WARNING

THIS IS AN APPEAL UNDER THE

YOUTH CRIMINAL JUSTICE ACT

AND IS SUBJECT TO:

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

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

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 (1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published), 118(1) (no access to records unless authorized) or 128(3) (disposal of R.C.M.P. records) or section 129 (no subsequent disclosure) of this Act, or subsection 38(1) (identity not to be published), (1.12) (no subsequent disclosure), (1.14) (no subsequent disclosure by school) or (1.15) (information to be kept separate), 45(2) (destruction of records) or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

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

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

CITATION: R. v. J.S., 2011 ONCA 304
DATE: 20110419
DOCKET: C52577

COURT OF APPEAL FOR ONTARIO

Laskin, Sharpe and Cronk JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

J.S.

Appellant

Dale E. Ives, for the appellant

Christopher Webb, for the respondent

Heard: April 8, 2011

On appeal from the findings of guilt entered on June 2, 2010 and the dispositions imposed on June 30, 2010 by Justice Gregory A. Pockele of the Ontario Court of Justice.

By the Court:

[1] This appeal was argued before us on Friday, April 8. At the conclusion of oral argument we gave our decision with reasons to follow. We allowed the appeal, set aside

the appellant's convictions and ordered a new trial. These are the brief reasons for our decision.

A. Background

[2] On a December evening in 2009, four masked men carrying knives broke into a townhouse where the complainant lived, and robbed him and his roommate. The appellant was charged with the robbery and three related offences. The Crown alleged that he was the third of the four men who had entered the townhouse.

[3] The sole issue at trial was identification. The third male, like all of the intruders, wore a black ski mask. Only his eyes and mouth were visible. The entire incident lasted about 5 to 10 minutes. The only evidence connecting the appellant to the robbery was the complainant's eye witness identification. The appellant did not testify.

[4] The complainant's identification evidence evolved over time. About an hour after the robbery he gave a statement to the police in which he said that, though he did not get a good look at the third male, he "kind of" recognized his eyes as those of the appellant. He said that the appellant had been to his townhouse a few times and he had seen him around the townhouse complex.

[5] But other than the eyes, the complainant gave no basis for identifying the appellant as the third male. Moreover, at trial the complainant acknowledged that when he gave the statement to the police he "wasn't even 50 per cent sure" that the appellant was one of the robbers.

[6] A day and a half after the robbery, the complainant picked the appellant out of a photographic lineup. By then, the complainant was 80 to 90 per cent sure that the appellant was the third male. He based his identification on the person's eyes, stance, height and wide build.

[7] By the time the complainant testified at trial he was "confident" and "100 per cent sure" that the appellant was the third male who robbed him. He said that he recognized the third male as the appellant from his eyes, the way he carried himself, his height, his medium build, the contours of his face, and the overall shape of his face and shoulders.

[8] The trial judge accepted the complainant's testimony and convicted the appellant on all charges. On sentence, the trial judge rejected a joint submission for six months deferred custody. Instead, the trial judge sentenced the appellant to eight months secure custody, four months supervision, and nine months probation, in addition to the 105 days of pre-sentence custody the appellant had already served. By the time the appellant was released on bail pending his appeal, he had served six of his eight months secure custody disposition.

B. Analysis

[9] The trial judge gave lengthy oral reasons for convicting the appellant. He appropriately cautioned himself about the concerns surrounding the reliability of eye witness identification. Nonetheless, he concluded that the complainant was "an exceptional witness" who "took a limited opportunity for observation in a limited field of

view and focused upon several distinctive features" to correctly identify the appellant as one of the robbers.

[10] Before us, one of the appellant's main submissions was that the trial judge failed to address the evolving details and level of confidence in the complainant's identification evidence. What underlies this submission is the concern that the complainant was not identifying the person he saw commit the robbery, but rather the person he knew from seeing him in his townhouse and in the area.

[11] We agree with the appellant's submission. Right after the robbery, the complainant was less than 50 per cent certain the appellant was the third masked male, and could identify him only from his eyes. By the time of the trial, the complainant's confidence level had increased to absolute certainty and he had added numerous generic features to bolster his identification. These evolving differences in the complainant's evidence were crucial to evaluating the reliability of his evidence. Because the trial judge failed to address them, the convictions cannot stand.

[12] Although the Crown's case was thin at best, we cannot go as far as to say the verdict was unreasonable. However, the trial judge's failure to deal with material evidence affecting the reliability of the convictions entitles the appellant to a new trial. We assume that in deciding whether to retry the appellant, the Crown will take into account the portion of the sentence the appellant has already served.

[13] The appeal is allowed, the convictions are set aside and a new trial is ordered.

RELEASED: Apr. 19, 2011
"JL"

"John Laskin J.A."
"Robert J. Sharpe J.A."
"E.A. Cronk J.A."