

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Hay, 2013 SCC 61, [2013] 3 S.C.R. 694 | **Date:** 20131108  **Docket:** 33536 |

**Between:**

**Leighton Hay**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 78)  **Concurring Reasons:**  (paras. 79 to 102) | Rothstein J. (McLachlin C.J. and LeBel, Abella, Cromwell and Wagner JJ. concurring)  Fish J. |

R. *v.* Hay, 2013 SCC 61, [2013] 3 S.C.R. 694

Leighton Hay Appellant

v.

Her Majesty The Queen Respondent

**Indexed as: R. *v.* Hay**

2013 SCC 61

File No.: 33536.

2013:  April 23; 2013:  November 8.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Wagner JJ.

on appeal from the court of appeal for ontario

*Criminal law — Charge to jury — Eyewitness evidence — Whether trial judge instructed jury that it could convict accused based on eyewitness evidence alone — If so, whether such an instruction would constitute an error.*

*Criminal law — Evidence — Fresh evidence — Hair clipping evidence relied upon by Crown to explain accused’s appearance at time of arrest as well as after‑the‑fact change of appearance — New forensic evidence reports and testimony to the effect that most hair clippings did not originate from scalp — Whether accused’s motion to adduce fresh evidence should be granted.*

In the early morning of July 6, 2002, two men, one wearing a blue/green shirt, shot and killed C.M. in a Toronto nightclub. E was seen leaving the club in a car registered to the appellant H’s mother, with whom H lived. Multiple witnesses were able to confidently identify E as the shooter. Given H’s connection to the residence and a database lookup that revealed he had a prior firearm conviction, the police considered him a suspect as well. L.M., who witnessed the shooting, was shown a lineup which included one photo of H that was taken roughly two years earlier. When asked about the identity of the shooter in the blue/green shirt, she selected H’s photo. Three weeks after the shooting, L.M. participated in a second photo lineup which contained the photo of H taken on the day of his arrest. L.M. did not select any photo from this sequence. E and H were subsequently charged with the first degree murder of C.M. and the attempted murder of his brother.

The Crown’s case against H consisted of testimony from L.M. and four pieces of physical evidence: bullets found in a sock in a laundry hamper in H’s bedroom; a white T‑shirt in the same hamper with one granule of gunshot residue on it; hair clippings from a newspaper in the garbage of the bathroom nearest to H’s bedroom; and hair clippings in an electric razor found in H’s nightstand. The Crown’s theory was that H shaved his head upon returning home from the shooting. This was necessary to explain the discrepancy between the eyewitness testimony, which indicated that the second shooter had dreadlocks that were two inches or longer, and the length of H’s hair when he was arrested, which was very short. It was also used to explain why L.M. was not able to identify H based on the arrest photo shown to her three weeks after the shooting. The Crown also suggested that the haircut represented an after‑the‑fact attempt by H to change his appearance to cover up his involvement in the shooting. The jury found E and H guilty of first degree murder of C.M. and attempted murder of his brother. In the Court of Appeal, H challenged his conviction on the bases that the jury’s verdict was unreasonable and that the trial judge erred in instructing the jury on eyewitness identification. The court found that the trial judge did not instruct the jury that it could convict on L.M.’s testimony alone and held that the jury’s verdict was not unreasonable because, despite weaknesses in L.M.’s eyewitness testimony, there was other confirmatory evidence presented to the jury.

While the application for leave to appeal was pending before this Court, H filed a motion to compel the Crown to release hair clipping evidence for forensic testing. H sought to forensically examine the hair clippings to determine from what part of the body the clippings came. This Court allowed the motion. H subsequently filed a motion to adduce the reports and testimony of experts who conducted the forensic examination.

*Held*: The appeal should be allowed, the motion to adduce fresh evidence should be granted and the matter should be remanded for retrial.

*Per* McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell and Wagner JJ.: It would have been an error to instruct the jury that it could convict H based on L.M.’s testimony alone. Where the Crown relies on an eyewitness identification, the trial judge has a duty to caution the jury regarding the well‑recognized frailties of identification evidence. However, a properly instructed jury may conclude, notwithstanding the frailties of eyewitness identification, that the eyewitness’ testimony is reliable and may enter a conviction on those grounds. This may be so even where the Crown has relied on only a single eyewitness. However, where the Crown’s case consists solely of eyewitness testimony that would necessarily leave reasonable doubt in the mind of a reasonable juror, the trial judge must direct an acquittal upon a motion for directed verdict. L.M.’s testimony, in and of itself, would not have permitted a reasonable juror to conclude without reasonable doubt that H was one of the shooters and therefore, it would have been an error for the trial judge to instruct the jury that it could convict H based solely on L.M.’s evidence. While L.M.’s testimony on its own could not have supported an inference of guilt beyond a reasonable doubt, the trial judge’s instruction, read as a whole, did not instruct the jury that it could convict H based solely on her testimony. Rather, in reviewing L.M.’s testimony, the trial judge described each of the specific problems with her identification and instructed the jury that it must look to confirmatory evidence. The trial judge was not circumscribed to instruct the jury as to the sufficiency of L.M.’s testimony using any particular words and he must be afforded some latitude in determining the best way to convey to the jury the relevant legal principles and how they apply to the evidence adduced at trial. The trial judge put great care into his jury charge and, in particular, into the instructions as to eyewitness evidence. L.M.’s testimony in conjunction with the confirmatory evidence was sufficient to support the conclusion that H was guilty beyond a reasonable doubt and, thus, there was no error in the jury charge.

The motion to adduce fresh evidence should be granted and a new trial should be ordered. H’s fresh evidence consists of affidavits and cross‑examinations of two forensic experts, in which each expert provides an opinion as to the percentage of hairs in the newspaper and the razor that came from H’s scalp, as opposed to his face or trunk. The experts agreed that the samples taken were predominantly facial hairs. The Crown’s experts conducted a paper review and testified that there was no evidence to support the proposition that the hair clippings represented a head shave. The overriding consideration upon a motion to adduce fresh evidence is “in the interests of justice” and this requires consideration of the principles enunciated in *Palmer v. The Queen*. The Crown has conceded that the expert evidence H seeks to adduce is credible. Mere lack of knowledge on the part of H’s trial counsel without any indication that he inquired into the possibility of obtaining and presenting the evidence is a factor against admitting the evidence for the first time on appeal. However, in view of the fact that this is a criminal case, involving charges of the most serious nature, the evidence should not be excluded solely on the basis of a lack of diligence. It cannot reasonably be disputed that H’s fresh evidence bears on a decisive issue. The evidence of hair clippings was used to explain the discrepancy between the eyewitness description of the shooter and H’s actual appearance at the time of arrest. This was also how the Crown explained L.M.’s inability to identify H based on his arrest photo. The hair clippings were also adduced as evidence that H had attempted an after‑the‑fact change of his appearance. The evidence was directly relevant to whether H was in fact the shooter in the blue/green shirt. The fresh evidence that H seeks to adduce could reasonably be expected to have affected the jury’s verdict. The Crown relied heavily on the haircut evidence at trial. The significance of the hair clippings was also reflected in the jury charge. The Court of Appeal too recognized that the hair clipping evidence was significant to the Crown’s case and noted that the hair clippings allowed for a powerful inference of guilt. Given the significance of the haircut to the Crown’s case, the fresh evidence could reasonably be expected to have affected the result. For these reasons, H’s motion to adduce fresh evidence should be granted. The appropriate remedy here is a new trial.

*Per* Fish J.: There is agreement that the appellant’s motion to adduce fresh evidence should be granted, that the appeal should be allowed and that a new trial should be ordered. However, the trial judge made a fatal error by instructing the jury that it could convict the appellant on the evidence of L.M. alone.

Crown counsel asked the judge to instruct the jury that they could convict the appellant on the evidence of one eyewitness alone. Counsel made clear that he was referring specifically to the testimony of L.M. In his closing address, Crown counsel proceeded on the understanding that the trial judge would charge the jury to that effect. At no point in his charge did the trial judge correct these assertions by the Crown. Pursuant to the Crown’s closing argument, the jury would thus have assumed that it was entitled to convict the appellant based solely on L.M.’s eyewitness identification. This misapprehension of the law was reinforced by the trial judge in his instructions to the jury. Although the trial judge urged caution, he informed the jury in unmistakable terms that the testimony of one eyewitness could properly ground a conviction. The jury would therefore have understood that this rule applied unless instructed otherwise for a particular witness. No such instruction was ever given. On the contrary, the trial judge explained that identification evidence is stronger if the accused was previously known to the witness. This was indisputably a direct reference to L.M.’s evidence implicating the appellant. The trial judge’s subsequent instructions regarding L.M.’s evidence further reinforced Crown counsel’s uncorrected statement to the jury that they could convict the appellant on her photo identification alone. It is not possible in light of this record to conclude that the trial judge did not instruct the jury that it could convict the appellant on the evidence of L.M. alone.

**Cases Cited**

By Rothstein J.

**Applied:** *Palmer v. The Queen*, [1980] 1 S.C.R. 759; **referred to:**  *R. v. Hay*, 2010 SCC 54, [2010] 3 S.C.R. 206; *R. v. Mezzo*, [1986] 1 S.C.R. 802; *R. v. Turnbull*, [1976] 3 All E.R. 549; *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445; *R. v. Canning*, [1986] 1 S.C.R. 991; *R. v. Nikolovski*, [1996] 3 S.C.R. 1197; *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828; *R. v. Reitsma*, [1998] 1 S.C.R. 769, rev’g (1997), 97 B.C.A.C. 303; *R. v. Zurowski*, 2004 SCC 72, [2004] 3 S.C.R. 509; *United States of America v. Shephard*, [1977] 2 S.C.R. 1067; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26; *R. v. Avetysan*, 2000 SCC 56, [2000] 2 S.C.R. 745; *R. v. Candir*, 2009 ONCA 915, 257 O.A.C. 119; *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402; *McMartin v. The Queen*, [1964] S.C.R. 484; *R. v. Stolar*, [1988] 1 S.C.R. 480.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1970, c. C‑34, s. 610.

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 683.

APPEAL from a judgment of the Ontario Court of Appeal (Moldaver, Blair and MacFarland JJ.A.), 2009 ONCA 398, 249 O.A.C. 24, [2009] O.J. No. 1904 (QL), 2009 CarswellOnt 2518, affirming the accused’s convictions for first degree murder and attempted murder entered by McCombs J. Appeal allowed**.**

*James Lockyer*, *Philip Campbell* and *Joanne McLean*, for the appellant.

*Susan L. Reid*, for the respondent.

The judgment of McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell and Wagner JJ. was delivered by

Rothstein J. —

1. Introduction
2. Leighton Hay was convicted of first degree murder and attempted murder for a shooting that took place in a Toronto nightclub. He appeals his conviction on two grounds. First, he argues that the trial judge erred by instructing the jury that he could be convicted based solely on the testimony of the one eyewitness who implicated him at trial. Second, he has filed a motion in this Court to adduce fresh evidence, which, he says, warrants acquittal or a new trial.
3. I agree with the Court of Appeal that the trial judge did not err in instructing the jury. The eyewitness testimony against Mr. Hay on its own could not have supported an inference of guilt beyond a reasonable doubt; however, the trial judge’s instruction, read as a whole, did not instruct the jury that it could convict Mr. Hay based solely on her testimony.
4. However, Mr. Hay’s motion to adduce fresh evidence should be granted. He has asked this Court to consider evidence from two experts who have forensically examined hair clipping exhibits that the Crown relied on at trial to establish that Mr. Hay shaved his head after the shooting. The evidence was used to explain the discrepancy between the eyewitness description of the shooter and Mr. Hay’s actual appearance at the time of arrest. It was also adduced as evidence that Mr. Hay had attempted an after-the-fact change of his appearance. The fresh evidence indicates that the hair clippings did not originate from Mr. Hay’s scalp. In my view, Mr. Hay has satisfied the standard for adducing fresh evidence articulated in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775, and the appropriate remedy is a new trial.
5. Factual Background
6. In the early morning of July 6, 2002, two men shot and killed Collin Moore in a Toronto nightclub. The men also shot at Collin’s brother, Roger Moore, who escaped with a graze to his forehead.
7. The evidence at trial established that Collin was hosting a monthly fundraising event at the nightclub. Sometime after midnight, three or four men arrived at the club and refused to pay the entry fee. Two of the intruders were Gary Eunick, who was seen wearing an orange vest, and his brother, both of whom were known by multiple witnesses at the club. The intruders pushed their way into the lobby of the club. When Collin and Roger intervened, a fight broke out in which beer bottles were broken and the glass door of the club was smashed.
8. Following the fight in the lobby, Collin and Roger retreated to the nightclub’s kitchen. The intruders exited the club, at which point Mr. Eunick was seen fidgeting with a gun in the parking lot. Minutes later, he and two of the other intruders, one wearing a blue/green shirt, returned to the nightclub. Mr. Eunick was armed with a semi-automatic handgun and the man in the blue/green shirt carried a long barrel revolver. Mr. Eunick and the man in the blue/green shirt entered the kitchen, where they shot Collin eight times, killing him. They also shot at Roger, who was grazed by a bullet and only slightly wounded.
9. The owner of the nightclub saw Mr. Eunick leaving the club in a green Honda and recorded the licence plate number. The car was registered to Lydia Hay, who resided at 6927 Chigwel Court, with her daughter Lisa Hay, who was Gary Eunick’s girlfriend, and her son Leighton Hay, the appellant. The police arrived at the Chigwel residence within approximately half an hour of the shooting, where they found the green Honda in the driveway. They surveilled the residence for approximately the next 10 hours.
10. While the police were surveilling the home, several witnesses from the nightclub were shown photo lineups at the police station. Multiple witnesses were able to confidently identify Gary Eunick as the shooter in an orange vest with the semi-automatic gun. Given Mr. Hay’s connection to the Chigwel residence and a database lookup that revealed he had a prior firearm conviction, the police considered him a suspect. Leisa Maillard, an acquaintance of Collin Moore who was in the kitchen at the time the intruders entered to shoot him, was shown a lineup containing a photo of Mr. Hay. When asked about the identity of the shooter in the blue/green shirt, she selected Mr. Hay’s photo. The details of that selection are discussed in more detail later.
11. Neither party proffered evidence as to whether Mr. Hay’s photo was included in the lineups shown to witnesses other than Ms. Maillard.
12. At approximately noon, following the shooting, Lisa Hay, Mr. Hay’s sister, emerged from the Chigwel residence and appeared as though she was prepared to clean the green Honda. At this point, the police moved in, secured the residence, and arrested Gary Eunick and Leighton Hay. The men were subsequently charged with the first degree murder of Collin Moore and the attempted murder of Roger Moore.
13. Procedural History
    1. Trial Proceedings
14. Mr. Eunick and Mr. Hay were tried together on both counts. The Crown’s theory at trial was that Mr. Eunick and Mr. Hay were the two men who entered the kitchen and shot at the Moore brothers.
15. The identity of Mr. Eunick as one of the shooters was never in serious doubt. Mr. Eunick was identified by multiple witnesses at the nightclub, including Collin Moore’s wife, who knew him, and the club owner, who named him during his initial 911 call that night. The physical evidence connecting Mr. Eunick to the shooting was also overwhelming. The Crown introduced evidence of a palm print and blood found on the front door of the nightclub that matched Mr. Eunick. It also introduced evidence of several items found scattered around the Chigwel residence that implicated Mr. Eunick, including: a shopping bag recovered from the back of the house containing the orange vest he wore at the club, which had Mr. Eunick’s blood and gunshot granules on it; a backpack containing a white T-shirt and blue jeans, which had Mr. Eunick’s blood and gunshot residue on them; shoes in Lisa Hay’s closet, which had glass shards in the treads from the broken door at the club; bullets found in a sock in a hamper at the entrance to Mr. Hay’s bedroom, one of which may have been cycled through (i.e. was at some point loaded in the chamber of the semi-automatic handgun fired by Mr. Eunick); and Mr. Eunick’s blood in the front passenger area of the Honda Civic.
16. The Crown’s theory was that Mr. Hay was the second shooter ― the man with the long barrel revolver wearing a blue/green shirt. Mr. Hay’s defence was that he never went to the club with Mr. Eunick that night and was instead at home sleeping during the relevant period.
17. The Crown’s case against Mr. Hay consisted of testimony from Ms. Maillard and four pieces of physical evidence: (1) the aforementioned bullets in a sock, which were found in a laundry hamper at the entrance of Mr. Hay’s bedroom; (2) a white T-shirt, which contained a particle of gunshot residue, found in the same hamper; (3) hair clippings found in a newspaper in the bathroom garbage; and (4) hair clippings found in an electric razor in Mr. Hay’s nightstand. An understanding of the relevance of each piece of evidence and the overall strength of the Crown’s case is necessary to evaluate Mr. Hay’s arguments on appeal.
    * 1. Ms. Maillard’s Eyewitness Evidence
18. Ms. Maillard was the only eyewitness who implicated Mr. Hay as one of the shooters. She testified that she was in the kitchen when the two shooters entered and that she focused her attention on the shooter who was wearing the blue/green plaid button-up shirt with a white T-shirt underneath and who carried a long barrel revolver. She described him as having two-inch long “picky” dreadlocks: A.R., vol. II, at p. 832. According to her testimony, she said to the shooter: “You don’t have to do this, you know. If you guys want to fight, just fight. He has a wife and kids” (p. 835). At that point, the man turned to her, pointed his gun, and said, “Shut your blood clot before I kill you” (*ibid.*)*.* Ms. Maillard continued to focus on the man in the blue/green shirt, who moved further into the kitchen and began firing at the Moore brothers. After the fourth shot, she left the kitchen and hid in the hallway.
19. As mentioned above, following the shooting, the police suspected that Mr. Hay might be the second shooter and included his picture in a photo lineup shown to Ms. Maillard. The evidence at trial established that the lineup contained 12 photos, one photo of Mr. Hay that was taken roughly two years earlier and 11 photos depicting men with similar features.
20. Detective Derek Young provided Ms. Maillard with a series of cautions before showing her the photo lineup. In particular, he informed her that he would be showing her a page with 12 photos on it that may or may not include a photo of the suspect. He informed her that she should go through each of the 12 photos before selecting anyone and that she should not rely heavily on facial features that might change. He told her that if she was able to identify the shooter with 100 percent positivity, she should say so, and if not, she should provide a percentage on the likelihood that the person she has selected was the suspect.
21. Det. Young’s and Ms. Maillard’s testimony established that Ms. Maillard looked at each photo in the lineup and that when she reached the photo depicting Mr. Hay, she became shaken up. She pointed at the photo and stated: “Out of all of these pictures this gentleman most fits the description of the gentlemen I saw shooting”: A.R., vol. III, at p. 999. She stated to the investigating officer that in her belief, the photo of Mr. Hay depicted the shooter in the blue/green shirt and on “a percentage scale I would probably say maybe 80 percent” (pp. 979-80). Det. Young then sought to clarify her statement with the following exchange:

[Det. Young:] Are you saying that this photograph depicts the likeness about 80 percent of the person?

. . .

[Ms. Maillard:] That’s correct.

. . .

[Det. Young:] That did the shooting?

. . .

[Ms. Maillard:] That’s correct.

. . .

[Det. Young:] But are you saying this is the person that did the shooting? I have to have a yes or no.

. . .

[Ms. Maillard:] No, the photograph is about 80 percent . . . of what depicts the likeness of the person that did the shooting.

. . .

[Det. Young:] Okay.

. . .

[Ms. Maillard:] I wish I could. [A.R., vol. III, at pp. 1014-16]

1. At trial, Ms. Maillard took the position that she did intend to identify Mr. Hay as the shooter in the blue/green shirt. She explained her comment that the photo shared 80 percent of the likeness of the shooter as follows:

I meant that the photograph being a photocopy, about not being able to pick up the facial hair, not being able to see, you know, knowing that it might not be a current photograph of him, noting that his hair might be different, taking into account all those factors that I was told and being — seeing someone get shot and knowing that this is something very important that I was doing, picking somebody, you know, out of a line-up that was responsible for a man dying, I was being cautious. [A.R., vol. II, at pp. 856-57]

1. According to Ms. Maillard’s testimony, a day or two after the shooting, she called the police station “to find out whether or not [her] I.D. was pretty much the right person or not”: A.R., vol. II, at pp. 893-94.
2. Three weeks after the shooting, Ms. Maillard participated in a second photo lineup, in which she was shown a number of photographs in sequence and asked if any matched the shooter in the blue/green shirt. The photo sequence contained the photo of Mr. Hay taken on the day of his arrest, following the shooting. However, Ms. Maillard did not select any photo from the sequence. Ms. Maillard testified at trial that she just “flipped through” the photos and stated that the arrest photo did not have a gaunt face, as she had recalled the shooter at the club: A.R., vol. II, at p. 895.
3. Finally, defence counsel elicited testimony from Ms. Maillard that at the preliminary inquiry, she repeatedly identified Mr. Eunick, not Mr. Hay, as the shooter in the blue/green shirt. Ms. Maillard testified that she erroneously pointed out Mr. Eunick because she was nervous and scared, and because Mr. Hay had bulked up since the shooting.
4. Ms. Maillard was not asked at trial if she could make an in-court identification of Mr. Hay.
   * 1. Physical Evidence: Bullets, White T-Shirt and Hair Clippings
5. As mentioned above, the Crown introduced the following physical evidence implicating Mr. Hay: (1) bullets found in a sock in a laundry hamper in his bedroom, one of which may have been cycled through the semi-automatic handgun fired by Mr. Eunick; (2) a white T-shirt in the same hamper with one granule of gunshot residue on it; (3) hair clippings from a newspaper in the garbage of the bathroom nearest to Mr. Hay’s bedroom; and (4) hair clippings in an electric razor found in Mr. Hay’s nightstand.
6. The bullets and white T-shirt implicated Mr. Hay in the crime based on the location in which they were found ― the hamper in his bedroom ― and the expert testimony associating them with the shooting. With respect to the bullets, the Crown’s firearms expert testified that one of the unfired bullets found in the sock had been cycled through the semi-automatic gun used by Mr. Eunick in the shooting. Mr. Hay’s firearm expert did not dispute the methodology or assumptions made by the Crown expert, but testified that he was unable to reach the same conclusion. It was undisputed that if the bullets in the sock had any connection to the shooting, it was to the semi-automatic gun fired by Mr. Eunick and not the long barrel revolver used by the shooter in the blue/green shirt.
7. The white T-shirt was tied to the shooting by virtue of the eyewitness testimony that the shooter in the blue/green shirt was wearing a white T-shirt underneath and the fact that the T-shirt was found on the top of Mr. Hay’s laundry hamper with one speck of gunshot residue on it. The Crown’s theory was that Mr. Hay put the bullets and his white T-shirt in the hamper upon returning home from the shooting.
8. The defence argued that Mr. Eunick, who had testified that he used the bathroom next to Mr. Hay’s bedroom upon returning from the club, placed the bullets in Mr. Hay’s hamper, which was located just inside the entrance to the bedroom. In the process of doing so, Mr. Eunick contaminated the white T-shirt on the top of the hamper with a single granule of gunshot residue. According to the defence, this was supported by the fact that there was no gunshot residue found on any of the other items in the hamper.
9. The other physical evidence introduced by the Crown was hair clippings obtained from two places: (1) a crumpled page of newspaper dated three weeks earlier found in the waste basket in the bathroom near Mr. Hay’s bedroom and (2) an electric razor found in the nightstand next to Mr. Hay’s bed. The evidence established that the hairs in the newspaper and the razor were less than a centimeter long. The hair was not submitted to a forensic expert for trial and no expert testified regarding the hair.
10. The Crown’s theory with respect to the hair clippings was that Mr. Hay shaved his head upon returning home from the shooting. This was necessary to explain the discrepancy between the eyewitness testimony ― which indicated that the second shooter had dreadlocks that were two inches or longer ― and the length of Mr. Hay’s hair when he was arrested ― which was very short. It was also used to explain why Ms. Maillard was not able to identify Mr. Hay based on the arrest photo shown to her three weeks after the shooting. The Crown also suggested that the haircut represented an after-the-fact attempt by Mr. Hay to change his appearance to cover up his involvement in the shooting.
11. In addition to this physical evidence, the Crown also introduced a videotape of the Chigwel Court residence recorded after Mr. Eunick and Mr. Hay were arrested. One scene in the video depicts a blue shirt draped on a bunk bed in a second bedroom in the home. However, the record does not indicate that the Crown ever sought to seize the shirt, let alone submit it for testing or present it to one of the eyewitnesses to make the case that it was the blue/green shirt worn by the second shooter.
    * 1. Jury Verdict
12. Based on the evidence described above, the jury found Mr. Eunick and Mr. Hay guilty of first degree murder of Collin Moore and attempted murder of Roger Moore.
    1. Ontario Court of Appeal, 2009 ONCA 398, 249 O.A.C. 24
13. In the Court of Appeal, Mr. Hay challenged his conviction on the bases that the jury’s verdict was unreasonable and that the trial judge erred in instructing the jury on eyewitness identification. Moldaver J.A., as he then was, wrote for a unanimous panel and dismissed the appeal.
14. The court held that the jury’s verdict was not unreasonable because, despite weaknesses in Ms. Maillard’s eyewitness testimony, there was other confirmatory evidence presented to the jury, including the bullets and shirt found in Mr. Hay’s hamper and the hair clippings, which allowed for the “powerful inference” that Mr. Hay shaved his head after the murder to disguise his appearance (para. 36). The court acknowledged that the jury could have drawn multiple inferences from the evidence presented, but concluded that this confirmatory evidence “put this case over the unreasonable verdict threshold” (*ibid.*)*.*
15. With respect to the trial judge’s instruction to the jury on eyewitness identification, Mr. Hay raised three arguments. First, he argued that the trial judge erroneously instructed the jury that it could convict Mr. Hay on the evidence of Ms. Maillard alone. The Court of Appeal disagreed. In its view, the trial judge did not instruct the jury that it could convict on Ms. Maillard’s testimony alone. Rather, the trial judge instructed the jury that it must look to confirmatory evidence.
16. Mr. Hay raised two other challenges regarding the trial judge’s instruction on eyewitness evidence and challenged the trial judge’s instruction on the planning and deliberation requirement for first degree murder. These challenges were rejected by the Court of Appeal and have not been reargued before this Court.
    1. Motion for an Order to Release Exhibits
17. While the application for leave to appeal was pending before this Court, Mr. Hay filed a motion to compel the Crown to release two pieces of evidence for forensic testing: the hair clippings found in the crumpled newspaper and the hair clippings found in the electric razor. Mr. Hay sought to forensically examine the hair clippings to determine from what part of the body the clippings came. This Court allowed the motion; see *R. v. Hay*, 2010 SCC 54, [2010] 3 S.C.R. 206, at para. 10. However, it deferred consideration of any motion to adduce fresh evidence to be considered with the appeal (para. 9).
18. On December 1, 2010, the parties submitted a proposed protocol for releasing the hair clippings and having them examined by the Centre of Forensic Sciences. This Court ordered that the hairs be released and examined in accordance with that protocol. Mr. Hay subsequently filed a motion under s. 683 of the *Criminal Code*, R.S.C. 1985, c. C-46, to adduce the reports and testimony of experts who conducted the forensic examination.
19. Issues
20. This appeal presents two issues:

(1) Whether the trial judge erred by instructing the jury that it could convict Mr. Hay based on Ms. Maillard’s eyewitness evidence alone.

(2) Whether Mr. Hay’s motion to adduce fresh evidence should be granted and if so, what is the appropriate remedy?

1. Analysis
   1. Jury Charge Regarding Eyewitness Testimony
2. Mr. Hay argues that the trial judge erred by instructing the jury that it could convict him on Ms. Maillard’s eyewitness testimony alone. Like the Court of Appeal, I am of the view that Mr. Hay’s argument should be rejected. As I explain below, it would have been an error to instruct the jury that it could convict Mr. Hay based on Ms. Maillard’s testimony alone because it was too weak to establish Mr. Hay’s guilt beyond a reasonable doubt. However, read as a whole, the trial judge’s jury charge did not instruct the jury that it could convict based on Ms. Maillard’s testimony alone. Rather, it instructed the jury that it must look to confirmatory evidence. It is not disputed that Ms. Maillard’s testimony in conjunction with the confirmatory evidence was sufficient to support the conclusion that Mr. Hay was guilty beyond a reasonable doubt and, thus, there was no error in the jury charge.
   * 1. Whether It Would Have Been an Error to Instruct the Jury That It Could Convict Mr. Hay Based on Ms. Maillard’s Testimony Alone
3. The credibility and weight that should be given to eyewitness testimony is an issue committed to the ultimate trier of fact ― here, the jury: *R. v. Mezzo*, [1986] 1 S.C.R. 802, at pp. 844-45. It is well established that where the Crown relies on an eyewitness identification, the trial judge has a duty to caution the jury regarding the well-recognized frailties of identification evidence; see *Mezzo*, at p. 845, citing *R. v. Turnbull*, [1976] 3 All E.R. 549 (C.A.); *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445, at paras. 78-79 (*per* Bastarache J., dissenting, although not on this point); *R. v. Canning*, [1986] 1 S.C.R. 991. However, a properly instructed jury may conclude, notwithstanding the frailties of eyewitness identification, that the eyewitness’ testimony is reliable and may enter a conviction on those grounds. This may be so even where the Crown has relied on only a single eyewitness; see *Mezzo*, at p. 844; *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, at para. 23.
4. Although the duty to assess the credibility and weight of an eyewitness’ evidence sits with the jury and, in some circumstances, the testimony of one eyewitness will support a conviction, the jury should not be permitted to convict on the basis of eyewitness testimony that could not support an inference of guilt beyond a reasonable doubt. In other words, a jury should not be instructed that it may convict based on eyewitness testimony alone where that testimony, even if believed, would necessarily leave reasonable doubt in the mind of a reasonable juror; see *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, at paras. 21-25; *R. v. Reitsma*, [1998] 1 S.C.R. 769, rev’g (1997), 97 B.C.A.C. 303; *R. v. Zurowski*, 2004 SCC 72, [2004] 3 S.C.R. 509; *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at p. 1080. Indeed, where the Crown’s case consists solely of eyewitness testimony that would necessarily leave reasonable doubt in the mind of a reasonable juror, the trial judge must direct an acquittal upon a motion for directed verdict (*Arcuri*, at para. 21).
5. In my view, it would have been unreasonable for the jury to convict Mr. Hay based solely on Ms. Maillard’s eyewitness testimony. In addition to the usual frailties associated with eyewitness identification and photo lineups, the evidence at trial established several other problems with Ms. Maillard’s ability to identify Mr. Hay as the shooter. As described above, Ms. Maillard’s initial selection of Mr. Hay from the photo lineup was accompanied by a statement that she was not identifying him as the shooter, but as someone who shared 80 percent of the likeness of the shooter. Furthermore, within a couple of days of the shooting, Ms. Maillard called the police to confirm whether the person she had selected was “pretty much the right person or not”: A.R., vol. II, at pp. 893-94. Also, the evidence established that three weeks after the shooting Ms. Maillard was not able to select Mr. Hay as the shooter based on his arrest photo taken the day of the crime and that, at the preliminary inquiry, Ms. Maillard repeatedly identified Mr. Eunick, not Mr. Hay, as the shooter in the blue/green shirt. Each of these events raised some doubt as to Ms. Maillard’s ability to identify Mr. Hay as the second shooter.
6. To be sure, the Crown did adduce evidence to address some of the problems with Ms. Maillard’s testimony. It elicited testimony from Ms. Maillard that, despite her statements to the contrary when she selected Mr. Hay’s photo on the morning of the shootings, she *did* intend to identify Mr. Hay as the shooter. Furthermore, the Crown introduced hair clippings found in Mr. Hay’s bathroom and electric razor to explain that Ms. Maillard was unable to identify Mr. Hay based on his arrest photo because he had cut his hair.
7. In my view, however, this evidence does not support the conclusion that Ms. Maillard’s testimony, on its own, provided a basis for conviction. Ms. Maillard’s testimony that she intended to identify Mr. Hay as the shooter could not erase the reasonable doubt created by her confirmation at the time of the photo lineup that she could not identify him as the shooter and by her inability to identify Mr. Hay at the subsequent photo lineup and at the preliminary inquiry. Furthermore, although the Crown’s explanation that Mr. Hay cut his hair after the shooting gave the jury a basis for reconciling Ms. Maillard’s difficulty in identifying Mr. Hay in the second photo lineup, the explanation itself relied on confirmatory evidence ― the hair clippings. It thus does not change the fact that Ms. Maillard’s testimony, *in and of itself*, would not have permitted a reasonable juror to conclude without reasonable doubt that Mr. Hay was one of the shooters.
8. For these reasons, in my view, it would have been an error for the trial judge to instruct the jury that it could convict Mr. Hay based solely on Ms. Maillard’s evidence. Indeed, in this appeal, the Crown has not attempted to argue otherwise. The Crown has instead argued that the trial judge made no error because he never instructed the jury that it could have convicted Mr. Hay based on Ms. Maillard’s testimony alone. I turn to that argument next.
   * 1. Whether the Trial Judge Erred in Instructing the Jury
9. In my view, the Court of Appeal correctly held that the trial judge made no error in instructing the jury regarding Ms. Maillard’s eyewitness testimony.
10. When reviewing a jury charge, “[a]n appellate court must examine the alleged error in the context of the entire charge and of the trial as a whole”: *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 32. Where an impugned reference in a jury charge in isolation could be understood to be an incorrect statement of the law, an appeal court will not interfere if it is evident that, considering the charge as a whole, the jury would have been properly instructed: *ibid.*, at paras. 3 and 24.
11. Furthermore, although appeal courts will interfere when a jury has not been adequately instructed, a trial judge must be afforded a certain degree of flexibility in instructing the jury; see *R. v. Avetysan*, 2000 SCC 56, [2000] 2 S.C.R. 745, at para. 9. A trial judge is not required to use “any particular form of words” in instructing the jury regarding the frailties of eyewitness evidence and, rather, must be afforded considerable latitude in deciding how best to apprise the jurors about those frailties: *Turnbull*, at p. 552; *R. v. Candir*, 2009 ONCA 915, 257 O.A.C. 119, at para. 110.
12. In the present case the trial judge made the following general remarks about the reliability of eyewitness evidence, prior to revisiting in detail the evidence against Mr. Eunick and Mr. Hay:

There has been eyewitness testimony from a number of witnesses. You must be very cautious about relying on eyewitness testimony to find either of the two accused persons guilty. That caution is required because experience has taught us that all identification evidence suffers from an inherent frailty. Human observations and recollections are notoriously unreliable in this area.

Indeed, many cases of miscarriage of justice have been due to mistaken identification by one or more responsible witnesses whose honesty was not challenged and who had ample opportunity for observation, but whose identifications subsequently proved to be erroneous.

You may have no doubt that a witness or witnesses are certain in their own minds that they observed and recognized the proper identifying characteristics, but a convincing witness, who is perfectly honest, may also be mistaken. A person can be sure in his or her own mind about an identification and yet be mistaken. In that context, you must bear in mind the distinction between credibility or truthfulness, as opposed to reliability or accuracy.

So I repeat, ladies and gentlemen, you must be very cautious about relying on eyewitness testimony alone to find either of the defendants guilty of any crime. In the past, there have been miscarriages of justice. Persons have been wrongly convicted because eyewitnesses have made mistakes in identifying the persons whom they saw committing the crime.

As a result, you should look for confirmatory evidence to support the eyewitness identification evidence. If you find other evidence to support the eyewitness identification evidence, you may decide that the frailties associated with a conviction based only on identification evidence has been discounted. It will be up to you.

But even if you find no confirmatory evidence ― even though you are to exercise caution because of the frailties of eyewitness identification evidence ― you are, nevertheless, entitled to convict on the evidence of even a single eyewitness if you accept that witness’ identification and find that it proves guilt beyond a reasonable doubt. But you should exercise real caution before convicting on this type of evidence alone. [Emphasis added; A.R., vol. V, at pp. 2145-46.]

Mr. Hay contends that the last paragraph of this excerpt would have left the jury with the understanding that it could have convicted him based on Ms. Maillard’s testimony alone.

1. Taken in isolation, the statement that the jury was “entitled to convict on the evidence of even a single eyewitness” may appear to do that. However, I agree with the Court of Appeal that such an interpretation of the trial judge’s instruction is belied when the full context of the jury charge is considered.
2. As the Court of Appeal observed, the impugned instruction was, as a general matter, a correct statement of the law. As mentioned above, a jury may convict on the basis of a single eyewitness’ testimony, notwithstanding the frailties of eyewitness identifications, if the witness’ testimony could support a finding of guilt beyond a reasonable doubt.
3. Furthermore, the impugned instruction was made in the context of general instructions that applied to both Mr. Hay and his co-defendant, Mr. Eunick. With respect to Mr. Eunick, there were multiple witnesses whose testimony could have supported a finding of guilt beyond a reasonable doubt. Witnesses Jennifer Moore and Hugh Robinson, for instance, were both able to recognize Mr. Eunick from their past dealings and identify him as one of the shooters during and immediately after the shooting.
4. After the general instruction excerpted above, the trial judge provided additional cautions regarding the frailties of eyewitness testimony and then reviewed the evidence against each defendant. The trial judge’s instruction regarding the evidence against Mr. Hay did not convey to the jury that it could convict Mr. Hay based solely on Ms. Maillard’s testimony. Rather, in reviewing Ms. Maillard’s testimony, the trial judge described each of the specific problems with her identification, including her inability to identify Mr. Hay at the second, sequential photo lineup ― which he described as “a better way of showing photographs” than the first photo lineup (A.R., vol. V, at p. 2178) ― and Ms. Maillard’s misidentification at the preliminary inquiry. After reviewing these problems the trial judge stated:

You must be very careful of the evidence of Ms Maillard because of the problems that I have pointed out. You should look for other evidence confirming her identification. [Emphasis added; A.R., vol. V, at p. 2181.]

In addition, the trial judge distinguished Ms. Maillard’s eyewitness account from the stronger eyewitness evidence against Mr. Eunick:

In the case of Leisa Maillard, unlike Hugh Robinson and Jennifer Moore, she had never seen the person she picked out of the lineup ― Leighton Hay ― before. Her evidence must, therefore, be approached with greater caution. [A.R., vol. V, at p. 2186]

1. I agree with the Court of Appeal that “[i]n the face of those instructions, it is fanciful to think that the jury would have convicted Hay solely on the eye-witness testimony of Ms. Maillard” (para. 48). Mr. Hay’s argument boils down to a contention that the trial judge was required to say words such as “you may not convict Mr. Hay based on Leisa Maillard’s testimony alone”. However, the trial judge was not circumscribed to instruct the jury as to the sufficiency of Ms. Maillard’s testimony using those particular words. He had a duty to “convey to the jury as trier of fact the relevant legal principles and how they apply to the evidence adduced at trial”, and he must be afforded some latitude in determining the best way to do so: *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, at para. 61. A reasonable juror instructed in the manner described above would not have interpreted the impugned statement as an instruction that the jury could render a conviction based solely on Ms. Maillard’s testimony; see *Jaw*, at para. 24.
2. The record establishes that the trial judge put great care into his jury charge and, in particular, into the instructions as to eyewitness evidence. The trial judge, for instance, gave a mid-trial instruction to the jury regarding the frailties of eyewitness testimony immediately after Ms. Maillard testified, in which he reiterated the problems with her evidence. At that time, he gave both parties an opportunity to object and make submissions requesting additional instructions, but neither counsel did so. Furthermore, prior to instructing the jury at the end of the trial, the judge held a pre-charge hearing, in which he accepted submissions on the instructions relating to eyewitness testimony. During that hearing, counsel for the Crown and both defendants were all asked to consider the paragraph Mr. Hay now impugns, and all counsel expressed satisfaction with its language. Counsel for Mr. Hay made several submissions regarding the problems with Ms. Maillard’s identification, each of which the trial judge made note of and subsequently included in his instructions to the jury. At no time during any of these hearings did any party express the view that the trial judge’s instruction would convey to the jury that it could convict based on Ms. Maillard’s testimony alone.
3. For these reasons, I am of the view that the trial judge did not err in instructing the jury and would dismiss this ground of appeal.
   1. Motion to Adduce Fresh Evidence
4. As mentioned above, Mr. Hay has filed a motion to adduce expert evidence regarding the forensic testing of the hair clippings that the Crown introduced at trial. Mr. Hay argues that the fresh evidence establishes that the hair clippings did not come from a shave of Mr. Hay’s scalp and that, as a result, acquittal or a new trial is warranted. I explain below that the motion to adduce fresh evidence should be granted and a new trial should be ordered.
   * 1. The Fresh Evidence
5. Mr. Hay’s fresh evidence consists of affidavits and cross-examinations of two forensic experts, in which each expert provides an opinion as to the percentage of hairs in the newspaper and the razor that came from Mr. Hay’s scalp, as opposed to his face or trunk.
6. Johanne Almer, a scientist at the Centre of Forensic Sciences, examined the hairs introduced at trial. In her initial report, she concluded, based on an examination of the diameter and shape of the individual hairs, that 68 percent of the hairs in the newspaper and 48 percent of the hairs in the razor were indicative of facial or trunk origin. The remaining hairs could have been facial, trunk or scalp hair.
7. Scientist Richard Bisbing, a second expert, endorsed the methodology used by Ms. Almer. After examining the hairs and Ms. Almer’s work, he concluded that “the samples from the two items are predominantly comprised of facial hairs” and that “[a]lthough the presence of some scalp hairs cannot be excluded, there is no indication of a large number of scalp hairs in either sample”: Application Record, vol. I, Tab D, at p. 3.
8. Mr. Bisbing recommended that a representative scalp hair be obtained from Mr. Hay to improve the accuracy of the testing. The Crown consented. After a representative scalp hair was obtained, Ms. Almer conducted further examination and produced a second report affirming her earlier conclusions. She reported that if a particular outlier hair from Mr. Hay’s scalp sample was excluded from her calculations, she would conclude that at least 91 percent of the hairs from the newspaper and 70 percent of the hairs from the razor did not originate from Mr. Hay’s scalp. Mr. Bisbing also conducted a second examination and agreed with Ms. Almer’s findings. He concluded:

It can now be stated with a reasonable degree of scientific certainty that the hairs from the clipper (Item 87) and from the newspaper (Item 88) are populations of facial (beard) hair. Neither sample contains a significant number of scalp (head) hairs to challenge this conclusion. [Application Record, vol. I, Tab E, at p. 3]

1. The Crown also hired two experts: David Exline, a hair analyst, and Dr. Jeffrey Rosenthal, a professor of statistics. Both experts conducted a paper review of Ms. Almer’s and Mr. Bisbing’s reports without personal examination of the hairs. Much of the Crown experts’ analysis focused on whether it was proper to exclude a hair obtained from Mr. Hay’s scalp that Ms. Almer and Mr. Bisbing considered to be an outlier. Both Mr. Exline and Dr. Rosenthal testified that they would have included the outlier hair. However, both also testified that such inclusion would not have a significant impact on the results and they would thus have reached conclusions similar to Ms. Almer and Mr. Bisbing. Consistent with Ms. Almer and Mr. Bisbing, Mr. Exline testified that although he could not say with absolute certainty that there were no scalp hairs among the hair clippings, there was, as a scientific matter, no evidence to support the proposition that the hair clippings represented a head shave.
   * 1. Whether the Motion to Adduce Fresh Evidence Should Be Granted
2. This Court considered the discretion of an appellate court to admit fresh evidence under s. 610 of the *Criminal Code*, R.S.C. 1970, c. C-34, the predecessor of s. 683, in *Palmer*. The overriding consideration upon a motion to adduce fresh evidence is “the interests of justice”: *Criminal Code*,s. 683; *Palmer*, at p. 775. This requires consideration of the following principles:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. [p. 775]

Here, the Crown has conceded that the expert evidence Mr. Hay seeks to adduce is credible and thus satisfies the third factor. As I explain below, the consideration of the remaining factors leads to the conclusion that the fresh evidence should be admitted.

* + - 1. Due Diligence

1. The due diligence criterion exists to ensure finality and order — values essential to the integrity of the criminal process: *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 19 (citing *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), *per* Doherty J.A., at p. 411). The due diligence requirement calls for an appellate court to consider the reason why the evidence was not presented at trial: *G.D.B.*, at para. 20. However, this Court has recognized that “due diligence is not an essential requirement of the fresh evidence test, particularly in criminal cases” and that the “criterion must yield where its rigid application might lead to a miscarriage of justice” (para. 19). Nonetheless, it is an important factor to be considered in the totality of the circumstances (*ibid.*)*.*
2. Here, Mr. Hay submits that the fresh evidence was not adduced at trial because his trial counsel was unaware that it was feasible to perform forensic testing to determine whether hair clippings originate from an individual’s scalp or another part of the body. Mr. Hay has submitted an affidavit from his trial counsel to that effect.
3. In his reasons granting the order to release the two exhibits for forensic testing, Cromwell J. inferred from the evidence before him that it simply did not occur to any of the experienced criminal lawyers that forensic testing of this nature was feasible:

This sort of forensic testing was not conducted by the Crown in preparation for trial and was not requested on behalf of the defence until several months after the appeal to the Court of Appeal had been dismissed. Defence counsel at trial indicates in his affidavit that he was unaware that forensic analysis could distinguish between scalp and facial hairs. There is a letter in the record indicating that the applicant’s counsel on the appeal to the Court of Appeal was similarly unaware of the feasibility of such testing. There is no evidence that the Crown was aware of this possibility. Given that it appears that no one requested such testing and the potential importance of the result which might be obtained, I would infer that it simply did not occur to any of the experienced criminal lawyers involved that this testing was available. [para. 8]

The parties have not provided any reason why this conclusion should be reconsidered.

1. In general, mere lack of knowledge on the part of trial counsel without any indication that he inquired into the possibility of obtaining and presenting the evidence is a factor against admitting the evidence for the first time on appeal: *McMartin*, at pp. 490-91. However, in view of the fact that this is a criminal case, involving charges of the most serious nature, I would not allow the evidence to be excluded solely on the basis of a lack of diligence.
   * + 1. Whether the Evidence Bears on a Decisive or Potentially Decisive Issue
2. It cannot reasonably be disputed that Mr. Hay’s fresh evidence bears on a decisive issue. As described above, the hair clippings from Mr. Hay’s waste basket and electric razor were used in two ways. First, they were used to explain the discrepancy between the eyewitnesses’ description of the shooter as having dreadlocks and the short length of Mr. Hay’s hair at the time of his arrest. This was also how the Crown explained Ms. Maillard’s inability to identify Mr. Hay based on his arrest photo. Second, the hair clippings were used to implicate Mr. Hay by suggesting that he had cut his hair immediately after the shooting as evidence of an after-the-fact attempt to change his appearance.
3. The evidence was therefore directly relevant to whether Mr. Hay was in fact the shooter in the blue/green shirt.
   * + 1. Whether the Evidence Could Reasonably Be Expected to Have Affected the Result
4. The fresh evidence that Mr. Hay seeks to adduce could reasonably be expected to have affected the jury’s verdict. The import of the hair clippings is evident from comments made by the trial judge and Crown counsel, the jury charge and the Court of Appeal’s analysis, each of which I describe below.
5. Although the Crown has sought to downplay the significance of the hair evidence in this appeal, it relied heavily on the haircut evidence at trial. In his closing address, for instance, Crown counsel painted the following picture for the jury:

When they came home, they convened at the back of the house. Mr. Hay took off his shirt and they began to task divide. They took Eunick’s bloody clothes to wash them. At some point, an old piece of newspaper was laid out, and Leighton Hay's short, short dreads were shaved off, possibly by himself but more likely by Mr. Eunick because he knows how to cut hair. They were then dumped into the toilet. They were taken off, and only the small hairs that weighed the least stuck to that newspaper, and he crumpled it up and threw it in the garbage, and that’s where it was, right on top, the last thing put in. Everything else was flushed.

Mr. House makes something of the date of that newspaper. If I understood his submission, the last time Leighton Hay would have shaved was June 18th. But he keeps his hair shears for shaving in his night table. He shaved his head that night. He threw the short dreads down the toilet. He left just the small clippings in that piece of newspaper.

Mr. House, if he suggested to you ― and I thought he did ― that they were all over the newspaper, they weren’t; they were wrapped up inside it. Detective Sergeant Tony Smith testified to that. And he threw them in the garbage. And the reason was to alter his appearance. There wouldn’t be much point in hiding clothes and bullets, and leaving hair in the waste bin. It was in the toilet. [Emphasis added; A.R., vol. VI, at pp. 128-29.]

1. Further, in comments made during the trial in the absence of the jury and witnesses, the trial judge recognized that if the Crown could establish that Mr. Hay shaved his head in the morning following the shootings, it would be “powerful evidence” of his “identity” as the shooter and that “he did it to alter his appearance”: A.R., vol. II, at p. 928.
2. The significance of the hair clippings was also reflected in the jury charge. The trial judge instructed the jury that because Mr. Hay had a shaved head at the time of his arrest, the jury “must consider whether the evidence establishes that Leighton Hay shaved his head that night after he got home”: A.R., vol. V, at p. 2153 (emphasis added). He instructed the jury that it must consider confirmatory evidence before relying on Ms. Maillard’s eyewitness testimony, given the frailties of eyewitness identifications and her inability to identify Mr. Hay at the second photo lineup and the preliminary inquiry. He repeated multiple times that the Crown’s explanation for Ms. Maillard’s inability to identify Mr. Hay based on his arrest photo hinged on proving that Mr. Hay had cut his hair after the murder, for which the only evidence was the hair clippings.
3. The Court of Appeal too recognized that the hair clipping evidence was significant to the Crown’s case. In concluding that the jury’s verdict was not unreasonable, the Court of Appeal explained that the hair clippings allowed for a “powerful inference” of guilt which was sufficient to “tip the scales and put this case over the unreasonable verdict threshold” (para. 36). Given the significance of the haircut to the Crown’s case, Mr. Hay’s fresh evidence indicating that the hair clippings did not come from a scalp shave could reasonably be expected to have affected the result.
4. For these reasons, I would grant Mr. Hay’s motion to adduce fresh evidence.
   * 1. The Appropriate Remedy
5. Having concluded that Mr. Hay’s motion to adduce fresh evidence should be granted, I turn to the appropriate remedy. This Court has explained that where an appeal court is of the view that fresh evidence would be conclusive of the issues in the case, it should dispose of the matter accordingly: *R. v. Stolar*, [1988] 1 S.C.R. 480, at p. 492. However, where the fresh evidence is not so decisive that it would allow an immediate disposition of the matter, but it nonetheless has sufficient probative force that, if accepted by the trier of fact, it might have altered the result of the trial, an appeal court should admit the evidence and direct a new trial: *ibid.*; *Palmer*, at pp. 776-77.
6. The appropriate remedy here is a new trial. As I have explained above, the expert evidence indicating that the hair clippings did not result from a scalp shave could reasonably be expected to have affected the verdict. However, it is not so decisive as to allow an immediate disposition in the form of an acquittal. The Crown, in its submissions on the motion to adduce fresh evidence, has raised the possibility of certain limitations or gaps in the expert evidence adduced in this appeal. The interests of justice require that the Court remit the matter for a new trial, in which the Crown would have the opportunity to adduce evidence challenging the reliability of the fresh evidence.
7. Conclusion
8. For the foregoing reasons, Mr. Hay’s motion to adduce fresh evidence is granted and the appeal is allowed. The matter is remanded for retrial.

The following are the reasons delivered by

Fish J. —

I

1. Like Justice Rothstein, and for the reasons he has given, I would grant the appellant’s motion to adduce fresh evidence and order a new trial.
2. Our sole disagreement relates to the trial judge’s charge concerning the evidence of Leisa Maillard. Justice Rothstein finds that the trial judge did not instruct the jury that it could convict the appellant, Leighton Hay, on the evidence of Ms. Maillard alone. With respect, I believe that he did.
3. As we shall see, the trial judge and counsel evidently thought so too. The jury can hardly have understood the judge’s charge differently.
4. This error is in my view fatal, though the judge’s charge was otherwise flawless and eminently fair. And I think it right to add that the law in this regard is more certain now than it was at the time of trial.

II

1. Leighton Hay stands convicted of first degree murder and attempted murder. Leisa Maillard was the only eyewitness who implicated Mr. Hay in the fatal shooting of the victim. In a photo lineup conducted by the police, Ms. Maillard said she was “about 80 percent” sure that Mr. Hay was the shooter, but could not answer that question “yes or no”. She did not identify Mr. Hay in court. Other significant frailties in her evidence are well set out in the reasons of Justice Rothstein (notably at paras. 15-23 and, compendiously, at para. 42).
2. In his pre-charge submissions, Crown counsel nonetheless asked the judge to instruct the jury that they could convict Mr. Hay on the evidence of one eyewitness alone (A.R., vol. V, at pp. 2004, 2008 and 2011). Counsel made clear that he was referring specifically to the testimony of Ms. Maillard (pp. 2008 and 2014). Indeed, he could hardly have been referring to anyone else: As mentioned earlier, *no other eyewitness implicated Mr. Hay*.
3. Quite properly, Crown counsel assured the trial judge that he “want[ed] to be able to fashion [his] closing address to the jury in a way that’s responsible and *consistent with what you’re going to be telling them*” (A.R., vol. V,at p. 2014; unless otherwise indicated, the emphasis throughout is mine). The trial judge replied that he “[did not] have a problem” with the Crown’s request and indicated that he would charge the jury to that effect, though not necessarily in the wording proposed (pp. 2011 and 2014).
4. In his closing address, Crown counsel proceeded on that understanding. This was apparent from the very outset:

I suspect His Honour will also tell you, after considering the strength of eyewitness testimony *you’re entitled to convict on it alone* if it persuades you, beyond a reasonable doubt, that the person identified was the shooter. [A.R., vol. VI, at p. 111]

1. The Crown then emphasized to the jury that this principle applied to the testimony of Leisa Maillard:

The lawyer [for Mr. Hay] has made much of the fact that [Ms. Maillard] said 80 percent. She explained to you what she meant. 80 percent is of the picture, because it may be an older picture. . . . If you accept her explanation — there’s no reason not to — *you can convict on the photo lineup and [her] visceral reaction [to it] all alone*. If you’re troubled by it, then your troubles will be wiped away by the overwhelming confirmatory evidence in this case, which under Canadian law makes up for any frailties you might find in the photo lineup. [A.R., vol. VI, at p. 117]

And again:

*You could, in this case, convict Leighton Hay on Leisa Maillard’s photo lineup* . . . . [p. 119]

1. At no point in his charge did the able and experienced trial judge correct these assertions by the Crown. This confirms to me, particularly in light of the pre-charge discussions, that they conformed to the judge’s own understanding of the law.
2. Pursuant to the Crown’s closing argument, the jury would thus have assumed that it was entitled to convict Mr. Hay based solely on Ms. Maillard’s eyewitness “identification”.
3. Unfortunately, this misapprehension of the law was soon to be reinforced by the trial judge in his own instructions to the jury.
4. Early in his charge, the trial judge made clear to the jury that “the main issue in this trial is the identity of the people who murdered Collin Moore” (A.R., vol. V, at p. 2144). He then explained the dangers associated with reliance on eyewitness evidence to establish guilt. Then, in some measure echoing Crown counsel’s prior submission, he instructed the jury as follows:

. . . you should look for confirmatory evidence to support the eyewitness identification evidence. If you find other evidence to support the eyewitness identification evidence, you may decide that the frailties associated with a conviction based only on identification evidence [have] been discounted. It will be up to you.

*But even if you find no confirmatory evidence* — even though you are to exercise caution because of the frailties of eyewitness identification evidence — *you are, nevertheless, entitled to convict on the evidence of even a single eyewitness* if you accept that witness’ identification and find that it proves guilt beyond a reasonable doubt. [A.R., vol. V, at p. 2146]

1. Thus, although the trial judge urged caution, he informed the jury in unmistakable terms that the testimony of one eyewitness could properly ground a conviction. The jury would therefore have understood that this rule applied unless instructed otherwise for a particular witness. No such instruction was ever given.
2. More particularly, the trial judge never told the jury that his general instructions that I have just quoted did not apply to the testimony of Leisa Maillard. On the contrary, soon afterward, he explained that identification evidence is stronger if the accused was previously known to the witness. And he related this instruction *specifically* to “the evidence against Leighton Hay” (A.R., vol. V, at p. 2148). This was indisputably a direct reference to Ms. Maillard’s evidence implicating Mr. Hay.
3. In any event, there could be no confusion regarding which defendant the trial judge was referring to when he instructed the jury that it was “entitled to convict on the evidence of even a single eyewitness” (A.R., vol. V, at p. 2146). Several eyewitnesses identified Mr. Hay’s co-accused, Gary Eunick, as one of the shooters. Only Mr. Hay was identified by “a single eyewitness” — Ms. Maillard (*ibid.*). Accordingly, the only meaningful application of this general instruction was in regard to Ms. Maillard’s testimony.
4. The judge’s subsequent instructions regarding Ms. Maillard’s evidence, if anything, reinforced Crown counsel’s uncorrected statement to the jury that they could convict Mr. Hay on her photo identification alone — and reinforced as well the judge’s own instruction to the same effect (reproduced above at para. 91).
5. For example, in terms virtually identical to the judge’s general caution regarding eyewitness identification evidence, he later instructed the jury that it “*should* look for other evidence confirming her identification” (A.R., vol. V, at p. 2181). Manifestly, the term “should” deprives this instruction of imperative force. And, with respect, I am unable to find in this or any other passage that the trial judge “instructed the jury that it *must* look to confirmatory evidence” (my colleague’s reasons, at para. 39).
6. Finally, near the very end of his charge, the trial judge once again indicated to the jury that they could convict Mr. Hay on the evidence of Ms. Maillard alone. Without any suggestion that this was wrong in law, the trial judge referred to Crown counsel’s submission that “just based on *Leisa Maillard’s evidence alone* you should be sure that the shooter was Leighton Hay” (A.R., vol. V, at p. 2245).
7. As mentioned at the outset and with the greatest of respect, I am unable in light of this record to conclude that the trial judge did not instruct the jury that it could convict Mr. Hay on the evidence of Ms. Maillard alone.

III

1. The Court of Appeal held, at para. 48, that “[i]n the face of [the jury] instructions, it is fanciful to think that the jury would have convicted Hay solely on the eye-witness testimony of Ms. Maillard.” My colleague Justice Rothstein agrees (para. 54).
2. Though patently speculative and certainly unverifiable, that may in fact be so. In light of the trial judge’s effort to make clear to the jury that it should be cautious before convicting Mr. Hay based solely on Ms. Maillard’s identification, it does appear unlikely that the jury convicted Mr. Hay without any regard to the confirmatory evidence. Whether that is the case, however, is a question that we are neither called upon nor entitled to resolve.
3. Rather, the issue that concerns us here is whether the trial judge erred in his instructions to the jury, and not with why the jury decided as it did — a matter beyond our ken.

IV

1. As stated at the outset, I agree with Justice Rothstein that the appellant’s motion to adduce fresh evidence should be granted, that the appeal should be allowed and that a new trial should be ordered.

*Appeal allowed.*

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