewitness testimony given the "inherent dangers of identification evidence, especially where the witness appears both honest and convincing".[12]

- The trial judge in *Downey* was found to have applied the wrong test to the victim's identification evidence by searching "'the record for <u>both</u> significant connections establishing [the main eyewitness]'s familiarity with the accused, <u>as well as</u> distinguishing features which would serve to demonstrate the accused's 'peculiarity' or uniqueness'".[13]

- A "recognition" witness does not have to be able to identify distinctive features about the accused. A close familiarity with the accused may be enough to afford the witness' evidence substantial value, "<u>even where the witness does not articulate the particular features or idiosyncrasies that underlie the recognition</u>".[14]

- A witness' ability to identify without hesitation enhances reliability in identification cases.

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[8] 2018 NSCA 33 [*Downey*].
[9] *Brown* at para. 14.
[10] *Brown* at para. 15, citing *R. v. Bob*, 2008 BCCA 485 at para. 13.
[11] *Brown* at para. 15, citing *R. v. Campbell,* 2017 ONCA 65 at para. 10.
[12] *Brown* at para. 16.
[13] *Brown* at para. 18. (emphasis in original)
[14] *Brown* at para. 19, citing *R. v. Berhe* 2012 ONCA 716, at para. 22, which cited *R. v. Panghali* 2010 BCSC 1710, at para. 42. (emphasis in *Downey*, *Brown*)

- Credibility of the witness and their reliability must be assessed separately. "Credibility is not a substitute for reliability".[15]

[48] The trial judge cautioned herself that, in accordance with *Downey*, she "must look carefully at the evidence of Meaghan Morris and that of Anthony Cooper which speaks to the extent of their previous encounters with T.J. Brown".[16]

[49] She knew she had to examine what opportunities the witnesses had to observe the appellant during the break-in and whether the evidence showed they were under the influence of drugs or alcohol.

[50] The trial judge distinguished the case of *R. v. M.B*.[17] on which the defence had relied heavily. She also thoroughly reviewed several additional cases to which the defence referred.[18]

[51] She went on to find:

- None of the witnesses said the assailant had any distinctive or unique features.

- There was no forensic evidence linking the appellant to the scene.

- The evidence given by Mr. Cooper and Ms. Morris did not suggest their description of the appellant "was some kind of amalgam of their previous observations of him on other occasions".[19] Nor did their descriptions change over time. The trial judge was satisfied the lighting in the bedroom was such that they could see the person who came into the room.

[52] The trial judge did not accept the defence's reading of this Court's decision in *Downey*. She found:

> [241] Further, I do not read the Court of Appeal's decision in *R. v. Downey* as saying that absent unique or distinctive features an eyewitness must have a long

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[15] *Brown* at para 25, citing *R. v. Newman*, 2018 NSSC 113, at para. 22. (aff'd 2020 NSCA 24)
[16] *Brown* at para. 227.
[17] 2017 ONCA 653.
[18] *Brown* at paras. 234-240.
[19] *Brown* para. 240.

> and closely familiar relationship with the person they identify, which seems to be what Defence counsel suggests.[20]

[53] The judge held that other variables, existing somewhere along a continuum, were in the mix for determining the weight to be given to recognition evidence: opportunity for observation, the ability of the witness to recall the incident, the degree of familiarity and the extent to which they can articulate identifying features.

[54] It was to the credibility and reliability of each witness' evidence where the judge went next, including an examination of their recognition evidence.

[55] The judge identified credibility issues with Mr. Cooper which she described in the context of his reasoning and lifestyle:

> [257] If Anthony Cooper's evidence at trial is to be believed, that it was T.J. Brown who entered his bedroom, assaulted him, and stole rifles and marijuana from him, that means that he must have lied to the 911 operator to whom he said, when asked, that he didn't know who had done these things, but offered that he could "find out". In cross-examination, Mr. Cooper first said, when asked by Defence counsel, that he had told the truth to the 911 operator. According to Luke Cooper, the incident happened around 11:45 p.m. on December 23, 2020. The 911 call was made at 2 a.m. on December 24. When he gave an audio statement to the police approximately twenty-five minutes later, at 2:24 a.m., Mr. Cooper identified T.J. Brown as the person who had assaulted him and stole his guns. Mr. Cooper gave an explanation to the Court as to why he didn't tell the 911 operator that it was T.J. Brown. From his evidence, it is clear that Anthony Cooper thought that if he told the people he says he knew took his guns that he was going to the police, they would realize that they had, in his words, "fucked up" and rather than face charges, they would voluntarily surrender the rifles to him, as being a cheaper and easier way of dealing with the matter. Well, that didn't happen, after Anthony Cooper texted Joshua Eye to this effect at 12:03 a.m. That was two hours before Anthony Cooper called 911. By the time he spoke with the Cst. Graham at 2:25 a.m., Mr. Cooper had apparently given up hope that the rifles would be returned, but in any event, was prepared to identify T.J. Brown.
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> [258] The fact that a witness is prepared to mold his evidence to serve his own purposes is very troubling. However, it is to be remembered that this Court can accept none, all, or parts of a witness' evidence.
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> [259] Anthony Cooper lived in a world where despite knowing the person who assaulted him, according to his testimony, he determined that it would nevertheless be a good idea not to inform the police of this, because in his mind

[20] *Brown*.

> this would thwart his goal of having his rifles returned to him by those who took them.
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> [260] Mr. Cooper also initially wanted to downplay the amount of marijuana he had in his home to police. In fact, he lied to police about the amount of marijuana that was in his home, initially saying that it was a "couple of grams, maybe" but at trial testifying that he believed "they took 6000 grams, or somewhere right around there".[21]

[56] The trial judge viewed Mr. Cooper's misleading statements to the 911 operator and the police as undermining his credibility, "even before the Court gets to the reliability of his eye-witness identification of Mr. Brown".[22]

[57] The judge however concluded she could find Mr. Cooper's trial evidence "sufficiently credible" to enable her to rely on his testimony identifying the appellant. She accepted his explanation for why he did not tell the 911 operator he knew who had assaulted him. She found he honestly believed it was T.J. Brown who entered the bedroom, assaulted him and stole his rifles and marijuana.

[58] The trial judge then proceeded to assess the reliability of Mr. Cooper's identification. She directed herself to consider:

> [267] …his opportunity for observing Mr. Brown, his ability to recall what happened, how familiar he was with T.J. Brown, the extent to which he could articulate any identifying features of Mr. Brown and whether he was under the influence of any substance at the time.[23]

[59] As for the fact that Mr. Cooper was drinking before the break-in and, according to Ms. Morris, had smoked "weed", the trial judge accepted his evidence he had not over-indulged as he planned to go Christmas shopping for his children on December 24. She was satisfied Mr. Cooper was "not inebriated to any point which would impair his ability" to identify his assailant.[24]

[60] The trial judge reviewed Mr. Cooper's evidence about the intruder and the events. She accepted he had known it was T.J. Brown within two seconds of the appellant entering the bedroom. She found that "Mr. Brown was not a stranger to

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[21] *Brown*.
[22] *Brown* at para. 261.
[23] *Brown* at para. 267.
[24] *Brown* at para. 270.

Anthony Cooper".[25] She described Mr. Cooper's previous interactions with the appellant which I described earlier.

[61] The judge concluded Mr. Cooper was "sufficiently familiar with T.J. Brown to identify him as his assailant".[26]

[62] Having dealt with Mr. Cooper's credibility and reliability, the trial judge moved on to Ms. Morris whom she characterized as "generally an uncertain witness".[27] She considered this might be "her natural way of speaking" but noted, "the fact is that she answered many questions put to her about details with an answer that had a question mark at its end".[28]

[63] Defence counsel had raised the inflection issue during Ms. Morris' direct examination, causing the trial judge to remark that as it was her job to assess the credibility and reliability of the witnesses she would "certainly tak[e] into account how they give their evidence".[29]

[64] As I noted earlier, Ms. Morris never identified T.J. Brown when she was interviewed by D/Cst. Murray on December 24. The trial judge found Ms. Morris' claim she wasn't asked for the name of the third man so she didn't offer it to be implausible. "That simply makes no sense…she deliberately withheld from them the identity of the person whom she later said was T.J. Brown".[30]

[65] Nevertheless, the judge accepted Ms. Morris' evidence that at the time when the home invasion occurred she believed the intruder who assaulted Mr. Cooper to have been T.J. Brown. In going on to assess Ms. Morris' reliability, the trial judge was satisfied she had been able to identify the man who came into the bedroom as the appellant.

[66] As she had concluded when considering Mr. Cooper's sobriety, the trial judge found Ms. Morris was not inebriated "to any extent which would impair her ability to recognize the person who she says was T.J. Brown".[31]

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[25] *Brown* at para. 275.
[26] *Brown* at para. 284.
[27] *Brown* at para. 285.
[28] *Brown* at para. 285.
[29] Appeal Book, Vol. II, p. 195.
[30] *Brown* at para. 288.
[31] *Brown* at para. 291.

[67] The trial judge accepted that Ms. Morris saw the intruder's face. She had testified the intruder yelled within a few inches of her face. Ms. Morris did not notice any particular facial features but she wasn't looking for any. She said: "I knew who it was".

[68] The trial judge found that T.J. Brown was no stranger to Ms. Morris. She had interacted with him in the past on several occasions. The judge reviewed Ms. Morris' evidence about those interactions.[32]

[69] The judge concluded she could rely on Ms. Morris' recognition of the appellant, even without other evidence linking him to the home invasion. She found the reliability of Ms. Morris' recognition evidence was strengthened by the fact she had been very close to the appellant's face. She assessed the basis for Ms. Morris' recognition of the appellant was not a long and close relationship but also not "fleeting" contact. She found it was not "a bald conclusion, without more".[33]

[70] With the exception of one part of his narrative, the trial judge accepted Luke Cooper's evidence, finding he was a credible witness on whose evidence she could rely. She disbelieved his claim that after the break-in he went to get cigarettes, saying it made "no common sense at all".[34]

The Errors Alleged in the Appeal

[71] The appellant says the trial judge erred in finding the eyewitnesses to be credible and reliable. He says the trial judge erred: by failing to properly scrutinize the reliability of the recognition evidence; by misapprehending crucial evidence on identification; and in her application of the law on recognition evidence. He says the trial judge made findings of guilt on the basis of recognition evidence that, properly scrutinized, cannot support the verdicts; in other words, the verdicts are unreasonable.

[72] In *Downey*, this Court endorsed the observations of the Ontario Court of Appeal in *R. v. Campbell*[35] where that court held that "the reliability of recognition evidence depends heavily on the extent of the previous acquaintanceship and the opportunity for observation during the incident".[36] The appellant argues the trial

[32] *Brown* at paras. 298-303.
[33] *Brown* at para. 306.
[34] *Brown* at para. 249.
[35] 2017 ONCA 65.
[36] *Ibid* at para. 10.

judge disregarded this requirement and placed too much weight on the "recognition" evidence by Mr. Cooper and Ms. Morris in the absence of them having a closer familiarity with him.

[73] The appellant emphasizes the evidence from Mr. Cooper and Ms. Morris that indicated they did not have a close relationship with him. Encounters where there had been personal interaction were dated. They were not friends and did not habitually socialize together.

[74] The lack of a close relationship did not mean the appellant was someone Mr. Cooper and Ms. Morris would not recognize. Both of them had had friendly interactions with him. Mr. Cooper knew something of the appellant's reputation in the community, enabling him to joke – "I hear you're the strongest man in Letterkenny". Ms. Morris learned his birthdate. Mr. Cooper knew the appellant's father and that he owned a towing company. He knew where the appellant grew up. His daughter was around the same age as the appellant. It is a small community and it was reasonable for the trial judge to conclude the social encounters would have enabled Mr. Cooper and Ms. Morris to acquire some familiarity with the appellant.

[75] I find the trial judge did not misstate the law as set down by this Court in *Downey*. I do not agree the witnesses had to have been able to identify distinguishing features in order to offer reliable recognition evidence. As was the case in *Downey*: "…based upon the preponderance of evidence, there was nothing unique" about the appellant.[37]

[76] I also find it to be of no significance that there were differences in the physical descriptions of the third man by the eyewitnesses. The physical descriptions added nothing. Anthony Cooper's observation of the intruder was fleeting. Ms. Morris gave almost no description and Luke Cooper's description provided no useful details.

[77] The evidence provided to the trial judge did indicate that Anthony Cooper and Meaghan Morris had enough familiarity with the appellant that they could recognize him. As I indicated at the start of these reasons, I find the issue is not familiarity but credibility and reliability. Were the guilty verdicts unreasonable,

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[37] *Downey* at para. 66.

given the credibility and reliability issues raised by the testimony of the eyewitnesses who claimed to recognize the appellant?

Standard of Review

[78] The Supreme Court of Canada has directed appellate courts tasked with assessing an unreasonable verdict ground of appeal to ask whether the verdict "is supportable on *any* reasonable view of the evidence and whether proper judicial fact-finding applied to the evidence *precludes* the conclusion reached" by the trier of fact.[38] The reviewing court "must treat the verdict with great deference".[39]

[79] In reviewing a trial judge's credibility and reliability assessment in the context of an unreasonable verdict allegation, an appellate court cannot intervene in those assessments unless it is established that the findings cannot be supported on any reasonable view of the evidence.[40]

[80] The standard of review for unreasonable verdict normally authorizes a limited reweighing of the evidence, including where the case concerns the issue of identity. Whether or not evidence of identification is sufficient is a question for the trial judge.[41] The function of this court is not to retry the case but to "review, analyse and, within the limits of appellate disadvantage, weigh the evidence".[42]

Analysis

[81] The guilty verdicts in this difficult case rested entirely on the recognition evidence of Mr. Cooper and Ms. Morris. That there was no other evidence to establish or support an inference that the appellant was the third man involved in the home invasion made the trial judge's task particularly challenging.

[82] The trial judge understood the Crown's burden was proof beyond a reasonable doubt. She recognized the evidence of Mr. Cooper and Ms. Morris necessitated close scrutiny. In the course of navigating the credibility and reliability issues, the trial judge identified the relevant law and engaged in a thoughtful and painstaking analysis.

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[38] *R.* v. *W.H.*, 2013 SCC 22 at para. 2 (emphasis in the original).
[39] *Ibid*.
[40] *R. v. C.P.*, 2021 SCC 19 at para. 30; *R. v. Burke*, [1996] 1 S.C.R. 474 at para. 7; *R. v. Newman*, 2020 NSCA 24 at para. 29.
[41] *R. v. Saddleback*, 2013 ABCA 250 at para. 13.
[42] *R. v. Biniaris*, 2000 SCC 15 at para. 36.

[83] The challenges the evidence presented to the trial judge in this case are obvious. She confronted them and would have been familiar with the references in *Downey* to the spectre of wrongful conviction that hangs over identification cases.[43]

[84] Mr. Cooper's observation of the intruder was fleeting. He had been surprised and shocked when the man entered the bedroom. His opportunity to observe the man who came into the bedroom was truncated by being knocked unconscious. He agreed he saw him for only three seconds before being sucker-punched and knocked out. After coming to for about 20 seconds, Mr. Cooper was punched again and knocked out.

[85] Ms. Morris testified the first punch knocked Mr. Cooper out cold. She confirmed Mr. Cooper had said, "Who are you?" and testified that she didn't think he knew who had entered the bedroom. The "who are you" question was noted in D/Cst. MacNeil's notes. Mr. Cooper testified he did not see the appellant until he was beside the foot of the bed, just before he was punched.

[86] The trial judge appropriately scrutinized the additional baggage Mr. Cooper carried—his compromised credibility. Furthermore, she contended with whether an inference could be drawn from Mr. Cooper's exchange with the 911 operator that he did not know the identity of the intruder. She satisfied herself that Mr. Cooper in fact had known his identity and chose not to disclose it in the 911 call.

[87] There was good reason for the appellant to have challenged Mr. Cooper's claim of pretending to the 911 operator that he did not know who had assaulted him so as not to jeopardize his chances of getting his rifles back without involving the police. When assessed with the evidence about that phone call, which I reviewed in paragraph 15, Mr. Cooper's explanation for lying to the 911 operator reasonably raised questions about his credibility. I will reiterate the evidence the trial judge heard:

- Mr. Cooper testified that after the intruders left, he texted J.D. Eye demanding his "stuff" back or he was calling the cops. He said he thought he had a better chance of getting his guns and marijuana back if he didn't go through the police. He then waited two hours before calling 911.

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[43] Discussed in *Downey* at paras. 56 – 58.

- When he spoke to the 911 operator Mr. Cooper did not indicate he knew who the intruders were. To the contrary, he said he could find out their names “through the neighbours” and was “pretty sure” he knew “one guy’s name”. And indeed he did; he mentioned J.D. Eye by name during the call.

- During the 911 call he obtained help describing the second male, by asking of others present while he talked to the operator, “What was J.D. wearing?”

- Once the 911 operator noted Mr. Cooper had named J.D., he was asked if he knew the names of the others to which Mr. Cooper responded: “I don’t know”.

- Mr. Cooper said on cross-examination he hadn’t revealed to the 911 operator that he knew his assailant was T.J. Brown because he thought he “might still have a chance of getting my rifles back”.

[88] In the 911 call Mr. Cooper named Mr. Eye, the very person he said he suspected had his guns and did not want to spook by involving the police. Notwithstanding this, the trial judge accepted his claim that he didn’t name the appellant in the 911 call so as not to frustrate any remaining possibility for his guns to be returned voluntarily by the intruders. She noted Mr. Cooper had confirmed on cross-examination that he had thought there was the potential for getting his rifles back after the 911 call and before the police officers arrived.

[89] As the trial judge heard, when giving his statement to D/Cst. Graham who arrived about twenty minutes after the 911 call, Mr. Cooper identified the appellant. The trial judge took note of this, and found she accepted his evidence that:

> [266] …the 911 call did not mean that much to him, that what he really wanted was for the police to come so that he could tell them what happened. In fact, by the time that Mr. Cooper met with the police twenty-five minutes after the 911 call, he named T.J. Brown as his assailant and as the person who broke into his home and stole his rifles. Lying to the police about the amount of marijuana stolen also, apparently, made sense to Mr. Cooper at the time, and does not, in my assessment, lead me to question the honesty of his identification of Mr. Brown.

[90] On appeal the appellant argued there had been an opportunity for collusion amongst the eyewitnesses, an issue addressed by the trial judge. She commented on what the defence had said about commingled evidence:

> [193] Defence counsel says that what the Crown is asking the Court to accept is the mix of evidence of Luke Cooper, Anthony Cooper, and Meaghan Morris and that when you break it down, you can't really determine what came from whom.[44]

[91] The trial judge's reasons indicate she found both Mr. Cooper and Ms. Morris independently identified the appellant and the circumstances in which they made their identifications. She referred to Crown counsel having asked Mr. Cooper in direct examination who he thought the intruder was before he spoke to Ms. Morris. Mr. Cooper responded: T.J. This was said in the context of Mr. Cooper having testified that he did not see either Mr. Eye or Mr. Hilchie that night.

[92] The trial judge's conclusion that Mr. Cooper's recognition of the appellant was credible laid to rest the issue of potentially contaminated identification raised by the defence.

[93] The appellant has criticized the trial judge for taking Mr. Cooper's testimonial demeanour into account in assessing credibility. Reliance on a witness's demeanour in the witness box is risky. It can amount to reversible error where it is relied on too heavily.[45] The trial judge here recognized it was a dangerous measure for credibility and did not anchor her conclusions in it. In deciding she could find Mr. Cooper to be credible, she said:

> [263] …I accept Mr. Cooper's explanation for why he did not tell the 911 operator he knew who assaulted him. This Court watched Mr. Cooper carefully when he was giving his evidence, including the evidence he gave about the 911 call and why he was not truthful to the operator. He gave this evidence calmly. He was not agitated; his demeanour was calm. It is noted, however, that relying on demeanour alone, can be dangerous when assessing credibility.
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> [264] As the trial judge, it is my task to assess the credibility of witnesses from the unique standpoint that I have. For example, I can hear how the witnesses [*sic*] delivers his evidence and observe him as he does so.
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> [265] I conclude that on this point, Mr. Cooper was credible - that he honestly believed that it was T.J. Brown who entered his bedroom, assaulted him, and took his rifles and his marijuana. Despite the fact that Mr. Cooper lied to the 911

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[44] *Brown* at para. 193.

[45] *R. v. Hemsworth*, 2016 ONCA 85 at para. 44-45; see also: *R. v. N.M.*, 2019 NSCA 4 at para. 52, citing *R. v. W.J.M.*, 2018 NSCA 54 at para. 45.

> operator, his explanation for doing so made sense to him and makes sense to this Court, based upon the knowledge I have gleaned from the evidence I heard. In Mr. Cooper's world, not being truthful to the 911 caller, was of less importance to him then getting his rifles back, without the involvement of the police. His text to J.D. Eye at around midnight shows that his concern at that point was focused on having his rifles returned to him, not on involving the police.

[94] The Supreme Court of Canada has emphasized credibility assessment is not a “purely intellectual” exercise.[46] It is trial judges who have “the benefit of the intangible impact of conducting the trial”.[47] Appellate review must appreciate that,

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.[48]

[95] Difficult-to-articulate credibility findings may reference demeanour but, as the trial judge acknowledged, it is dangerous territory. Here, consideration of it did not constitute reversible error.

[96] The trial judge also found Ms. Morris’ identification of the appellant to be credible and reliable. Although she did not identify the appellant when interviewed by D/Cst. Murray on the night of the break-in, she had identified him to Luke Cooper. Luke testified to this fact.

[97] The trial judge scrutinized Ms. Morris’ credibility and, in her assessment of it, rejected aspects of her evidence. She was entitled to do so and still find, on balance, that she was satisfied Ms. Morris recognized the appellant.

[98] The trial judge rejected Ms. Morris’ testimony that she did not provide the appellant’s name in her statement to police because she was not asked for it. The judge made an adverse credibility finding:

> [288] I do not believe Ms. Morris' explanation that she did not tell the police the identify of the person she told Luke that she recognized as T.J. Brown because they didn't ask her. That simply makes no sense. She knew that the police were there to investigate the home invasion and she deliberately withheld from them the identity of the person whom she later said was T.J. Brown.[49]

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[46] *R. v. R.E.M.*, 2008 SCC 51 at para. 49.
[47] *R. v. G.F.*, 2021 SCC 20 at para. 81.
[48] *R. v. Gagnon*, 2006 SCC 17 at para. 20.
[49] *Brown*.

[99] Although she had just found Ms. Morris “was not caught out in any direct lies”[50], disbelieving Ms. Morris’ explanation for not supplying police with the appellant’s name would seem to be inconsistent with that conclusion. The judge did find this aspect of Ms. Morris’ evidence to be a “concern”. She noted Ms. Morris had only told D/Cst. Graham that “someone” had walked into the bedroom and that this “guy” had punched Mr. Cooper.

[100] It was Luke Cooper’s evidence that satisfied the trial judge Ms. Morris’ claim of recognizing the appellant could be believed. She found:

> [287] However, Ms. Morris told Luke Cooper, whose evidence I have found to be credible, it was T.J. Brown who was the first person who came into the TV room and had hit his father. Luke Cooper so testified. Meaghan Morris did so shortly after the incident occurred, before the 911 call and before the police arrived. Meaghan told Luke that she recognized the person as T.J. Brown, that she knew "of him" and had seen him before.[51]

[101] Luke Cooper was the witness the trial judge found carried the least credibility and reliability baggage. Although the trial judge did not believe he went on a post-home invasion midnight cigarette run, she otherwise accepted his evidence. He testified that Ms. Morris identified the appellant to him which corroborated Ms. Morris’ claim she said this once the intruders had left, indicating she had recognized him.

[102] The trial judge carefully examined the issue of whether Ms. Morris’ identification of the appellant was reliable. She was satisfied it was, finding that:

- Ms. Morris’ ability to recognize the appellant was not impaired by the alcohol she had consumed that night.
- There was adequate lighting in the bedroom and Ms. Morris could see the person who came into the room.
- Ms. Morris’ brief sighting of the intruder was enough to enable her to recognize the appellant “pretty much as soon as he started hitting Tony”.

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[50] *Brown* at para. 286.
[51] *Brown*.

- Ms. Morris described the appellant yelling "in her face", by which she meant he was "within a few inches of her face" and they were facing each other.

- The appellant was no stranger to Ms. Morris. She was familiar with him from previous social interactions and "knew who it was".

[103] The trial judge was impressed with Ms. Morris' testimony about her sister and the appellant sharing a birthday. She said:

> [302] I do not accept Defence counsel's suggestion, that Meaghan Morris only offered this evidence after a break in her evidence and didn't give this evidence early on. This evidence, as I have noted above, was occasioned by a question from Crown counsel about Mr. Brown's age, a question not previously asked.
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> [303] I find this evidence of Mr. Brown's birthday does much to strengthen the reliability of Ms. Morris' recognition of T.J. Brown. I say this, not because she happened to know his birthday, but because common sense tells me that a conversation wherein it is revealed that two people's birthdates are the same is not a fleeting one. Common sense tells me that "small talk" at a party doesn't start with the question, "What's your birthday?". There has to be some level of interaction, surely, before the conversation veers to the area of birthdays. Ms. Morris' recollection of Mr. Brown's birthdate was unchallenged and there was no evidence from any other source wherein she learned of Mr. Brown's date of birth.[52]

[104] Although the trial judge said she found corroboration of Ms. Morris' evidence concerning "the sequence and outcome of the events" in the evidence of Luke and Anthony Cooper and the photographs taken by police of the bedroom and Mr. Cooper's injuries, this actually provided no support for evidence of identification. The issue was not whether a violent home invasion had occurred during which Mr. Cooper was badly injured. The sole issue at trial was whether the appellant had been the perpetrator. The principal corroboration for Ms. Morris' claim that she had recognized the appellant was Luke Cooper's testimony about what she said to him once the intruders left.

The Fact the Appellant Did Not Testify at Trial

[105] The respondent has said that in assessing the appellant's unreasonable verdict grounds we can consider the fact he did not testify at his trial. Its reliance

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[52] *Brown*.

on this Court's decision in *R. v. Roberts*[53] indicates it is advocating for an adverse inference to be drawn against the appellant because of his testimonial silence.

[106] The nature of the evidence in *Roberts* underpinned this Court's comments on that appellant's failure to testify at his trial:

> [54] In this case, there was a lot of evidence connecting Mr. Roberts to the drugs in the home. By calling no evidence and choosing not to testify the trial judge was denied evidence from the accused to support alternative explanations, for which he now argues before this Court.
>
> [55] This Court cannot use Mr. Roberts's silence to supply any shortcomings in the Crown's case at trial. Equally however, Mr. Roberts cannot at once remain silent and then ask this Court to transform speculative alternative explanations, on which he offered no evidence, into reasonable doubt.

[107] The case against the appellant is readily distinguished from *Roberts*. *Roberts* allows for the disregarding on appeal of speculative explanations that have not been supported by evidence offered by the accused and do not raise a reasonable doubt. The appellant's defence targeted the frailties of the Crown's witnesses: it was not focused on alternative explanations.

[108] In *R. v. George-Nurse*, the Supreme Court of Canada held that because the Crown had presented a strong case to answer, the court on appeal was entitled "to consider the appellant's silence in assessing and ultimately rejecting his unreasonable verdict argument".[54]

[109] This is not a case where the appellant should have been expected to offer an exculpatory explanation. The appellant's trial silence cannot be treated as an absence of evidence to support "any alternative reasonable inference consistent with innocence".[55] The appellant bore no onus and put the Crown to its burden of proof beyond a reasonable doubt. It would not be appropriate in this case to consider the appellant's silence, which was a constitutional right he was entitled to exercise.

[110] I note the trial judge properly did not draw an impermissible inference from the appellant not testifying. Other than mentioning that he did not testify, she said nothing more about it.

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[53] 2020 NSCA 20.
[54] 2019 SCC 12.
[55] *R. v. Okojie*, 2021 ONCA 773 at para. 135.

Conclusion

[111] Having reviewed, analyzed and, within the limits of appellate disadvantage, weighed the evidence relied on by the trial judge I am satisfied the verdicts are supportable on a reasonable view of the evidence.

Disposition

[112] Despite the very able arguments of Mr. MacDonald, I would dismiss the appeal.

Derrick, J.A.

Concurred in:

Bryson, J.A.

Scanlan, J.A.