WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.5(1), (2), (2.1), (3), (4), (5), (6), (7), (8) or (9) or 486.6(1) or (2) of the *Criminal Code* shall continue.

These sections of the *Criminal Code* provide:

> 486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.
>
> (2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is in the interest of the proper administration of justice.
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> (2.1) The offences for the purposes of subsection (2) are
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> (a) an offence under section 423.1, 467.11, 467.111, 467.12, or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;
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> (b) a terrorism offence;
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> (c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or
>
> (d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

(3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.

(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society’s interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

(8) An order may be subject to any conditions that the judge or justice thinks fit.

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings. 2005, c. 32, s. 15; 2015, c. 13, s. 19

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Phillips, 2018 ONCA 651
DATE: 20180718
DOCKET: C61679

Watt, Huscroft and Trotter JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Dino Phillips

Appellant

Anil K. Kapoor and Dana C. Achtemichuk, for the appellant

Mabel Lai, for the respondent

Heard: May 28, 2018

On appeal from the conviction entered on February 7, 2013 by Justice Kelly A. Gorman of the Superior Court of Justice, sitting with a jury.

Huscroft J.A.:

OVERVIEW

[1] Three men armed with firearms invaded and robbed two London homes. The question at trial was whether the appellant was one of them.

[2] The appellant was identified from a photo lineup by one of the participants in the crimes, but the case against him depended largely on eyewitness identification evidence that was replete with problems. No physical evidence linked the appellant to the crimes.

[3] The jury convicted the appellant of possession of a firearm while prohibited; two counts of uttering death threats; kidnapping; two counts of unlawful confinement; five counts of robbery; two counts of break and enter; mischief; and five counts of pointing a firearm. He appeals on the basis that:

(1) the verdict was unreasonable;

(2) the trial judge failed to warn the jury of the inherent dangers of in-dock identifications;

(3) the trial judge failed to warn the jury of the heightened risk of misidentification inherent in cross-racial identifications;

(4) the trial judge provided an inadequate caution regarding the probative value of the photo lineup evidence; and

(5) the trial judge provided a flawed *Vetrovec* instruction.

[4] I agree with the appellant that the trial judge erred in her instructions on how the jury should treat the identification evidence, and in particular the in-dock identification and photo lineup evidence. Ordinarily a new trial would follow.

[5] However, the verdict was unreasonable in any event. No reasonable jury could convict the appellant on the evidence in this case.

[6] Accordingly, for the reasons that follow, I would allow the appeal, set aside the convictions, and enter acquittals on all counts in the indictment.

BACKGROUND

[7] The home invasions occurred on May 8, 2009. A trio of men, including Shawn George and Floyd Deleary, set out to rob the apartment of C., George's drug dealer.

[8] It turned out that C. was not alone in his apartment. His ex-girlfriend, K., K.'s infant daughter, and K.'s sister M. were there with him. Deleary held a gun to K.'s head and the intruders tied the hands of K. and C. M. was forced to help the intruders look for money. The intruders were not satisfied with the money they found and threatened to kill C., K., and K.'s daughter.

[9] George and Deleary did not cover their faces and referred to each other by their first names throughout. The third man, described by the witnesses as "the black man", covered his face and threatened to kill the victims if they looked at him. He was never addressed by name during the commission of the crimes.

[10] Deleary and "the black man" stole K.'s car and drove C. to his parents' home at gunpoint. George followed in another car, but took off when he thought he saw an undercover police car. Deleary and "the black man" forced their way into C.'s parents' home by holding a gun to C.'s mother, M. They robbed the home and Deleary told "the black man" to tie up C's mother M., father J., and sister E.

[11] At this point, J. reached for a machete and a struggle occurred with “the black man”. Deleary fired his gun. Police sirens were heard. Deleary told “the black man” to get out and he did so, jumping out of the bedroom window and taking the machete with him. A witness saw a black man running with what he thought was a sword. The machete was found nearby the next day, but there were no fingerprints on it. Nor was there any forensic evidence linking the appellant to either crime scene.

[12] Deleary was arrested in the stolen car shortly afterwards. George was not arrested until February 23, 2010, and the appellant shortly after that, following his identification by George in a photo lineup.

Photo lineup identification

[13] Shawn George was questioned by the police following his arrest and indicated that he knew “the black man” only as “Virus”. He said he could identify Virus and told the lead investigator, Detective Blumson, that he had already been shown a photo of Virus by another officer.

[14] Detective Blumson’s partner, Detective Constable Ellyatt, conducted the photo lineup for George. D.C. Ellyatt had been involved in the investigation. For example, he had transcribed the victims’ statements and participated in the arrest of George. D.C. Ellyatt prepared photos of twelve different men. The appellant’s

photograph was the fifth in the lineup. George identified photograph number 5 as the man he knew as Virus.

[15] The police did not administer a photo lineup for any of the other witnesses. In answer to the question whether this was “a not thought of process or contemplated and rejected”, Detective Blumson testified: “No, we, we didn’t even think about it.”

In-dock identification

[16] At the preliminary inquiry, witnesses were asked to identify “the black man”. The appellant was the only black man in the courtroom at the time.

[17] C. did not identify the appellant, as he testified that he did not look at the assailants. Nor did M. She testified that she could not identify “the black man” if she saw him again, and expressed the concern that she did not want to wrongly accuse someone.

[18] One witness testified that the appellant looked similar to “the black man”. Several witnesses pointed to the appellant in in the courtroom at the preliminary hearing and trial.

THE GROUNDS OF APPEAL

[19] I will address the issues concerning the identification evidence before addressing the unreasonable verdict argument. The appellant did not advance the cross-racial identification issue in oral argument and it is not necessary to address

it here. In my view, the trial judge made no errors in her *Vetrovec* instruction and I will say no more about it.

Did the judge fail to instruct the jury about the inherent danger of in-dock identification?

[20] The appellant submits that the identification of him as "the black man" in court at the preliminary hearing was poor quality evidence that had a prejudicial impact and lacked probative value. In-dock identification is inherently problematic, as the Supreme Court pointed out in *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445, and the risk it poses increases when there are multiple in-dock identifications: a jury may use the number of identifications to bolster their reliability, a problem identified by this court in *R. v. Jack*, 2013 ONCA 80, [2013] O.J. No 519, at para. 38. The trial judge failed to give the particularly strong caution about the in-dock identification of the appellant that was required. The need for such a caution was even greater in this case, given the weakness of the other identification evidence; the in-dock identification of the appellant at the preliminary hearing was the first time he was identified as "the black man" who committed the crimes.

[21] The Crown emphasizes that the charge must be read as a whole, in the context of the trial as a whole, including the closing addresses counsel made. The Crown acknowledges that, as general rule, in-dock identifications are entitled to little weight: *R. v. Pelletier*, 2012 ONCA 566, [2012] OJ No 4061, at para. 93, and that the trial judge did not specifically instruct the jury in this regard. However, the

Crown submits that counsel and the trial judge treated the eyewitness identification evidence with care and that the trial judge's instructions concerning the frailties of eyewitness identification would have been understood as informing the in-dock identification issue. The Crown notes that there was no objection to the trial judge's charge and suggests that this was for a tactical reason: it was part of counsel's attempt to persuade the jury that the prosecution was built on a flawed police investigation.

Discussion

[22] The dangers posed by in-dock identification are well known, as Justice Arbour explained in *Hibbert*, at para. 50:

> [T]he danger associated with eyewitness in-court identification is that it is deceptively credible, largely because it is honest and sincere. The dramatic impact of the identification taking place in court, before the jury, can aggravate the distorted value that the jury may place on it.

[23] The danger has been recognized by this court in a number of cases, most recently *R. v. Lewis*, 2018 ONCA 351 and *R. v. Biddle*, 2018 ONCA 520. And the danger only increases in the context of multiple identifications, as in this case: *Jack* at para. 38.

[24] Trial counsel were well aware of the problem posed by the in-dock identification. Crown counsel warned the jury of convicting someone based solely on frail identification evidence, stating that "in court identification in and of itself

really isn't that helpful or conclusive". The appellant's trial counsel (not Mr. Kapoor or Ms. Achtemichuk) addressed the in-dock identification evidence as follows:

> Mr. Phillips not only had they been told by the police was one of the men that they had caught, but Mr. Phillips was the only black man in the courtroom and it would be funny if it weren't true. Think about it. There's one black guy in the courtroom, what are they going to say? I, I say to you, you cannot accept that identification of the preliminary inquiry when you consider together the cumulative effect of all of the circumstances surrounding the observations at the scene…
>
> …
>
> I hope you will not hesitate in giving that identification zero weight because obviously they've [the witnesses] already seen this individual at the preliminary hearing and pointed him out.

[25] Crown counsel specifically stated his expectation that the jury would be instructed by the trial judge on in-dock identification and the appellant's trial counsel no doubt assumed that the trial judge would address the issue.

[26] But the trial judge did not do so. Although she instructed the jury that they should be very cautious about relying on eyewitness testimony and alerted them to the possibility of mistakes leading to wrongful convictions, the trial judge simply identified the in-dock identification as an important consideration:

> And you'll recall that in this case none of the civilian witnesses was presented with a photographic line-up. Almost universally, their first observation subsequent to the events of May 8th were at the preliminary hearing. And we have heard that at that preliminary hearing there was but one black man in the court… That will be an important

> consideration for you. The preliminary hearing happened I think more than a year after the alleged incidents.

[27] The appellant's trial counsel made strong submissions on the issue in his closing address to the jury, but they were just that: submissions. It was the responsibility of the trial judge to instruct the jury, having regard to counsel's submissions, and she failed to do so. Her silence on the point may well have undermined counsel's submissions by failing to endorse them.

[28] In my view, the circumstances surrounding the in-dock identification in this case are egregious. The in-dock identification of the appellant may have seemed strong compared to the other eyewitness evidence, but it was not. Months after the traumatic events, the victims identified in court a man they had not been able to describe with any significant degree of detail immediately following those events – a man they had not identified from a photo lineup because it "never occurred" to the police to administer a photo lineup for them. There was one black man to choose from in court: a black man they knew was charged with having committed the crimes. The man the police said did it.

[29] This was highly prejudicial, and an instruction to give the in-dock identification little weight would not have been sufficient to prevent the risk that the jury would give the identification more weight than it deserved, especially given the compounding effect multiple identifications could be expected to have. In these

circumstances, nothing less than an instruction that it would have been dangerous to rely on the in-dock identification would do.

[30] I do not accept the Crown's submission that the trial judge's instructions concerning the frailties of eyewitness identification overlapped the in-dock identification issue, and so obviated the need for specific instructions on the in-dock identification issue. It cannot be said that the message was "broadcast and heard, loud and clear, through the trial judge's instructions", as the Crown contends.

[31] Nor do I think that trial counsel's failure to object to the charge should bear "considerable weight" in assessing the adequacy of the trial judge's charge, as the Crown contends. I see no tactical advantage to the appellant in not having objected to the charge.

[32] The bottom line is that the appellant was entitled to a proper instruction concerning in-dock identification and did not get one. The trial judge's failure to instruct the jury concerning the dangers of in-dock identification is an error that undermines the fairness of the trial.

Did the judge provide an inadequate caution regarding the probative value of the photo lineup evidence?

[33] The appellant submits that the photo lineup procedure employed by the police in which Shawn George identified the appellant was deeply flawed and failed to comply with most of the recommendations set out in *The Inquiry Regarding*

Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation (Winnipeg: Manitoba Justice, 2001, Peter Cory, Commissioner) (“Sophonow Inquiry”). In particular:

- the photos did not resemble the appellant;
- the lineup was conducted by D.C. Ellyatt, who had been involved in the investigation, was partner of the lead investigator, and was involved in arresting George;
- D.C. Ellyatt made remarks to George after he had selected the fifth photograph appearing to validate his choice;
- George was shown a picture of Virus prior to the lineup and knew that he would be in the lineup.

[34] The Crown contends that the issues concerning the photo lineup were thoroughly vetted before the jury. The only real issue with the lineup was the individual photograph that Shawn George probably saw before the lineup was shown to him. Crown counsel acknowledged the possibility of contamination in his closing address and the appellant’s trial counsel identified three deviations from the *Sophonow* recommendations in his submissions, in which he argued that the lineup was unfair and of no probative value. Moreover, the trial judge instructed the jury that shortcomings in the lineup process should cause them some concern, and that eyewitness identification is very tricky and unreliable. The trial judge’s instructions were not inadequate. Indeed, the Crown on appeal notes that Crown

counsel at trial objected to the trial judge's instruction on the basis that she *overemphasized* the flaws in the photo lineup procedure.

Discussion

[35] It is not contested that the photo lineup in this case did not comply with most of the recommendations of the *Sophonow Inquiry*. The Crown accepts as much, but argues that the extent of the deviation from those recommendations and the significance of the deviation was a matter for the jury.

[36] I accept that, as this court set out in *Pelletier*, at para. 94, although the recommendations of the *Sophonow Inquiry* governing the conduct of photo lineups are "persuasive tools to avoid wrongful conviction arising from faulty eyewitness investigation", they are not conditions precedent to the admissibility of eyewitness testimony. Nor do they establish rules governing the assignment of weight. That said, the problem in this case is more than simply a failure to comply with one or more of the *Sophonow Inquiry* recommendations.

[37] It is important to put the photo lineup evidence in context. Shawn George was the only witness who was shown a photo lineup – presumably because the other witnesses would have had difficulty in identifying "the black man". George might be expected to have had no difficulty in picking out the person with whom he had committed the crimes. However, George testified that he met the man he

described as “Virus” just prior to the crimes, and the photo lineup did not take place until 10 months later, when George was arrested.

[38] The photo lineup was administered by D.C. Ellyatt, the partner of the lead investigator, Detective Blumson. D.C. Ellyatt was involved in arresting Shawn George and had been involved in transcribing the witness statements. The *Sophonow Inquiry* rejected the suggestion that a police force other than the one investigating a crime should conduct the lineups. Members of the same force could do so, but this was subject to the requirement that officers dealing with an eyewitness should not be involved in the investigation and should not know the suspect or whether his photo is included in the lineup.

[39] It would have been preferable if another officer – someone with no connection to the investigation – had conducted the photo lineup. But the most significant problem with the photo lineup was this: Shawn George was shown a picture of the man known as Virus and knew that Virus would be in the photo lineup prior to choosing the appellant from that lineup.

[40] George testified that he never saw Virus after the crimes until the preliminary hearing on April 7, 2011, but that he was shown a photograph of him between those dates. He testified to this exchange with Detective Blumson in his interview with him:

> Q: Page 32 of the statement that I have, he says this,

> Yeah. A little bit later if I come back down here with a picture of Hubert do you think you'd be able to pick him out?
>
> [You said]: Yeah
>
> [Then he said]: Or um, Virus?
>
> [And you said]: Yeah, he's got dreads, long dreads.
>
> That's Virus you're talking about?

A: Yes, sir.

Q: And then Officer Blumson said,

> Okay.
>
> [And then you said this]: A big fucker. As a matter of fact I was just talking – I was talking to – I really – I can't really say, but someone of your calibre over on the other squad and yeah, they were showing me a picture of him too.

[41] Although George initially testified that he could not remember if this was true, he acknowledged that it was. Defence counsel then questioned George concerning his testimony at the preliminary hearing:

> Q: Okay. And then at the preliminary hearing you were asked about that, page 50 about line 20, and this is when I was asking you questions at the preliminary hearing which was May the 2nd, 2011. And we were discussing this passage that I just quoted and I said,
>
> Right. The way I read this, Officer Blumson was interviewing you and you, referring to the other squad, someone of your calibre on the other squad, and indicating that they were showing me a picture, being Virus, too.

> [Your answer was]: Okay. So what the hell's your point? Get to your point.
>
> And then on page 51 about line seven I said,
>
> I suggest to you that before you were interviewed by Constable Blumson or Officer Blumson, you were shown a photograph of my client by another police officer.
>
> [And you said]: Yes, I was.
>
> Do you remember that question and giving that answer?
>
> A: Yes.

[42] It is not clear who showed George the photograph or whether the photograph George was shown prior to the lineup was the same photo that he was shown in the lineup. But it was improper procedure in any event, as D.C. Ellyatt's testimony confirmed. Plainly, this was a matter that the trial judge needed to address.

[43] The trial judge instructed the jury as follows:

> Now, you'll recall that Mr. George was shown a photo line-up. He's the only person who was shown the photo line-up and it was on February 23, 2010, so it's a significant period of time after the incidents. Now, once the photo line-up exists February 23rd, it certainly could have been administered to the other witnesses. It was not done and Sergeant Blumson and was asked why that was and he said it never occurred to him to administer the photo line-up to the civilians.

> So Sergeant Blumson details Sergeant Dave Ellyatt to administer a photo line-up to Mr. George on February 23, 2010. He, Sergeant Ellyatt, had no involvement in the investigation, didn't know which photograph depicted the suspect. And that's the right way to do it, have someone administer the photo line-up who has nothing to do with the case. However, shortly before the photo line-up was shown to Shawn George he was shown an individual photograph of Dino Phillips. I'd suggest to you that has to cause you some concern. Eye witness identification is very tricky and unreliable. I ask you to spend significant time in your deliberations on it.

[44] The trial judge began by noting the passage of time between the crimes and the photo lineup, which she described as significant. She noted, uncritically, that the photo lineup was never shown to any of the other witnesses. The trial judge erred in stating that the officer who conducted the photo lineup was not involved in the investigation. Plainly, D.C. Ellyatt was involved in the investigation, and in a more than peripheral way. This error is compounded by the trial judge's reiteration that the lineup had been done "the right way".

[45] Only at the end of this passage did the trial judge advert to the fact that George was shown a photograph of the appellant before the lineup. She described this causing "some concern"; reiterated that eyewitness identification can be difficult and unreliable; and asked that the jury spend "significant time" on the issue.

[46] In my view, this instruction was wholly inadequate.

[47] The problems with the photo lineup, taken as a whole, were so significant as to render George's identification of the appellant practically worthless, and I say

this regardless of the appellant's further submission that the others in the photo lineup did not resemble the appellant. Having identified Virus from a photograph shown to him, George proceeded to choose the appellant from a lineup that he knew would include a picture of him.

[48] In these circumstances, the trial judge's instruction – essentially encouraging the jury simply to be careful with eyewitness evidence and to spend significant time on it – was not nearly sufficient to address the problems with the photo lineup evidence. As with the in-dock identification, the submissions of counsel are no substitute for judicial instructions. Those submissions made clear the nature of the identification problems, but they could not explain the law or instruct the jury as to its legal obligations. That was the trial judge's responsibility, and trial counsel clearly contemplated that she would do so in light of their submissions. Her failure to do so, combined with her failure to properly instruct the jury concerning the dangers of in-dock identification evidence, caused the trial to be unfair.

UNREASONABLE VERDICT

[49] The errors outlined above would require a new trial. However, in the circumstances of this case, the appellant argues that an acquittal is required because the verdict is unreasonable. The appellant submits that the identification evidence is exceptionally weak and largely prejudicial, and is incapable of proving

that he is “the black man” who participated in the home invasions. The appellant contends that all of the circumstances identified by this court in *R. v. Tat*, [1997] O.J. No. 3579 (C.A.), are present in this case and that the case is particularly well suited to review under s. 686(1)(a)(i).

[50] The Crown acknowledges that its case was “far from overwhelming”. But the Crown says that the jury would have appreciated the flaws in the eyewitness identification evidence, the problems with Shawn George’s testimony, and the possible contamination of his photo lineup evidence. The Crown argues that the absence of an application for a directed verdict on the identification issue is telling, given that the appellant sought a directed verdict on a different basis in regard to some of the counts. This, the Crown says, is a tacit acknowledgment that there was some evidence of identity on which the jury, properly instructed, could have convicted. The Crown argues that the verdicts are supportable on a reasonable view of the evidence and adds that this court is entitled to consider the appellant’s failure to testify in assessing the reasonableness of the verdicts.

Discussion

[51] As the Supreme Court explained in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 40, juries are required to act judicially, which “means not only acting dispassionately, applying the law and adjudicating on the basis of the record and nothing else”, but also “arriving at a conclusion that does not conflict with the

bulk of judicial experience." In determining whether this has occurred, the jury's verdict is entitled to deference. The jury heard the evidence and saw the witnesses, and stands in a superior position to an appellate court. Unease or doubt about a verdict does not render it unreasonable. Nor is the court to act as a "thirteenth juror" in determining whether a verdict is unreasonable: *Biniaris*, at para. 40. Instead, as the court explained in *R. v. Wills,* 2014 ONCA 178, 318 O.A.C. 99, aff'd 2014 SCC 73, [2014] 3 S.C.R. 612, at paras. 30-31, the court examines the cogency of the evidence having regard to the risk of wrongful convictions in specific contexts. The court does not weigh the evidence for purposes of making its own determination of guilt or innocence, comparing its determination with the verdict reached by the jury and equating disagreement with unreasonableness. The court seeks to establish only whether a particular verdict goes beyond the bounds of reasonableness.

[52] Doherty J.A. discussed unreasonable verdicts and eyewitness identification in *Tat* at paras. 99-100:

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

> that the concerns about the reasonableness of such verdicts are particularly high where the person identified is a stranger to the witness, the circumstances of the identification are not conducive to an accurate identification, pre-trial identification processes are flawed and where there is no other evidence tending to confirm or support the identification evidence. (Citations omitted.)

[53] I agree with the appellant that the concerns Doherty J.A. identified are present in this case. The appellant was a stranger to the witnesses who identified him; "the black man" was observed in the context of a very stressful home invasion, during which he took steps to conceal his identity and warned witnesses not to look at him; and Shawn George's pre-trial identification of the appellant by the photo lineup process was deeply flawed. The strongest evidence against the appellant came from a *Vetrovec* witness, and there was no independent confirmatory evidence supporting his identification of the appellant, and no fingerprint or DNA evidence.

[54] I will review the eyewitness evidence briefly before addressing George's evidence.

The eyewitness evidence

[55] *C.*: C. testified that he was too frightened to look at the assailants and could not provide a description as a result.

[56] *K.*: K. described "the black man" as tall; 6' 5" or more with a medium build; approximately 35 years old; with long black hair. He was wearing glasses and had

brown eyes. He was wearing a heavy winter coat with fur around the hood, light green or beige. He had fabric around his neck that he used to cover his mouth and nose when she looked at him.

[57] *M.*: M. described "the black man" as taller than her (she is 5'3-4") with a skinny build in his 20s, then in cross-examination added late 20s-early 30s. She did not recall him wearing glasses. He was wearing a long black jacket with a fur hood and black gloves. She never looked at his face.

[58] *C.'s mother M.*: C.'s mother M described "the black man" as taller than her height of 4'10-11", "probably between five and six feet". Then she added: "Maybe two feet taller than me." He sounded Jamaican or black. He had a black beard and black braided hair. He was wearing dark glasses so she could not see his eyes. He wore a dark jacket, possibly black leather, along with black leather gloves. He wore a mask or something that hid his entire neck.

[59] *J.*: J. described "the black man" as tall, at least one foot taller than his height of 164 cm. He was about 30 years old and had a moustache and goatee. He could not see his hair, but agreed that he could have been bald. He was wearing dark glasses and a green coat with patches and a hood, and dark gloves.

[60] *E.*: E. described "the black man" about 6' tall, with a medium build, in his thirties. He had a moustache and a goatee and she agreed that he could have

been bald. He was wearing sunglasses a dark green jacket with fur trim around the hood, black gloves, and a bandana. She did not hear an accent.

[61] *The neighbour*: The neighbour did not know how tall the man he saw was, but put his weight at around 150 lbs, and placed his age at around 17-18. He could not see if the man had any facial hair, but looked bald under his toque. He was wearing a brown winter jacket with a fur hood.

Summary of the eyewitness evidence

[62] The Crown's acknowledgement that its case was "far from overwhelming" is an understatement. The case depended entirely on identification evidence and the quality of that evidence was poor: the various descriptions of "the black man" provided by the victims and the description of the man the neighbour saw are vague, general, and often inconsistent.

[63] For example, the victims testified that "the black man" was tall, although how tall he was is not clear. The neighbour testified that the man he saw was 17-18 years of age; one victim testified that "the black man" was in his 20s, and still others testified that he was about 30 or 35 years of age. Depending on the witness, "the black man" was skinny or had a medium build. His facial hair also differed depending on the witness: according to one, he had a black beard, but other witnesses testified that he had a moustache and goatee. The man the neighbour saw could have been bald, but some victims said "the black man" had long black

hair, or braided hair. The only consistent identification evidence comes from the in-dock identification by several of the victims, but that identification was problematic for the reasons I have outlined.

Shawn George's evidence

[64] Not only is the weakness of the eyewitness evidence apparent; the Crown's strongest evidence is deeply problematic, for it came from Shawn George, an unsavoury witness with a lengthy criminal record whose testimony necessitated a *Vetrovec* caution. At the time of his testimony, George was awaiting trial for his part in the crimes.

[65] In his closing submissions at trial, Crown counsel acknowledged that George had admitted to multiple lies to the police on multiple occasions, and had changed his testimony between statements and his evidence at the preliminary hearing, and between the preliminary hearing and the trial. He was, as Crown counsel put it, "the kind of man who will say whatever suits his purpose to try and get him where he wants".

[66] George's description of "the black man" contradicts those of the other witnesses. He described "the black man" as "a big fucker"; 30-40 years of age; 240-250 lbs., with a moustache and goatee and dreadlocks. His photo lineup identification was problematic for the reasons set out above. Although the Crown argues that George's testimony is confirmed by several pieces of evidence, the

confirmatory evidence proffered at trial does not support the most important issue – George's identification of the appellant as "the black man" who committed the offence.

The verdict is unreasonable

[67] The question on appeal is not whether there is *any* evidence capable of supporting a conviction, as it would have been on an application for a directed verdict but, instead, whether, considering the evidence as a whole, the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered. This determination necessarily involves assessing the evidence, not merely identifying its existence. See *R. v. Yebes*, [1987] 2 S.C.R. 168; *Biniaris*; *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180; and in this court, *R. v. Pannu*, 2015 ONCA 677, 127 O.R. (3d) 545, at paras. 161-164.

[68] I am satisfied that no reasonable jury could have convicted the appellant on the evidence in this case, even assuming the jury had been charged properly. The absence of an application for a directed verdict on the identity issue is of no moment in these circumstances.

[69] Nor does the appellant's failure to testify assist the Crown. An accused's decision not to testify may be a relevant consideration in assessing whether a verdict is unreasonable: *Corbett v. R.*, [1975] 2 S.C.R. 275, at pp. 280-1; *Pannu*, at para. 175. But this was not a case in which the evidence cried out for an

explanation that only the appellant's testimony could have provided, such that he must accept the consequences of having remained silent. It was a very weak Crown case built on identification. The failure of the accused to testify does not undermine his argument that the verdict was unreasonable.

[70] This was a case based entirely on eyewitness evidence. The weakness of the eyewitness identification evidence; the flaws in the in-dock and lineup identification; the unreliability of Shawn George's testimony; and the absence of independent confirmatory evidence relevant to the identity of "the black man" combine to render the appellant's conviction unreasonable. In short, there is evidence that the crime was committed by a black man, but it is not reasonable to conclude that the appellant was "the black man".

CONCLUSION

[71] I would allow the appeal, set aside the convictions, and enter acquittals on all counts.

Released:

"DW"
"JUL 18 2018"

"Grant Huscroft J.A."
"I agree David Watt J.A."
"I agree G.T. Trotter J.A."