

Case Name:
R. v. Johnson

Between
Her Majesty the Queen, and
Floyd Johnson, Appellant

[2006] O.J. No. 4450

Court File No. 592/05

Ontario Superior Court of Justice

M.R. Dambrot J.

Heard: September 25 - October 25, 2006.

Judgment: November 7, 2006.

(157 paras.)

Criminal law -- Offences -- Offences against person and reputation -- Kidnapping, abduction and unlawful confinement -- Property offences -- Robbery -- Sexual offences -- Rape or sexual assault -- The accused was convicted of 29 of 30 counts against him including robbery, kidnapping and sexual assault with regard to four separate incidents of attacks on couples parked at Summerlea Park in Toronto -- The court was satisfied beyond a reasonable doubt that the accused was the attacker in

two of the incidents even before considering the similar fact evidence, and was convinced of his guilt in all four afterwards.

Criminal law -- Evidence -- Methods of proof -- Circumstantial evidence -- Similar fact evidence -- Identification -- The accused was convicted of 29 of 30 counts against him including robbery, kidnapping and sexual assault with regard to four separate incidents of attacks on couples parked at Summerlea Park in Toronto -- The court was satisfied beyond a reasonable doubt that the accused was the attacker in two of the incidents even before considering the similar fact evidence, and was convinced of his guilt in all four afterwards.

The accused was tried on 30 counts in an indictment alleging a variety of offences, including: robbery, kidnapping, various weapons offences and sexual assault -- The charges stemmed from four incidents in which a young couple parked at Summerlea Park in Toronto was approached while in their vehicle, robbed, and the woman was kidnapped and either sexually assaulted or threatened with sexual assault -- In a prior ruling, it had been determined that similar fact evidence was admissible, and the main question centred around the identification of the accused -- HELD: The accused was found guilty of all 30 counts save count 20 -- It was hard to imagine a tighter web of circumstantial evidence of identity with regard to the first incident -- Even before considering the similar fact evidence, based on the DNA evidence, the evidence of witnesses and the phone records, the court was satisfied beyond a reasonable doubt that the accused was the attacker in incidents #1 and #2 -- The court was also "virtually certain" that the accused was the attacker in incident #4 -- However, after considering the similar fact evidence, the court was convinced beyond a reasonable doubt that the accused was the attacker in all four incidents -- With respect to the acquittal on count 20, the court was not satisfied beyond a reasonable doubt that the accused used the gun in committing the sexual assault.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 265(1), s. 265(2)

Counsel:

D. Lissaman and J. Cameron, for the Crown

M. Kerbel and S. Daniel, for Floyd Johnson

1 M.R. DAMBROT J.:-- Floyd Johnson was tried by me, without a jury, on thirty counts in an indictment alleging a variety of offences, including robbery, kidnapping and sexual assault. These thirty charges relate to four separate incidents. In each incident, a young couple was in a parked car in a parking lot at Summerlea Park in Toronto. The couple was approached by a young man who robbed them, kidnapped the young woman and sexually assaulted her, or at least threatened to do so.

1. THE EVIDENCE

INCIDENT #1: THE MAY 5, 2003 ATTACK ON CR AND AA

2 On May 5, 2003, at about 1:30 a.m., CR and her friend AA were parked in AA's motor vehicle in a parking lot at Summerlea Park in Toronto. CR was seated in the driver's seat, and AA was seated in the front passenger's seat. The driver's door was open. They were talking. Suddenly a black man wearing a bandana over his face leaving only his eyes exposed, and a baseball cap with hair poking out, appeared at the driver's door. He put a small silver gun to CR's chest, and according to CR, said, "Give us the money, give us the money, I need money." He also asked for their bank cards and PIN numbers. AA recalled him saying, "Give me everything you have." CR and AA told him that they had no money - they had just come from a casino. AA gave the man his wallet, which contained his bank card, but no money. The man then took CR's purse, and emptied it. He found no money, but he took CR's bank card from the purse.

3 The man then directed CR into the back seat, and he got into the driver's seat. He demanded the car key from AA, put it into the ignition, and started the car. The man then told AA to get out of the car, and leave the lady inside. He instructed him to sit on a picnic bench nearby. AA complied. He asked CR to put the car into reverse, which she did. AA returned to the car, but the man told him to return to the picnic bench and sit down, and that they would be back in five minutes. The man then started to drive to a bank machine, where he intended to see if there was any money on CR's bank card. On the way, CR convinced him that there was no money on the card. The man then drove into another part of the park, and said, "If you don't have money then you have to give me something else." When CR asked what he wanted, the man replied, "a blow job." He repeated this several times. CR refused, and offered to work this out another way. The man asked CR for her cell phone number. She supplied it, and the man saved it in his cell phone. He said that his name was Jonathan. The man had his gun in his hand throughout these events, and CR feared for her life.

4 The man then drove back to the spot where the car had originally been parked, warned CR and AA not to go to the police, and told them they were lucky they weren't white or they would have been shot. The man then left the area via a dark path at the back of the park.

5 CR testified that she thought that the man was Jamaican, because he used certain peculiarly Jamaican words. But she said that he had no accent, so she thought he must have been born here. She thought that he was in his mid-20's, and was between 5'6" and 5'11" in height, and of average build. He spoke quietly, not harshly at all. His tone of voice never changed. CR said that the man never showed his face. He did not permit her to turn on the light in the car.

6 AA testified that the man had dark skin, and was taller than him (he was 5'8 1/2" or 5'9"). He thought that he was of mixed race. His face was covered, and he was only able to see his eyes. The man was wearing a winter hat, and he was unable to see his hair. He was wearing a light-coloured sweat shirt, and dark gloves. The index finger on the right glove was cut out, and his finger came through.

7 After the man left, AA drove CR home. He wanted her to go to the police, but she refused, telling him that she was scared because the man had her cell number. Later that morning, CR changed her mind and decided to go to the police. She did in fact go to a police station and gave a videotaped statement concerning this incident.

8 That evening, CR received four or five phone calls on her cell phone. In each case, "private number" appeared on her call display. She did not answer these calls. In one case, a message was left on her voice mail. CR listened to the message, recognized the caller as the man who had attacked her, saved the message and took her cell phone to the police that same day or the next morning. The police recorded the message. When it was played for CR in court, she identified the voice as being the voice of "Jonathan", the person who abducted her.

9 On August 21, 2004, Mr. Johnson was arrested outside of his residence at 73 Sawmill Rd. sitting in a black Nissan Ultima with licence plate ARXF 264, which was registered in his name.

10 On August 23, 2004, Detective Constable Patching participated in the execution of a search warrant to search that motor vehicle, which was sealed and located in an impound garage. He located a black leather day timer bearing the name of the accused in the glove box, along with various papers. He found a Telus cellular phone in the centre console.

11 Records from Rogers Wireless establish that four calls were received on CR's cell phone on May 5, 2003 from the cell phone number assigned, at the time, to the cell phone found in Mr. Johnson's car. These calls were made at 7:24 p.m., 7:46 p.m.,

9:03 p.m. and 9:04 p.m., and lasted 3 seconds, 1 minute and 19 seconds, 40 seconds and 30 seconds respectively.

12 Records from Telus Mobility establish that the account for the Telus telephone located in Mr. Johnson's car from which the calls were made to CR's cell phone on May 5, 2003 bore the name Floyd Johnson, who had a date of birth of February 7, 2004, and whose last recorded address was 75 Tandridge Cres., Apt. 116, in Etobicoke. This phone had a consumer pay and talk pre-paid phone service, and was active from July 29, 2002 to March 15, 2004. Joy Palmer testified that her daughter and the accused had lived at that address with her for several years prior to these incidents.

13 Joy Palmer lived at 75 Tandridge Cres., Apt. 116, for a three-year period ending in June of 2003. Accordingly, she lived at this address at the time of this incident. Mr. Johnson was married to her daughter at the time. They are now divorced. She testified that he had lived at that address with Ms. Palmer, his wife and their daughter for a couple of years, but he and her daughter had moved to a residence on Sheppard Ave. on some unspecified date before May 5, 2003 as a result of some problem. She also testified that a photograph of the automobile in which the Telus cell phone was found appeared to depict the accused's motor vehicle.

14 On August 20, 2004, more than a year after the incident, CR was shown a photo lineup. One of the photographs depicted Mr. Johnson. A videotape of the lineup process was played in Court. CR was unable to pick out any one of the photographs as depicting "Jonathan." This was unsurprising, particularly in light of the fact that she saw only his eyes, and some of his hair sticking out from under a cap, more than one year earlier. She did pick out one photograph respecting which, she said, the hair, forehead and eyes looked familiar. She could not tell, however, if that person was the same person who had abducted her. That person was not Mr. Johnson.

15 AA was also shown an identical photo lineup the next day. He was also unable to identify the man.

INCIDENT #2: THE SEPTEMBER 10, 2003 ATTACK ON DD AND SS

16 Late in the day on September 10, 2003, after attending church together, DD and her boyfriend SS, arrived at Summerlea Park in DD's brother's Toyota Corolla. According to DD, they arrived at about 10:00 p.m. According to SS, they arrived some time between 10:30 p.m. and 11:00 p.m. They parked in the same parking lot as CR and AA had parked in and sat talking. DD was in the driver's seat, and SS in the front passenger's seat. The car lights were probably not on, and it was very dark. A tall figure appeared on the passenger side of the car in the dark and tapped on the front window. DD jumped with fear, locked her door and the one behind her and began screaming. The man put his fingers to his lips and asked for a cigarette. SS opened

the front passenger window of the car, and both he and DD said that they had no cigarettes.

17 The man then opened the front passenger door, put a knife to SS's stomach and covered all of his face except his eyes and forehead with a red bandana. He asked DD and SS for their wallets. DD immediately put the key in the ignition to start the car in an effort to get away. The man, who was then on the inside of the open door, was able to reach over and grab the key and pull it out of the ignition. The man looked through SS's wallet, and became upset when he found no money. He ordered the couple out of the car. DD dropped her purse and kicked it under the seat. She did not want the man to get it because he already had her house and car keys. She put her brother's cell phone, which she had borrowed, in the back of her pants, in hopes of being able to call the police at some point. She then walked to the passenger side of the car.

18 The man asked DD if she had any money. She said that she did not. He then took hold of her shirt, and began dragging her into the bushes on their right. SS followed. DD began pleading with the man not to take her alone. He told SS to tell her not to yell. SS told the man not to take her, and that they would give him whatever money he wanted. The man continued to pull DD into the bushes. DD dropped her cell phone so that SS could recover it and call for help. The man didn't see this, but SS did. He stopped following the man and DD, and picked up the cell phone.

19 The man pulled DD into the bushes and demanded a "blow job." He still had the knife in his hand. DD tried negotiating with him, to no avail. When they got far enough into the bushes that they could not be seen, DD said that she had never done this, and pleaded with the man not to make her do it. He did not appear to care. DD fell, and continued to plead with the man. She refused to do what he wanted. The man told her to do it or he would stab her. He still had the bandana on at this point, covering his face, and allowing her only to see his eyes. The man came at DD as if to stab her. DD continued to try to buy time. She indicated that they were not in a good spot. He pulled her further into the bush by her hair. She became afraid that they were so far in that no one would find her, and told him that the spot was good. He stopped.

20 DD was then on her knees. The man removed his pants and put her mouth to his penis. He kept telling her, "Do it like you like it." She wondered how he could say that. She put her mouth on his penis. Ultimately, she felt his penis throb, and knew he was going to ejaculate. She removed her mouth, and he put his penis to the side. DD did not know if the man had ejaculated, but she saw him rub the ground with his shoe and pull his pants back up. The man then took DD back out of the bushes. DD again asked the man not to hurt them, and offered to give them money if he took them to her house.

21 Meanwhile, SS called 911 and reported what had happened. He was directed to stay on the line until the police arrived, and not to follow the man and DD into the bushes. When the man emerged from the bushes, he observed SS talking on the cell phone. He walked quickly to the car. DD slowed down so that she could run for help. SS told her to run. She ran up a slope to Albion Road. The man then ran towards some townhouses. She saw a car entering the park. The car was being driven by a man. He had a woman passenger. DD told the driver that a man was going to kill her boyfriend. She then entered the car. SS arrived soon after, and ultimately he entered the car as well. The driver backed out of the park, and waited with SS and DD for the police to arrive.

22 Some time passed but the police did not arrive. SS and DD reentered the park, found that the man was gone, and drove out of the park in their car. DD told SS what had happened. She felt disgusted and wanted to gargle. She told SS that she was dirty and nasty. He held her while she cried. When they got to the road, they encountered the police, and returned to the park with them. The police calmed DD down and drove her to the police station, while SS drove DD's brother's car to the station. The car was left in the custody of the police. DD gave a statement to the police, and was then taken to the hospital. Afterwards, the police drove her home.

23 DD described the man as appearing to be between 25 and 35 years of age. He had dark skin. He seemed tall to her - certainly taller than her height of 5'5". His hair was uncovered, and appeared frizzy, short and curly. He had a "Rasta" accent, like a Jamaican. She recognized this accent from school. He was wearing a maroon dress shirt. Although he wore a bandana most of the time, she did see his face for perhaps 20 seconds when he asked for a cigarette. She remembered his facial features at the time, but by the time she was shown a photo lineup that included a photograph of the accused on August 21, 2004, almost one full year after the attack, she was unable to identify him.

24 SS described the man as black, with a Jamaican accent. He was able to identify the accent because he had a lot of Jamaican friends. Jamaicans, he said, speak in a "different" way. He thought that the man might be in his 30's. He was about 5'10" - taller than SS who was 5'8". He did not get a clear view of the man's face because it was very dark. When SS was shown a photo lineup on August 22, 2004, he was also unable to identify the man. A photograph of the accused was in the lineup.

25 On September 11, 2003, at about 2:00 a.m., Sgt. White photographed DD's brother's car, and looked for fingerprints. He concentrated on the front passenger door and the area around it. He located one set of partial prints on the top trim above the window. There were two obvious fingerprints and a third that was less clear. Of the

two obvious fingerprints, only one was suitable for comparison. The other was not, because it didn't have enough detail. In each case, the fingertips were facing down.

26 On August 21, 2004, the accused was fingerprinted in a police station. Sgt. White later compared the fingerprint that he had removed from the trim of DD's brother's car to Mr. Johnson's fingerprints, and concluded that it matched Mr. Johnson's left index finger. His evidence that there was a match was very strong, and was not challenged by the defence.

27 Sgt. White expressed the view that in order to leave the prints that he found on the car, Mr. Johnson either had to have approached the car with his arms in the air and his hands upside down, or to have left the prints from inside the door, placing his arm over the top of the doorframe, with the car door open.

28 Eversley Thomas is in the business of renting halls for social functions. He was engaged in this business with the accused for a short time. They first rented a hall together for a Mother's Day event on May 11, 2003. This event was advertised by the distribution of flyers. Mr. Thomas has seen flyers used for the advertising of other events as well.

29 Richard Banton is a local disc jockey who has also promoted parties. The accused hired him to promote and DJ at functions that the accused promoted or was involved with. Mr. Banton explained that one part of the promotion of these functions involves the distribution of flyers. He said that it is common to place flyers in the driver side window of motor vehicles, where they will be noticed. Mr. Banton did not actually testify that the accused distributed flyers, but it is a fair inference from his evidence that he did. Jeannette Thompson stated affirmatively that the accused did distribute flyers to promote his events. The only time that Mr. Banton was able to say that the accused was involved in the promotion of an event was in May 2003, as a result of being shown a flyer for the May 11, 2003 Mother's Day event mentioned by Mr. Thomas. There was no evidence that Mr. Johnson was engaged in distributing flyers in August or September 2003.

INCIDENT #3: THE DECEMBER 26, 2003 ATTACK ON FL AND OK

30 A little after midnight on December 26, 2003, FL and her boyfriend OK arrived at Summerlea Park in OK's sister's van. They parked in a parking lot that was virtually contiguous to the parking lot that CR and AA had parked in, and ate some take-out food that they had purchased. After they were done, and FL entered the back of the van looking for a box of napkins. Suddenly OK, who had remained in the driver's seat, saw a shadow through the back window. The shadow turned out to be a man with a silver handgun. His face was covered by a bandana up to his eyes, and he was wearing a toque. The man approached the driver's door, opened it and put the gun to

OK's head. He told OK to move to the passenger seat, which he did. The man sat in the driver seat, and demanded everything they had, including money, cell phones and bank cards. He took their cell phones, which were on the driver's seat. OK gave him his wallet, which had a small amount of money in it. FL gave him her purse, but denied having a bank card, although she did have one with her.

31 The man then ordered OK out of the car. He said that he wanted time alone with OK's girlfriend. OK refused, and said that they had given him all they had, and that was all that he needed. The man told him that he didn't think he wanted to die that night. The keys were in the ignition, and the man started the car and put it in reverse. He kept his hand on the gun in his jacket pocket, and drove with his left hand. He drove out of the park for about four minutes, then stopped at a bridge and again told OK to get out. When OK refused, the man screamed at him that he would shoot him if he didn't get out. OK looked to the back of the van. He saw that FL was crying, and that the back door was locked. He unlocked it from his seat, got out and tried to open the back door from the outside to free FL, but failed. The man drive away. OK ran after the van. The man pointed his gun at him, saying, "I swear, I'm going to shoot him." OK was not able to keep up with the van. Throughout the time that he was in the van, OK was not permitted to look at the man. The man made him turn away from him.

32 OK ran to the nearest house and asked the occupants to call the police. They arrived within three or four minutes, and took OK to their Division.

33 Meanwhile, in the van, the man told FL that he would not hurt her, and ordered her to get into the passenger seat. She refused, telling him that she was scared of him. The man put the gun away, pulled out an eight inch knife with a green handle and a thin blade, waved at FL to come into the front, and said, "All I want is a really good blow job." FL asked him why he was doing this, particularly at Christmas time. The man continued to tell her to come into the front. Finally, the man stopped the van, told FL that she seemed like a nice person, and let her go. He asked FL if she knew how to drive. When she said that she did not, he said that he would leave the van around the corner. He asked for her shoes, jacket and purse, and fled, leaving between two houses in an alley.

34 FL waited for ten to fifteen minutes. When she thought she was safe, she ran to Islington Ave. where the police found her. She told the police that the man who had robbed her was a black, tall, thin male, dressed in all black clothing, and had a silver handgun and a knife. The police located both FL and the van within twenty or twenty-five minutes of first encountering OK.

35 In her evidence, FL described the man as being about 6'1", in his early 20's, with a Caribbean accent of some kind. He had black sunken eyes and a low, deep voice. He was stern for the most part, but never raised his voice except when he threatened to shoot OK. She was not wearing her glasses that day, and as a result her vision was blurry. She was never shown a photo lineup.

36 OK described him as being a dark skinned man, in his 20's, with a rough, deep voice, and possibly a Jamaican accent. In cross-examination, he said that the man might have been between 5'7" and 5'9", but noted that he had mostly seen him sitting, and so wasn't sure of his height.

37 As I have already mentioned, Joy Palmer is the former mother-in-law of the accused. The accused and Ms. Palmer's daughter were living with Ms. Palmer at the time of this incident. Ms. Palmer testified that the accused ate Christmas dinner at her residence in 2003 with her family.

38 On August 22, 2004, some eight months after the incident, OK was shown a photo lineup. He picked out four of the photographs as being of individuals that looked the most like the man, based on face structure and apparent age.

INCIDENT #4: THE AUGUST 1, 2004 ATTACK ON SG AND MS

39 At about 12:30 a.m. on August 1, 2004, SG and her boyfriend MS parked in the parking lot at Summerlea Park in MS's pick-up truck.¹ MS was in the driver's seat; SG was in the front passenger's seat. The doors were closed and locked. The lighting was dark. About five minutes after they arrived, MS saw a man try to open the passenger's front door, and then begin tapping on the window with a long, black or brown gun. MS said that the gun was at least six inches long, and appeared to be a pistol and not a revolver. MS screamed that there was someone outside with a gun. SG then saw the man with what appeared to her to be a dark gun outside her window. MS testified that the man was six feet tall, or a little taller, was wearing all white, had a hooded sweater on, had two stud earrings, and wore a banadana on his forehead but had nothing covering his face.

40 The man told them to open the door or he would shoot. MS either unlocked the doors himself, or instructed SG to do it. The man then pulled the passenger door open, told SG and MS not to look at him, and demanded all their money. They gave him all that they had - money, credit cards and debit cards. MS said that he gave the man between \$100 and \$150 himself. The man reached into the car and took MS's keys from the ignition and his cell phone. When MS showed the man that his wallet was empty, he took the wallet as well.

41 The man asked SG what the limits on their credit cards were. MS said that his limit was \$100. SG said that she didn't remember. The man then walked around the

back of the truck, opened the driver's door and demanded that MS get out. When MS resisted, the man pointed his gun at MS, reached in, grabbed his shirt, pulled him out, punched him in the stomach and said that he was taking SG to the bank in MS's vehicle. MS asked the man to take him instead, and offered to cooperate. The man refused. He then jabbed MS in the stomach with his gun and led him a few feet into the forested area. He told MS to stay where he was while he went to the bank with SG. MS resisted again, and the man told him to shut up or he would "put two caps in" him. He then yelled as if he was addressing someone on the other side of the park that if MS moved, "Shoot him."

42 The man then got into the car and drove to SG's bank with SG beside him. Initially, he had some difficulty getting into gear, and he fishtailed as he drove away. On the way to the bank, the man held his gun to SG's neck and told her to act "normal" if they saw the police or anything unusual, or he would kill MS. They arrived at a branch of the Bank of Montreal in five to ten minutes. The man took side streets and appeared to know the way. At the bank, the man told SG to withdraw as much money as she could with her debit card. She returned with \$500. He then handed SG's Visa card to her and asked her to withdraw more money. She did, ultimately giving him \$700. He remained in the car while she withdrew money. No one else was around.

43 The man then drove SG back to the park. On the way there, he began to touch her legs, and put his hands under her skirt. He kept telling her not to look at him. When he arrived in the park, the man returned the car to the same spot as it was in before. MS started to emerge from the woods, but the man screamed at him to go back in. He said that he wasn't going to hurt SG, but he needed to speak to her for five minutes. When he re-entered the car, MS shouted, "Let her go." The man kept yelling, "Shut up. Shut up."

44 The man then told SG that he was "going to fuck" her. She asked him not to. He told her to "suck [his] dick." She feared that he might kill one or both of them if she did not go along, and so she complied. After a short time, the man picked SG's head up and started kissing her on the mouth. He then moved to the passenger side of the front seat where SG was, made her get on top of him but facing the windshield, and penetrated her with his penis. No clothing was removed - the man just moved SG's underwear to the side. He did not wear a condom. Again this didn't last very long. She did not think that he ejaculated. He then began talking to SG as if they were friends, and asked when he could see her again. SG got off the man, moved to the passenger side and said that he could see her whenever he wanted. The man then asked SG to give him her phone number, and she agreed. He pulled a card out of MS's wallet, and SG wrote her first name and cell phone number on it. MS testified he was employed by his father's plaster and cement company, and that one of his

business cards, with his name and the name and telephone number of his employer on it, was in the truck that night.

45 SG gave her real cell number to the man because her phone was in the car, and she was afraid that he might call the number and check if the number she gave was correct. He asked her what the best time to call was, and she said that it didn't matter, evening or anytime. He suggested that they could get together and have a really good time. He asked her not to set him up when they met, and she replied that she wouldn't do that.

46 The man started to leave the truck when he realized that he had left one of his gloves behind. SG found the glove in the driver's seat and gave it to him. He then took off running in a south-west direction, between a utility shed and the forest. As soon as MS saw the man leave, he came out of the bushes, entered the van and asked SG if she was OK. He wanted to take her to the hospital, but she refused. He took her instead to a hall owned by a friend so she could relax a bit. When they arrived, according to SG, they went up to the office and remained there for 20 to 30 minutes. According to SG, they went to a suite, rather than an office, and remained there for fifteen minutes.

47 SG then agreed to go the hospital. MS first drove her to Etobicoke General Hospital, but there were no sexual assault kits available there. The nurse who dealt with SG sent her to Trillium Hospital in Mississauga, and called ahead so that the staff could be ready to receive her. A police officer was waiting for her when she arrived. He took a statement from her, and then took her to a hospital room where a kit was performed.

48 The officer then took SG to the police station. She intended to give a statement at the station, but became nauseous. Det. Donais took her home. He asked her to remove her clothes and give them to him for testing. She agreed, went to her room to change, and gave him her clothes. He separated the clothing, placed each item in a paper bag and sealed it. He then returned to the police station and turned the items over to Det. Verbeek.

49 SG stayed home for a couple of hours, and in the afternoon she returned to the police station and gave a videotaped statement.

50 Between noon and 1:00 p.m. that same day, SG received a telephone call on her cell phone. Her call display showed an unknown number. Her brother-in-law, PC was at her home to see how she was, so she handed the phone to him and asked him to answer. A male voice asked to speak to SG. PC could identify his accent immediately as Jamaican. PC told him that she was unavailable, and asked for his name. The man said Jonathan or Jonapan Davidson. The man spoke softly, and there were loud noises

in the background. PC asked him where he knew SG from, and he responded that he knew her from a plaster and cement company. He gave PC a number where SG could call him back, and said that if he wasn't there she could ask for M. The number was MS's father's company's number, and M was MS's first name. As I have already noted, the card that the man who sexually assaulted SG had taken from MS's wallet had MS's name and the name and telephone number of MS's father's plaster and cement company printed on it, as well as MS's name.

51 Also on August 21, 2004, Detective Wilson, assisted by Detective Sansom showed SG a photo lineup consisting of 12 individuals, one of whom was the accused. In conformity with the recommendations of the Honourable Peter Cory in the Thomas Sophonow Inquiry, the entire lineup procedure was videotaped. I cannot help but comment on how helpful the videotape was in permitting me to understand the nature of the identification made by SG, and make an appropriate assessment of it.

52 At the outset of the procedure, Detective Wilson gave SG full instructions about what was to take place, and how she should approach the process. There were 12 photos in the photo-pack. She was, of course, told that the perpetrator might or might not be in one of the pictures, that she was in no way obliged to select any photograph if she did not recognize the individual as being involved in the case, that it is as important to clear the innocent as to identify the suspect, that she should study each photograph carefully before making any comment and that after looking at each photograph she should turn it down and proceed to the next one. SG acknowledged that she understood the instructions.

53 As instructed, SG began by turning up the first photo, examining it carefully, turning it down and continuing with the next. When she got to the seventh photo, which was the photo of the accused, it was immediately apparent that it stood out to her. She examined it for a much longer period than the first six, and appeared reluctant to put it down. Finally, she asked if she could go back and look at the photos again. When she was told she could, she put it down and continued with the remainder of the deck.

54 She then returned to the beginning of the deck and looked through the photos a second time. When she got to the photo of the accused, she said, that she couldn't be 100% sure, but "the only one that stands out is this one." She went through the deck a third time, and stopped again at the photograph of the accused. Detective Sansom asked her why it stood out, and she referred to the man's eyes in response. After examining the photograph for a while longer, she volunteered that if she had to choose, she would say "this one," and that it stands out for some reason, referring to the photograph of Mr. Johnson. Still later she added that the perpetrator's face wasn't very long. She was asked in cross-examination how certain she was that the man in the

photograph she selected was the man who raped her on a scale of one to ten. She answered that she wasn't 100% certain, but placed her level of certainty at seven or eight out of ten.

55 On August 22, 2004, MS was shown a similar photo lineup. He also examined the photographs for some time. At one point, he isolated three photographs to look at the eyes of the persons depicted. He said that the eyes of the man who robbed them were the most distinguishing thing about him. Finally, he pointed to another of the photographs, examined it again, put the other three aside, and said, "The more I look at this it keeps hitting on me." He was reminded that he was not obliged to pick out a photograph, but he said, "I'll go with that one there - there's something ... it really hits me."

56 SG described the man who sexually assaulted her as an African American with a strong Jamaican accent. She said that she could distinguish a bit amongst Caribbean accents. He was in his 20's, maybe his mid-twenties. She wasn't sure of his height, but said that he was the same height as MS. He was wearing a white sweater and a white fleece sweatshirt with a hood. The hood was up the whole time. He had black gloves on, and, she thought, was wearing jeans.

57 As I have already noted, MS testified that the man was six feet tall, or a little taller, was wearing all white, had a hooded sweater on, had two stud earrings, and wore a bandana on his forehead, but had nothing covering his face. He also said that the man appeared to be in his mid-20's, and was wearing dark brown or black gloves. When asked if the man had an accent, he testified that he couldn't identify a specific type of accent, but described the man as speaking a kind of street talk, not proper English, and in a low, calm tone. He had dark brown or black gloves on his hands.

58 As I have mentioned, Det. Donais took possession of the clothes that SG was wearing when she was sexually assaulted, separated the items, placed each item in a paper bag and sealed it, and delivered the items to Det. Verbeek. Det. Verbeek then applied for, and was granted a DNA warrant for Mr. Johnson, and executed it at Maplehurst with the assistance of Detective Constable Irish from Forensic Services. Detective Constable Irish actually pricked Mr. Johnson's finger and took some blood droplets from him.

59 Tera Brutzki is a forensic biologist employed in the biology section of the Centre of Forensic Sciences. She was qualified as an expert in the screening of body fluids and the interpretation of DNA-STR profiles.

60 Ms. Brutzki examined various items presented to her in this case to determine whether or not semen or saliva was present. She also performed autosomal STR (short tandem repeats) DNA analysis and Y-STR analysis on some of these items to

determine if certain males, including the accused and MS, could be excluded as the source.

61 Ms. Brutzki explained that in autosomal, or standard STR DNA testing, DNA analysis is performed at STR loci on non-gender-determining chromosomes from a bodily substance extracted from an item of evidence submitted to the examiner by an investigator. The examiner attempts to develop DNA STR profiles and compares them to the DNA STR profile of a known individual to determine if that individual can be excluded as the donor of the bodily substance. If the individual cannot be excluded, in other words, if the individual's DNA profile matches a profile generated from the bodily substance, then the examiner assesses the probability that a randomly selected individual unrelated to the known individual would coincidentally share the observed profile.

62 Where male DNA is present in a mixture in low amounts relative to female DNA, and as a result standard STR DNA analysis of the male DNA is not possible, Y-STR analysis may be possible. The process is similar, but in Y-STR testing, DNA analysis is performed at STR loci on the Y chromosome. The Y chromosome is one of a pair of chromosomes that include information required for gender determination, but is found only in males. It is passed unaltered from father to son. As a result, all paternally related males have the same Y chromosome DNA profile. Obviously, Y chromosome DNA profiling is not as discriminating as standard DNA testing.

63 Ms. Brutzki's pertinent conclusions can be summarized as follows:

1. Semen was detected on the back panel of SG's denim skirt.
2. DNA extracted from the semen on the back panel of SG's skirt was amplified in the STR Profiler Plus system, a system for generating DNA STR profiles. The male DNA profile from this semen was determined at 9 STR loci. Both the accused and MS were excluded as a source of the DNA profile.
3. The DNA extracted from SG's denim skirt was amplified in the Y-STR PowerPlex Y system, a system for generating DNA Y-STR profiles. A Y-STR DNA profile was determined at 12 loci. The accused and MS were both excluded as the source of the DNA.
4. P30 was detected on a vaginal swab taken from SG, as well as on the front panel of SG's underwear. P30 is a component of semen. It may be found in other body fluids, but only rarely.

5. Amylase was also detected on the crotch and front panel of SG's underwear. Amylase is a component of saliva. Amylase can also be detected in low levels on other body fluids, such as perspiration, vaginal secretions and semen, and sometimes in high levels in feces.
6. DNA extracted from the p30 positive area of SG's underwear was amplified in the STR Profiler Plus system as well as the Y-STR PowerPlex Y system.
7. The DNA STR profiles generated from the p30 positive area of SG's underwear revealed a mixture of DNA from at least two persons, one female, and one male. The major profile was attributable to SG. Uncertainty about the number of additional contributors and the small amount of DNA detected resulted in the minor DNA profiles being unsuitable for comparison.
8. The Y-STR profiles generated from the p30 positive area of SG's underwear was a mixture from at least two males. The major profile was determined at 12 loci. Floyd Johnson and each of his paternal male relatives cannot be excluded as the source of this profile.
9. This Y-STR profile was compared to a North American population database of Y STR profiles. This database consists of a total of 4004 unrelated male profiles, including 1311 Caucasians, 1108 blacks and 325 Asians. Frequencies of particular Y chromosome profiles in the database are generally more common than conventional DNA profiles. In this case, however, the Y chromosome DNA profile generated from SG's underwear does not appear in the database. The statistical significance of this result is limited by the size of the database.

64 DR. Amarjit Chahal has a Ph.D. in Plant Mitochondrial Genetics, and extensive experience related to DNA testing. He performs assessments of DNA testing laboratories for accreditation purposes, he has been a director of laboratories engaged in DNA testing and is presently the general manager of Molecular World Inc., an organization that does forensic DNA testing and paternity testing. Like Ms. Brutzki, he was qualified as an expert in the screening of body fluids and the interpretation of DNA-STR profiles. He had been asked by the defence in this case to do independent testing of the same p30 positive area of SG's underwear that Ms. Brutzki tested.

65 Like Ms. Brutzki, he concluded that the Y-STR DNA generated from this profile cannot be excluded as originating from Floyd Johnson or his paternal relatives. He also compared this profile to a North American database of Y STR profiles, albeit a different one than the one used by Ms. Brutzki. This database consisted of 3561 unrelated samples, including 1276 Caucasians, 985 blacks and 597 Hispanics. Once again, the Y chromosome profile generated from SG's underwear does not appear in the database. Unlike Ms. Brutzki, however, Dr. Chahal was prepared to estimate probability that a randomly selected individual from major ethnic groups unrelated to the accused would share the Y STR DNA profile in issue, using a 95% Confidence Interval, an upper limit conservative estimate.

66 His estimates were that there was a 1 in 333 probability that a randomly selected black man would share the profile; a 1 in 435 probability that a Caucasian would share the profile; a 1 in 200 probability that an Hispanic would share the interval and a 1 in 1250 probability that a person from a major ethnic group would share the profile, all measured at a 95% level of certainty.

67 In cross-examination, Dr. Chahal agreed that the two databases did not duplicate profiles, and so their 7565 total results could be combined and analyzed together. When this was done, he was able to say that there is a 1 in 714 probability that a randomly selected black man would share the profile, with 95% certainty. This means that 99.86% of black males are excluded as the donor. He said that Mr. Johnson's profile is a relatively rare one, but there is a possibility of it being present in an unrelated population.

68 Jeanette Thompson met the accused in May 2003, and was dating him at the time of this incident. She testified that she was with him at the Caribana Parade on July 31, 2004. She and the accused arrived at about 4:30 or 5:00 p.m., and met Ms. Thompson's friend, Naomi Wilson. They stayed almost to the end of the parade. Ms. Thompson and Mr. Johnson left, got something to eat and then attended at Nathan Phillips Square, where they met Ms. Thompson's mother and infant son. At about 11:30 p.m., Mr. Johnson, Ms. Thompson and her son left for a drug store to buy diapers. They left the drug store around midnight, and the accused drove Ms. Thompson home. The accused escorted Ms. Thompson to her front door, and left at approximately 12:30 a.m.

69 Ms. Thompson recalled that the accused was wearing a printed shirt that evening, and dress pants. She said that she had never seen him wear earrings. When asked if she had ever seen him in a track suit, she replied that he mostly wore dress clothes.

70 Ms. Wilson confirmed that she had met the accused and Ms. Thompson that night, and that Mr. Johnson was wearing "cream pants or khakis or something" and a cream "polo top-like" t-shirt with green leaves in a camoflauge pattern. She said that she left at 7:00 or 8:00 p.m.

71 In cross-examination, Ms. Thompson testified that Summerlea Park is about a 10 minute drive from her home. She also said that Mr. Johnson had gone to Summerlea Park with her "like twice."

ADDITIONAL EVIDENCE

72 As I have mentioned, Joy Palmer is Mr. Johnson's former mother-in-law. Her daughter was his wife. Her daughter sponsored the accused when he came from Jamaica to Canada. The accused lived with Ms. Palmer for more than three years at her residence at 75 Tandridge Cres., apt. 116 but had moved out some time prior to any of the charges arising from the four incidents alleged against the accused. Tandridge Cres. borders on Summerlea Park, and is very close to the parking lots where the perpetrator of each of the four incidents first approached the complainants' motor vehicles. Ms. Palmer herself moved from the Tandridge Cres. residence to a residence on Sawmill Rd. in June 2003.

73 The accused did not testify.

3. ANALYSIS

74 Identification was the only issue raised by the defence throughout the trial, including in closing argument. This, of course, does not absolve me of the responsibility, should I be satisfied beyond a reasonable doubt that the accused was the person who committed any or all of the acts alleged against him, to consider whether the evidence satisfies me of the various elements of the offences that I find he committed. Given the focus of the trial, I will begin by considering identification.

(1) IDENTIFICATION

75 In *R. v. Arp*, (1998), 129 C.C.C. (3d) 321 (S.C.C.), Cory J. provided helpful direction on the instructions that should be given to a jury that is asked by the Crown to make use of similar fact evidence in deciding the issue of identity. He noted that appellate courts have employed two very different approaches to the use of similar fact evidence.

76 In the first of these, which he called the "pooling" or "cumulative" approach, the jury is instructed to examine the similarities between the counts charged in the indictment and to decide, as a preliminary matter, whether the offences were likely committed by one person. Only if they are satisfied on a balance of probabilities that

the offences were committed by one person may they consider the evidence of each count in determining whether the accused committed the other offences. If they are unable to make this preliminary finding, they must consider the evidence on each count separately in determining the accused's innocence or guilt.

77 In the second approach, which he called the "anchor" or "sequential" approach, when applied in the context of a multi-count indictment, the jury must determine first that the accused committed one of the offences charged beyond a reasonable doubt, using only the evidence relevant to that count. Only then may the jury proceed to consider the circumstances of that offence as similar fact evidence with regard to the remaining counts.

78 Cory J. decided, for the Court, that as a matter of principle, the correct approach to a consideration of similar fact evidence by a jury is the "cumulative" or "pooling" approach. Thus, as a general rule where similar fact evidence is adduced to prove identity, the jury should be instructed that once they have concluded that there is sufficient likelihood that the same person committed the alleged similar acts, they may consider all the evidence relating to the similar acts in considering whether the accused is guilty of the act in question.

79 Not being a jury, I propose to proceed somewhat differently. I propose to begin by determining if the identification of the accused has been established beyond a reasonable doubt with respect to any of the incidents without resort to similar fact evidence. Only after I have done this will I consider the effect of the similar fact evidence in accordance with the pooling approach. I recognize, of course, that, even as a Judge trying this case without a jury, I am bound by the approach mandated for juries in *Arp*. But in case I have erred in admitting similar fact evidence, it may be helpful should my judgment be reviewed for an appellate court to know how I viewed the strength of the Crown's case without reference to similar fact evidence.

80 I will consider the evidence one transaction at a time.

MY ANALYSIS OF THE EVIDENCE WITHOUT REFERENCE TO THE SIMILAR FACT EVIDENCE

INCIDENT #1: THE MAY 5, 2003 ATTACK ON CR AND AA

81 There is one significant piece of evidence that points to Mr. Johnson as the man who attacked CR and AA: the evidence of the follow-up phone call to CR. This can only be regarded as a highly compelling piece of identification evidence. It is helpful to recall the sequence of pertinent events:

1. The perpetrator attacked CR and AA at 1:30 a.m. on May 5, 2003.

2. CR talked the perpetrator out of forcing her to perform oral sex on him by offering to work things out with him another way.
3. The perpetrator agreed and asked for CR's cell phone number.
4. She gave it to him.
5. The man identified himself as "Jonathan."
6. CR thought that the perpetrator was Jamaican because he used words known to her as peculiarly Jamaican. She didn't think he had an accent.
7. That same evening, CR received four or five cell phone calls. Each time, "private number" appeared on her call display.
8. She did not answer the calls.
9. In one case, the caller left a message.
10. When she listened to the message, CR recognized the voice as that of the man who had attacked her.
11. The police transcribed the message that same day or the next day.
12. When it was played in court, CR identified the voice again.
13. On August 21, 2004, the accused was arrested in a black Nissan Ultima registered in his name.
14. His former mother-in-law testified that the accused was residing with her and her family at the time of the attack.
15. She confirmed that a photograph of the car the accused was arrested in looked like the car he drove at the time.
16. A Telus Mobility cell phone was found in the accused's vehicle.
17. Telus records establish the phone found in the accused's car was active on May 5, 2003.
18. The records also establish that the phone was registered in the name of Floyd Johnson, with a date of birth of February 7, 1974, and with a last recorded address of 75 Tandridge Cres., apt. 116, in Etobicoke.
19. The accused's mother-in-law had lived at that address for several years, and the accused had as well, although he had moved out prior to May 5, 2003.
20. When he was fingerprinted, the accused gave February 7, 1974 as his date of birth, and Jamaica as his place of birth.

21. Rogers Wireless records establish that four calls were received on CR's cell phone on May 5, 2003 at 7:24 p.m., 7:46 p.m., 9:03 p.m. and 9:04 p.m., and lasted 3 seconds, 1 minute and 19 seconds, 40 seconds and 30 seconds respectively.
22. Rogers records also establish that the calls were received from the cell phone found in the accused's car.

82 It is hard to imagine a tighter web of circumstantial evidence of identity. The attacker was undoubtedly the caller who left the message. The attacker sounded Jamaican, obtained CR's phone number, was otherwise a stranger to CR and said he would call her. The caller sounded Jamaican, had the same voice as the attacker according to CR, was otherwise a stranger to CR but was calling her number just as the attacker had indicated he would. And the caller undoubtedly was the accused. Rogers records show that calls were made to CR's phone at the time of the message from a particular cell phone. Telus records show that that cell phone was registered to the accused. And to place the matter beyond all doubt, that cell phone was found in the accused's car when he was arrested. It follows that the accused was the attacker.

83 Is there anything in the evidence from which doubt could arise?

84 The accused says the following:

While we have heard from the complainant that she recognized the voice as the person who robbed her the night before, there is an absence of direct evidence of who made the call or that the voice on the recording was that of the accused.

Both complainants described a black male in his early 20's. The accused was born in 1974 and was 30 years of age at the time of his arrest.

85 A reasonable doubt does not arise in my mind from either of these points.

86 The lack of direct evidence that the accused made the cell phone call is, of course, of no moment. We regularly tell juries that the law does not prefer direct evidence over circumstantial evidence, but rather that neither is necessarily better or worse than the other.

87 As for the second point, there are no doubt frailties in the descriptions of the attacker given by both CR and AA. In addition, neither was able to identify the accused in a photo-lineup. But this is not surprising, and does not undermine the strength of the circumstantial evidence. The perpetrator wore a bandana over his face, up to his

eyes, throughout his contact with CR and AA. There really was no prospect of them being able to either describe him accurately, or identify him in a lineup. What is more, the lineup took place more than a year after the attack. The fact of the matter is that Mr. Johnson does match the general description provided by CR and AA. He is a relatively young, black, Jamaican male.

88 I am satisfied beyond a reasonable doubt that the accused was the person who attacked AA and CR, without reference to the similar fact evidence.

INCIDENT #2: THE SEPTEMBER 10, 2003 ATTACK ON DD AND SS

89 Once again there is one significant piece of evidence that point to Mr. Johnson as the man who attacked DD and SS: the fingerprint evidence.

90 This too can only be regarded as a highly compelling piece of identification evidence. Once again it is helpful to recall the sequence of pertinent events:

1. DD and SS were sitting in DD's brother's car sometime after 10:00 p.m. on September 10, 2003 when the man who attacked them appeared on the passenger side.
2. He opened the front passenger door, put a knife to SS's stomach, and asked DD and SS for their wallets.
3. DD put the key in the ignition in an effort to start the car and get away.
4. The man, who was then on the inside of the open door, was able to reach over and grab the key and pull it out of the ignition. Following this, the various offences alleged by the Crown took place.
5. After the man fled, DD and SS encountered the police. The police drove DD to the police station, while SS drove the car to the station.
6. On September 11, 2003, at about 2:00 a.m., Sgt. White located a set of partial prints on the doorframe above the window of the passenger side front door of the car. The fingertips were pointing down. Only one of the prints was suitable for comparison.
7. The accused was fingerprinted upon his arrest on August 21, 2004. The fingerprint of Mr. Johnson's left index finger was a very strong match for the print taken from the car.
8. Sgt. White expressed the common sense view that in order to leave the prints that he found on the car, Mr. Johnson either had to have approached the car with his arms in the air

and his hands upside down, or to have left the prints from inside the door, placing his arm over the top of the door-frame, with the car door open. The former, of course, is highly unlikely, to say the least, while the latter is plausible, and is consistent with the actions and placement of the man who attacked DD and SS.

91 Once again, this is strong circumstantial evidence of identity. Is there anything in the evidence from which a doubt could arise?

92 The accused says the following:

On September 10th, 2003, DD was the victim of a hands-on sexual assault in Summerlea Park. The Crown relies upon a fingerprint that matched the accused and was located on the door-frame above the window of the passenger side door.

The fingerprint expert, Sgt. Paul White, could not determine when the fingerprint was left or how long it had been there. Sgt. White further testified that at the time of the Fingerprint Investigation Services (FIS) examination of the vehicle, the car had been driven by the complainants to the police station themselves and that the police did not take any precaution so to protect the crime scene from contamination. It was also noted that the window which the accused allegedly tapped on to get the attention of the occupants of the vehicle was not tested for fingerprints and the window was in fact rolled down at the time Sgt. White first saw the vehicle at the police station.

The probative value of fingerprint evidence depends on the totality of the evidence. Fingerprint evidence will almost always afford cogent evidence that the person whose fingerprint is left on the object touched that object. However, the ability of the fingerprint evidence to connect an accused to the crime charged will depend on whether there is other evidence capable of establishing that the accused touched the object at the relevant time and place so as to connect the accused to the crime.

Put differently, the Crown cannot point to any evidence that makes the inference that the accused touched the vehicle in con-

nection with the robbery a more likely inference than the inference that he touched the vehicle at some other time.

Both of the complainants described a black male in his early 20's. The accused was born in 1974 and was 30 years of age at the time of his arrest. [But he was 29 at the time of the attack.]

DD and SS were not able to identify the accused in a Photo Line-Up which took place approximately 11 months after the attack. SS commented that "No, I don't recognize any of them" and those comments were properly noted on the Photo Line-Up Instructions Sheet. No comments were noted on the Photo Line-Up Instructions Sheet signed by DD.

93 A reasonable doubt does not arise in my mind from any of these points.

94 The fact that DD's brother's motor vehicle was left unprotected in a police station visitors' parking lot for a short period of time was undoubtedly an investigative oversight, but it does not in any way undermine the Crown's case. It is impossible to imagine that in that brief time, in the middle of the night, the accused might have entered the police parking lot and somehow left his inverted fingerprint above the right front passenger window.

95 The fact that the window was not itself tested for fingerprints does not in any way undermine the significance of the print that was found.

96 It is of course true, that fingerprint evidence will almost always afford cogent evidence that the person whose fingerprint is left on the object touched that object, but will not on its own establish when the person touched the object, or that the person touched the object in connection with the crime alleged. As counsel for the accused puts it, "the probative value of fingerprint evidence depends on the totality of the evidence." I acknowledge that the fingerprint evidence here does not, standing alone, establish the identity of the man who attacked DD and SS. The real question is, what does the fingerprint tell us when considered together with all of the other circumstances? In this case, quite a lot.

97 Several unusual circumstances give this print special significance. First, the odd placement of the print makes it almost a certainty that Mr. Johnson was standing between the body of the car and the open door when he touched the doorframe above the window. Second, the fact that Mr. Johnson's fingerprint points downward fits the description of the actions of the person who attacked DD and SS perfectly. Third, any other explanation for the print that might be imagined is fanciful at best.

98 The suggestion that Mr. Johnson might have placed the print on the window when he was distributing flyers does not fit the facts. He would not have opened doors of cars and stepped inside when distributing flyers. If he did not do so, then an inverted fingerprint would not have found its way to the doorframe. And even if distributing flyers might have resulted in the accused touching doorframes in this way, it would be an impossible coincidence that out of all of the many cars in Toronto, the accused picked this one to touch.

99 Finally, on this point, I do not find that the evidence of Richard Banton and Jeanette Thompson provide any assistance to the accused. While it is true that collectively, they give me some insight into how flyers are distributed, and a basis to conclude that the accused had distributed flyers, they did not provide any evidentiary foundation for the suggestion that he was distributing flyers at the relevant time. And even if he was, Mr. Banton's evidence makes it clear that placing flyers on passenger windows is the exception, not the rule.

100 To be clear, I do not suggest that the accused has an obligation to explain how his fingerprint came to be on the car door. Nor am I of the view that the fact that, in this case, an explanation offered by the accused failed, adds weight to the Crown's case. I simply am of the view that the fingerprint in this case, viewed in context, is highly inculpatory.

101 Moving to the other points made by the accused, I do not consider the fact that DD and SS thought that a twenty-nine-year-old man was in his early twenties to be of any significance whatever, especially because DD and SS saw the man without his mask only for a few seconds, and in the dark.

102 Similarly their failure to identify the accused in a photo lineup as the man whose face they saw eleven months earlier for a few seconds in the dark is without significance.

103 Finally, the accused argues that the failure of the police to note the comments made by DD during the photo lineup on the Photo Line-Up Instructions sheet has significance. I see none, particularly because the lineup process was videotaped.

104 Considering cumulatively the fact that the attacker positioned himself inside the front passenger door and was able to reach over and grab the key from the ignition from this position, the finding of the fingerprint of the accused on the door frame above the front passenger window and the fact that the fingertip was pointing down, I am satisfied beyond a reasonable doubt that the print was placed on the door frame by the man described by DD and SS, and accordingly I am satisfied beyond a reasonable doubt that the accused was the person who attacked DD and SS. To be clear, I reach these conclusions without reference to the similar fact evidence.

INCIDENT #3: THE DECEMBER 26, 2003 ATTACK ON FL AND OK

105 Absent the similar fact evidence, there is no basis upon which I could be satisfied beyond a reasonable doubt that the accused attacked FL and OK.

INCIDENT #4: THE AUGUST 1, 2004 ATTACK ON SG AND MS

Evidence Implicating the Accused

106 There are four pieces of evidence that have significance in connection with the possible identification of Mr. Johnson as the man who attacked SG and MS. They are:

1. the photo-lineup identification of the accused by SG
2. the follow-up phone call to SG
3. the DNA evidence
4. the evidence of proximity

107 I will consider each of these pieces of evidence in turn.

1. The Photo-Lineup Identification of the Accused by SG

108 The identification of Mr. Johnson by SG was tentative. While her attention was immediately drawn to the photograph of the accused, she was not about to express certainty where she was not sure. She was candid in saying that she was not 100% certain that he was the man at the time, although she was able to explain her choice, in part, on the basis of his eyes and the length of his face. She took a consistent position at trial. She was asked in cross-examination how certain she was that the man in the photograph she selected was the man who sexually assaulted her on a scale of one to ten. She answered that she wasn't 100% certain, but placed her level of certainty at seven or eight out of ten.

109 In my view, this evidence is not without value, and I take it into account in making my decision. At the same time I recognize that this evidence certainly could not establish the identity of the accused standing alone.

110 I note that the defence argues that I should give this evidence no weight, not only because SG was uncertain, but also because:

Detective Samson neglected to notify the complainant prior to the videotaped Photo Line-Up that he knew who the accused was or that he was one of the investigators on the case.

Detective Samson improperly brought attention to the photograph identified by SG, which he knew to be that of the accused, by asking her if she was able to articulate why it stood out.

Detective Wilson did not include any of the utterances made by the complainant in the "Comments" section of the Photo Line-Up Instructions Sheet, and Detective Sansom made no notation on the Line-Up Instructions Sheet or in his notebook of any of the statements made by the complainant, making this an improper Line-Up.

Detective Wilson also neglected to have the complainant sign the photograph that she allegedly selected.

111 These matters have no impact on my view of the weight that should be attached to the identification of the accused by SG. They may reflect certain shortfalls in photo-lineup best practices, but they had absolutely no effect on the fairness of the identification process in the circumstances of this case. In my view, the identification process in this case was entirely fair, and the presentation of the evidence was entirely fair. I will elaborate briefly.

112 With respect to the first point, I note that there is an obvious reason for having officers conduct a photo-lineup who are not involved in the investigation, and who do not know if the suspect is included in the lineup or, if the suspect is in the line-up, who do not know where the suspect is placed, and also for having the officers communicate this to the witness. Conducting a lineup in this way avoids contamination of the identification by removing any possibility of an officer suggesting, or any possibility of the witness thinking the officer is suggesting, who should be identified. Fortunately, in this case, I have had the luxury of reviewing the videotape of the identification process more than once. It is absolutely clear to me that at no time did Detective Sansom suggest who should be selected by word, action or expression. What is more, I saw nothing that could reasonably be construed by the witness to be such a suggestion.

113 With respect to the second point, the defence suggests that Detective Sansom did in fact improperly bring the photograph that he knew to be the photograph of the accused to the attention of SG, by asking her if she was able to articulate why it stood out. This, says the defence, was an indication to SG that that the person in the photograph was the person suspected by the police. I cannot accept this argument. Detective Sansom asked this question only after SG had clearly focussed on the particular photograph, examined it at length twice, stated that she couldn't be 100% sure, but

that "the only one that stands out is this one," and then examined the deck a third time and stopped again at this photograph. Clearly Detective Sansom did not bring the photograph to SG's attention; she brought it to his attention. Significantly, her level of confidence in her selection of the photograph of the accused did not increase after Detective Sansom's question. In my view, it was an appropriate investigative question to ask, and was asked at an appropriate time.

114 With respect to third and fourth points, the failure of the officers to record SG's comments during the lineup on the instruction sheet or in their notes is irrelevant, because the comments were in fact recorded, on videotape. Whether the officers had written the comments down or not, the videotape recording was far more helpful to the Court than their notes could ever be.

2. The Follow-Up Phone Call to SG

115 In considering this piece of evidence, it is helpful to recall the context and the sequence:

1. In The perpetrator in the August 1, 2004 attack on SG and MS was a male with a Jamaican accent.
2. The perpetrator took MS's wallet from him before he removed him from the vehicle.
3. The wallet had MS's business card in it, which had MS's name and business telephone number on it, as well as the name of MS's employer - a plaster and cement company.
4. After he sexually assaulted her, the perpetrator asked SG for her phone number. She gave him her cell number.
5. The perpetrator then removed MS's business card from his wallet, and wrote SG's first name and cell number on it.
6. Later that day, SG's brother-in-law, PC, took a call from an unknown number on SG's cell phone. A male voice with a Jamaican accent asked to speak to SG.
7. When PC said that SG was unavailable, the man said that he was Jonapan or Jonathan.
8. When PC asked where he knew SG from, he said from a plaster and cement company.
9. When PC asked the man to leave a call back number, the man gave MS's first name and business number to him.

116 Based on this evidence, it is beyond dispute that the man who called SG and spoke to her brother-in-law is the man who had attacked her in the park. His knowledge of her cell phone number, his fulfillment of the attacker's promise to call and his

knowledge of MS's name, employment and phone number can only be explained if the caller is the attacker. But this evidence, without more, does not implicate the accused in the offence. There is nothing in this evidence standing alone that suggests that the accused is the attacker/caller.

2. The DNA Evidence

117 I was impressed with the evidence of both DNA experts. In my view neither of them were advocates for the side that called them; each attempted to provide me with assistance in a fair and dispassionate manner. There was no disagreement between them concerning either profiling or interpretation, and I am able to accept the evidence that each of them gave. The only difference of significance in their evidence is the fact that Dr. Chahal was able to provide a statistical interpretation of his DNA testing, as well as the combined results of their DNA testing.

118 As I have already noted, he testified that the male profile generated from SG's underwear is a relatively rare one, but that it matched Mr. Johnson's profile. More precisely, he said that 99.86% of black males are excluded as the donor of the male sample discovered in SG's underwear at a 95% level of certainty. An even higher proportion of males from all major ethnic groups are excluded.

119 This evidence, as I understand it, makes it unlikely that someone other than Mr. Johnson or one of his paternal relatives was the donor of the sperm found in SG's underwear, or, put another way, makes it likely that he was the donor. If he was the donor, then he was certainly the attacker. But I do not equate this significant level of probability, on its own, with certainty.

120 I note that the defence made two points in argument that were intended to minimize the effect of the DNA evidence, namely:

1. As it happens, this particular occurrence took place at the same time as the Caribana Festival and as a result of this festival there would be a much higher than normal concentration of Caribbean males at this particular time in the City of Toronto as this celebration attracts participants from around the world. Ms. Brutzki however, did not disclose or volunteer any evidence of how often the same profile would appear in unrelated individuals within the community.
2. Ms. Brutzki, when asked about the possibility of exposing SG's underwear to the secondary transfer of DNA materials while she was sitting in a Bridal Suite and while she was wearing a short skirt, answered "yes it is possible". It was

the defence position that all of the locations that SG was present at after the sexual assault but before the sexual assault kit was done, namely the Bridal Suite, two hospitals, a police station interview room and a police vehicle are all potential sources of secondary transfer of DNA materials. It is the Defence position that all of the stains found on Ms. SG's clothing are the result of secondary transfer of DNA material and should not be considered as evidence against the accused.

121 In my view, both of these points are without significance. Regarding the first point, I note that there is no evidence of the extent to which the male black population of Toronto increases during the Caribana festival, nor is there evidence of the statistical significance of the increase. Assuming, however, that the increase is significant enough to affect the probability that someone other than the accused might have been the donor of the male DNA in SG's underwear, even simple arithmetic tells us that the increase is insignificant. In any event, it is highly unlikely that one of these visitors was the man that attacked SG in the park.

122 Regarding the second point, the evidence is unclear as to where exactly MS and SG went before going to the hospital. SG and MS both testified that they spent a short period of time in a hall owned by a friend of MS. I recorded no evidence from either of them that SG sat in a bridal suite. SG said that they went to an office in the hall. SG said that they went to a suite. Neither of them said that SG was sitting. Significantly, there was no cross-examination of SG directed at clarifying where she was, whether she sat, or what she sat on. Even if SG did sit in a bridal suite, the likelihood that during this brief visit, she sat on a surface that had semen on it, that she sat in such a manner that there was direct contact between her underwear and the semen, and that, as a result, male DNA was transferred to her underwear, is highly unlikely and completely speculative. The possibility that the male DNA came from any of two hospitals, a police station interview room and a police vehicle is, if anything, even more speculative and less likely. I did not take these entirely speculative and groundless possibilities into account when considering the DNA evidence.

3. The Evidence of Proximity and Opportunity

123 Jeanette Thompson and Naomi Wilson were called by the defence primarily as alibi witnesses. The net effect of their evidence, however, was to establish that the accused escorted Ms. Thompson to her door, and then left her residence, at approximately 12:30 a.m. on August 1, 2004. At around the same time, SG and MS parked in the parking lot at Summerlea Park. Their attacker began tapping on their window a few minutes later. Ms. Thompson's residence, according to her, was about 10 minutes

away from the Park, and the accused had taken her to the Park on other occasions. He knew the way. An examination of the map suggests that the time that it would take to drive to the Park might be even less than 10 minutes. While none of these times can be considered precise, this evidence places the accused very near to the scene of the crime, which took place in a neighbourhood he knew and a park he had visited, very close to the time of the crime.

Evidence that Might Raise a Reasonable Doubt

124 Is there anything more in the evidence from which doubt could arise?

125 In addition to the items of evidence referred to by the accused that I have already discussed, the accused relies on three additional pieces of evidence that tend to point away from Mr. Johnson, and from which a reasonable doubt might arise. They are:

1. the photo-lineup identification of a different man by MS
2. the evidence of MS that the attacker had earrings, coupled with the evidence of witnesses who had not seen him with earrings
3. the evidence that Mr. Johnson dresses "formally", and was wearing clothing that differed from the clothing worn by the attacker

126 I will consider each of these in turn.

1. The Photo-Lineup Identification of a Different Man by MS

127 The identification by one eyewitness of a different person than another eyewitness always gives pause to a trier of fact. In this case, I do not dismiss the evidence from consideration, but at the same time I find it to be of no great significance. MS did see the perpetrator with his face unmasked for a few moments at the outset of the attack. During part of that time, the attacker was very close to MS, walking beside him, but it was dark, and the attacker was walking a bit to the front of MS, so that he could not really see the attacker's face. MS also saw the attacker briefly at the end of the incident, from a distance. His opportunity to see the face of the accused was much briefer and less intimate than that of SG. It is quite conceivable that he erred in identifying the attacker.

2. The Evidence of MS that the Attacker Had Earrings, Coupled with the Evidence of Witnesses Who Had Not Seen Him with Earrings

128 MS recalled that the perpetrator wore earrings. SG did not. When asked if he was wearing jewellery, she said that she didn't remember it. SG was in very close

proximity to her attacker. She was forced to perform oral sex on him, and to have intercourse with him. She was an exceptional witness, with a good memory and an eye for detail. Had he been wearing earrings, I am certain she would recall it. I am of the view that on this point, MS is in error.

3. The Evidence that Mr. Johnson Usually Dressed "Formally", and Was Wearing Clothing that Differed from the Clothing Worn by the Attacker

129 It is the defence position that even if the accused had the opportunity to be at the Summerlea Park at the time of the occurrence, he would have had to have changed his clothing to an all white ensemble and either pierced his ears or put on fake earrings en route to Summerlea Park in order to commit this attack. This, of course, is an "unlikely" scenario.

130 I have already considered the issue of the earrings, and concluded that the evidence that the attacker was wearing earrings was erroneous. I view the evidence concerning the all white ensemble differently.

131 SG and MS gave similar descriptions of the attacker's apparel. SG said that the man was wearing a white sweater and a white fleece sweatshirt with a hood. MS said that the man was wearing all white, and had a hooded sweater in.

132 On the other hand, Jeanette Thompson recalled that the accused was wearing a printed shirt that evening, and dress pants, and Naomi Wilson recalled that he was wearing "cream pants or khakis or something" and a cream "polo top-like" t-shirt with green leaves in a camoflounge pattern. Ms. Thompson was asked if she ever knew Mr. Johnson to wear sweat suits. She replied, "He mostly wore dress-up clothes."

133 I find it significant that Ms. Thompson and Ms. Wilson, who are friends, both recalled Mr. Johnson's clothing on the night of July 31, 2004, and have such similar recollections of it, down to the printed shirt, despite the fact that the evening was uneventful and Mr. Johnson's clothing did not take on any significance until quite some time later. The accused was not even arrested until three weeks after the Caribana parade. It is not without significance that when the police arrested Mr. Johnson, he was wearing white running shoes. When they searched his car, they found a cap and a T-shirt. And when they searched the two bedrooms of his residence, they found three toques, a baseball cap, a dew rag, track pants with a bandana in the pocket, a track-suit, two pairs of jeans, and a sweatshirt. I do not know which, if any of the items in the residence belonged to the accused, but the overall picture is not one of a man who "mostly wore dress-up clothes." I place no reliance on the recollections of Ms. Thompson and Ms. Wilson about Mr. Johnson's clothing that evening.

The Cumulative Effect of the Evidence Relating To Incident #4

134 When I consider the photo lineup evidence of SG, the DNA evidence and the evidence of proximity together, taking into consideration, at the same time, the photo lineup evidence of MS and the other frailties in the Crown's case raised by the defence, I find myself virtually certain that the accused was the assailant, but not certain beyond a reasonable doubt.

MY ANALYSIS OF THE EVIDENCE TAKING INTO CONSIDERATION THE SIMILAR FACT EVIDENCE

135 I have concluded that I am satisfied beyond a reasonable that the accused was the attacker in each of incident one and two without reference to the similar fact evidence. I will now go on to consider the effect of the similar fact evidence, in accordance with the pooling approach explained by Cory J. in *Arp*.

136 Following this approach, I must first examine the similarities between the counts charged in the indictment and decide, as a preliminary matter, whether the offences were likely committed by one person. Only if I am satisfied on a balance of probabilities that the offences were committed by one person may I consider the evidence of each count in determining whether the accused committed the other offences.

137 In a trial by a judge without a jury, the answer to this question will usually be obvious. In this case, in my ruling on the admissibility of similar fact evidence, I concluded that there is such a degree of similarity among the four sets of acts that it is likely that they were committed by the same person, and so the similar fact evidence had sufficient probative force to outweigh its prejudicial effect and could be admitted. This was only a live issue with respect to the third incident: the attack on FL and OK. I took some time to explain my thinking concerning that incident, and will not repeat it here.

138 I will, however, make one comment. It might appear from the language I used in my similar fact ruling that I was unaware that the third incident took place in a different parking lot than the other three incidents. I ought to have mentioned the difference because it might appear to be a dissimilarity that bears on the admissibility of that incident as similar fact evidence. I did not do so because the defence did not raise it as a difference of significance. Presumably they did not raise it for the same reason that I did not consider it: the two parking lots are so close together that a person intent on the conduct in issue here would find his victims as easily in either lot. It is a difference that is of no moment.

139 Having concluded on a balance of probabilities that the four sets of offences were committed by one person, I will go on to consider the evidence of each incident

in determining whether the accused committed the offences that took place in the other incidents. I will leave incident three, which is wholly dependent on the similar fact evidence for proof of identity, to the last.

INCIDENT #1 AND #2

140 Having already found that the accused was the attacker in each of incident one and two, I need take little time in considering the effect of the similar fact evidence. It is, I think, sufficient to say that if I had had a reasonable doubt about either of these incidents, the similar fact evidence would have eliminated that doubt. But I will say a bit more.

141 It is apparent that I consider the evidence against the accused in respect of the first incident overwhelming, without consideration of the similar fact evidence. That certainty is helpful in considering the second incident. The similarities between those two incidents alone confirm me in my view that the accused was the attacker in the second incident.

INCIDENT #4

142 As I have indicated, on the basis of the evidence relating to incident four alone, I am virtually certain that the accused was the attacker. The similar fact evidence easily eliminates any tiny doubt I may have. Incident four has more similarities to the other counts than any of the others. But in addition, there is a signature similarity between incident one and incident four that makes it an absolute certainty that the same person was the attacker in both incidents. And, once again, since I am certain beyond a reasonable doubt that the accused was the attacker in incident one, I am equally certain that he was the attacker in incident four.

143 The signature similarity I have reference to was described in my similar fact ruling. I stated that I viewed the request for a phone number from the victim, and the follow-up phone calls to the victim seen in the CR and AA incident (incident one) and the SG and MS incident (incident four) as amounting to a unique trademark or signature. I remain of that view.

144 But there is a second, related similarity that also amounts to a signature. In incident one, when the attacker asked CR for her phone number, he told her that his name was Jonathan, which of course was not true. In incident four, when the attacker spoke to the brother-in-law of SG on the telephone, he told him that his name was Jonathan or Jonapan Davidson. To me, this makes it absolutely certain that incident one and incident four involved the same attacker. The notion that there were, in two incidents even fifteen months apart, two armed young black men with Jamaican accents who approached young couples parked in cars in a parking lot at Summerlea Park in Toronto late at night, who opened the car door, demanded money and bank

cards, took control of the motor vehicle, threatened the young couple and separated them, leaving the male free to contact the authorities, demanded oral sex of the young woman, attempted to or did sexually assault her and ultimately released her, took the cell phone number of the young woman and called her later that day, and, on top of all of that, who both identified themselves with the same or a similar name, is inconceivable.

INCIDENT #3

145 In view of my certainty that incidents one, two and four were committed by the accused, and in view of the great many significant similarities between incident three and some or all of those incidents, which had already satisfied me that the attacker in all four incidents was the same person, and despite some dissimilarities, I am satisfied beyond a reasonable doubt that the accused was also the attacker in incident three. I do not propose to review the similarities again. It is worth noting a couple of them, however, that relate to incident three and only one other incident, and so are uniquely helpful with respect to incident three. I have in mind the fact that in incident three and incident four, when leaving the parking lot, after experiencing some difficulty with shifting the gears of a manual transmission, the attacker asked the female victim if she could drive; and the fact that in incident one and incident three, the female victim, quite astonishingly, was able to talk the attacker out of sexually assaulting her. These two similarities reassure me that I am correct in concluding that the Crown has established that the accused was the attacker in incident three.

(2) OTHER ELEMENTS OF THE OFFENCES

146 As I noted earlier, identification was the only issue raised by the defence throughout the trial, including in closing argument. But this does not absolve me of the responsibility to consider whether the evidence satisfies me beyond a reasonable doubt that the various elements of the offences in addition to identification have been established. I have done so, and am satisfied that all other elements of the offences have been established beyond a reasonable doubt without the need for further discussion, save for the seven counts alleging the use of an imitation firearm or a weapon while committing the offence of sexual assault.

147 In counts 5 and 6, the accused is charged, respectively, with using a weapon in committing a sexual assault on CR, and using an imitation firearm in committing a sexual assault. The Crown advises me that the weapon in question in count 5, and the imitation firearm in question in count 6, are one and the same: the gun that CR testified that the accused had with him throughout the attack. Clearly, if findings of guilt were entered on these two counts, they would attract the application of *R. v. Kineapple* (1974), 15 C.C.C. (2d) 524 (S.C.C.).

148 It will be remembered that in the first incident, the accused appeared at the driver's door of AA's motor vehicle wearing a bandana over his face, put a small silver gun to CR's chest, demanded money, directed CR to the back seat, and ordered AA out of the car, intending to drive to a bank with CR. When CR convinced him that there was no money to be had from the bank, he drove to another area of the park and told CR several times that if there was no money, she had to give him "a blow job." Ultimately, she talked him out of it.

149 In these circumstances, how can it be said that the accused used a weapon or firearm in committing a sexual assault? What did he do that could amount to a sexual assault? When I raised this question with Crown counsel in argument, she directed me to the definition of assault in s. 265(1) of the *Criminal Code*, which, of course, applies to sexual assault with a weapon or firearm by virtue of s.265(2). Section 265(1)(b) provides that a person commits an assault when:

he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes another person to believe upon reasonable grounds that he has, present ability to effect his purpose.

150 I have no doubt that the accused's demand for a "blow job" made to CR, while he was armed with a gun and was forcing her to accompany him alone in AA's vehicle, and having already put the gun to CR's chest when he demanded money, amounted to a threat by the accused to apply force to CR, having a present ability to effect his purpose. But that would be a threat by words. The section requires that the threat be by act or gesture. Do words fall within the meaning of "acts or gestures?"

151 The cases suggest not. In *R. v. Byrne*, [1968] 3 C.C.C. 179 (B.C.C.A.), the Court held that there was no assault in circumstances where a man with a coat draped over his arm but no gun visible repeated to a bank teller several times, "I've got a gun, give me all your money or I'll shoot." In order to constitute an assault there must be a threatening act or gesture. Mere words are not sufficient. To the same effect, see *R. v. Cadden* (1989), 48 C.C.C. (3d) 122 (B.C.C.A.).

152 But this case is different than *Byrne* or *Cadden*. This is not a case of mere words. In this case, the accused made his demand for a "blow job" while he had a gun in his hand, in a confined space into which he had forced the victim. In my view, the holding of the gun while making the demand, at least in these circumstances, remembering how the accused had already used the gun in relation to CR, amounts to a threat by act or gesture. I note that in *Cadden*, the Court adopted the view of Lord Goddard in *R. v. Rolfe* (1952), 36 Cr. App. R. 4 (K.B.) that where threatening behaviour (there the accused walked towards a woman with his "person" exposed) in a con-

fined space was accompanied by words that amounted to an indecent suggestion, there is an assault. That is not unlike what happened here. Mr. Johnson engaged in threatening behaviour (holding a gun) in a confined space, accompanied by words amounting not merely to an indecent suggestion, but to an indecent demand. In my view, in this case as in *Rolfe*, the accused did something that, in the circumstances, amounted to a threatening act. Accordingly, in the circumstances here, he used a weapon, which was also an imitation firearm, in committing a sexual assault.

153 It is worth noting that the year before he decided *Rolfe*, Lord Goddard had decided, in *Fairclough v. Whipp*, [1951] 2 All E.R. 834 (K.B.), that where an accused does no more than invite a complainant to commit a sexual act upon him, the accused is not guilty of assault. That decision was applied in *Cadden*, as it had been in an earlier decision of the Ontario Court of appeal in *R. v. Baney* (1972), 6 C.C.C. (2d) 75. The decision in *Rolfe* is consistent with *Fairclough v. Whipp*. Clearly Lord Goddard was skilled at making the careful distinctions that must be made in this area of the criminal law, and is a helpful authority on this issue.

154 In count 11, the accused is charged with using a weapon, namely a knife, in committing a sexual assault on DD. In this instance, however, the outcome is obvious. The accused actually committed a sexual assault on DD, without reference to the extended definition of assault in 265(1)(b) of the *Criminal Code*, and made use of the knife in compelling DD to cooperate. It will be recalled that when DD initially refused to give him a "blow job," he told DD to do it or he would stab her, and then came at DD as if to stab her.

155 In counts 19 and 20, the accused is charged with using a weapon in committing a sexual assault on FL, and using an imitation firearm in committing a sexual assault respectively. These counts are similar to counts 5 and 6, in the sense that the extended definition of assault must be relied on, but here the accused did much more than hold the weapon while demanding oral sex. On this occasion the accused ordered FL to get into the passenger seat while holding a gun. She refused, telling him that she was scared of him. The man put the gun away, pulled out an eight inch knife with a green handle and a thin blade, waved at FL to come into the front, and said, "All I want is a really good blow job." In other words, the gun was put away before the demand for a "blow job" was made, while the knife was actually waved at FL when the demand was made. In these circumstances, while it is a close call, I am not satisfied beyond a reasonable doubt that the accused used the gun in committing the sexual assault, but I am satisfied beyond a reasonable doubt that he used the knife in committing the sexual assault. I find him guilty of count 19, but not guilty of count 20.

156 Finally, in counts 28 and 29, the accused is charged, respectively, with using a weapon in committing a sexual assault on SG, and using an imitation firearm in committing a sexual assault. It will be remembered that in this incident, after holding a gun to SG's neck, the accused forced her both to perform oral sex on him, and have intercourse with him. In those circumstances, there is no question that he is guilty of both offences, subject to the application of *R. v. Kineapple, supra*.

DISPOSITION

157 Accordingly, subject to the application of *R. v. Kineapple, supra*, I find the accused guilty of all thirty counts in the indictment except count 20.

M.R. DAMBROT J.

1 I note that MS testified that they arrived around 11:30 p.m., but I found that SG's evidence about the events leading up to their arrival was more detailed and more reliable. I accept her evidence on this point.