SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Clarke*, 2016 NSSC 357

Date: 20161215
Docket: CRH 455133
Registry: Halifax

Between:

Her Majesty the Queen

v.

Charles Russell Clarke

Judge:	The Honourable Justice Heather Robertson
Heard:	December 12, 13, and 15, 2016, in Halifax, Nova Scotia
Written Release:	April 12, 2017 **(Orally: December 15, 2016)**
Counsel:	Janine Kidd, for the Crown Peter W. Kidston, for the accused

Robertson, J.: (Orally)

[1] The accused, Charles Russell Clarke, was charged as follows:

1. That he on or about the 7th day of March, 2016, at, or near Halifax, in the County of Halifax, in the Province of Nova Scotia, did unlawfully rob Emma Peters and [A]ngela Kiesekamp, contrary to Section 344 of the Criminal Code.
2. AND FURTHER that he at the same time and place aforesaid, did unlawfully have in his possession a weapon or imitation of a weapon, to wit., a knife for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to Section 88(1) of the Criminal Code.
3. AND FURTHER that he at the same time and place aforesaid, while bound by a Probation Order issued on the 8th day of April, 2015 at Guelph, Ontario did wilfully fail without reasonable excuse to comply with such order, to wit., "keep the peace and be of good behaviour,", contrary to Section 733.1(1)(a) of the Criminal Code.

[2] There was an agreed statement of facts read into the record:

Date

1. THAT the alleged offences took place on March 7, 2016.

Jurisdiction

2. THAT the alleged offences took place at the Nova Pharmacy located at 6199 Coburg Road in Halifax, Nova Scotia.

Continuity and Accuracy of the following Exhibits

3. THAT continuity and accuracy are admitted for the video surveillance of the robbery at the Nova Pharmacy given by Peter Jorna the business owner to Detective Constable Christian Pluta on March 7, 2016.
4. THAT continuity and accuracy are admitted for still photographs of the robbery suspect inside the Nova Pharmacy obtained by Constable Shelly Pierce on March 7, 2016.
5. THAT continuity and accuracy are admitted for photographs of the scene at the Nova Pharmacy taken by Detective Constable Randy Wood on March 7, 2016.
6. THAT continuity is admitted for the blue BIC lighter identified by staff of the Nova Pharmacy to Constable Shelly Pierce, photographed by Detective Constable Randy Wood and seized by Detective Constable Illya Nielsen on March 7, 2016.

7. THAT continuity is admitted for the DNA sample taken by Constable Shawn MacIssac from Charles Russell Clarke by pricking the skin with a sterile lancet to take on July 1, 2016 pursuant to a valid Section 487.05(1) Criminal Code DNA warrant (which was signed on May 19, 2016 by Halifax Provincial Court Judge William B. Digby).

The Probation Order

1. THAT on the alleged offence date the accused was bound by a valid Probation Order which he entered into on April 4, 2015. This order had a term of 12 months and contained the statutory term "keep the peace and be of good behaviour."

DNA Evidence of Senior Forensic Biologist Stephen Denison

2. THAT the blue Bic lighter seized by police from the scene at the Nova Pharmacy on March 7, 2016 was sent to the Forensic & DNA Services division of Maxxam Analytics in Guelph, Ontario.

3. THAT on March 18, 2016 Maxxam Analytics received the blue Bic lighter.

4. THAT the outer surface, lever/button and wheel of the blue Bic lighter were swabbed for DNA analysis at Maxxam Analytics.

5. THAT on May 6, 2016 Stephen Denison – a Senior Forensic Biologist with the Forensic & DNA Services division of Maxxam Analytics in Guelph, Ontario – preformed the interpretation of the DNA profile obtained from the sample taken from the blue Bic lighter:

    a. THAT the major DNA profiled obtained from the sample taken from the blue Bic lighter came from a male and was designated Male Profile #1;

    b. THAT the major DNA profile – Male Profile #1 – was a clear, good quality, full DNA profile that contained all 15 markers which Maxxam Analytics tests for;

    c. THAT additional low-level background DNA was also obtained from this sample originating from at least one other individual;

    d. THAT this additional low-level background DNA was not suitable for comparison purposes.

6. THAT Stephen Denison cannot determine how long any of the DNA profiles have been on the blue Bic lighter.

7. THAT Stephen Denison cannot determine which of the DNA profiles is the most recent to have been left on the blue Bic lighter.

8. THAT on July 13, 2016 the known DNA sample from Charles Russell Clarke was sent to the Forensic & DNA Services division of Maxxam Analytics in Guelph, Ontario.

9. THAT on July 26, 2016 Stephen Denison interpreted and compared the major DNA profile – Male Profile #1 – obtained from the sample taken from the blue Bic lighter with Charles Russell Clarke's known DNA sample:

    a. THAT DNA analysis was performed to determine whether Charles Russell Clarke could be excluded as the source of the major DNA profile – Male Profile #1 – obtained from the sample taken from the blue Bic lighter;

    b. THAT Charles Russell Clarke could not be excluded as the source of the major DNA profile – Male Profile #1 – obtained from the sample taken from the blue Bic lighter;

    c. THAT the probability that a randomly selected individual from the Caucasian population unrelated to Charles Russell Clarke would coincidentally share the observed DNA profile is estimated to be 1 in 20 quintillion;

    d. THAT the probability that a randomly selected individual from the Northern Ontario Ojibwe Aboriginal population unrelated to Charles Russell Clarke would coincidentally share the observed DNA profile is estimated to be 1 in 1.1 sextillion;

    e. THAT the probability that a randomly selected individual from the Saskatchewan Cree Aboriginal population unrelated to Charles Russell Clarke would coincidentally share the observed DNA profile is estimated to be 1 in 62 quintillion;

    f. THAT the probability that a randomly selected individual from the British Columbia Salishan Aboriginal population unrelated to Charles Russell Clarke would coincidentally share the observed DNA profile is estimated to be 1 in 1.8 sextillion;

    g. THAT the world's current population is approximately 7.5 billion people;

    h. THAT Stephen Denison is of the opinion that in the absence of an identical twin, Charles Russell Clarke is the source of the major DNA profile – Male Profile #1 – obtained from the sample taken from the blue Bic lighter.

Background

[3] On March 7, 2016, the Guardian Nova Pharmacy located on the corner of Coburg Road and LeMarchant Street was robbed of drugs and cash in a daring five-minute robbery.

[4] The perpetrator pushed his way through the enclosed pharmacy door at the back of the store and held a knife to the throat of an employee while demanding

the pharmacist give him access to the drug safe and cash drawer so he could fill a dark duffel bag with the loot. He also threatened a pharmacy customer who was standing at the pass-through window just outside the pharmacy room threatening him with harm by telling him not to move while the robbery was in progress. Then the robber fled the pharmacy having completed the robbery.

[5] The case against the accused, Charles Russell Clarke, rests on the direct eye witness identification and ten exhibits which include video evidence taken from inside the Guardian Nova Drug Store while the robbery was in progress and the discovery of the Bic lighter found on the floor inside the glass enclosed pharmacy room, tested for the DNA comparison to the accused.

[6] The four police officers who responded to the call testified, as did a number of lay witnesses, four of whom were employees of the pharmacy, one a customer present at the pharmacy window as the robbery was in progress, and the property superintendent where the accused had resided while in Halifax in March 2016.

[7] The burden of proving guilt beyond a reasonable doubt rests with the Crown and never shifts to the accused. An accused in a criminal trial is presumed innocent and bears no burden to explain or rebut the Crown's evidence. The burden of proving guilt beyond a reasonable doubt is not discharged if guilt is suspected or if guilt is a probability.

[8] The Crown must prove each essential element of the offences charged. In this case the accused is charged with the armed robbery of the two Guardian Nova Pharmacy employees, Emma Peters and Angela Kiesekamp. (I have called her Ms. Kiesekamp in this decision. She is now married and has another name, but the indictment recognizes her as Angela Kiesekamp.)

[9] In order for the Crown to succeed it must prove the essential elements of the offence against the accused. The parties agree that this is a case involving identification and circumstantial evidence, whether the Crown has proved beyond a reasonable doubt that Charles Russell Clarke robbed the Guardian Nova Pharmacy on March 7, 2016.

Governing Law

[10] The Crown has relied on the following cases: *R. v. Gough,* 2013 ONCA 137; *R. v. Nikolovski,* [1996] 3 S.C.R. 1197; *R. v. Barrett,* 2004 NSCA 38; *R. v.*

Villaroman, 2016 SCC 33; *R. v. O'Brien*, 2010 NSCA 61; *R. v. O'Brien*, 2011 SCC 29; and *R. v. W.(D.)*, [1991] 1 S.C.R. 742, but the accused did not testify.

[11] Defence counsel cited a 2016 case of the Nova Scotia Court of Appeal, *R. v. Muise*, 2016 NSCA 34. Two more recent cases of the Supreme Court of Nova Scotia dealing with identification evidence are *R. v. Jobe*, [2016] N.S.J. No. 403, given by Chipman, J. and *R. v. Leeds*, [2013] N.S.J. No. 629. In the latter case Justice Cacchione dealt with the eye witness identification evidence at length in paras. 7-15:

> [7] The decision in this case essentially rests on whether Ms. Gautreau correctly identified the accused as the person she allegedly saw assault the deceased. It is for this reason that her evidence must be scrutinized with the greatest care. Observation and memory are often unreliable when it comes to the identification of people. It is an area where people often make honest mistakes.
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> [8] In cases where eyewitness identification is the foundation of the prosecution's case, special caution must be paid when relying on such evidence. This is because although an eye witness can be a convincing witness, because the witness honestly believes that the accused is the person that he or she saw committing the offence, the witness may be mistaken. The Court must also be aware that although identification evidence by one witness can support that of another, even a number of honest witnesses can be mistaken. It is incumbent upon the Court to examine closely the circumstances in which the identification by a witness or a number of witnesses came to be made and to take into account any weaknesses which appear in the identification evidence: *Sophonow* (No.2), (1986), 25 C.C.C. (3d) 415, at 438-40 (Man.CA.).
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> [9] Eye witness identification cases involving the identification of a stranger heighten the alarm as to the well recognized dangers inherent in such evidence and the risk of a miscarriage of justice through wrongful conviction: *R. v. Goran*, [2008] O.J. No. 1069 (C.A.) at para. 19. The Court in *Goran* went so far as to say that "... such evidence is inherently unreliable ...": *R. v. Cuming* (2001), 158 C.C.C. (3d) 433 (Ont. C.A.) at para. 20; *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.) at 38. As the trier of fact dealing with eye witness identification evidence regarding a complete stranger I must be mindful that such identification evidence can be notoriously unreliable: *The Queen v. Nikolovski* (1997), 111 C.C.C. (3d) 403 (S.C.C.) at 411-412; *Bardales v. The Queen*, [1996] 2 S.C.R. 461 at 461; *Burke v. The Queen* (1996), 105 C.C.C. (3d) 205 (S.C.C.) at 224.
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> [10] It is of the utmost importance that the Court be cognizant of the danger of an honest but inaccurate identification especially in cases where the alleged perpetrator is previously unknown to the eye witness. The eye witness may be convincing and convinced of the identity of the perpetrator. That witness, as I have said previously, may also be mistaken. It is important that the Court

recognize that it is the reliability and not the credibility of the eye witness which must be established: *R. v. Alphonso*, [2008] O.J. No. 1248 (C.A.) at para. 5: "... certainty cannot be equated with reliability ..."; In *R. v. Goran* (supra) at paras 26-27 the Court referred to the fallacy of mistaking certainty for accuracy. In the present case Ms. Gautreau has convinced herself that the accused was the perpetrator as evidenced by her testimony at trial that, "in my mind Ryan Leeds killed my boyfriend".

[11] A reason why special caution is necessary when examining eye witness identification evidence was aptly expressed by Doherty J.A. in *R. v. Quercia* (supra) at p. 383 where he stated: "... The spectre of erroneous convictions based on honest and convincing, but mistaken, eyewitness identification haunts the criminal law ..." This Court is required to assess the quality of the eye witness identification evidence. The poorer the quality of such evidence, the greater the danger of a wrongful conviction: *Mezzo v. The Queen* (1986), 27 C.C.C. (3d) 97 (S.C.C.) at 108.

[12] If a witness has no previous knowledge of the accused person so as to make her or him familiar with that person's appearance, the greatest care ought to be used to ensure the absolute independence and freedom of judgment of the witness. The witness' recognition must proceed without suggestion, assistance or bias: *Rex v. Smierciak* (1946), 87 C.C.C. 175 (Ont. C.A.) at 177.

[13] In cases where the eye witness identification evidence is suspect, a Court must look for cogent confirmatory evidence in order to overcome the real risk of a miscarriage of justice taking place: *R. v. Boucher et al.* (2000), 146 C.C.C. (3d) 52 (Ont. C.A.) at 58.

[14] Eye witness identification evidence must be based on the independent recollection of the witness and not recollection arising as the result of discussions with and amongst various people. Such evidence may be compromised where an eye witness has discussed with others his or her recollection of the person's appearance before making an identification: *R. v. Holden* (2001), 56 O.R. (3d) 119 (C.A.) at p.136-137. In some cases, the failure to mention distinctive characteristics of a suspect in an initial description to the police may be quite material to the reliability of the identification.

[15] The Supreme Court of Canada has described an in-dock or in-court identification as having an "... almost total absence of value as reliable positive identification ...": *R. v. Hibbert* (2002), 163 C.C.C. (3d) 129 (S.C.C.) at p.146-147.

[12] In *R. v. Gough* the court outlined in paras. 34-37 concerns regarding identification evidence:

[34] As indicated above, our concern is that the trial judge failed not only to self-instruct properly on the inherent unreliability of identification evidence, but

> also to advert to and adequately scrutinize the specific frailties disclosed by the evidence. The trial judge's comments that "the court should be cautious when looking at identity" and it is "an area where mistakes are made" fall short of the degree of scrutiny required. The trial judge also failed to instruct himself on the fallacy of mistaking certainty for accuracy by placing excessive reliance on Mr. Desarmia's "child-like genuineness" and the fact that he sensed a "ring of truth and an air of certainty about his evidence."
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> [35] Being notoriously unreliable, eyewitness identification evidence calls for considerable caution by a trier of fact: *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, at pp. 1209-10; *R. v. Bardales*, [1996] 2 S.C.R. 461, at pp. 461-62; *R. v. Burke*, [1996] 1 S.C.R. 474, at p. 498. It is generally the reliability, not the credibility, of the eyewitness' identification that must be established. The danger is an honest but inaccurate identification: *R. v. Alphonso*, 2008 ONCA 238, [2008] O.J. No. 1248, at para. 5; *Goran*, at paras. 26-27.
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> [36] The trier of fact must take into account the frailties of eyewitness identification in considering such issues as whether the suspect was known to the witness, the circumstances of the contact during the commission of the crime (including whether the opportunity to see the suspect was lengthy or fleeting) and whether the circumstances surrounding the opportunity to observe the suspect were stressful; *R. v. Carpenter*, [1998] O.J. No. 1819 (C.A.), at para. 1; *Nikolovski*, at 1210; *R. v. Francis* (2002), 165 O.A.C. 131, [2002] O.J. No. 4010, at para. 8.
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> [37] As well, the judge must carefully scrutinize the witnesses' description of the assailant. Generic descriptions have been considered to be of little assistance; *R. v. Boucher*, 2007 ONCA 131, [2007] O.J. No. 722, at para. 21. The same can be said of in-dock or in-court identification; *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445, at 468-69; *R. v. Tebo* (2003), 172 O.A.C. 148 (Ont. C.A.), at para. 19.

[13] The Crown reminds the Court that *R. v. Barrett*, *supra*, addresses the reasonable verdict test stated in paras. 18-19:

> [18] *Yebes*, a leading case on the reasonable verdict test on appellate review, was a case of circumstantial evidence. One of the points argued before the Supreme Court of Canada was that the Court of Appeal had failed to apply the correct test in reviewing the reasonableness of a conviction where the evidence against the appellant was entirely circumstantial. Responding to this submission, McIntrye, J. for the Court stated that in applying the unreasonable verdict test, the appellate court must re-examine and to some extent reweigh and consider the effect of the evidence. This process, he said, will be the same whether the case is based on circumstantial or direct evidence. However, he pointed out that the Court of Appeal had "... rejected all rational inferences offering an alternative to the conclusion of guilt" and that it was "... therefore clear that the law was correctly understood and applied.": at 186. In *Yebes*, the Court acknowledged that evidence

> of motive and opportunity alone could not meet this standard unless the evidence reasonably supported the conclusion of exclusive opportunity: see 186 - 190.
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> [19] I would conclude that while the test for whether a verdict is reasonable is the same in all cases, where the Crown's case is entirely circumstantial, the reasonableness of the verdict must be assessed in light of the requirement that circumstantial evidence be consistent with guilt and inconsistent with innocence: see *Yebes* at page 185 where this formulation was said to be the equivalent of the requirement that the circumstantial evidence be inconsistent with any rational conclusion other than guilt. This was summed up by Low, J.A. in *R. v. Dhillon* (2001), 158 C.C.C. (3d) 353 (B.C.C.A.). At para 102, he stated that where the Crown's case is entirely circumstantial, the appellate court applying the unreasonable verdict test must determine "... whether a properly instructed jury, acting judicially, could have reasonably concluded that the only rational conclusion to be reached from the whole of the evidence is that the appellant..." was guilty.

[14] In *R. v. Villaroman*, *supra*, the current status of the "rule" in *Hodge's Case* was commented on in paras. 17-18:

> [17] In *Hodge's Case*, the evidence of identification was made up entirely of circumstantial evidence: p. 1137. Baron Alderson, the trial judge, instructed the jury that in order to convict, they must be satisfied "not only that those circumstances were consistent with [the accused] having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the [accused] was the guilty person": p. 1137. This sort of jury instruction came to be required in circumstantial cases: see, e.g., *McLean v. The King*, [1933] S.C.R. 688.
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> [18] Over time, this requirement was relaxed: see, e.g., *R. v. Mitchell*, [1964] S.C.R. 471; *R. v. Cooper*, [1978] 1 S.C.R. 860. It is now settled that no particular form of instruction to the jury is required where the evidence on one or more elements of the offence is entirely or primarily circumstantial. As Charron J. writing for a majority of the Court put it in *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, at para. 33:
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> > We have long departed from any legal requirement for a "special instruction" on circumstantial evidence, even where the issue is one of identification: *R. v. Cooper*, [1978] 1 S.C.R. 860. The essential component of an instruction on circumstantial evidence is to instill in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty. Imparting the necessary message to the jury may be achieved in different ways: *R. v. Fleet* (1997), 120 C.C.C. (3d) 457 (Ont. C.A.), at para. 20. See also *R. v. Guiboche*, 2004 MBCA 16,

> C.C.C. (3d) 361, at paras. 108-10; *R. v. Tombran* (2000), 142 C.C.C. (3d) 380 (Ont. C.A.), at para. 29. [Emphasis added.]

[15] The Crown also cites *Villaroman* to explore the relationship between circumstantial evidence and proof beyond a reasonable doubt at paras. 28-30:

> [28] The reasonable doubt instruction describes a state of mind -- the degree of persuasion that entitles and requires a juror to find an accused guilty: Berger, at p. 60. Reasonable doubt is not an inference or a finding of fact that needs support in the evidence presented at trial: see, e.g. *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at pp. 600-610. A reasonable doubt is a doubt based on "reason and common sense"; it is not "imaginary or frivolous"; it "does not involve proof to an absolute certainty"; and it is "logically connected to the evidence or absence of evidence": *Lifchus*, at para. 36. The reasonable doubt instructions are all directed to describing for the jurors how sure they must be of guilt in order to convict.
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> [29] An instruction about circumstantial evidence, in contrast, alerts the jury to the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence: Berger, at p. 60. This is the danger to which Baron Alderson directed his comments. And the danger he identified so long ago -- the risk that the jury will "fill in the blanks" or "jump to conclusions" -- has more recently been confirmed by social science research: see Berger, at pp. 52-53. This Court on occasion has noted this cautionary purpose of a circumstantial evidence instruction: see, e.g., *Boucher v. The Queen*, [1955] S.C.R. 16 per Rand J., at p. 22; *John*, per Laskin J., dissenting but not on this point, at p. 813.
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> [30] It follows that in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt. No particular language is required. Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences. It may be helpful to illustrate the concern about jumping to conclusions with an example. If we look out the window and see that the road is wet, we may jump to the conclusion that it has been raining. But we may then notice that the sidewalks are dry or that there is a loud noise coming from the distance that could be street-cleaning equipment, and re-evaluate our premature conclusion. The observation that the road is wet, on its own, does not exclude other reasonable explanations than that it has been raining. The inferences that may be drawn from this observation must be considered in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[16] This case also commented on whether the inference must be based on proven facts at paras. 35-37:

> [35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts" see *R. v. McIver*, [1965] 2 O.R. 475, at p. 479 (C.A.), aff'd without discussion of this point [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
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> [36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
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> [37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

And at para. 42:

> [42] The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences;" that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.

[17] On the role of the DNA in *R. v. O'Brien*, *supra*, at para. 18 the court notes:

> [18] It is well established that DNA evidence is simply a piece of circumstantial evidence. Like fingerprint evidence, it merely indicates that a person's DNA somehow got where it was found, not that a person committed the crime. (See *R. v. Terciera* (1998), 123 C.C.C. (3d) 1, [1998] O.J. No. 428 (C.A.), aff'd [1999] 3 S.C.R. 866). The Crown acknowledged that the DNA evidence in this case was the equivalent to that of a fingerprint. That is, if accepted, it established that at some point in time, the appellant had handled, or even worn the mask. It did not, without more, establish that the appellant had committed the robbery.

[18] In *O'Brien* the robber was wearing a mask and a mask was later found some distance from the crime scene. The Court of Appeal observed at para. 27:

> [27] His reasoning process can be summarized as: the mask was worn by a person who robbed the store. The accused at some point handled or wore the mask. Ergo, he robbed the store. With all due respect, the trial judge needed to ask himself a further question: in light of the evidence, and bearing in mind the obligation of the Crown to prove beyond a reasonable doubt the identity of the accused as the robber, can I draw the inference that the accused was the person who robbed the store? By not asking this question, the trial judge failed to consider if there was any other explanation for the presence of the appellant's DNA on the mask along with other factors such as the presence or absence of other evidence on the issue of identity. There is no indication in the trial record that the appellant matched the description of the robber given by Ms. Coates, or as revealed on the tape. Fingerprints found on the piece of the cash register did not match those of the appellant. Although I note the trial judge observed that he was unable to say the robber was not wearing gloves, Coates did not say he was.

And at para. 32:

> [32] The trial judge said "I am satisfied that the circumstantial evidence is strong and sufficient to prove beyond a reasonable doubt that there is a connection between the blue mask and the robbery of the convenience store at Top of the Hill on the previous evening" (para. 6). Although the exchange between the Crown and Ms. Coates was somewhat confusing, this was not the only evidence on this issue. The trial judge had the advantage of seeing the mask and comparing it to the video footage from the store's security camera. The mask was found close to a butcher style knife that was similar to the one described by Ms. Coates, and depicted in the video. The mask was also close to a piece of the cash register, positively identified by the store manager as being from the store. In these circumstances, the conclusion by the trial judge that the blue/black mask found was the one used in the robbery was clearly supported by the evidence and is in no way unreasonable.

[19] I have instructed myself pursuant to all of that case law.

Facts Based on the Evidence Presented

Police Witnesses

[20] Constable Shelly Pierce was the first police office on the scene after the robbery. She instructed the staff to close the store and interviewed the staff after the robbery. She testified that she was told by the staff that the robber dropped his lighter.

[21] Detective Constable Illya Nielson, working in forensic ID section of the Halifax Regional Municipal Police, testified that he seized the lighter found on the floor first inside the door of the enclosed pharmacy at the back of the store. He also processed fingerprint evidence taken at various locations within the store and that none was that of the accused, Charles Russell Clarke.

[22] Detective Constable Randy Wood processed the photographs at the scene within the store and they were shown as Exhibit 3 and used while questioning the witnesses.

[23] Detective Constable Christian Pluta testified as to the progress of the investigation following the robbery. He testified the pharmacy owner, Mr. Peter Jorna, entered the pharmacy just after the robbery and soon provided the police with the video surveillance tapes which he copied to a flash drive for the police. As the robber was not familiar or known to any of the witnesses to the event, the police took still images from the video surveillance and immediately distributed these to patrolling police officers by email. By March 8, the day following, the video was also made available to the media outlets and therefore to the public, who were asked to help in apprehending the robber by calling in tips.

[24] Detective Constable Pluta described how he received nine tips from this publication of the video as to whom the perpetrator might be, once the video was aired by the media.

[25] Detective Constable Pluta put together a photo line up and on March 17th asked the pharmacy staff present at the robbery, Emma Peters a clerk, Angela Kiesekamp a pharmacist, as well as the store owner Peter Jorna, to identify the perpetrator. On March 18, the pharmacy customer, Liam Wigle, the customer who had remained at the pharmacy in front of the pass-through window during the robbery, also viewed this photo line up.

[26] No conclusive identification of the robber was made then, although both Mr. Wigle and Ms. Peters did believe that the photo of the perpetrator was among those of the photo line up. Ms. Peters declaring that she was 85-95 percent certain of one ID and Mr. Wigle picking out two possible suspects. The accused photo we learned, was not included in this photo line up. In all, nine names of possible suspects had been called into the tip line and one suspect in particular, not the accused, was the subject of police investigation, but no arrests were made.

[27] Yet another anonymous tip received on March 21st named a man called Charles, resident at 1260 Edward Street in Halifax. Video footage was sent to the building superintendent, Linda Mason, where Charles Russell Clarke, the accused, resided at the time of the robbery, but she could not make a certain identification.

[28] A blue Bic lighter that was found on the floor just inside the enclosed pharmacy door soon after the robbery. It was seen by both pharmacy employees and was sent for DNA analysis, which results were forwarded to the Halifax Regional Municipal Police on May 11, 2016. A major DNA profile – Male Profile #1 – was clear and of good quality and contained all 15 markers tested for. An additional low level background DNA was also obtained from the lighter and belonged to at least one other individual. This low-level background DNA was not suitable for comparison purposes.

[29] Detective Constable Pluta followed up on the accused suspect, Charles Russell Clarke, and found him to be on probation, living in Guelph, Ontario. He had a DNA warrant executed against the accused. The swab was taken from the accused and it matched that of the earlier DNA profile of Male Profile #1.

[30] The particulars of DNA analysis are contained in the agreed statement of facts entered into evidence as Exhibit 1.

[31] Constable Pluta did not re-interview Mr. Peter Jorna, the store owner, or the other witnesses to the robbery, although he did report the DNA findings regarding the lighter to Mr. Jorna. No subsequent photo line up was arranged where witnesses could view a line up with the accused, Charles Russell Clarke, in the line up.

[32] The investigating officer, Constable Detective Pluta, was of the view that the DNA of the accused on the Bic lighter found on the floor inside the enclosed pharmacy soon after the robbery, would be determinative of the issue of identification on the totality of the evidence. On cross-examination Detective

Constable Pluta was asked by counsel if he was aware there was another DNA profile found on the Bic lighter and he testified “not until now.”

[33] The preliminary hearing was scheduled for October 2016, but did not proceed. However, witnesses who testified at this trial were able to observe the accused, Charles Russell Clarke, in the courtroom as the man facing these charges on that date.

Lay Witnesses

[34] In testimony at trial the three witnesses who had the greatest opportunity, about five minutes, to observe the robbery were Ms. Emma Peters, Ms. Angela Kiesekamp and Mr. Liam Wigle. Each identified the accused, Charles Russell Clarke, as the person who committed the robbery. Each recalled the details of the five-minute robbery and agreed that it was an adrenaline-charged experience. Each of these three witnesses’ narratives of the event varied in small details from one another, but generally captured the event.

[35] Emma Peters testified that she was outside the glass room of the pharmacy stocking shelves when she saw the customer, Liam Wigle, approach the counter. She entered the door of the pharmacy to help fill his prescription when the robber pushed into the pharmacy behind her and held a knife to her throat. She had a few seconds to look behind at her assailant to see his face. She testified he demanded drugs from the pharmacist, Angela Kiesekamp, who was at her computer behind the centre counter in the pharmacy.

[36] Ms. Peters was able to observe the robber then, after he let her go, when he was leaning down to the drug safe located at the centre counter and depositing drugs into his duffle bag as the pharmacist, Angela Kiesekamp, was not doing it fast enough, Ms. Peters testified.

[37] She described the robber as being tall, over six feet, having darker skin, dark clothing, wearing gloves, having a sunken face. She testified that he asked the pharmacist, Angela Kiesekamp, for oxy, fentanyl, and valium, and after collecting the drugs in his duffel bag, she testified that he asked where the cash register was. Ms. Peters opened the cash drawer for him and he took the cash and put it in his pocket and stormed out of the door.

[38] In her written statement given to the police just after the robbery she described the robber as being Hispanic looking and mentioned that he had a rough

voice. She identified the accused in the courtroom as the robber of the pharmacy on March 7, 2016.

[39] Angela Kiesekamp is 45 years old and first observed the robber as he came through the door in the pharmacy. She testified that she focused on his face and demeaner as she was gaging his reaction if he could hurt any of her staff if something went wrong – something escalated during the event. She could recall a description of him as being around six feet tall, wearing a knit cap having a complexion darker than mine, wearing dark plaid jacket and dark pants, maybe dark jeans. She described his voice as soft. She did not observe him to be agitated.

[40] Angela Kiesekamp described how she keeps the safe door open while on duty so in the event of a robbery she would not be fumbling with a lock to open the safe.

[41] With respect to the drugs stolen, Ms. Kiesekamp's recollection of how she accounted for the drug inventory after the robbery was confused. She recalled finally, the squiggled lines through the inventory lists (Exhibit 7) were actually the drugs remaining after the robbery. She did testify that she did not hand drugs to the robber from the safe shelves, allowing him to do it himself. She did not recall him asking for oxy, fentanyl, but only for patches, which she testified is how fentanyl is administered.

[42] Ms. Kiesekamp identified the accused in the courtroom as the robber whom she had the opportunity to observe on March 7, 2016.

[43] Veronica Jorna, the 20-year-old daughter of the owner, Peter Jorna, also identified the accused as the robber, although she did testify that she did not know the robbery was in progress and she was at the counter at the front of the store and only had a view of the robber as he passed her on leaving the store.

[44] Peter Jorna, her father, was outside the store walking his dogs as the robbery was in progress. He testified that he could identify the accused as the robber because he remembered observing him at the intersection of Coburg Road and LeMarchant Street when he dropped a bill at the street corner that someone then noticed and handed back to him. They encountered each other for a few seconds passing midway in the intersection. This could only have been a briefest observation of the accused. However, Mr. Jorna immediately went to the video surveillance tapes after the robbery occurred to assist the police who were called to

the pharmacy. He was also later informed by the police that, in fact, the DNA identification of the accused had been made from the analysis done on the Bic lighter.

[45] Liam Wigle on the other hand had a clear view for at least five minutes of the robbery in progress while he stood at the pharmacy window just outside the enclosed pharmacy. He agreed he was very excited, at first thought the knife was pointed very close to his own head and that the robbery took 15 to 20 minutes in duration. Although after viewing the video tapes, Exhibit 2, he realized the robbery was shorter in duration and that the knife was never close to him, although pointed toward him with the instruction to remain still.

[46] Mr. Wigle also recalled the robbery, although his memory of the event also differed in detail from that of Ms. Peters and Ms. Kiesekamp, as he recalled the robber taking drugs off back shelves at the pharmacy before emptying the drug safe.

[47] His description of the robber was that he had olive skin and pronounced facial features, the jaw bones sunken in where they connect to the cheeks to the actual jaw. He described him as being over six feet tall, a head above his own height of 5 feet 11 inches. He testified he was wearing a hat, heavy clothes, but looked very slim. He could not recall his eye colour.

[48] He described both pharmacy employees, Ms. Peters and Ms. Kiesekamp, as wearing white coats with a Guardian pharmacy employee tag on the front of them. I note that only Ms. Kiesekamp wore such a jacket.

[49] He described how the robber asked where the opiates were and that the pharmacist, Angela Kiesekamp, named a certain shelf and how she scooped the drugs into his bag. He recalled the robber asking where the cash register was and proceeding to take the cash, but Mr. Wigle testified that he could not see the cash drawer from his position outside the pharmacy.

[50] Mr. Wigle testified that he felt confident he could identify the accused as the robber of the pharmacy on March 7, 2016, saying that although he was bad with names he could remember people's facial features and their actions "stick with me." Mr. Wigle agreed he had never seen the robber before that day - March 7, 2016. Mr. Wigle gave a statement to the police after the robbery, in which he described the robber's threat to him, while he stood at the pass-through counter,

"he said if I moved he'd kill me." He did not mention the theft of cash, only drugs in this statement.

[51] He also agreed on cross-examination that he had picked out one or two possible suspects in the photo line up shown to him ten days after the robbery, but said that he was not sure of the identification of the robber then "as the photos shown to me were not recent photos but old photos of the accused."

[52] Linda Mason, the building superintendent at 1260 Edward Street, was the last witness to testify. She recognized the accused, Charles Russell Clarke, in the courtroom as having been a tenant in her building from December 2015 to the end of March 2016. She testified she met him on four occasions. This witness testified that she was sent, by email, still photos of the robber, Exhibit 4 photos 1, 2, 3 and 6. She thought they looked like Charles Russell Clarke, but she could not be sure.

[53] It is the Crown's position that the eye witnesses to the robbery were able to describe the robber and that their descriptions roughly matched the accused answering these charges. They say it was his lighter left behind the pharmacy door, where customers do not enter, that adds to the strength of their case.

[54] Notwithstanding the frailties of eye witness identification and in-dock or in-courtroom identification, the Crown suggests that there is sufficient corroborative evidence, although circumstantial, when taken together with the direct evidence in this case including the video surveillance of the robbery and still photos, to establish beyond a reasonable doubt that the accused committed these offences.

[55] After considering all of the evidence in this case: the evidence of the witnesses; the DNA evidence relating to the Bic lighter; and the video and still photographic evidence of the robbery in progress; I can tell you counsel that I have some concerns. The video footage is very grainy that is Exhibit 2 and the still photos of the robber, Exhibit 4, are still more grainy; unlike the situation in *R. v. Villaroman*, *supra* in which the robbery videos were a very good quality and could be relied upon.

[56] I sat in this courtroom for two days and observed the accused and could not say I was certain he was the man seen in the video committing the robbery or the man in the still photographs. There are features about his cheek bones and chin, a gauntness of his face that seems similar, but I cannot say with a higher degree of certainty that the accused is the robber in these videos and still photos.

[57] I note that the witnesses' descriptions of the robber variously describe his complexion, his voice and state of agitation during the robbery, each from their own memory of the robbery.

[58] Thus, I have grave concerns about the direct identification evidence of the witnesses who essentially are making what is referred to as an in-dock or in-courtroom identification where the accused was unknown to the witnesses before the event. It is very possible that they have an honest or mistaken belief that they can identify the accused as the robber.

[59] A robbery is always an adrenaline-charged experience and each witness's observations of the details of the robbery varied in recounting the actions of one another and the actions of the accused during the event. Yet with certainty they felt they could ID the accused as the robber. Mr. Wigle and Ms. Peters admitted that they had just ten days after the robbery, however selected suspects other than the accused in the photo line up, but not with absolute certainty.

[60] It is really unfortunate that when the accused became a suspect in the robbery a further photo line up including his photograph was not presented to these witnesses.

[61] I tend to agree with defence counsel that on the circumstantial evidence of the accused's DNA on the lighter, the Crown case was believed to be secured. Had there been no other DNA on the lighter, I too may have reached this conclusion. The presence of another person's DNA on the lighter at a level to low for comparison is a concern. The fact could not be established as to how long the two DNA profiles were on the lighter and which profile was most recent and that is an issue for me.

[62] For these reasons, although I can say the accused may probably have been the perpetrator in this robbery, I am unable to find beyond a reasonable doubt that the accused committed this robbery. The accused is accordingly acquitted on the charges contained in the indictment.

Robertson, J.