[Indexed as: R. v. Reitsma]

Reitsma v. The Queen

125 C.C.C. (3d) 1
Reversing 125 C.C.C. (3d) at p. 1

Supreme Court of Canada
Cory, McLachlin, Iacobucci, Major and Binnie JJ.

Judgment rendered: May 20, 1998
Court File No. 26305

Evidence — Identity of accused — Identification by complainant — Complainant having 15-second opportunity to observe intruder in home during daytime — Complainant not making positive identification of accused in photo line-up but stating that accused's photo looked similar to suspect — Complainant making in dock identification at trial — Complainant's explanations for failure to make positive identification in photo line-up not consistent with what could be seen in photo line-up or with balance of complainant's testimony — Majority of British Columbia Court of Appeal holding that conviction not unreasonable — Supreme Court of Canada adopting reasons of the dissenting judge in British Columbia Court of Appeal — Conviction set aside and acquittal entered.

APPEAL by the accused from a judgment of the British Columbia Court of Appeal, infra, 157 W.A.C. 303, 36 W.C.B. (2d) 197, dismissing the accused's appeal from his conviction for breaking and entering and theft.

The judgment appealed from is as follows

October 23, 1997.

M.J. Munro, for accused, appellant.

R.A. Mulligan, for the Crown, respondent. ***[page2]***

PROWSE J.A. (NEWBURY J.A. CONCURRING):—

Nature of Appeal

¶ 1 On December 13, 1996, Mr. Reitsma was convicted by a Provincial Court judge of one count of breaking and entering and theft, contrary to s. 348(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46. Mr. Reitsma is appealing from his conviction and asking that a verdict of acquittal be entered.

Issue on Appeal

¶ 2 The critical issue on appeal is whether the verdict was unreasonable and unsupported by the evidence. In essence, counsel for Mr. Reitsma submits that the trial judge erred in convicting him on the basis of identification evidence which was fundamentally flawed and upon which no jury, properly instructed and acting judicially, could reasonably have convicted.

Background

¶ 3 On January 16, 1996, the complainant, Mr. Carter, returned to his home in the District of Saanich, opened the door, and encountered an intruder. Mr. Carter described his interaction with the intruder at that time as follows:

> A I came home from work for lunch a little after noon that day and parked in the driveway, used my key to enter the family room door from the exterior. And once I was just inside the house, a male individual came out from the kitchen and was standing at the stop -- top of the stairs, about four stairs up to the kitchen.
>
> Q How far away from you was he?
> A Approximately eight feet.
> Q Okay.
>
> A I wondered who he was and asked who he was. He said that he had come to pick up some things for him. I have a son living at home, now twenty-two years old.
>
> Q What's his name?
> A His name is Clive.
> Q Yes.
>
> A So I thought, as I think he intended me to think, that it was a friend of my son's. However, I said, thinking that it didn't quite sound like my son to do this -- to let a stranger into the house -- I said to him, "Who did?" and he said, "David," and that's, of course, not my son's name.
> During this conversation he'd come down the stairs and was walking towards me, towards the door which was behind me. And at that point he went out the door, slamming it behind him. And I collected my wits at the ***[page3]*** odd answer, opened the door, and saw him running down the end of the driveway towards the golf course.
> Q I take it you had never given that individual permission to be in your house?
>
> A That's correct.

Q The -- how long do you think this all took, from beginning to end, to when you first saw this gentleman to when he ran out the door?

A No more than fifteen seconds.

¶ 4 Mr. Carter went on to describe the intruder as a young white male, 23-25 years of age, approximately 5'6", clean-cut, without facial hair and wearing a baseball cap. He did not recall the intruder's hair colour and said that it was difficult to see the length of the hair on top because of the baseball cap. He stated that the intruder did not have any scars or other distinguishing features. In cross-examination, he described the intruder as an average-looking individual "in many respects".

¶ 5 The day following the break-in, Mr. Carter was shown a photo line-up. After viewing that line-up, he filled in a ballot which included the following notation in his handwriting:

> Photo #7 is similar to the suspect although I cannot be 100% sure from the photo, I feel that I could identify the individual in person.

Photo #7 is a picture of Mr. Reitsma.

¶ 6 At trial, 11 months following the break-in, Mr. Carter positively identified Mr. Reitsma as the intruder who had been in his home. It is common ground that the only other people in the courtroom at the time of this "in-court" identification were the judge, court staff, counsel, and Mr. Reitsma.

¶ 7 At trial, Mr. Carter was examined and cross-examined as to how he was able to identify Mr. Reitsma at trial when he had not been able to positively identify him as the intruder in the photo line-up. His evidence in that regard was as follows:

Direct Examination
Q Okay. Is there any explanation you could provide to the court as to why you couldn't make a description from the -- or an identification from the photo to a hundred percent certainty?
A Photos aren't three-dimensional, to start with. The photograph did not have the individual with exactly the same hairstyle.

Q Mm-hmm.

A But the -- the clothes were different as well. There wasn't eye-to-eye contact, as I recall, in the photograph. ***[page4]***

Q Mm-hmm.

A So several things that made it not a one-hundred-percent surety. That is, I wouldn't send anyone to jail on the basis of a photograph. Not that photograph.

Cross-Examination
Q Is it your evidence today that this individual seated here is equally similar to the person you saw? [in the photo]
A Equally similar -- the photograph? No, I would not say that. I would say that this individual is the person who was in my house. It's much more easy to identify person-to-person than in the photograph.

I note that Mr. Carter was not shown the photo line-up when he was asked these questions.

Proceedings at Trial

¶ 8 The only issue at trial was identification; that is, whether the evidence established, beyond a reasonable doubt, that Mr. Reitsma was the individual who had broken into Mr. Carter's home.

¶ 9 The Crown called two witnesses at trial: Mr. Carter and the police officer who presented the photo line-up to Mr. Carter the day following the break-in. The defence called no evidence.

¶ 10 The trial judge commenced his reasons for judgment by cautioning himself with respect to the frailties of identification evidence, as follows:

THE COURT: Both experienced counsel have made able submissions on this always difficult issue of identification, where there is only one witness and no physical evidence to support the identification evidence.

Mr. Munro has quite properly highlighted the issues in this particular case and the issues surrounding identification, and I too, like the courts in all of the cases that have been mentioned, am cognizant of the need to be extremely careful with respect to the issue of identification evidence, especially when it is coming from a victim of a crime who, as has been stated in some of these cases, whilst not calling into question in any way their honesty, might be genuinely mistaken and initially convinced that they have the right person when they identify a person and carry on with that mistaken but honest belief.

¶ 11 The trial judge then went on to refer to some of the authorities which discuss the frailties of identification evidence, and the need for caution before relying on such evidence. Those cases included R. v. Izzard (1990), 54 C.C.C. (3d) 252 (Ont. C.A.), R. v. Hang (1990), 55 C.C.C. (3d) 195 (B.C.C.A.), R. v. Virk (1983), 33 ***[page5]*** C.R. (3d) 378 (B.C.C.A.), and R. v. Fengstad (1994), 27 C.R. (4th) 383 (B.C.C.A). The trial judge clearly recognized the danger of a miscarriage of justice in cases of honest, but mistaken, identity.

¶ 12 After considering the evidence as a whole, the trial judge was satisfied, beyond a reasonable doubt, that Mr. Reitsma was the person who had broken into Mr. Carter's

home. The trial judge's reasoning process in arriving at that conclusion is reflected in the following passages from his reasons for judgment:

> The only evidence of identification here is from Mr. Carter. There is no real evidence or supporting scientific evidence or anything along those lines, and I note that the human observation and recollections are notoriously unreliable in this area but, at the same time, I am of the opinion that simply because there is only one witness and it is that witness's ability to accurately recall who it was he or she saw, that that, in and of itself, depending on the circumstances of the case, is not enough to reject that as being unreliable.
>
> . . . . .
>
> . . . whilst there were no special distinguishing features, I am of the opinion that notwithstanding that, in the totality of the circumstances, Mr. Carter's identification evidence is reliable.
>
> . . . . .
>
> I am cognizant of all those issues, all of those cases, the extreme caution that has to be exercised when convicting a person of a criminal offence on the identification evidence of one person alone with no confirming evidence apart from the witness's recollection, but notwithstanding all of those concerns, I am satisfied that having regard to the totality of the circumstances here, that Mr. Carter's identification evidence is reliable and that the Crown has proven this particular offence beyond a reasonable doubt and there is a finding of guilty on the charge.

Discussion

¶ 13 In his factum, counsel for Mr. Reitsma submitted that the trial judge erred in failing to take into account certain flaws in the explanation given by Mr. Carter as to why he was able to positively identify Mr. Reitsma at trial, but was not able to make a positive identification of Mr. Reitsma in the photo line-up. At the hearing of the appeal, however, the issue on appeal was framed in accordance with s. 686(1)(a)(i) of the Code; that is, whether the verdict should be set aside on the basis that it is unreasonable or unsupported by the evidence.

¶ 14 The test to be applied by the Court in determining whether a verdict is unreasonable or unsupported by the evidence is whether a jury, properly instructed and acting judicially, could reasonably have rendered the verdict. In applying this test, the appellate court ***[page6]*** must re-examine and, to some extent, reweigh and consider the effect of the evidence (R. v. Yebes, [1987] 2 S.C.R. 168, 36 C.C.C. (3d) 417).

¶ 15 In this case, Mr. Carter observed the intruder in his home in broad daylight and carried on a brief conversation with him. Unlike the situation in many of the identification cases, Mr. Carter's interaction with the intruder was not marked by trauma, violence or other distractions. He was able to provide a general description of the intruder to the police. The day following the break-in he was able to pick Mr. Reitsma's picture from a photo line-up, although he was not able to positively identify Mr. Reitsma as the intruder. He indicated at that time he thought he would be able to identify the intruder if he saw him in person. He later positively identified Mr. Reitsma at trial.

¶ 16 Mr. Carter gave several reasons for being able to identify the intruder at trial despite being unable to make a positive identification from the photo line-up. The trial judge specifically referred to three of his reasons: that Mr. Carter would not send anyone to jail on the basis of a photograph such as the one in the photo line-up; that a person looks different in 3-D; and that there is a difference between seeing a photograph of someone and seeing that individual in person.

¶ 17 Two of the reasons Mr. Carter gave for not being able to positively identify the intruder from the photo line-up were not mentioned by the trial judge and are troubling. The first is Mr. Carter's statement that, as far as he recalled, the person in the photo line-up was not making eye-to-eye contact. The second is his statement that he thought the "clothes were different". The photo from the line-up shows that Mr. Reitsma was looking into the camera and that his clothing was not visible. Mr. Carter's memory of the photo line-up was faulty in those respects.

¶ 18 The limited time Mr. Carter had for observing the intruder (15 seconds) and the fact that Mr. Reitsma was the only person in the courtroom at trial who could have been the intruder are two further factors which signalled caution with respect to Mr. Carter's identification of Mr. Reitsma as the intruder.

¶ 19 In re-examining and reweighing the evidence at trial, I have focused on the strengths and weaknesses of the identification evidence. I have done so in light of the authorities which emphasize the frailties of identification evidence and the need for caution in ***[page7]*** assessing such evidence. In this case, despite the frailties in the identification evidence to which I have referred, I am satisfied that the strengths of that evidence, particularly as set out in para. 15 of these reasons, were such as to justify a properly instructed jury, acting judicially, reasonably to conclude that Mr. Reitsma was guilty of the offence with which he was charged. In other words, I conclude that the verdict was reasonable and supported by the evidence.

¶ 20 In the result, I would dismiss the appeal.

¶ 21 **ROWLES J.A.** (DISSENTING):— I have had the privilege of reading in draft the reasons for judgment of my colleague, Madam Justice Prowse. I regret that I am unable to agree with her conclusion that the verdict in this case can reasonably be supported by the evidence.

¶ 22 The appeal is brought under s. 686(1)(a)(i) of the Criminal Code on the ground that the verdict is unreasonable or cannot be supported by the evidence. The function of an appellate court, when determining whether a verdict is unreasonable, was explained by Sopinka J., speaking for the majority, in R. v. S. (P.L.), [1991] 1 S.C.R. 909 at 915, 64 C.C.C. (3d) 193:

> In an appeal founded on s. 686(1)(a)(i) the court is engaged in a review of the facts. The role of the Court of Appeal is to determine whether on the facts that were before the trier of fact a jury properly instructed and acting reasonably could convict. The court reviews the evidence that was before the trier of fact and after re-examining and, to some extent, reweighing the evidence, determines whether it meets the test. See R. v. Yebes, [1987] 2 S.C.R. 168.

¶ 23 It is only where an appellate court has considered all of the evidence before the trier of fact and determined that a conviction cannot be reasonably supported by the evidence that the court can invoke s. 686(1)(a)(i) and overturn the trial court's verdict: R. v. Burke, [1996] 1 S.C.R. 474 at 480-81, 105 C.C.C. (3d) 205 at 211.

¶ 24 The issue on this appeal is whether a jury, properly instructed and acting reasonably, could have found that the evidence of identity in this case met the requisite standard of proof.

¶ 25 In view of the grounds of appeal, I prefer to set out the evidence in my reasons.

The Evidence

¶ 26 The complainant arrived home during the day and was surprised to find a young man in his house whom he had never seen before. The encounter lasted no more than 15 seconds. ***[page8]***

¶ 27 The day following the incident the complainant was shown a photographic line-up. The appellant was depicted in photograph seven. The complainant did not make a positive identification but the note he wrote on the form said that "Photo #7 is similar to the suspect".

¶ 28 No other pre-trial identification procedures were undertaken.

¶ 29 The trial took place 11 months later. At trial, the complainant identified the appellant as the person he had seen in his house.

¶ 30 While not reflected in the transcript, the following facts are admitted for the purposes of the appeal, as contained in the Admission of Fact filed August 1, 1997:

1. That when the Accused was presented for identification to the Complainant, the only other individuals present in the courtroom

were the Judge, the Court Clerk, Crown and Defence Counsel, and two Deputy Sheriffs.

2. That the Accused was garbed in prison greens.
3. That a Deputy Sheriff sat on either side of the Accused at all material times.

¶ 31 Before identifying the appellant in the courtroom, the complainant was asked to describe the person he saw in his home on the day of the breaking and entering:

Q. Can you describe him for the court, please?
A. Yes. I recall that he was approximately five foot six inches tall, white male, young, in the twenty-three/twenty-five-year range, clean-cut, no facial hair. He was wearing a baseball cap. In fact, I remembered him as looking just very much like an individual like my son, who's a university student. Round face.
Q. Any facial hair?
A. No facial hair.
Q. How would you describe the length of his hair?
A. Short hair. Not -- that is, not long, not shoulder length, not unruly. But he was wearing a baseball cap, so it was difficult to see what it -- what the length was on top.
Q. What colour?
A. Impossible.
Q. What colour of hair?
A. I don't recall the colour of the hair.
Q. What about race of the individual?
A. White. White individual. ***[page9]***
Q. Any recollection of any glasses or anything like that?
A. No glasses.

Q Any scars --
A No.
Q -- or distinguishing features?

A No. I don't recall any scars or unusual skin growths or anything unusual about his face.

¶ 32 As to his clothing, the complainant said the intruder was wearing a baseball cap "blue in colour, possibly a shade of green" and "an outdoor jacket of a very popular style".

¶ 33 When the complainant was asked if it would be "a fair description to say that the individual [he] saw on the day in question was an average-looking individual", he responded:

Yes. He -- he is an average -- the person I saw is an average-looking

individual. In -- and I'd add to that, in many respects.

¶ 34 During examination-in-chief, the complainant gave the following explanation as to why he could not make a positive identification from the photo line-up:

Q. Okay. Is there any explanation you could provide to the court as to why you couldn't make a description from the -- or an identification from the photo to a hundred percent certainty?
A. Photos aren't three-dimensional, to start with. The photograph did not have the individual with exactly the same hairstyle.
Q. Mm-hmm.
A. But the -- clothes were different as well. There wasn't eye-to-eye contact, as I recall, in the photograph.
Q. Mm-hmm.
A. So several things that made it not a one-hundred-percent surety. That is, I wouldn't send anyone to jail on the basis of a photograph. Not that photograph.

¶ 35 In cross-examination, the complainant gave this evidence:

Q. Are you able to say, Mr. Carter, how long you viewed the lineup that you were shown when you were shown it?
A. The photograph --
Q. Yes.
A. -- lineup? I viewed it for approximately two minutes, total time.
Q. And following that is when you wrote your -- your note on the ballot that we've heard about. Is that right?
A. That's right.
Q. And that was that number seven looked similar to the individual you'd seen on January the 16th? ***[page10]***
A. Yes. Well, that's not what I wrote. I wrote a different -- slightly different statement than -- than similar, as I recall.
Q. You wrote -- you wrote more than that. But one of the things you wrote -- the way you started it was, "Number seven is similar to the suspect."
A. Correct.
Q. Is it your evidence today that this individual seated here is equally similar to the person you saw?
A. Equally similar -- the photograph? No, I would not say that. I would say that this individual is the person who was in my house. It's much more easy to identify person-to-person than in the photograph.

¶ 36 Apart from the complainant's testimony, there was no other evidence which would link the appellant to the offence.

¶ 37 No evidence was called by the defence.

Discussion

¶ 38 Judicial warnings about the inherent frailties of eye-witness identification abound. In R. v. Burke, supra, at 498 (S.C.R.), Sopinka J., giving the judgment of the court, said:

> The cases are replete with warnings about the casual acceptance of identification evidence even when such identification is made by direct visual confrontation of the accused. By reason of the many instances in which identification has proved erroneous, the trier of fact must be cognizant of "the inherent frailties of identification evidence arising from the psychological fact of the unreliability of human observation and recollection": R. v. Sutton, [1970] 2 O.R. 358 (C.A.), at p. 368. In R. v. Spatola, [1970] 3 O.R. 74 (C.A.), Laskin J.A. (as he then was) made the following observation about identification evidence (at p. 82):
>
> > "Errors of recognition have a long documented history. Identification experiments have underlined the frailty of memory and the fallibility of powers of observation. Studies have shown the progressive assurance that builds upon an original identification that may be erroneous . . . The very question of admissibility of identification evidence in some of its aspects has caused sufficient apprehension in some jurisdictions to give pause to uncritical reliance on such evidence, when admitted, as the basis of conviction . . ." [Emphasis added by Sopinka J.]

¶ 39 An appellate court must be conscious of the advantages enjoyed by the trier of fact, but reversal for unreasonableness remains available under s. 686(1)(a)(i) of the Criminal Code where the "unreasonableness" of the verdict rests on a question of credibility: R. v. Burke, supra, at 482.

¶ 40 The conviction in this case rests entirely on the identification evidence given by the complainant. As in many cases of eyewitness identification, the honesty and integrity of the eyewitness was not in ***[page11]*** issue. The jurisprudence on eyewitness identification makes clear, however, that testing the reliability of the evidence of identity goes beyond a determination of whether an eyewitness is being honest in his or her testimony.

¶ 41 The decision of the Alberta Court of Appeal in R. v. Atfield (1983), 25 Alta. L.R. (2d) 97 at 98-99, is instructive in distinguishing between the credibility of eyewitnesses and a determination of the reliability of their evidence of identity:

> The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing, and have been responsible for many cases of miscarriages of justice through

> mistaken identity. The accuracy of this type of evidence cannot be determined by the usual tests of credibility of witnesses, but must be tested by a close scrutiny of other evidence. In cases where the criminal act is not contested and the identity of the accused as the perpetrator the only issue, identification is determinative of guilt or innocence; its accuracy becomes the focal issue at trial and must itself be put on trial, so to speak. As is said in Turnbull, [63 Cr. App. R. 132, [1976] 3 All E.R. 549] the jury (or the judge sitting alone) must be satisfied of both the honesty of the witness and the correctness of the identification. Honesty is determined by the jury (or judge sitting alone) by observing and hearing the witness, but correctness of identification must be found from evidence of circumstances in which it has been made or in other supporting evidence. If the accuracy of the identification is left in doubt because the circumstances surrounding the identification are unfavourable, or supporting evidence is lacking or weak, honesty of the witnesses will not suffice to raise the case to the requisite standard of proof, and a conviction so founded is unsatisfactory and unsafe and will be set aside. It should always be remembered that in the famous Adolph Beck case, 20 seemingly honest witnesses mistakenly identified Beck as the wrongdoer. [Emphasis added.]

Trial Judgment

¶ 42 The trial judge, after setting out the initial portion of the passage in R. v. Atfield, supra, quoted above, regarding the danger inherent in mistaken visual identification that comes from witnesses "who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken", said this:

> I agree wholeheartedly with that statement and I am alive to those cases of miscarriages of justice but I think it is important to note that in this particular case Mr. Carter was not one of these persons who, at the outset, is absolutely certain, convinced of their correctness and carry on with their sureness as time proceeds. ***[page12]***
>
> Mr. Carter, when he was shown the photographic lineup . . . selected number seven, who was Mr. Reitsma . . . but very fairly, at that time, did not say he was certain this was the person, and he has explained why he did that in testimony today, and that he would not send anyone to jail on the basis of a photograph, especially that photograph, and then described the 3-D issue and the difference between identifying a person from a photograph and when seeing that person in person, or live.
> . . . The only evidence of identification here is from Mr. Carter. There is no real evidence or supporting scientific evidence or anything along those lines, and I note that the human observation and recollections are notoriously unreliable in this area but, at the same time, I am of the opinion that simply because there is only one witness and it is that witness's ability to accurately recall who it was he or she saw, that that, in and of itself, depending on the circumstances of the case, is not enough to reject it as

unreliable.

. . . Here there is no question it was a brief period of observation as these things go, fifteen seconds, but at the same time, it was noon, he was not woken from a sound sleep, it was not nighttime. There was nothing to suggest in the testimony from Mr. Carter that he was traumatized, had any difficulty observing the person. Indeed, at the outset, he thought it was a friend of his son's. He had a conversation with the person. This person walked by him. He observed him leave, and it was really only after he left that he realized that something was not correct. His primary and only focus was on this person who was in his home, standing on the stairs, eight feet from him.

Unlike in the Izzard [R. v. Izzard, (1990), 54 C.C.C. (3d) 252] case, here, as I have already pointed out, it was the same day that there was this initial and qualified identification of Mr. Reitsma as the person when the corporal showed him the photographic lineup and whilst there were no special distinguishing features, I am of the opinion that notwithstanding that, in the totality of the circumstances, Mr. Carter's identification evidence is reliable.

The photographic lineup was a fair one. The persons in there were a fair representation of the person described as being the person in his home by Mr. Carter. I will state for the record that I agree wholeheartedly with [defence counsel] that the only person coming close to matching the description of the intruder was Mr. Reitsma. There is no obligation whatsoever on defence to cross-examine on that particular type of point, but I do state for the record that I acknowledge that Mr. Reitsma was the only person in court matching the description.

He was quite properly cross-examined by [defence counsel] as to whether the person he was identifying in court today was merely the most similar or similar to the person in his home, and he clearly and unequivocally stated that it was that person.

There is no specific weakness in the identification evidence in the sense of prior misidentifications, prior non-identifications, contradictory descriptions, failures of any other person to recognize the person . . . [Emphasis added.]

¶ 43 After citing several decisions of this Court in which the adequacy of the jury charge regarding eyewitness identification was considered, the trial judge concluded: ***[page13]***

I am cognizant of all those issues, all of those cases, the extreme caution that has to be exercised when convicting a person of a criminal offence on the identification evidence of one person alone with no confirming evidence apart from the witness's recollection, but notwithstanding all of those concerns, I am satisfied that having regard to the totality of the circumstances here, that Mr. Carter's identification evidence is reliable and that the Crown has proven this particular offence beyond a reasonable doubt and there is a finding of guilty on the charge.

Analysis

¶ 44 From his reasons for judgment, it is apparent that the trial judge regarded the complainant's note on the photo line-up as a "qualified identification" rather than a failure to identify. It is also apparent that he regarded the complainant's reaction to the photo line-up favourably in the sense that the complainant was said to have acted "very fairly" in declining to reach a firm conclusion on a photograph. In effect, the trial judge appears to have viewed this as a case of a careful, fair witness who wanted an opportunity to see the suspect in person whom he had identified in the photograph before making a positive identification that could result in imprisonment of the person in question.

¶ 45 The appellant argues that the trial judge erred in using the complainant's reluctance to make a positive identification in the photo line-up to enhance or bolster the reliability of his identification evidence. He submits that an examination of some of the reasons the complainant gave for not making a positive identification the day following the offence are not borne out by an examination of the photo line-up and other evidence given by the complainant and that the circumstances surrounding the courtroom identification are such that little or no weight could be attached to it.

¶ 46 The Crown's case against the appellant depended wholly on the correctness of the identification evidence of the complainant. As there was no other direct evidence or any circumstantial evidence which would minimize the inherent dangers of the eyewitness identification, the complainant's identification evidence requires careful scrutiny.

¶ 47 The honesty of a witness is obviously an important factor for the trier of fact to consider but an assessment of the reliability of a witness's evidence of identification does not end with a determination as to his credibility, as the many cases which speak to the frailties of eyewitness identification have emphasized. ***[page14]***

¶ 48 When the complainant was shown the photo line-up on the day after the break-in, he did not make a positive identification. Instead he wrote on the line-up form:

> Photo #7 is similar to the suspect although I cannot be 100% sure from the photo. I feel that I could identify the individual in person.

¶ 49 There is no indication in the transcript that the complainant was shown the photo line-up exhibit during his testimony. When the complainant was asked why he was not able to make a positive identification from the photo line-up he gave these reasons:

(a) "Photos aren't three-dimensional . . .".

(b) "The photograph did not have the individual with exactly the same hairstyle."

(c) ". . . the clothes were different as well."

(d) "There wasn't eye-to-eye contact, as I recall, in the photograph."

(e) ". . . I wouldn't send anyone to jail on the basis of a photograph. Not that photograph."

(f) "It's much more easy to identify person-to-person than in the photograph."

¶ 50 The trial judge referred to only some of the reasons given by the complainant:

> . . . that he would not send anyone to jail on the basis of a photograph, especially that photograph, and then described the 3-D issue and the difference between identifying a person from a photograph and when seeing that person in person, or live.

¶ 51 It was not unreasonable to accept the complainant's comments about the limitations of photographs in comparison to "live" viewing, although the comments were of a general nature. There was no evidence, however, of any further pre-trial identification procedures having been undertaken. Whether the complainant would have been able to make a positive identification of the intruder in a properly conducted line-up is unknown.

¶ 52 The other reasons the complainant gave for not having made a positive identification in the photo line-up are specific in nature but no reference is made to them in the trial judgment. Each of the other reasons given by the complainant conflicts with either what may be seen in the photo line-up exhibit or with the complainant's other testimony. ***[page15]***

¶ 53 The complainant's explanation that there "wasn't eye-to-eye contact in the photograph" is not in accord with the photo line-up exhibit. The person shown in photo seven, as the respondent's counsel concedes, appears to be looking directly at the camera. Photo seven depicts only the person's head, not his clothing, thus the complainant's explanation that "the clothing was different" has no foundation. The complainant's evidence that "the photograph did not have the individual with exactly the same hairstyle" is also unsatisfactory in light of the complainant's earlier testimony that the intruder was wearing a baseball cap.

¶ 54 One view that might be taken of the foregoing evidence is that the complainant was having difficulty recalling the photo line-up accurately and, as a result, having difficulty in responding to the question he had been asked.

¶ 55 Regardless of the view taken of the complainant's testimony in regard to the photo line-up, however, it is not possible to elevate the complainant's statement on the exhibit that "Photo #7 is similar to the suspect" into a positive identification through an assessment of the witness's honesty and fairness.

¶ 56 That brings me to the courtroom identification. The trial took place some 11 months after the offence. The complainant identified the appellant in the courtroom in the circumstances set out in the agreed facts. The appellant argues that little or no weight could be attached to this identification evidence because of the circumstances in which

the identification was made. Support for the argument that little or no weight can be attached to a "dock" identification where there has been no positive pre-trial identification may be found in R. v. Amaral, [1990] O.J. No. 1762 (QL) (Ont. C.A.) [summarized 11 W.C.B. (2d) 204]. Appellant's counsel referred as well to R. v. Hibbert (24 July 1996) Victoria Registry V02554 (B.C.C.A.) [now reported 128 W.A.C. 277], in which Legg J.A. observed in para. 57:

> The identification of the accused for the first time in the courtroom after a failure to positively identify him from a photo line-up is of little weight.

¶ 57 Identification of an accused for the first time in the dock was considered in R. v. Williams (1982), 66 C.C.C. (2d) 234 (Ont. C.A.), in which Martin J.A. made these observations at 235:

> Identification always has certain inherent frailties. Identification evidence may be strengthened if the identifying witness is able to pick out the person whom he claims to have seen on the occasion in question from among a ***[page16]*** number of other persons of similar age and size and general physical appearance in a line-up. On the other hand, an identification of an accused as the offender made for the first time when the prisoner is in the dock possesses particular frailties over and above the normal frailties attaching to identification evidence.

¶ 58 The frailties of eyewitness identification may be most pronounced in cases where the accused was not known to the complainant before the offence and where the complainant's opportunity to observe the perpetrator was limited to a brief, stressful encounter. In this case, the encounter was brief and unexpected but not stressful.

¶ 59 The identification of an accused person for the first time "in the dock" is generally regarded as having little weight. In a dock identification the witness is obviously not required to pick out the person whom he claims to have seen from among a number of other persons of similar age and size and general physical appearance. In a courtroom identification there is also the danger of the witness anticipating that the offender will be present. That danger is accentuated when an accused is readily identifiable in the courtroom as the person accused of the crime. Identification of an accused for the first time in the dock is analogous to a police "show up" in which the only person shown to the identifying witness is the suspect, and for that reason it is open to the same criticism. Generally, anything which tends to convey to a witness that a person is suspected by the police or is charged with the offence has the effect of reducing or destroying the value of the identification evidence.

¶ 60 Given the circumstances in this case, the courtroom identification which was made could not reasonably be accorded much weight.

Summary And Conclusion

¶ 61 The present case is one in which the complainant's identification evidence is unsupported by any other direct or circumstantial evidence. Reliance on the honesty and fairness of the witness to overcome the weaknesses in the identification evidence and to raise the case to the requisite standard of proof does not accord with the jurisprudence. The complainant's evidence that photo seven in the photo line-up was "similar" to the intruder could have had some evidentiary value if the identification procedure in the courtroom had been analogous to a line-up. Unfortunately it was not and any weight which might reasonably have been attached to the ***[page17]*** complainant's photo line-up evidence was effectively undermined by the manner in which the appellant was presented for identification in the courtroom. In the circumstances in which the appellant was identified in the courtroom in this case, little, if any, weight could be attached to that identification evidence.

¶ 62 For the foregoing reasons, I am of the view that the verdict cannot reasonably be supported by the evidence in this case. Accordingly, I would allow the appeal and, pursuant to s. 686(1)(a)(i) of the Criminal Code, quash the conviction.

Michael J. Munro, for accused, appellant.
Robert A. Mulligan, for the Crown, respondent (videoconference -- Vancouver).

The judgment of the court was delivered orally by

CORY J.:— We are all in agreement with the minority reasons given by Madam Justice Rowles. The appeal is therefore allowed, the conviction is set aside and an acquittal is directed.

Appeal allowed; acquittal entered.