

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Araya, 2015 SCC 11, [2015] 1 S.C.R. 581 | **Date:** 20150313  **Docket:** 35669 |

Between:

Her Majesty The Queen

Appellant

and

Nahoor Araya

Respondent

**Coram:** McLachlin C.J. and Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 72) | Rothstein J. (McLachlin C.J. and Cromwell, Moldaver and Karakatsanis JJ. concurring) |

r. *v.* araya, 2015 SCC 11, [2015] 1 S.C.R. 581

Her Majesty The Queen Appellant

v.

Nahoor Araya Respondent

**Indexed as: R. *v.* Araya**

2015 SCC 11

File No.: 35669.

2014: October 17; 2015: March 13.

Present: McLachlin C.J. and Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for ontario

*Criminal law — Charge to jury — Evidence — Admissibility — Limiting instructions — Characterization of witness’s testimony — Accused convicted of manslaughter — Accused’s appearance changing between time of offence and time of trial — Whether photographs of accused taken days after offence admissible — Whether trial judge’s instructions to jury on use it could make of photographs of accused insufficient — Whether trial judge erred in jury instructions by referring to witness’s account of conversation with accused as confession.*

A was convicted of manslaughter for his alleged involvement in a shooting that took place in a Toronto park. The victim and some friends were socializing in the park when a group of men entered the park and attempted to rob some of them. The victim was shot and killed while chasing after the assailants who fled the scene. Eyewitnesses only provided general descriptions of the assailants — young, black, thin and clean-shaven — and described the shooter as being between 5’4” and 5’8”. A, who was 6’1” at the time, was not identified as being among the assailants. He was arrested five days after the shooting, when a teacher of his notified the police that A had approached him and confessed to being present at the shooting but not to having fired the gun.

Because A’s appearance had changed between the time of the shooting and his trial, the Crown sought to have admitted two photographs of him taken five days after the shooting in order to establish what he looked like at the time. The defence objected, arguing that the photographs were highly prejudicial. The trial judge admitted the photographs for the purpose of allowing the jury to consider whether A had any of the physical attributes described by the eyewitnesses, subject to a limiting instruction that warned the jury that it could not conclude that A was among the assailants solely because his appearance fit within the general description provided by the eyewitnesses. In his instructions to the jury, the trial judge also summarized the Crown’s position that the conversation which took place between A and his teacher should be viewed as a confession of guilt. A appealed his conviction and sentence. A majority of the Court of Appeal allowed the appeal and remitted the matter for a new trial.

*Held*: The appeal should be allowed, A’s conviction for manslaughter restored, and the matter remanded to the Court of Appeal for consideration of the sentencing appeal.

There is no reason to disturb the trial judge’s finding that the photographs were admissible. Whether A could have been among the assailants was a critical issue in this case, because he denied being in the park the night of the shooting. Moreover, A did not concede that his appearance fit within the general eyewitness descriptions. Accordingly, the photographs were relevant to the limited question of whether A’s appearance at the time of the shooting fit within the general descriptions provided by witnesses. Regarding the potential prejudicial effect of the photographs, there are particular dangers involved in showing eyewitnesses a single photograph to determine if the individual shown is the individual they saw, because the witness’s memory may be tainted by exposure to that photograph. However, this concern is not relevant where it is the jury who has been exposed to the photograph of a single person and asked to consider whether the person shown falls within a general description. The jury has no pre-existing memory of the person’s appearance to corrupt, nor is the concern about the over-persuasiveness of tainted witness testimony relevant in this context. In light of the deference afforded to trial judges on questions of balancing probative effect against prejudice, there is no reason to disturb the trial judge’s finding that the risk associated with the photographs could be appropriately mitigated by a limiting instruction, and thus that the probative value of the photographs outweighed their prejudicial effect.

The trial judge’s limiting instruction with respect to the use it could make of the photographs was adequate. Parsing the language in one particular sentence to determine whether it was sufficient to warn of an impermissible line of reasoning, without taking into consideration the greater context of the jury instructions and the trial itself, represents the kind of dissection and minute scrutiny this Court has warned against. In this case, there does not appear to be a considerable risk that the jury would have, as a consequence of minor imperfections with the jury instructions, abandoned their common sense and adopted clearly flawed reasoning. Moreover, the risk of a juror actually using the photographs as the basis for an impermissible line of reasoning in the context of this case was appropriately minimized both by the fact that Crown counsel did not urge the jury to adopt impermissible lines of inference and by the trial judge’s charge to the jury as a whole.

The trial judge’s use of the word “confession” in his jury instructions does not constitute a toxic instruction such that a new trial should be ordered. Indeed, the trial judge did not himself label A’s statements to his teacher as confessions. Rather, he repeatedly described the school exchange as a conversation. Moreover, the trial judge only referred to the exchanges as a confession when reiterating the Crown’s position, which was that the school conversation should be viewed as a confession of guilt. When viewed in light of the trial judge’s other cautions to the jury, including the caution that the teacher’s testimony be evaluated only for its evidence of what A said, rather than the teacher’s interpretation of his statements, as well as the caution that confession to mere presence at the scene was not sufficient to establish guilt, a single use of the word “confession” in describing the Crown’s submissions would not have been so toxic as to call for a correcting instruction. The trial judge fairly described the conversation between A and his teacher and it was properly for the jury to conclude whether the conversation amounted to a confession.

Since the jury instructions were adequate, it is not necessary to consider whether the facts of this case would warrant the application of the curative proviso provided in s. 686(1)(*b*)(iii) of the *Criminal Code*.

**Cases Cited**

**Distinguished:** *R. v. Proctor* (1992), 69 C.C.C. (3d) 436; **referred to:** *R. v. Hay*, 2013 SCC 61, [2013] 3 S.C.R. 694; *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33; *R. v. Rodney*, [1990] 2 S.C.R. 687; *R. v. Goldhar* (1941), 76 C.C.C. 270; *R. v. Smierciak*, [1947] 2 D.L.R. 156; *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. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Cooper*, [1993] 1 S.C.R. 146; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445; *R. v. Samuels* (2005), 196 C.C.C. (3d) 403.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 21(2), 686(1)(*a*), (*b*)(iii).

APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Gillese and Strathy JJ.A.), 2013 ONCA 734, 312 O.A.C. 284, 305 C.C.C. (3d) 14, [2013] O.J. No. 5546 (QL), 2013 CarswellOnt 16738 (WL Can.), setting aside the accused’s conviction for manslaughter. Appeal allowed.

*Michael Bernstein*, for the appellant.

*James Lockyer* and *Richard Posner*, for the respondent.

The judgment of the Court was delivered by

1. Rothstein J. — Nahoor Araya was tried by a judge and jury for second degree murder and convicted of the included offence of manslaughter for his alleged involvement in a shooting that took place in a Toronto park on October 3, 2008. The Ontario Court of Appeal (Strathy J.A. (as he then was), dissenting) overturned that conviction and ordered a new trial, finding that the jury instructions given at trial were insufficient to warn the jury against making improper inferences with regard to certain photographs of Mr. Araya taken a few days after the shooting and admitted at trial. The Crown appeals this decision and asks that the manslaughter conviction be restored. In the alternative, the Crown argues that the majority of the Court of Appeal erred in failing to apply the curative proviso in s. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46.
2. In supporting the decision of the majority of the Court of Appeal, Mr. Araya proffered two additional arguments: first, that the photographs had no probative value whatsoever and were thus inadmissible, and second, that the jury instructions were also flawed with respect to the testimony of Cordel Browne, Mr. Araya’s high school English teacher, with whom Mr. Araya spoke after the shooting.
3. On the issue of the jury instructions regarding the photographs, I agree with Strathy J.A. that the trial judge’s instructions were adequate. While not perfectly phrased, the totality of the instructions, viewed in the context of the case as a whole, adequately guarded against the possibility that the jurors might use the photographs as the basis for impermissible reasoning.
4. On the issue of admissibility, I do not agree with Mr. Araya’s contention that the photographs had no probative value. Identity was a key issue in this case. Mr. Araya’s appearance had changed from the time of the shooting to the time of his trial. The defence never conceded that Mr. Araya fell within the admittedly broad descriptions of the assailants given by eyewitnesses to the events in the park. Thus, the burden remained on the Crown to establish identity, and the trial judge found that the photographs were probative in showing that Mr. Araya fit within the class of individuals described by the eyewitnesses. I agree with the Court of Appeal that the trial judge’s decision on admissibility should not be disturbed.
5. Finally, on the issue of Mr. Browne’s testimony, I do not agree with Mr. Araya’s contention that the trial judge erred in instructing the jury with regard to the proper uses or characterization of Mr. Browne’s testimony. The trial judge fairly described the conversation between Mr. Araya and Mr. Browne in the jury charge, and it was properly for the jury to conclude whether this conversation amounted to a confession.
6. I would allow the appeal and remand the matter to the Court of Appeal for consideration of the sentencing issue. It is thus unnecessary to consider the issue of the curative proviso.
7. Factual Background
8. On the evening of October 3, 2008, 17-year-old Boris Cikovic and a group of friends were drinking and socializing in and around the tennis courts in Buttonwood Park in west Toronto. According to witnesses, a second group of around three or four men entered the park at about 10:30 p.m., got into a confrontation with some of the individuals in Mr. Cikovic’s group, and attempted to rob some of them. Mr. Cikovic resisted and used a taser against one of the assailants. The assailants then fled the scene and Mr. Cikovic chased after them, at which point one of the assailants turned and shot Mr. Cikovic, killing him.
9. The lighting near the tennis courts was dim, and eyewitnesses were only able to provide broad, general descriptions of the unknown men: young, black, thin, and clean-shaven. Some witnesses recalled some of the men wearing bandanas over their faces. The shooter was described as being between 5’4” and 5’8”. Mr. Araya was 6’1” at the time. None of the witnesses specifically identified Mr. Araya as being among the assailants.
10. On October 7, four days after the shooting, Mr. Araya approached Mr. Browne, his English teacher, and asked to speak to him in private. There was disagreement at trial over the nature of the conversation. Mr. Araya testified at trial that while he did have a conversation with Mr. Browne, he did not mention being in Buttonwood Park or having any involvement with the shooting. Instead, he testified that he made up a fabricated story about a confrontation at a different location, in the hopes that Mr. Browne would worry about Mr. Araya’s well-being and offer him a place to stay that night. According to Mr. Browne, Mr. Araya said that he had been with the group of people who robbed and shot Mr. Cikovic at Buttonwood Park on October 3, but that he had not fired the gun and wanted Mr. Browne’s advice on what to do. Mr. Browne told Mr. Araya that he should inform the authorities, and subsequently notified the police of his conversation with Mr. Araya. Mr. Araya was arrested on October 8. Mr. Browne also gave the police a statement on October 8 about his conversation with Mr. Araya at school the previous day.
11. Procedural History
    1. Trial Proceedings
12. Mr. Araya was tried before a jury in 2011 on the basis that he was among the assailants on the night of the shooting, and was thus liable for second degree murder pursuant to s. 21(2) of the *Criminal Code*. The Crown did not allege that Mr. Araya was the shooter. Eyewitnesses to the event testified to their recollections about the description of the assailants. As noted above, these descriptions were limited to vague, general characteristics – young, black, thin, and clean-shaven.
13. Mr. Araya testified that he was not in Buttonwood Park on the night of October 3, 2008, but was instead at a friend’s house several kilometres away from the park. He admitted to having a conversation with Mr. Browne at school on October 7, but disputed the nature of that conversation. His position was that he made up a story related to a different robbery to get Mr. Browne’s attention and concern, but that even in this fabricated story, he did not admit to having been at Buttonwood Park on the night of October 3.
14. Mr. Araya pointed to a number of discrepancies that had arisen between Mr. Browne’s statement to police the day after the school conversation and his testimony at trial. Specifically, while Mr. Browne testified that Mr. Araya had admitted to being in the group of assailants at the park on October 3, Mr. Araya said that discrepancies in this testimony, such as whether he had told Mr. Browne “I was involved” or “I wasn’t involved”, and “we rolled up” or “they rolled up”, undermined the value of Mr. Browne’s inculpatory testimony (Mr. Browne testified that he understood “roll up” in this context to mean to rob the individuals in the tennis court).
15. The question of whether Mr. Araya was in Buttonwood Park was thus central to the case against Mr. Araya. He disputed that he was among those at the park, and never conceded that his appearance on October 3, 2008 fit within the general description provided by the eyewitnesses.
16. Mr. Araya’s appearance had changed between the events in 2008 and his trial: by 2011, he had gained weight, had shorter hair, was clean-shaven, and wore glasses. The Crown sought to admit two photographs of Mr. Araya taken five days after the shooting in order to establish what he looked like at the time. The defence objected to the admission of the photographs, arguing at trial that they were highly prejudicial. The concern was that the jury might hear the vague eyewitness descriptions of the assailants, note that the photographs of Mr. Araya showed that he fit those descriptions, and impermissibly conclude that Mr. Araya must have been one of the assailants as a result. The trial judge, McMahon J., admitted the photographs for the limited purpose of allowing the jury to consider whether Mr. Araya had any of the physical attributes described by the eyewitnesses, subject to a limiting instruction that warned against improperly concluding that Mr. Araya was among the assailants based solely on his appearance fitting within the general eyewitness descriptions.
17. Before the jury retired to consider their verdict, the trial judge issued lengthy jury instructions that addressed, *inter alia*, the photographs at issue and Mr. Browne’s testimony.
18. Mr. Araya was convicted of manslaughter and sentenced to eight years in prison, less credit for the time he had spent in pre-trial custody.
    1. Ontario Court of Appeal, 2013 ONCA 734, 312 O.A.C. 284
19. Mr. Araya appealed his conviction and sentence to the Ontario Court of Appeal, where he argued that the trial judge erred in admitting the photographs and, in the alternative, that if the photographs were properly admitted, the limiting instructions to the jury were insufficient to protect against prejudice.
    * 1. The Majority (per Gillese J.A., Laskin J.A. Concurring)
20. The majority found no error in the trial judge’s finding that the photographs were relevant and had some probative value (para. 31), but agreed with Mr. Araya that this probative value was minimal in light of the fact that the defence did not challenge the allegation that Mr. Araya’s appearance in 2008 fit within the general description provided by eyewitnesses (para. 32).
21. The majority then found that the use of the photographs could have had a significant prejudicial effect by leading jurors to engage in a flawed and impermissible line of reasoning in the following manner: “The photos of the appellant at the time of the shooting reveal a young, thin, relatively clean-shaven black male. Thus, at the time of the shooting, the appellant fit the eyewitness generic descriptions of the robbers in the tennis courts. Therefore, the appellant was in the park and/or one of the robbers” (para. 33).
22. Given the potential prejudice that would arise if a juror were to engage in such reasoning, the majority found that clear jury instructions were required, and that the instructions had to meet two requirements. First, they had to indicate the permissible use that could have been made of the photos, and second, they had to explain the dangers of impermissible lines of reasoning (para. 42). The majority found that the first of these requirements was met (para. 45), but found the instructions insufficient with regard to the second requirement because they did not “clearly explain to the jury the chain of impermissible reasoning” (para. 47). The majority also took issue with the specific wording of the trial judge’s limiting instruction, finding it “confusing” (para. 46).
23. In light of the insufficiency of the limiting instruction, the majority found that there was a “risk of a serious miscarriage of justice” (para. 50), and allowed the appeal on this ground. The majority thus did not find it necessary to address Mr. Araya’s other asserted grounds for appeal, including the trial judge’s treatment of Mr. Browne’s testimony.
24. The majority allowed the appeal and remitted the matter for a new trial.
    * 1. Strathy J.A., Dissenting
25. Strathy J.A. dissented. He agreed with the majority that the photographs were probative. He stated that in the absence of an admission from Mr. Araya that he fit within the general eyewitness descriptions in 2008, his appearance “remained a live issue” (para. 154). He reviewed the trial judge’s jury charge and found it adequate to guard against the risk of a miscarriage of justice. Specifically, he found that the risk of prejudice needed to be evaluated “having regard to all the evidence before the jury, the arguments of counsel, and the trial judge’s charge, taken as a whole” (para. 157, citing *R. v. Hay*, 2013 SCC 61, [2013] 3 S.C.R. 694, at para. 47).
26. Looking at the trial proceedings as a whole, Strathy J.A. found that the impugned photographs played a minor role in the Crown’s case. They were also referred to by the defence as serving to exclude Mr. Araya from the general eyewitness descriptions, because some of the witnesses had described the assailants as clean-shaven, while Mr. Araya had facial hair at the time (para. 158). He also noted that the defence did not object to the jury instruction on this issue (para. 171). He found that the majority’s view that there was significant risk that jurors would make impermissible use of the photos “gives no credit to the jury’s common sense and no weight to the trial judge’s instruction that it was precisely what they should not do” (paras. 178-79).
27. Strathy J.A. also considered several other arguments raised by Mr. Araya at the Court of Appeal. Most relevant to the arguments before this Court, he considered whether the trial judge erred in his instructions pertaining to Mr. Browne’s testimony. Strathy J.A. summarized both Mr. Browne’s version and Mr. Araya’s version of the conversation they had at school on October 7, 2008 (paras. 93-109), as well as their respective versions of a subsequent conversation at the Metro West Detention Centre on October 23, 2008 (paras. 116-22). He acknowledged that there were apparent discrepancies between Mr. Browne’s police statement and his testimony at trial (para. 104), but that the trial judge “thoroughly reviewed the evidence of both the appellant and Browne concerning their two conversations” (para. 246), that the jury instructions explained how the jury should consider the differences between Mr. Browne’s police statement and his testimony at trial (para. 247), and that the jury was told to consider Mr. Browne’s testimony as to what Mr. Araya said, not what Mr. Browne interpreted those statements to mean (para. 249).
28. Strathy J.A. concluded that the apparent discrepancies between Mr. Browne’s police statement and trial testimony about the school conversation and between Mr. Browne’s and Mr. Araya’s characterization of the detention centre conversation arose because of ambiguous language (paras. 253-54). Thus, “it was for the jury to consider the explanation of the alleged inconsistency and to determine what to make of the evidence” (para. 255). The trial judge’s explanation of the jury’s duties and his caution that Mr. Browne’s testimony be considered only for Mr. Araya’s words, rather than Mr. Browne’s interpretation of them, were sufficient to render the jury instructions adequate (para. 255).
29. Strathy J.A. would have dismissed the appeal from conviction.
30. Issues
31. The Crown raises the following issues on appeal:

(1) Whether the trial judge’s jury instructions regarding the permissible and impermissible uses of the two photographs of Mr. Araya were insufficient; and

(2) Whether the majority at the Court of Appeal erred in failing to apply the curative proviso in s. 686(1)(*b*)(iii) of the *Criminal Code*.

1. Mr. Araya seeks to uphold the decision of the majority of the Court of Appeal and raises the following additional issues:

(3) Whether the photographs were inadmissible because they lacked any probative value whatsoever; and

(4) Whether the trial judge erred in failing to instruct the jury that Mr. Browne’s account of the October 7, 2008 conversation with Mr. Araya could not be relied upon as a confession of his involvement in the robbery. This issue was raised by Mr. Araya before the Court of Appeal but not addressed by the majority.

1. Analysis
2. Under s. 686(1)(*a*) of the *Criminal Code*, a court of appeal may allow an appeal against a conviction where the verdict is unreasonable or unsupported by the evidence, where there has been a wrong decision on a question of law, or where a miscarriage of justice has occurred. Mr. Araya asserts that the trial judge’s decision to admit the photographs, his instructions to the jury regarding the permissible use of the photographs, and his instructions regarding the use of Mr. Browne’s testimony each amounted to a miscarriage of justice. Based on the grounds raised, I am of the opinion that these arguments are properly understood as assertions that the trial judge engaged in misdirection or non-direction of the jury amounting to errors of law.
   1. Admissibility of Photographs
3. It is a basic principle of the law of evidence that the probative value of a particular piece of evidence depends on the context in which it is proffered. In assessing whether evidence was admissible at trial, the trial judge’s weighing of probative value and prejudicial effect is entitled to significant deference. Though this deference is not unlimited, “the trial judge’s advantage of being able to assess on the spot the dynamics of the trial and the likely impact of the evidence on the jurors” provides good reason to defer to his or her weighing of the probative value against any prejudicial effect that might arise as a result of admission: *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33, at para. 73.
4. Under s. 21(2) of the *Criminal Code*, an accused may be found culpable of an offence if that person shares a common intent to commit an unlawful act with one or more other people, and one of those other people commits an offence that the defendant knew or ought to have known was a probable consequence of the plan.[[1]](#footnote-1) In this case, Mr. Araya was convicted of manslaughter under this party liability provision; while the Crown did not assert that Mr. Araya was the shooter, it did argue that Mr. Araya was among the group of assailants, and that the shooting was a probable consequence of their plan to accost Mr. Cikovic’s group in the park. Accordingly, the Crown needed to establish that Mr. Araya was in Buttonwood Park at the time of the shooting, as well as the extent of his involvement in the assailants’ common intent to commit robbery and that he knew or should have known that the shooting was a probable consequence of that plan.
5. Whether Mr. Araya could have been among the assailants was a critical issue in this case, because he denied being in Buttonwood Park the night of the shooting. The Crown sought to admit the post-arrest photographs of Mr. Araya as bearing on the question of identity, and defence counsel objected on the ground that the photographs were highly prejudicial. The trial judge, in ruling on the admissibility of the photographs, remarked that the jury was presented with testimony from multiple witnesses that established a set of vague physical attributes possessed by the assailants. He then noted that the jury had been able to observe Mr. Araya’s appearance at trial over several weeks, and that this appearance differed considerably from Mr. Araya’s appearance in 2008. He found that the photos were circumstantially relevant to the limited question of whether Mr. Araya’s appearance in 2008 fit within the general descriptions provided by witnesses.
6. Mr. Araya contends that the photos were not relevant to a live issue at trial, and thus were improperly admitted, because it was “apparent” that he did not dispute that his appearance had changed significantly between 2008 and 2011. However, even if this Court were to accept this implied concession, the issue of whether his appearance had changed is a distinct matter from the issue of whether his appearance in 2008 fit within the eyewitness descriptions. Here, Mr. Araya did not concede that his appearance fit within the general eyewitness descriptions. Accordingly, I see no reason to challenge the trial judge’s finding that the photographs were relevant for this particular purpose.
7. Mr. Araya relies on *R. v. Proctor* (1992), 69 C.C.C. (3d) 436 (Man. C.A.), for the proposition that the Crown may not adduce prejudicial evidence that bears on matters that are not in dispute. This reliance is misplaced. *Proctor* concerned the Crown’s refusal to accept a “crystal clear” defence admission as to identity in order to artificially preserve an issue at trial such that highly inflammatory evidence could be adduced with reference to that issue: pp. 440 and 447. Here, there was no clear admission that Mr. Araya’s appearance fit within the eyewitness descriptions, nor did the Crown reject an admission in an attempt to adduce inflammatory evidence; the trial judge in this case remarked that the photographs were relatively innocuous in and of themselves, and did not feature the defendant in an overtly prejudicial light. In addition, at the time the Crown sought to admit the photographs, it could not have known what would or would not be said with regard to Mr. Araya’s appearance and the general eyewitness descriptions when the defence’s evidence was adduced or in defence counsel’s closing address. Thus, *Proctor* does not bear on the circumstances at issue in this case.
8. Mr. Araya also asserts that, because it would have been impermissible to show the photographs of a single individual to the eyewitnesses and ask them if the person shown was the person they observed, it was impermissible to show the photographs to the jury in this case. I agree that there are particular dangers involved in showing eyewitnesses a single photograph to determine if the individual shown is the individual they saw. In such a case, there is a distinct possibility that “the person who has seen the photograph will have stamped upon his memory the face he has seen in the photograph, rather than the face he saw on the occasion of the crime”: *R. v. Goldhar* (1941), 76 C.C.C. 270 (Ont. C.A.), at p. 271. But this danger relates to the fact that the *witness’s* memory, which may be given considerable persuasive weight by the jury if found to be credible and reliable, may be tainted by exposure to a single photograph: *Goldhar*, at p. 271; *R. v. Smierciak*, [1947] 2 D.L.R. 156 (Ont. C.A.), at pp. 157-58. This concern is not relevant where it is the jury who has been exposed to photographs of a single person and asked to consider whether the person shown falls within a general description. The jury has no pre-existing memory of the person’s appearance to corrupt, nor is the concern about the over-persuasiveness of tainted witness testimony relevant in this context.
9. Regarding the weighing of probative value and prejudicial effect, the trial judge was satisfied that “there is probative value to the jury knowing in an identification case what the accused looked like at the time of the event”. He also acknowledged Mr. Araya’s argument that the photos may have a prejudicial effect:

Since none of the eyewitnesses can identify the accused, the jury, armed with the photos, could improperly use the photos to conclude that the accused may have been there because he may have fit a general description of some eyewitnesses who could only provide vague descriptions. It is submitted by the defence that this is the risk of prejudice to the accused. [A.R., vol. VII, at p. 88]

He found that this prejudicial effect could be appropriately mitigated by a limiting instruction, and thus concluded that “the probative value of these photographs outweigh[s] the prejudicial effect”.

1. In light of the deference afforded to trial judges on questions of balancing probative effect against prejudice, I agree with the Court of Appeal that there is no reason to disturb the finding of the trial judge that the photos were admissible.
   1. Adequacy of Limiting Instruction
2. When considering an alleged error in a trial judge’s jury instructions, “[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, per LeBel J. Further, trial judges are to be afforded some flexibility in crafting the language of jury instructions: see *Hay*, at para. 48, citing *R. v. Avetysan*, 2000 SCC 56, [2000] 2 S.C.R. 745, at para. 9. While trial judges must seek to ensure that their instructions adequately prepare the jury for deliberation, the standard for jury instructions is not perfection. Appellate review of jury instructions is meant to “ensure that juries are properly — not perfectly — instructed”: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 62, per Lamer C.J. This Court has emphasized that the charge generally should not be “endlessly dissected and subjected to minute scrutiny and criticism”: *R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 163. As Bastarache J. has summarized it in *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 30:

The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case.

Appellate courts should not examine minute details of a jury instruction in isolation. “It is the overall effect of the charge that matters”: *Daley*, at para. 31.

1. I begin with an examination of the jury instructions. Justice McMahon’s comprehensive jury charge was delivered over a total of approximately four hours, and discussed a considerable number of factual and legal issues relevant to the jury’s deliberations, including the issue of the eyewitness descriptions and their relationship to the photographs. Because of the importance of taking a functional and contextual approach to reviewing jury instructions on appeal, the relevant portions of the charge that address the question of whether Mr. Araya was in Buttonwood Park are reproduced here. Regarding the eyewitness accounts, the trial judge instructed:

Now, members of the jury, along with all the evidence I have already reviewed on this issue about whether or not he was in the park that night, you should also consider how the people that were in the tennis court that night described the black males that came in. I want to remind you that none of the young people in the park can identify Mr. Araya as being there. Many of the people in the tennis court told you because of how dark it was, how the black males were dressed and how quickly events took place, they could not tell you what any of the males’ faces looked like.

Some of them were, however, able to provide vague descriptions of clothing, height and skin colour. Some were able to provide descriptions of hair style, and my recollection is none of the people described the males as having facial hair. I also believe none of the witnesses say they saw any of the males, when I say the males, the black males that came in, as having a bag or knapsack when they arrived. As you heard, these descriptions were very vague. [A.R., vol. I, at p. 94]

1. The trial judge then instructed the jury with regard to the permissible and impermissible uses that could be made of the photographs:

Now, you have photographs of what Mr. Araya looked like five days after the shooting. I believe his evidence and Ms. Cooke’s [*sic*] was that is what he looked like about that time of October 3. You can consider whether he fits or does not fit the vague descriptions provided by the various witnesses. You cannot, of course, however, conclude based only on the vague descriptions of what Mr. Araya looked like in the photographs, that he must be the person. That would be completely improper since the descriptions are so vague and people can’t identify anyone. If there are features described which are dissimilar to the accused, they may be used to demonstrate that the accused was not present.

You will recall that none of the witnesses described seeing facial hair. Now, you will have a picture of Mr. Araya taken five days later which witnesses say reflect[s] how he looked on October 3. It would appear he has some facial hair on his chin. Obviously he does not have a bushy beard. It is what it is in the picture. It will be for you to decide whether that is something that the witnesses would have noticed considering the opportunity to observe, the condition of the witnesses and the lighting conditions. [A.R., vol. I, at pp. 94-95]

1. Finally, the trial judge instructed the jury on how the eyewitness and photographic evidence bearing on Mr. Araya’s presence or absence in the park related to broader issues of culpability:

If you believe and accept the witnesses that the males were all clean shaven, then Mr. Araya could not have been one of the males. Later in my review of the witnesses, I will go over each witness’ evidence and their brief description.

You can, however, consider how the accused looked and the vague descriptions of the males as but one piece of circumstantial evidence, whether the accused’s physical appearance fit or did not fit the vague descriptions. You would consider this along with the totality of the evidence to determine whether the Crown has satisfied you beyond a reasonable doubt that Mr. Araya was one of the black males who attended the tennis court.

After you consider all that evidence, if on the totality of the evidence you are not satisfied beyond a reasonable doubt that Mr. Araya was in Buttonwood Park that night, the night that Mr. Boris Cikovic was shot, then you will find the accused not guilty and your deliberations would be over, and you won’t go through any further steps on the decision tree.

If on the totality of the evidence you are satisfied beyond a reasonable doubt that Mr. Araya was in that park that night, then you must go on to determine if he committed any criminal offence. As I mentioned earlier, simply being present at the scene of a crime is not enough to find a person guilty of an offence. So assuming you are satisfied beyond a reasonable doubt that the accused was in the park, you would go to the next step. [A.R., vol. I, at pp. 95-97]

1. In finding the jury instructions to be insufficiently clear, the majority at the Court of Appeal placed significant emphasis on the following sentence from para. 41 above: “You cannot, of course, however, conclude based only on the vague descriptions of what Mr. Araya looked like in the photographs, that he must be the person.” The majority found this sentence confusing for two reasons. First, the phrase “vague descriptions of what Mr. Araya looked like in the photographs” appears incongruous. The vague descriptions were of the assailants the eyewitnesses saw in the park, and not the photographs of Mr. Araya. Second, the majority found the use of the phrase “he must be the person” unclear, because it did not specify whether the jury was barred from inferring that he was only in the park or inferring that he was one of the robbers (para. 46).
2. With respect, these concerns are overstated when viewed in the context of the broader instructions. Regarding the apparent ambiguity about the phrase “vague descriptions of what Mr. Araya looked like in the photographs”, this phrasing appears to be a minor misstatement. A clarified articulation in the judge’s oral charge would have stated that the jurors could not draw conclusions about identity based only on the general descriptions *and* what Mr. Araya looked like in the photographs. Indeed, the written charge to the jury stated exactly this in instructing that the jury could not “conclude based only on the vague descriptions and what Mr. Araya looked like in the photographs, that he must be the person” (emphasis added). I would not go so far as to suggest that all flaws in oral jury instructions may be remedied by corrected written instructions alone, as some jurors may place significant weight on what they hear in the courtroom. But where the criticism of oral jury instructions rests on the possibility that the jurors may have been confused, including unambiguous language in the written instructions helps ensure that jurors who found themselves confused would have had access to that clarified language for reference.
3. Further, in the context of the oral jury charge itself, the trial judge adopted a clear phrasing moments later when he instructed the jury that “[y]ou can, however, consider how the accused looked and the vague descriptions of the males as but one piece of circumstantial evidence, whether the accused’s physical appearance fit or did not fit the vague descriptions” (emphasis added). This statement further clarifies the logical relationship between the photos and the vague descriptions.
4. Regarding the second issue, that the jury may have been confused by the phrase “he must be the person”, the majority at the Court of Appeal was concerned that this phrasing did not make it clear exactly which inferences would be improper to draw based only on the eyewitness descriptions and the photos. Specifically, given the general nature of the evidence, it would have been impermissible to infer from the eyewitness descriptions and the photos alone whether Mr. Araya was in the park or part of the group of assailants. However, two paragraphs later in the trial judge’s instructions, he notes that “[i]f you believe and accept the witnesses that the males were all clean shaven, then Mr. Araya could not have been one of the males.” Not only does this latter statement emphasize the exculpatory features of the photographs in a way that would seem to help minimize the danger that they would be highly prejudicial to Mr. Araya, it further emphasizes that the inferences relevant to the photographs are those that would place Mr. Araya with the assailants in the park.
5. From the entirety of the jury instructions and the context of the trial, it is clear that “the males” refers to the group of male assailants in Buttonwood Park. While I do not dispute that the phrase “he must be the person” could have been made more explicit, it seems reasonably clear in the context of this case that inferring that Mr. Araya was “the person” meant inferring that he was in Buttonwood Park and among the assailants. Having regard to the context of the jury instructions, I am not persuaded that the jury would have been confused by the phrase “he must be the person”.
6. Before this Court, counsel for Mr. Araya argued that the trial judge erred further in instructing the jury with regard to the extent of Mr. Araya’s facial hair at the time of the shooting, and whether the witnesses would have observed it. The trial judge instructed that “[i]t will be for you to decide whether [Mr. Araya’s facial hair, as shown in the post-arrest photographs,] is something that the witnesses would have noticed considering the opportunity to observe, the condition of the witnesses and the lighting conditions.”
7. It was asserted by Mr. Araya’s counsel that this instruction is problematic because it amounts to an assumption that Mr. Araya was in the park. I cannot agree. Taken in context, it cannot fairly be said to expressly or impliedly assume that he was in the park. The very next sentence in the jury charge instructs the jury that if they believe the witnesses that all of the assailants were clean-shaven, Mr. Araya could not have been among them. Thus, the possibility that Mr. Araya may not have been in the park or among the assailants was expressly acknowledged. Reading these two statements together, I do not find that there was a significant risk that the jury may have been improperly swayed by the instruction regarding whether the witnesses would have been able to observe Mr. Araya’s facial hair. It remained sufficiently clear that the question of whether Mr. Araya was in the park or among the assailants was one for the jury to decide.
8. It is worth noting that neither counsel invited the jury to follow the impermissible line of reasoning or use the photographs in the problematic manner suggested by the majority of the Court of Appeal. That is not to say that a flawed instruction could not by itself give rise to a miscarriage of justice, but it is a relevant consideration in evaluating the context of the jury instructions.
9. It is also relevant that Mr. Araya’s trial counsel (not counsel on appeal) — the person in the courtroom most attuned to Mr. Araya’s interests — did not object to the allegedly confusing and insufficient instruction at trial. This failure to object suggests that the phrasing of this instruction, heard in its full context in the courtroom, did not sound likely to confuse or to invite improper reasoning. This Court has stated that while defence counsel’s failure to object to jury instructions is not determinative on appeal, it nonetheless “says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection”: *Jacquard*, at para. 38.
10. Parsing the language in one particular sentence to determine whether it was sufficient to warn of an impermissible line of reasoning, without taking into consideration the greater context of the jury instructions and the trial itself, represents the kind of dissection and minute scrutiny this Court warned against in *Cooper*. While the instruction regarding impermissible use was not perfect, I would emphasize Dickson C.J.’s comments in *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 692, that “it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system” (emphasis in original). In this case, there does not appear to be a considerable risk that the jury would have, as a consequence of minor imperfections with the jury instructions, abandoned their common sense and adopted the clearly flawed reasoning that because Mr. Araya’s appearance fit within a broad description that could have encompassed a great many individuals, he must have been in Buttonwood Park.
11. Finally, in assessing the overall adequacy of the jury instructions, the majority of the Court of Appeal emphasized that “this was not a strong Crown case” (para. 49). Before this Court, Mr. Araya’s counsel further urged that the adequacy of the jury instructions should be evaluated in light of the strength of the Crown’s case. I agree with the Crown that the strength of its case was not a proper consideration in evaluating the adequacy of the jury instructions. As this Court observed in *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445, at para. 43, per Arbour J., the proper order of inquiry in evaluating jury instructions requires judges first to look to the adequacy of the instructions. Only then, if they are found inadequate, must the nature and effect of the error in the instructions be determined with reference to the strength of the Crown case, in the context of the curative proviso framework of s. 686(1)(*b*)(iii).
12. In my opinion, the foregoing establishes that the risk of a juror actually using the photographs as the basis for an impermissible line of reasoning in the context of this case was appropriately minimized both by the fact that Crown counsel did not urge the jury to adopt impermissible lines of inference and by the trial judge’s charge to the jury. Accordingly, I am satisfied that the limiting instruction, taken in context, was adequate.
    1. Characterization of the Testimony of Mr. Browne
13. Mr. Araya emphasizes certain inconsistencies between Mr. Browne’s testimony and police statement about the school conversation on October 7, 2008 and argues that, in light of these inconsistencies, it was an error for the trial judge to refer to that conversation as a “confession” in the jury instructions. Three questions are relevant in addressing this argument: first, what was the nature of the alleged inconsistencies between Mr. Browne’s police statement and his testimony at trial? Second, did the trial judge err in his consideration of those inconsistencies? Third, did the trial judge err in labeling the school conversation a “confession” in the jury instructions?
    * 1. Inconsistencies Between Mr. Browne’s Police Statement and His Trial Testimony
14. Mr. Araya points to several phrases that he argues establish significant inconsistencies between Mr. Browne’s police statement and his testimony at trial. Further, he says that Mr. Browne’s testimony contained his interpretation of Mr. Araya’s words, rather than the exact words used by Mr. Araya during the school conversation (R.F., at para. 53), and that the manner in which the testimony was framed for the jury in the jury instructions constituted a miscarriage of justice. (As indicated earlier, I am of the opinion that this is better characterized as an allegation that the trial judge erred in law.) I will first consider each of the alleged inconsistencies. I will then consider whether the jury instructions respecting those alleged inconsistencies were adequate given the potentially inconsistent nature of Mr. Browne’s statements. However, in considering each alleged inconsistency, it is important to observe that the analysis of any particular phrase, removed from the context of the trial record and jury instructions, should not be given undue weight in evaluating the adequacy of the jury charge as a whole. Rather, analysis of these phrases informs the broader contextual inquiry into whether the jury was adequately instructed on how, as a matter of law, they could consider Mr. Browne’s statements.
15. First, Mr. Browne indicated in his police statement that Mr. Araya told him “[t]hey rolled up on these guys” in the park, while at trial he testified that Mr. Araya said “[w]e rolled up on these guys” (R.F., at para. 55 (emphasis in factum)). Mr. Araya asserts that the first phrasing indicates that he was not participating in the robbery that led to the shooting, while the second phrasing suggests he was an active participant (R.F., at para. 55). He argues that the two statements are fundamentally inconsistent, and that the critical implication that he was a participant in the robbery arose out of Mr. Browne’s interpretation of Mr. Araya’s comments, and not from Mr. Araya’s actual words during the school conversation. Put briefly, Mr. Araya argues that Mr. Browne’s police statement should be taken as accurate and exculpatory, while his statements at trial should be viewed as an impermissible interpretive spin on Mr. Araya’s actual words.
16. Examining these two phrases in greater context, I am not persuaded that they are irreconcilable. During his police statement, Mr. Browne occasionally spoke in sentence fragments and mixed his recollections of Mr. Araya’s actual words with his own summaries of Mr. Araya’s words and with recollections of his own words. Regarding the issue of who rolled up on Mr. Cikovic’s group in the park, Mr. Browne described this portion of the conversation to the police as follows: “And [Mr. Araya] went on to explain basically that he said, no, he didn’t want to be involved in it but they rolled up on the guys anyway.” By contrast, Mr. Browne’s testimony at trial was that “the summary would be I was there, I was involved. We rolled up on some guys. I didn’t have the gun, things went down, someone got hit, but I wasn’t the one carrying the gun.”
17. In my view, Mr. Browne’s police statement that “they rolled up on the guys” could have been a direct recollection of Mr. Araya’s specific use of the word “they” — doing so could have been Mr. Araya’s way of distancing himself from the assailants by removing himself from the group. Alternately, this phrase could have been Mr. Browne speaking about Mr. Araya and the rest of the group of assailants rolling up on Mr. Cikovic’s group together after Mr. Araya’s initial protest. It does not seem unreasonable that the jury could have interpreted Mr. Browne’s use of “they” in this latter sense. Nor do these statements necessarily establish that Mr. Browne was spinning Mr. Araya’s words during his testimony at trial to make them seem more inculpatory than the statements he initially reported to police.
18. Second, Mr. Araya emphasizes that at trial, Mr. Browne described his recollection of Mr. Araya’s statement as follows: “Well, you know, someone got shot but I -- I didn’t do it. I was there, I was involved, but I didn’t do it. I didn’t have the gun” (emphasis added). By contrast, during his police statement, Mr. Browne described Mr. Araya’s statement as follows:

. . . I said what about [the shooting in Buttonwood Park] and he’s like well I was there but I wasn’t involved and I said what do you mean Nahoor? And he’s like, I was there but I wasn’t involved, I didn’t have the gun and he went on to explain basically that um he had said no he didn’t want to be involved in it but they rolled up on the guys anyway. [Emphasis added; A.R., vol. VII, at pp. 138-39.]

Mr. Araya asserts that Mr. Browne’s initial statement to the police (“I was there but I wasn’t involved”) was his recollection of what Mr. Araya said to him, while what Mr. Browne said at trial (“I was there, I was involved, but I didn’t do it”) was his interpretation of Mr. Araya’s statements (see R.F., at para. 53).

1. Mr. Browne gave additional testimony that creates some ambiguity about whether Mr. Araya actually admitted to “involvement” in the robbery, despite his protestations that the group should not go through with it. Mr. Browne testified that he understood Mr. Araya’s statement that he was present in the park as implying involvement in the robbery: “. . . him being there, I’m interpreting it as he’s involved” (emphasis added). However, when asked by defence counsel immediately after that statement whether “it’s only your interpretation that he was involved in rolling up”, Mr. Browne clarified: “No, he said that he was there and that they decided to roll up on this guy. He was one of the guys saying no. Something went down, someone was hit, and now he’s seeking my advice as to what he should do about his involvement in this matter.” While Mr. Browne expressly denied that his testimony contained any interpretive spin, it appears that his testimony contained both efforts to recall Mr. Araya’s actual words as well as statements that could be read as Mr. Browne’s interpretation of the meaning of those words. Even if this statement to the police were to be considered inconsistent, however, it must nonetheless be considered in the context of the rest of Mr. Browne’s testimony and the trial judge’s instructions to the jury in this regard.
2. Third, regarding Mr. Browne’s own statements to Mr. Araya during the school conversation, Mr. Araya argues that there is an important difference between Mr. Browne’s testimony that he told him to “inform the authorities” and his testimony that he told him to “turn [your]self in” (R.F., at para. 55). Mr. Araya argues that the phrase “inform the authorities” is more appropriately said to a witness, rather than a participant in a crime, and that this inconsistency, combined with the other alleged inconsistencies in Mr. Browne’s testimony, made it wrong for the trial judge to use the word “confession” in the jury instructions (R.F., at para. 57). I am not persuaded by Mr. Araya’s argument that the use of the phrase “inform the authorities” should be given significant weight on appeal in determining whether the trial judge acted improperly in using the word “confession” as he did in the jury instructions. Examining Mr. Browne’s testimony regarding the school conversation as a whole, his memory of his words to Mr. Araya was imperfect, but he recalls telling him to inform the authorities with the understanding that this phrase meant to turn himself in.
3. The context of Mr. Browne’s testimony thus indicates some uncertainty about the exact words he and Mr. Araya used in their conversation at school, as well as his explanation for that uncertainty, which the jury was entitled to consider. Further, the trial judge did take note of inconsistencies in Mr. Browne’s testimony in his jury instructions, framing them as follows:

Cordel Browne told you in examination-in-chief that Mr. Araya told him he was there and involved in the robbery but not the shooting. In cross-examination he was asked about the video statement he gave to the police the day after that conversation. He admitted telling the police that Mr. Araya said he was not involved. He also admitted that what he told the police was the truth. He also provided an explanation for the difference between what he said here and what he said in his earlier statement. Since it would appear Mr. Browne adopted his prior statement, you may consider that as part of his evidence. You must also consider his explanation for the differences. [A.R., vol. I, at p. 38]

1. Given the possible interpretations of Mr. Browne’s police statement and testimony, and of his testimony regarding the meaning of the inconsistencies, I do not find that the trial judge’s instruction regarding how the jury was to consider Mr. Browne’s evidence amounted to misdirection. Where there were possible inconsistencies between Mr. Browne’s police statement and trial testimony, the jury was properly instructed to evaluate these differences.
2. Even if one were to find some amount of interpretive spin in Mr. Browne’s testimony about Mr. Araya’s statements on October 7, 2008, as, for example, where he discusses the meaning of the word “involved”, the trial judge’s jury instructions also expressly warned the jury about the dangers of such testimony. The jury was instructed that it was “what Mr. Browne was told that is relevant, not what Mr. Browne thinks Mr. Araya meant by what he said”. Accordingly, I am not persuaded that the trial judge misdirected the jury in relation to Mr. Browne’s evidence.
   * 1. Characterizing the School Conversation as a “Confession”
3. Mr. Araya argues that the inconsistencies in Mr. Browne’s testimony and the exculpatory nature of Mr. Araya’s statements as initially recounted by Mr. Browne during his police statement make it impermissibly prejudicial to describe the school conversation as a “confession”. In this regard, Mr. Araya takes issue with the following jury instruction:

It is submitted that on October 7, 2008, Mr. Araya confessed to being one of the group of males who “rolled up” to rob Mr. Cikovic and his friends in Buttonwood Park on the evening of October 3, 2008. It is submitted he told his teacher, Mr. Browne, that he did not have the gun, he did not fire the shot, but that he was part of the group that “rolled up.” It is the Crown’s position that in this context, Mr. Araya was using the term “roll up” to mean they were going to commit a robbery. [A.R., vol. I, at p. 159]

1. According to counsel for Mr. Araya, the use of the word “confession” in this context was a “toxic instruction” that should give rise to a new trial under the reasoning of *R. v. Samuels* (2005), 196 C.C.C. (3d) 403 (Ont. C.A.) (R.F., at para. 58). I do not agree. This case is not like *Samuels*; in that case, the defendant’s statements were largely exculpatory, but the trial judge himself instructed the jury that “the statements of the accused Samuels contain both admissions or confessions as well as excuses which tend to exonerate him”: para. 27. The trial judge went on to suggest that greater weight should be placed on the defendant’s inculpatory statements than his exculpatory ones. Armstrong J.A. held that the instruction in that case was “seriously flawed. The statements of the appellant are largely exculpatory and support his defence of accident. It is therefore wrong and prejudicial to describe the statements as containing ‘admissions’ or ‘confessions’”: *Samuels*, at para. 28. *Samuels* thus found it prejudicial for the *trial judge*, in the context of that case, to label certain statements of the defendant as “confessions”.
2. By contrast, the trial judge in this case did not himself label Mr. Araya’s statements as confessions. Indeed, he repeatedly described the school exchange as a “conversation”, rather than a confession, elsewhere in the charge. In the portion of the jury instructions emphasized by Mr. Araya, the trial judge remarked that “[i]t is submitted that . . . Mr. Araya confessed” (emphasis added). This statement amounts to a reiteration of the Crown’s position, which was that the school conversation should be viewed as a confession of guilt. When viewed in light of the trial judge’s other cautions to the jury, including the caution that Mr. Browne’s testimony should be evaluated only for its evidence of what Mr. Araya said, rather than Mr. Browne’s interpretation of his statements, as well as the caution that confession to mere presence at the scene was not sufficient to establish guilt, I do not find that the single use of the word “confession” in describing the Crown’s submissions would have been so “toxic” an instruction as to call for a correcting instruction.
   1. Grounds of Appeal Before the Ontario Court of Appeal
3. Before the Court of Appeal, Mr. Araya asserted that the trial judge had made seven errors. The majority of the Court of Appeal found that the alleged flaws in the jury instructions pertaining to the permissible use of the photographs were sufficient to allow the appeal, and thus did not address the remaining alleged errors. Two of the seven errors originally asserted — the admissibility of the photographs and the associated jury instructions, and the trial judge’s treatment of Mr. Browne’s testimony — were argued before this Court. The other five grounds that Mr. Araya asserted before the Court of Appeal were that the trial judge erred in:

(b) failing to caution the jury concerning how to use disbelief of the appellant’s alibi;

(c) failing to give a *Vetrovec* caution with respect to the evidence of one eyewitness, George Athens;

(d) failing to properly instruct the jury regarding party liability under s. 21(2) of the *Criminal Code* . . .;

. . .

(f) failing to instruct the jury that it was improper for the Crown to ask the appellant to comment on why his teacher would lie and implicate him in the shooting, given their positive relationship; and

(g) permitting the Crown to lead evidence of the appellant’s demeanour at the time he learned of the warrant for his arrest, and following his arrest, as after the fact conduct capable of supporting an inference of guilt.

(Court of Appeal reasons, at para. 68, per Strathy J.A., dissenting)

1. For the reasons of Strathy J.A., I agree that the trial judge did not err in regard to any of these five additional grounds of appeal.
   1. Curative Proviso
2. Because I find the jury instructions to have been adequate, it is not necessary to consider whether the facts of this case would warrant the application of the curative proviso provided in s. 686(1)(*b*)(iii) of the *Criminal Code*.
3. Conclusion
4. The appeal is allowed and the respondent’s conviction for manslaughter is restored. The matter is remanded to the Ontario Court of Appeal for consideration of the sentencing appeal.

*Appeal allowed.*

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitors for the respondent: Lockyer Campbell Posner, Toronto.

1. Section 21(2) operates somewhat differently where a conviction is sought on a charge of murder. Under this Court’s decision in *R. v. Rodney*, [1990] 2 S.C.R. 687, “[a] conviction for murder must be based on proof of subjective foresight of death” (p. 692). Thus, culpability for murder under s. 21(2) only exists where a defendant knew the killing was a probable consequence of the common plan in which he or she was a participant. [↑](#footnote-ref-1)