

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R v. Sykes, 2007 NSPC 46

Date: August 27, 2007

Docket:1651535

1651536

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1651539

Registry: Halifax

Her Majesty the Queen

v.

Kenneth Curry Sykes

Judge: The Honourable Judge Castor H. Williams

Decision: August 27,2007

Charge: 344; 264.1(1)(a); 351(2); 85(2); 88(1)

**Counsel: Rick Miller for the Crown
Peter Nolen for the Defendant**

Introduction

[1] A masked man who was wearing baggy clothes and a sweatshirt with the attached hood pulled up and partially covering his face committed an armed robbery at a store on the Bedford Highway in the Halifax Regional Municipality. The victim and only witness opined that the robber was an African Canadian male but saw no distinguishing identifiers. Other persons at nearby and adjacent businesses, in varied observations, described that at about time of the robbery they saw a black male driving a dark brown older model car leaving the area.

[2] The police suspected the accused of unresolved matters and had him and his known places of residence and contacts under surveillance. As a result of their suspicions, upon learning, via dispatch, that a black man driving a brown car had committed the robbery, Det. Constable Gerald Longley, who was part of the surveillance detail, concluded immediately, without any additional investigation or inquiries, that the accused was indeed the robber.

[3] Dressed in muftis and driving an unmarked police vehicle he went

immediately to one of the accused contact addresses, parked one hundred feet away and waited. Shortly afterwards, he saw the accused, wearing a light-coloured shirt and driving in a normal manner arrived and stopped at the address. Longley approached in his vehicle and when he was fifty feet away the accused engaged his vehicle and sped away. A chase ensued but was discontinued because of the traffic. In any event, the accused entered a nearby local cemetery and, after becoming involved in an accident, abandoned the vehicle. Witnesses then saw him retrieve a light-coloured gym bag from the car's trunk, held it in his hand, fled the scene on foot and disappeared by scaling a fence at an adjoining housing estate.

[4] After an investigation, the police charged the accused with armed robbery and a number of related offences. This case therefore concerns the issue of identity and whether, in all the circumstances, the facts point, without a doubt, to the rational conclusion that it was the accused and no other person who committed the armed robbery.

Summary of Relevant Evidence

[5] Nella Fantasia is a small home furnishing store located in a small strip Mall at 604 Bedford Highway in the Halifax Regional Municipality. To the right side of this Mall, looking from the Bedford Highway, is a paved driveway that leads from the rear of the building to the Bedford Highway. However, on the left side of this Mall, at 600 Bedford Highway, is Manor House Furniture, a business that is located in another building that had an unpaved driveway on its left side leading from some apartments and a parking lot in the rear to the Bedford Highway.

[6] On May 18, 2006, sometime between 1530 hours and 1545 hours, a man, wearing a dark baggy sweatshirt that had an attached hood pulled up and over his face and also wearing a dark-colored mask that covered his entire face, entered Nella Fantasia. He brandished what appeared to be a sawed-off shotgun at one, Manish Sinha, the co-owner who was alone in the store, and demanded from him money under threat of bodily injury.

[7] After the robber left the store Sinha ran outside to see whether the robber or a get away vehicle were in the vicinity, but saw nothing. He then went to an upstairs store, reported the robbery to the occupants and requested them to call the police. They did.

[8] All the same, minutes before Sinha went to the upstairs store, Kyle Strong and Denise Johnson, who were the workers of that store, had seen a two-tone brown older model vehicle enter the rear parking lot and reversed onto the right paved driveway and exited toward the Bedford Highway. Johnson opined that the driver of the vehicle was a black man who was wearing a sweater with a hood down. She, however, could not discern any facial characteristics that would have enabled her to make any identification, or at all.

[9] Likewise, at about the same period of time, from the location of the Manor House Furniture at 600 Bedford Highway, Judy Wambolt overheard her co-worker, Catherine Johnson, remarked that a person had walked across the store's front parking lot, to the left, and that soon after, a person had run from the left to the right, which she thought was unusual, as

customers usually arrive at the store by a vehicle.

[10] As a result, Wambolt, Johnson and another colleague went outside to investigate, leaving another co-worker, Wanda Harrie, inside the store.

When outside, Wambolt heard a vehicle coming fairly quickly down the right side gravel driveway from the rear apartments' area and only saw, from thirty feet away, that it was a brown large older model car and that the driver, who did not look like a short person was a dark-skinned male. He had short dark hair but no facial hairs and he turned the vehicle quickly onto the Bedford Highway toward Halifax.

[11] Johnson, however, when inside the store, had seen a person wearing a dark sweater, with a hood, walking quickly from the right of the building and was carrying a dark backpack strapped over both shoulders. Three or four minutes later she again saw whom she thought was the same person, running toward the right of the building. She, however, could not detect the person's gender or race. On her second sighting she observed that the person was wearing a dark hooded sweatshirt that was pulled up over the head, was about five feet ten inches tall but she was uncertain whether the

person was carrying a backpack.

[12] When Johnson went outside she did not see anyone. However, in less than one minute, from a distance of thirty to forty feet she saw, for less than ten seconds, a dark-brown four-door older model vehicle that was moving quite fast coming down the right gravel driveway. She did not see the driver and could not compare the driver with the person whom she saw crossing in front of the building.

[13] From her position inside the store, Harrie, for four to ten seconds, saw someone, thirty feet away, run from the direction of Nella Fantasia. The person was five feet four inches tall, not very big, wearing dark clothing with a hood that was pulled up. She, however, could not discern the person's race or gender but opined that the person was carrying what appeared to be a heavy knapsack on the back.

[14] When he photographed the abandoned vehicle at the cemetery, Constable Robert Furlong seized, among other items, a blue toque near the two front seats, a black face-neck warmer and a blue and black patterned

toque from the trunk. These items were tendered as exhibits. Even so, no forensic analysis or DNA tests were conducted and none of the witnesses at the crime scene were shown these exhibits.

[15] Constable David Boone who was part of the surveillance team on the accused, received a dispatch that a black man with a shotgun had robbed a store at 604 Bedford Highway and had fled in a dark brown vehicle. He also received a call from Longley to meet at 80 Rufus Ave, which was one of the accused known hangouts. Soon after, Longley called again stating that he was pursuing a dark-brown vehicle that was later abandoned in the Fairview Cemetery. The car's abandoned location was five to eight hundred meters from 3360 Federal Avenue, a known address of the accused.

[16] Under the authority of a Feeney search warrant, the police, at 2300 hours, entered and searched 3360 Federal Avenue. Nonetheless, they did not locate the accused at this address and, from their own surveillance since 1515 hours, no one had seen him approach or enter the building. Similarly, the police did not find any weapons or ammunition but seized items that were not tendered as exhibits.

[17] Longley neither visited nor interviewed any witnesses from the crime scene but nonetheless prepared photographic lineups. Also, he cannot recall whether he had information obtained from the witnesses before he prepared the photographic lineups that the police showed them. As well, he cannot recall whether a vehicle description was aired before he went to wait at 80 Rufus Avenue. In addition, he had never met the accused before this encounter but stated that the accused had a fairly recognizable goatee and mouthstache. What is more, he agreed in cross examination, that when he saw the accused he, the accused's, clothing and physical features were different to those that were broadcasted for being that of the robber.

[18] There are several possible routes to 80 Rufus Avenue from 604 Bedford Highway. However, Longley decided upon one route to the exclusion of all others, and he, along with Boone, drove along that selected route believing that it was the one that the robber took. Consequently, one night sometime after the incident, at 2100 hours and driving at the posted speed limit of 50 to 60 kph, they measured a distance of 6.9 kms in eight minutes and eighteen seconds between 604 Bedford Highway and 80 Rufus

Avenue.

Finding of Facts

[19] The accused has pleaded guilty to the offences that:

On or about the 18th day of May 2006, at or near Halifax, Nova Scotia, did while operating a motor vehicle, being pursued by a Peace Officer operating a motor vehicle, did fail, without reasonable excuse and in order to evade the Peace Officer, to stop the vehicle as soon as it is reasonable in the circumstances, contrary to Section 249.1(1) of the Criminal Code.

And Further that he at the same time and place aforesaid, having the control of a vehicle that was involved in an accident with Kenneth Dacey, did unlawfully with intent to escape civil or criminal liability, did fail to stop his vehicle and give his name and address, contrary to Section 252(1)(b) of the Criminal Code.

[20] Consequently, on the total evidence tendered before me concerning the armed robbery; a threat to cause bodily harm; masked while committing an indictable offence; possession of an imitation firearm and possession of a firearm while committing an indictable offence, I find as a fact that a masked man, armed with a sawed-off shot gun did rob Nella Fantasia, a store located at 604 Bedford Highway in the Halifax Regional Municipality.

[21] Likewise, I find that Manish Sinha who faced the robber and had a

good unobstructed view from about three feet, could see only a person wearing a snugly fitted grey or dark-blue face mask. Furthermore, I find that he was unable to discern any facial characteristics, but nonetheless opined, that from what he gathered, the robber was, from skin colour or tone, a light-skinned African American.

[22] Also, I find that the robber was five foot eight inches tall, wore baggy clothes and was very strong looking. In addition to the mask, I find that he wore a baggy hooded dark sweatshirt perhaps navy blue with a hood that was up and coming down to his eyes which were watery. Likewise, I find that he also wore jeans or track pants, and weighed between one hundred and one hundred and fifty pounds and was carrying a dark blue gym duffel bag. However, I also find that Sinha admitted that the robber could have been an Asian or any nonwhite person.

[23] Furthermore, I find that Sinha, as he did not see the robber's face, logically was unable to identify the accused as the robber from a forensic photographic line-up. Also, I find that, as he did not see any vehicle, logically he was unable to identify any vehicle, Exhibit 2, or to say whether or not such

a vehicle was used by the robber on the day in question.

[24] I find that Manor House Furniture is another business establishment located in another building to the right of the small strip mall containing Nella Fantasia. Furthermore, I find that to the right and in the back of Manor House Furniture are some apartment buildings with a small parking lot with a gravel driveway that connects to the Bedford Highway.

[25] I also find that Judy Wambolt, Catherine Johnson and Wanda Harrie were at work at this business place on May 18, 2006. I find that from a distance of thirty feet, Wambolt saw a brown large older model car driven by a dark-skinned male with short hair and no facial hairs, whom she cannot identify from a photo line-up, rapidly exited the nearby gravel driveway onto the Bedford Highway. I find that she is not certain that Exhibit 2, photo 7 was the car that she saw.

[26] Further, I find that Johnson saw someone wearing a dark sweater with hood walking quickly from the right side of their building in their parking lot which was unusual as their customers usually arrive by a vehicle. I find that

three to four minutes later she saw someone whom she assumed to be a male person, whose face she could not see, and wearing a dark hooded sweatshirt over the head and carrying a dark backpack running from the left side area of their building, Nella Fantasia area. Furthermore, I find that from a distance of 30 to 40 feet and for less than 10 seconds she saw a dark brown four door older model car coming fast down the driveway but she could not compare the driver to the person whom earlier she saw running in the parking lot. Additionally, I find that Harrie added no more significant identifiers to what she saw compared to what her colleagues did see.

[27] With respect to the testimonies of Kyle Strong and Denise Johnson I find that both were in a position to see, minutes before they spoke to Sinha, a brown vehicle, that drove with a loud muffler noise, turn in the rear parking lot onto the paved driveway that led to the Bedford Highway. Also, I find that it was Johnson who called the police to report the robbery. Likewise, I find that Johnson saw that the driver, whom she cannot identify, was someone who was not a Caucasian male and who was wearing a sweater with a hood that was down. Also, I find that Johnson did not provide any facial description of the person she saw to the police and that the vehicle that she saw was

similar only in colour to the accused vehicle.

Analysis

[28] The Crown's theory was that there existed a series of circumstances when woven together proved conclusively and rationally, without any doubt, that the accused and no other person was indeed the robber. He points to the fact that the robber was a light-skinned African Canadian as was the accused. Likewise, a black man was seen driving a dark brown car leaving the crime scene. The accused was seen driving a dark brown car on the day before the robbery and he was under surveillance for similar unproven wrongdoings.

[29] Furthermore, the Crown hypothesized that the accused changed his clothing on the way to 10 Rufus Avenue and placed the incriminating apparels and the shotgun into the duffel bag and then put the bag in the car's trunk, thus explaining his haste to retrieve the bag from the trunk. When the police, after the robbery, approached a brown vehicle that the accused was driving, he, for no reasonable explanations, fled from the police,

an action that the Crown declared was further suggestive of his guilt.

[30] Acknowledging that identification was the critical issue, the Defence submitted that the victim who was the only person who had a good unobstructed view of the robber could only say, with certainty, that the person was wearing a mask and dark clothing with a dark hoodie and that he had watery eyes. However, this victim was never shown any court exhibits that were seized from the alleged get away car. Likewise, no forensic or scientific nexus was established between the accused and these exhibits.

[31] Other witnesses who saw a dark-skinned man at or near the crime scene described him not having facial hairs while the accused does have distinguished facial hairs. Furthermore, the vehicle that the accused was seen driving although similar in description it differed in several distinguishing features that one would easily and readily observe. Critically, however, when the police and other witnesses saw the accused at Rufus Ave and in the cemetery he was wearing a light-coloured shirt, no sweatshirt with hood and, what he retrieved from the trunk of the abandoned car was a light-coloured gym bag. Therefore, the Crown's theory was seriously flawed as it was

based entirely on suspicions, lacked any rational, logical and probative force and was not based upon any incontrovertible facts.

[32] In any event, based upon my findings of facts and my observations of all the witnesses as they testified and my impressions of their testimonies, in my opinion, identity is the pivotal issue. However, I am reminded that this case is based on the reliability of eyewitness identification evidence and, as in many cases, an eyewitness identification can be unreliable and call for considerable caution.

[33] Basically, therefore, I should instruct myself and be cautious in relying upon the correctness of an eyewitness identification evidence as such a witness and others in support could be mistaken but be convincing. Furthermore, I should weigh carefully and examine all the evidence and not selectively pick and accept evidence that support correctness while disregarding contradictory evidence. Likewise, I should consider any peculiarities of the witness such as his or her ability to perceive clearly and to recount accurately the event. Also, the effect of fear, excitement or bias toward the accused or at least a biased perception of the event or of the

accused. See: **R.v. Bullock** [1999] O.J. No.3106 (Ont. Sup. Ct.), **R.v. Nikolovski**, (1996) 111 C.C.C. (3d) 403 (S.C.C.) **R.v. Sophonow** (No.2) (1986), 25 C.C.C. (3d) 415 (Man. C.A.), (leave to appeal to the S.C.C. refused, April 22, 1986) at p.438, **R.v. Shermetta**, [1995] N.S.J. No.195 (C.A.). at para. 46.

(a) Direct contact with and observation of the robber

[34] Here, I find several critical concerns. Sinha was the only person who saw and looked directly at the actual robber. The robber wore a mask that covered his entire face and a dark hood pulled up and partially covering the face. Sinha did not testify that he saw the person's skin colour. He appears to have good eyesight and from three feet away all that he testified to was that he saw that the person's eyes were watery. Notably, he did not say on what basis he concluded that at the time the person was before him he knew for a fact that the person was an African Canadian.

[35] However, I noted that he did say that he "gathered" that the person was an African Canadian. Thus, my impressions were that the robber's race

was not his own personal perception but rather was related to him from other source impressions. Also, I think that, for Sinha, the robbery was a terrifying traumatic event and he certainly might earnestly desire the robber's conviction and thus may be biased in that direction. I say so because he testified that he was afraid and although he did not and could not give the police any facial descriptions of the robber the police did show him a photo line-up that included a photograph of the accused, and of dark-skinned persons with facial hairs.

[36] Therefore, on the total evidence, I conclude and find that Sinha cannot state, with any certainty, the robber's racial identity, or at all. Furthermore, he did not see any vehicles or saw anyone go from his store to a vehicle. Therefore, I conclude and find that he cannot make any connection between the robber and any vehicle, or at all.

(b) Observations at or near the crime scene

(i) The vehicle

[37] The evidence was that Sinha told Strong and Johnson that he was

robbed. Given the Crown's theory, there was, however, no evidence of what he actually told them or, for that matter that he told them that the robber was a black man. When Strong and Johnson saw a vehicle turned in the rear parking lot they thought nothing of it and did not pay it much attention as they were busy at their usual work tasks. Strong did not see the whole vehicle but was sure that it made lots of noise from what sounded to be a hole in the muffler. Johnson was unable to give distinctive details of the vehicle such as its sunroof , whitewall tires and no hubcaps that someone with more than a casual look would have noticed. The most that she can say, in my opinion, is that the car she saw in the rear parking lot at 604 Bedford Highway looked similar to the car that the accused abandoned in the cemetery. This is a factor that I must consider on all the evidence.

[38] The witnesses from Manor House Furniture saw a speeding dark brown four-door, old model car coming from the area of the rear apartments on a gravel driveway. This driveway is to the left of the building looking from the Bedford Highway and is some distance away from the other paved driveway on the right of the 604 address. The car that came down the gravel driveway turned right on the Bedford Highway toward Halifax. The car that came down

the paved driveway nobody saw in which direction it went on the Bedford Highway, if at all. Was it the same vehicle seen at a different point in time? Or were the observations degrees of the same factual observation? On first blush, the evidence is unclear. However, before I arrive at a conclusion, I will first consider the evidence concerning the driver.

(ii) the driver

[39] All that Harrie saw was a person, whose gender she cannot determine, wearing a hoodie and carrying a knapsack. Strong saw an individual, whom he cannot describe, in the vehicle. Denise Johnson admits to seeing a non-Caucasian male wearing a sweater with hood down. Even so, she could not comment on his age or built and could not describe any facial characteristics. It was she who called in the robbery but there is no evidence of what she, in fact, told the police. However, she swore that he did not provide any facial descriptions of the person she saw to the police.

[40] Wambolt saw a dark-complected male with short hair with no observable facial hairs as the driver. Catherine Johnson first saw a person

wearing a dark sweater with a hood walking quickly from the right of the building in the front parking lot. When she next saw someone, the person was wearing a dark hooded sweatshirt over the head carrying a dark backpack. When she eventually saw the driver of the vehicle she was unable to tell whether it was the same person whom she saw walking or what was the person's gender. Parenthetically, it seems to me and I conclude and find that the witnesses at the cemetery merely confirmed that the accused clothing and duffel bag were different from that of the robber.

(c) The Tendered Exhibits

[41] In my opinion, it serves no useful purpose to tender exhibits that serve merely as props rather than as tangible physical evidence with some probative evidential purpose and value. Here, the police seized several items from the abandoned car in the cemetery. These included, among other things, a blue toque, a blue/black toque and a dark-coloured neck warmer. The suggestion was that any of these items could have been used in some manner by the robber.

[42] However, none of the witnesses who either directly saw the robber or saw someone whom the police suspected may have been the robber, were ever shown these exhibits for their comments. Likewise, the police conducted no forensic or scientific testing or analysis to determine whether there existed a nexus between any of these items and the accused.

[43] Consequently, in my opinion, failure to establish a nexus between the accused and the items, apart from saying that they were found in the vehicle that he was driving, particularly when there is uncontradicted evidence that proved ownership and use of the items by third parties, demonstrated a lack of an appreciation of the necessity to establish, beyond a reasonable doubt, proof of disputed facts. Respectfully, the mere projection of personal subjective hunches or unsupported suggestive notions is not the basis on which positive proof of fact is established.

[44] Here, I find that there were no physical traces from the accused on these items. For example, there were no fingerprints or DNA evidence that would have allowed me to draw either a reasonable or rational inference from expert testimony traceable scientifically to the accused. All that I received

as evidence of materiality and relevancy, in my opinion, were baseless subjective conjectures that had no probative value. Therefore, I conclude and find that the tendered exhibits lacked relevancy and materiality, have no proven nexus to the crime or the accused and therefore do not assist in establishing the guilt of the accused beyond a reasonable doubt.

[45] In my opinion the discrepancies and inconsistencies are noteworthy. Thus, an analysis of the evidence that I accept and found, in my opinion, disclosed no cogent and convincing evidence directly linking the accused to the crime scene. I find that there is no direct identification of the robber. Also, I find that no one saw the robber enter a vehicle and, on the evidence, it is difficult for me to conclude, without a reasonable doubt, that the vehicle seen by witnesses on the driveway of 604 Bedford Highway given the description, or lack thereof of the driver, was one and the same vehicle seen by the other witnesses at 600 Bedford Highway coming down the gravel driveway, again given the vague description of the driver and the general generic description of the vehicle.

[46] Moreover, in my opinion, on the total evidence, there is no direct

evidence that the seen vehicle was involved in the robbery as no one at or near the crime scene could positively identify who was the robber; no one at or near the crime scene saw the robber actually enter a vehicle; no one at or near the crime scene could compare or identify the driver of the seen vehicle with the robber and no one at or near the crime scene can say with any certainty that the seen vehicle and the robber were factually connected.

[47] Is there, however, a circumstantial nexus between the accused and the robbery? I think that it is critical to consider what information the police had when they concluded that the accused was the robber. The only person who knew that Sinha was robbed were himself, D. Johnson and Strong. None of them saw the robber's face nor saw the robber enter a vehicle. Similarly, none of them testified that they assumed that the vehicle they saw was involved in the robbery and why so. There is no evidence what D. Johnson relayed to the authorities when she reported the robbery but she swore that she did not provide the police with any facial description.

[48] So, what did the police have? Longley, who concluded immediately that the accused was the robber, in my opinion on the evidence that I find and

accept, had no detailed information on which to act. He was working on a hunch and a suspicion that, as I listened to his testimony and as I observed him as he testified I formed the impression, and it is my opinion, that his subjective beliefs may have affected and coloured any logical, rational and unbiased search for the perpetrator.

[49] From the evidence, a reasonable inference can be drawn that the police had subjectively concluded that the accused and no other person was the robber. Despite the fact that no witness gave any composite description of the robber or stated that they saw no facial hairs on a possible person of interest the police showed all the witnesses, who were at or near the crime scene, photo lineups with persons having facial hair. This approach, in my view, not only tainted the process but was also unfair to the accused as it intentionally presented to eyewitnesses for consideration a spectrum or genre of persons whom they did not and could not identify and which included a photograph of the accused. This is also troubling as the police appeared to be seeking confirmation of their suspicions and it could, I think, be viewed as an attempt by the investigator to influence and to confirm his subjectivism.

[50] I do not doubt that the accused arrived at 80 Rufus Avenue and that he was driving a brown two-toned older model car. The critical question is: where did he come from? Given the many approaches from Bedford Highway to Rufus Avenue, there is no evidence that he and the vehicle were seen anywhere that would or could suggest that he had just driven from the Bedford Highway area. Moreover, Longley, who saw the vehicle arrive did not say from which direction it approached 80 Rufus Avenue. Thus, it seems to me to be highly speculative and, without more, to conclude beyond a reasonable doubt, that the accused arrived at 80 Rufus Avenue from the Bedford Highway area.

[51] Another point of interest is the flight of the accused when Longley approached his vehicle. In my opinion, if in fact, a positive nexus, either directly or indirectly, was established between the accused and the crime scene, I could, on its face, in the absence of an explanation, draw a reasonable adverse inference from the fact of his sudden departure from Rufus Avenue. See: **R.v. Cooper**, [1978] 1 S.C.R. 860, **R.v. Coyle**, [2003] N.S.J. No. 257 (Prov. Ct.).

[52] However, I think that, here, to attract an adverse inference any nexus to the crime must be established by evidence of direct or indirect involvement, prior to the accused contact with Longley. Subsequent activities, in my view, could then be properly considered as post offence conduct in support of the prior established conduct. The difficulty here is that Longley was not sure that any description of the car was broadcasted so it appears that he was waiting for the accused regardless of what vehicle the accused was driving.

[53] Further, D. Johnson did not provide any facial description to the police and, the police did not interview the Manor House Furniture witnesses until the following day. Also, the evidence is not clear whether the robber's clothing was broadcasted. But, assuming that it was, the clothing that the accused was wearing differed significantly from that seen worn by the robber. Additionally, Longley apparently had not met the accused before and there is no evidence that the accused knew Longley by sight. Moreover, Longley was in civilian clothes and in an unmarked police vehicle.

[54] True, the rapid departure by the accused was suspicious, but in my view lacked context or nexus to the robbery. It was contextually ambiguous

as the evidence points to other speculative activities of the accused. Sure, it may well be consistent with a guilty conscious and may be inconsistent with the conduct of an innocent person. But, the question is: what is the guilt? Given the relationship between the accused and the authorities, as disclosed by the evidence, his avoidance of the police may well be for other rational reasons.

[55] I do not think that it can be said, beyond a reasonable doubt, that because the accused avoided the police that he is automatically guilty of the robbery or that he needs to give an explanation for his conduct, absent any proven nexus to the index crime. Therefore, I conclude and find that all we have are speculations and suspicions that cannot be the basis to ground any liability in a criminal trial. Here, for the same reasons, it is also my opinion, that they do not establish circumstantially a consciousness of guilt with respect to the robbery.

[56] Here, with respect to the robbery and the related offences, the Crown's case is entirely circumstantial. In *R.v. Cameron*, [2004] N.S.J. No. 309 (Prov. Ct.) , this Court opined at para.13:

The burden is on the Crown to satisfy me beyond a reasonable doubt that on the circumstantial evidence the only inference that can be drawn from the proven facts is that the accused is the guilty party. That burden never shifts onto the accused. He does not have to prove his innocence. He is presumed to be innocent until proven guilty on credible, reliable and trustworthy evidence

[57] Furthermore, this case, in the end, turns primarily on the eyewitnesses' identification. Their ability to positively identify the robber would have of necessity resolve all outstanding issues. However, it is not simply an adding up of similarities and dissimilarities but rather whether there is proof beyond a reasonable doubt, on the identification evidence, that the accused committed the crime. To that end, I adopt the principle pronounced in **R.v. Atfield**, [1983] A.J. No. 870 (C.A.), at para.6:

It goes without saying that correctness of identification must be decided by examining the whole of the evidence left on the scales at the end of the case and not by selectively picking and accepting those items of evidence which support correctness while disregarding contradictory evidence not specifically rejected for cause, which might leave correctness in doubt. The accused is entitled to the benefit of the most favorable interpretation of discrepancies in evidence which cannot otherwise be resolved. Such an examination in this case, conducted without first accepting or rejecting the correctness of identification but to determine if it is so, leads to the conclusion that the eye witnesses were mistaken, albeit honestly so, and compels the acquittal of the appellant

Conclusion

[57] Therefore, on the comments and analysis that I have made and on the above cases, I am not satisfied that the evidence of identification of the robber as the accused has been proved beyond a reasonable doubt.

[58] Here, I do not find, on the total evidence that there are sufficient evidential factors or indexes of the physical and facial characteristics of the robber and the observed conduct of the accused at 80 Rufus Avenue and subsequent, that when combined created an irrefutable web of circumstances to persuade me, beyond a reasonable doubt, that it was the accused and no other person who committed the robbery. In short, I am not satisfied that the total evidence when considered with the hypothesis and circumstances as submitted by the Crown is consistent only with the guilt of the accused and inconsistent with any other rational conclusion. ***R.v. Charemski***, [1988] 1 S.C.R. 679, [1988] S.C.J. No. 23 Put another way, I am not satisfied that the guilt of the accused is the only reasonable or rational inference to be drawn from the proven facts.

[59] Consequently, I find the accused **not guilty** as charged on all counts of the information tried before me. Acquittals will be entered on the record.

J.