

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Jesse, 2012 SCC 21, [2012] 1 S.C.R. 716 | **Date:** 20120427  **Docket:** 33694 |

**Between:**

**Larry Wayne Jesse**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 74): | Moldaver J. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ. concurring) |

R. *v*. Jesse, 2012 SCC 21, [2012] 1 S.C.R. 716

Larry Wayne Jesse *Appellant*

v.

Her Majesty The Queen *Respondent*

**Indexed as: R. *v*. Jesse**

2012 SCC 21

File No.: 33694.

2011:  December 9; 2012:  April 27.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for british columbia

*Criminal law — Evidence — Admissibility — Similar fact evidence — Prior conviction — Voir dire — Whether Crown was entitled to lead prior conviction on similar fact voir dire — Whether accused was entitled to challenge prior conviction on similar fact voir dire — Whether trial judge committed reversible error in finding, at trial, that accused had likely assaulted first victim.*

The appellant was charged with sexually assaulting a severely intoxicated woman, J.M., by inserting a wine cork into her vagina. At trial, the Crown sought to introduce similar fact evidence showing that, in 1995, a jury had convicted the appellant of sexually assaulting another severely intoxicated woman, J.S., by inserting two large plastic shopping bags into her vagina. Although the appellant maintained at that trial that he was not J.S.’s assailant, he did not appeal the conviction or challenge the seven‑year sentence he received.

The appellant’s trial for sexually assaulting J.M. was conducted by a judge alone. On a *voir dire* to determine the admissibility of the similar fact evidence regarding J.S., the trial judge permitted the Crown to prove the 1995 conviction for the limited purpose of linking the appellant to the earlier sexual assault. The trial judge did not permit the appellant to challenge the prior conviction on the *voir dire*, although she allowed him to do so on the trial proper. Placing considerable weight on the prior conviction involving J.S., the trial judge ultimately convicted the appellant of sexually assaulting J.M. His appeal from conviction was dismissed by the British Columbia Court of Appeal.

*Held*: The appeal should be dismissed.

The prior conviction was admissible as “some evidence” linking the appellant to the assault on J.S. In the context of a similar fact application, a prior conviction may be tendered to establish an essential element of the prior offence where that element has been placed in issue. In this case, the appellant contested that he was the person responsible for the prior act, thus putting the question of identity in issue and allowing the Crown to lead the prior conviction as “some evidence” of his involvement in that prior act. The admissibility of a prior conviction does not depend on whether it was the product of a guilty plea or a post‑trial guilty verdict. Verdicts should not be viewed as hearsay or opinion evidence of questionable value. Whether rendered by a jury or by judge alone, they are presumptively reliable and, on the issue of identity, should be treated that way unless overturned on appeal or later shown to be wrong.

Because similar fact evidence is presumptively inadmissible, its probative value must exceed its prejudicial effect. In this case, the prejudicial effect of admitting the prior conviction did not warrant its exclusion. The appellant’s prior conviction for sexually assaulting J.S. had significant probative value. Admitting it did not, *per se*, render the trial unfair or occasion irretrievable prejudice to the appellant. There are several reasons for this. First, it is not uncommon for a trier of fact to be exposed to a prior conviction, in the form of a guilty plea, which stems from the similar fact evidence the Crown seeks to lead. The trier of fact is made aware of the limited use that can be made of the similar fact evidence, and the accused can challenge or explain the prior conviction. Second, while a prior conviction constitutes strong proof that the similar act conduct in question occurred, that does not make the conviction inadmissible. The fact that a piece of evidence operates unfortunately for an accused does not render the evidence inadmissible or the trial unfair. Third, an accused is entitled to a fair trial, not a trial in which the playing field is tilted in his or her favour. Once an accused challenges his or her involvement in an earlier incident, the rules of evidence do not permit the accused to keep the best evidence linking him or her to that incident — the conviction — from the trier of fact.

While an accused should not be automatically foreclosed from challenging a prior conviction at the *voir dire* stage of a similar fact application, situations in which such a challenge may be launched will be rare because of the low evidentiary threshold (“some evidence”) required to link an accused to the similar act. A challenge at the *voir dire* stage will not be appropriate if there is no reasonable likelihood that it will impact the admissibility of the evidence. In deciding whether the conviction can be challenged, labels such as *res judicata* and abuse of process are unhelpful and inappropriate — neither of these doctrines can prevent an accused from challenging a prior conviction on a *voir dire*. The decision to allow a challenge or not at the *voir dire* stage is a function of the trial judge’s right to control the proceedings.

In this case, the trial judge made no error in receiving the prior conviction on the similar fact *voir dire* for the limited purpose of linking the appellant to the sexual assault on J.S. The verdict giving rise to the prior conviction constituted highly reliable evidence and, at a minimum, constituted “some evidence” that he had assaulted J.S. Its probative value was clear and outweighed any prejudicial effect.

On the trial proper, the trial judge was satisfied, on balance, that the appellant had assaulted J.S. The frailties of the identification evidence, though well known to her, did not cause her to doubt the integrity of the prior conviction.

**Cases Cited**

**Not followed:** *Hollington v. F. Hewthorn & Co.*, [1943] 1 K.B. 587; **applied:** *R. v. Arp*, [1998] 3 S.C.R. 339; **referred to:** *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908; *R. v. Duong* (1998), 39 O.R. (3d) 161; *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316; *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, [2011] 1 S.C.R. 657; *Demeter v. British Pacific Life Insurance Co.* (1984), 48 O.R. (2d) 266; *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1, leave to appeal refused, [1986] 1 S.C.R. viii; *R. v. Snow* (2004), 73 O.R. (3d) 40; *R. v. Fisher*, 2003 SKCA 90, 179 C.C.C. (3d) 138, leave to appeal refused, [2004] 3 S.C.R. viii; *R. v. James* (2006), 84 O.R. (3d) 227, leave to appeal refused, [2007] 3 S.C.R. x; *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 696.3(3)(*a*).

**Authors Cited**

*Cross and Tapper on Evidence*, 12th ed. by Colin Tapper. New York: Oxford University Press, 2010.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, rev. 5th ed., Toronto: Irwin Law, 2008.

APPEAL from a judgment of the British Columbia Court of Appeal (Chiasson, D. Smith and Neilson JJ.A.), 2010 BCCA 108, 284 B.C.A.C. 192, 481 W.A.C. 192, 252 C.C.C. (3d) 442, 205 C.R.R. (2d) 11, 73 C.R. (6th) 263, [2010] B.C.J. No. 381 (QL), 2010 CarswellBC 514, affirming the conviction for sexual assault entered by Arnold‑Bailey J., 2007 BCSC 1355, [2007] B.C.J. No. 1991 (QL), 2007 CarswellBC 2079. Appeal dismissed.

*Gil D. McKinnon*, *Q.C.*, and *Gregory S. Pun*, for the appellant.

*Jennifer Duncan* and *Elizabeth A. Campbell*, for the respondent.

The judgment of the Court was delivered by

Moldaver J. —

I. Introduction

1. Following a trial before Justice Arnold-Bailey of the Supreme Court of British Columbia, sitting alone, the appellant was convicted of one count of sexual assault against J.M. His appeal from conviction was dismissed by the British Columbia Court of Appeal. He now appeals to this Court with leave, seeking to have his conviction overturned and a new trial ordered.
2. This appeal raises evidentiary and procedural issues surrounding the admissibility and use of a prior conviction, where the conduct underlying that conviction is sought to be introduced as similar fact evidence to prove identity.
3. In this case, the similar act conduct relates to the sexual assault of a woman named J.S. in 1993, for which the appellant was convicted in 1995. On a *voir dire* to determine the admissibility of that evidence, Arnold-Bailey J. permitted the Crown to prove the 1995 conviction for the limited purpose of linking the appellant to the sexual assault on J.S. The trial judge did not permit the appellant to challenge the prior conviction on the *voir dire*, although she allowed him to do so on the trial proper.
4. The appellant submits that the trial judge erred in permitting the Crown to lead his 1995 conviction on the similar fact application. He further submits that the trial judge erred in foreclosing him from challenging that conviction on the *voir dire*. Those two issues form the centrepiece of this appeal.

II. Background

1. The facts surrounding the J.S. incident may be briefly stated. On the night of January 26, 1993, a passerby witnessed J.S. lying on her stomach in a dark public place. A man appeared to be inserting something into her vagina. By the time the witness had gathered some friends and returned to the scene, the man was leaving. J.S. was intoxicated and incoherent. She was examined by a doctor some hours later. In the course of the examination, the doctor found two large compacted shopping bags inserted into her vagina. The appellant was apprehended near the scene of the crime. Although he maintained that he was not J.S.’s assailant, he was charged with sexual assault and convicted following a trial by judge and jury in 1995. He did not appeal from that conviction, nor did he challenge the seven-year sentence he received.
2. Several years after his release from prison on the J.S. matter, the appellant was charged again with sexual assault, this time in relation to a woman named J.M. The incident in question occurred on February 19, 2005. At the trial relating to this incident — which forms the basis of the instant appeal — the appellant denied that he was responsible for the assault on J.M. The circumstantial evidence pointed to the appellant and one other man as the only two people who could have committed the crime.
3. The sexual assault on J.M. took place at a house where she and her friends, along with the appellant and others, had been partying. At the end of the evening, the appellant left to walk home. About five minutes later, C.S., who lived at the house, and her partner, G.B., went looking for the appellant to offer him a ride home. At that point, J.M. and one man were alone in the house. Both had passed out from excessive alcohol consumption.
4. Unable to find the appellant, C.S. and G.B. returned to the house. They had been gone for no more than 15 minutes. C.S. was surprised to find the front door locked. She banged on the door and, a minute or so later, the appellant opened it from the inside, rushed past her and G.B., and ran away.
5. C.S. and G.B. entered the home where they found J.M. unconscious, naked from the waist down, lying on the living room floor. Blunt instruments — consisting of an electric toothbrush, a hair brush with a five- or six-inch handle and a regular toothbrush — were found on the floor near her. According to the unchallenged evidence of C.S. and G.B., those items were out of place and must have been removed by someone from the bathroom where they were normally kept.
6. The next morning, while urinating, J.M. excreted a wine cork from her vagina.
7. In view of the highly unusual nature of the sexual assaults on J.S. and J.M. and the bizarre features they shared in common, Crown counsel sought to introduce, as similar fact evidence, the sexual assault on J.S. at the appellant’s trial for sexually assaulting J.M. The purpose of the proposed evidence was to ask the trial judge to infer from the highly unusual nature and bizarre features of the assaults on J.S. and J.M. that the appellant was the person who had committed the assault on J.M. If admitted, the sexual assault on J.S. would not constitute conclusive proof of the appellant’s guilt on the charge involving J.M. It would simply be a piece of circumstantial evidence, bearing on the issue of the identity of J.M.’s assailant, that the trier of fact could consider along with the rest of the evidence in deciding whether the Crown had proved its case against the appellant beyond a reasonable doubt.
8. On the *voir dire* to determine the admissibility of the proposed similar fact evidence, Crown counsel called a number of witnesses who had testified approximately 11 years earlier, at the appellant’s 1995 trial.[[1]](#footnote-1) J.S. was not among them, as she had died in the interim. One of the witnesses described the nature of the sexual assault on J.S., and others recounted the appellant’s post-assault movements pending the arrival of the police and his ensuing arrest. Crown counsel who prosecuted the J.S. case tendered a certified copy of the indictment upon which the appellant was tried and convicted. A doctor who examined J.S. testified about the compacted shopping bags in J.S.’s vagina. She explained that, in the course of 142 examinations of alleged sexual assault victims over the past 15 years, she had never before found a foreign object in a vagina. Evidence was also tendered which established that fingerprints taken from the appellant upon his arrest in 1993 matched the fingerprints taken from him upon his arrest in 2005. That is to say, the appellant definitively was the same man who had been convicted of the 1993 sexual assault of J.S.
9. The appellant challenged the testimony of the witnesses who purported to identify him as J.S.’s assailant. He impugned the reliability of their observations and called into question some of the police practices used to identify him — just as he had at his trial in 1995. However, he did not testify on the *voir dire* and hence did not directly deny responsibility for the assault on J.S. In closing submissions on the *voir dire*, he characterized the evidence implicating him as J.S.’s assailant as tenuous and claimed that it was insufficient to link him to the assault on J.S. Thus, he argued that the J.S. incident could not be used to connect him to the charge involving J.M. and, for that reason (among others that are no longer in issue), it should not be received as similar fact evidence.

III. Ruling on the Similar Fact *Voir Dire*, Kelowna Docket No. 61071-3, September 29, 2006 (unreported)

1. The trial judge instructed herself on the general principles that govern the admissibility of similar fact evidence, as well as the particular requirements that apply when the similar fact evidence is being tendered to prove identity, relying on two decisions of this Court: *R. v. Arp*, [1998] 3 S.C.R. 339, and *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908.
2. Initially, the trial judge considered the similarities and dissimilarities between the crime charged (the sexual assault on J.M.) and the proposed similar fact evidence (the sexual assault on J.S.) with a view to determining whether she was satisfied that the same person likely committed both assaults. This test is sometimes referred to as the first of the *Arp* tests (see *Arp*, at paras. 48-50). Her careful and detailed review of the salient evidence led her to find that she was so satisfied — a finding that the appellant does not challenge in this Court:

Based on the enumeration of similarities set out above, I find that there is a striking similarity between the similar act evidence pertaining to the 1993 sexual assault of J.S. when compared to the alleged sexual assault of J.M. I find the similar act evidence to be highly probative in relation to the issue of identity of the perpetrator of the sexual assault on J.M. In accordance with the steps of analysis set out in *Arp* at ¶ 50, the significant similarities of the 1993 sexual assault make it highly probative evidence and outweigh its prejudicial effect. The high degree of similarity makes it unlikely that the accused’s involvement in the alleged act is a product of coincidence. I find, based on the degree of striking similarity, that it is likely that the same person committed both sexual assaults. [Emphasis added; ruling on *voir dire*, at para. 84.]

1. The trial judge next addressed the twin prejudices — moral prejudice and reasoning prejudice — so identified in *Handy*, at paras. 139-47. With respect to moral prejudice, she found that the offences involving J.S. and J.M. were of a “generally similar moral character” and the evidence surrounding the 1993 sexual assault on J.S. was not such “as to cause revulsion or condemnation of the [appellant] by the trier of fact” (ruling on *voir dire*, at para. 87). Accordingly, there were no moral prejudice concerns that impeded the admission of the proposed evidence.
2. As for reasoning prejudice, the trial judge concluded that there was no appreciable risk that the process of proving the J.S. incident would either distract the trier of fact from the offence charged, or result in the undue consumption of time. The appellant had been tried and convicted for the sexual assault on J.S. and, in the trial judge’s view, he was “not entitled . . . to be re-tried in relation to that allegation in the context of these proceedings” (para. 89).
3. The trial judge then turned to consider whether there was “some evidence” linking the appellant to the crime against J.S. (para. 91). This test is sometimes referred to as the second of the *Arp* tests (see *Arp*, at paras. 53-57).
4. After satisfying herself that the appellant was the same person who had been tried and convicted for the sexual assault on J.S., the trial judge noted that the Crown was relying on the appellant’s 1995 conviction for the sexual assault of J.S. to establish the necessary link. Defence counsel, she observed, was opposed to this method of establishing the link, because the appellant “may have been wrongfully convicted of that offence based on the frailties of eyewitness identification and other irregularities alleged to have occurred in that trial” (ruling on *voir dire*, at para. 93). In support of this position, defence counsel pointed to alleged weaknesses in the Crown’s 1995 case that had been exposed on the *voir dire* through cross-examination of some of the witnesses who testified at the 1995 trial.
5. The trial judge refused to give effect to the defence position. She recognized that memories had faded and that some witnesses from the 1995 trial were unavailable, including the victim J.S. who had passed away in the interim. She also noted that there appeared to be some inconsistencies in the description of J.S.’s attacker by the eyewitnesses now called on this *voir dire* and the police may have engaged in some dubious practices regarding the issue of identification in 1993. However, those matters and the appellant’s denial that he had sexually assaulted J.S. would have been brought to the attention of the jury who convicted him nonetheless.
6. In the end, the trial judge was satisfied that the Crown could use the appellant’s conviction regarding J.S. “for the limited purpose of meeting the burden of proof to a balance of probabilities that he was its likely perpetrator” (para. 95).[[2]](#footnote-2) She knew of no rule of evidence that would preclude its use for that purpose “within the context of the alleged similar fact evidence” (para. 96). In addition, she refused to permit the appellant to challenge the 1995 conviction on the *voir dire*. In her view, not having appealed his conviction, the matter was *res judicata* and the appellant was estopped from raising it in further proceedings. At the conclusion of her ruling, the trial judge clarified that she was not precluding the appellant from challenging his 1995 conviction on the trial proper. At that stage, he could take the stand and say “whatever he wanted to say about the conviction” (para. 117).
7. Finally, the trial judge saw no impediment to using the 1995 conviction to link the appellant to the assault on J.S., even though it did not result from a plea of guilty but from a finding by a jury. In this regard, she quoted with approval the following passage from *R. v. Duong* (1998), 39 O.R. (3d) 161 (C.A.), *per* Doherty J.A., at p. 174:

A previous judicial determination of guilt beyond a reasonable doubt, whether based on a plea, or following a full trial is, in my view, sufficiently reliable to warrant its admissibility in a subsequent proceeding as some evidence of the facts essential to the finding of guilt.

1. In the result, the trial judge permitted the Crown to lead the proposed similar fact evidence on the issue of identity. Seeing as she was trying the case alone, it was agreed that the *voir dire* evidence relating to the J.S. incident would form part of the trial record.

IV. Decision at Trial, 2007 BCSC 1355 (CanLII)

1. The appellant testified at trial. He denied responsibility for the 2005 assault on J.M. and the 1993 assault on J.S. The trial judge rejected his evidence and found that it did not leave her in a state of reasonable doubt “in relation to who inserted the cork into J.M.’s vagina” (para. 208). The trial judge gave cogent reasons for coming to that conclusion. No issue is taken with this aspect of her decision.
2. In rejecting the appellant’s evidence, the trial judge reviewed the evidence of the Crown witnesses and determined that she could safely act on their testimony. At para. 193, she stated:

Based on the foregoing assessment of the reliability and credibility of all the witnesses who testified in this trial, I find that I accept the evidence of the witnesses called by the Crown, both in relation to the 1993 incident, and the present charge.

1. In concluding that the appellant was the person who assaulted J.M., the trial judge placed considerable weight on the J.S. incident. At para. 217, she stated:

The evidence of similar fact from the 1993 incident regarding the accused and J.S. is what I find conclusive in terms of the guilt of Larry Jesse in relation to the 2005 incident. It is his highly unusual “calling card” of inserting foreign objects into the vaginas of passed out women as found in the case of J.M. that permits me to conclude his guilt in this case of the offence of sexual assault as charged.

1. Earlier in her reasons, at para. 119, the trial judge explained that, in her capacity as trier of fact, she was satisfied, for the reasons given on the *voir dire*, that she could rely on the appellant’s 1995 conviction “as proof of identification to the required balance of probabilities . . . pertaining to the identification of Larry Jesse as the perpetrator of the sexual assault of J.S. in 1993”. The appellant takes issue with this aspect of her reasons. I shall address his concern in due course.

V. British Columbia Court of Appeal, 2010 BCCA 108, 284 B.C.A.C. 192

1. Chiasson J.A., writing for himself and Smith and Neilson JJ.A., engaged in a detailed review of the trial judge’s evidentiary rulings and her reasons for judgment. He found no errors in her factual findings or in her legal analysis, with the possible exception that she may have erred in holding that *res judicata* prevented the appellant from challenging his 1995 conviction on the *voir dire*. Whether she was correct in that conclusion was debatable following this Court’s decision in *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316. Nonetheless, even if the trial judge erred in holding that *res judicata* applied, Chiasson J.A. considered the error to be harmless because:

. . . the appellant did not testify on the voir dire, that is, he did not directly challenge the conviction; had he attempted to do so, in my view, his attempt could have been rejected as an abuse of process at the voir dire stage of the proceeding. [para. 94]

1. In the end, Chiasson J.A. was not persuaded that the trial judge erred in refusing to allow the appellant to contest his 1995 conviction on the *voir dire*. But even if she did err, the error occasioned no harm to the appellant because it did not prevent him from contesting the 1995 conviction “in the trial proper where his guilt or innocence was at stake and he did so” (para. 103).
2. Chiasson J.A. further found that the trial judge was entitled to use the 1995 conviction for the limited purpose of linking the appellant to the similar acts. In this regard, at para. 104, he stated:

If the underlying rationale for the admission of similar fact evidence is met and probative value outweighs prejudice, I see no reason in principle for the exclusion of the evidence of the 1995 conviction for the purpose of considering the identification of the person who assaulted J.M. Had the trial been with a jury, it would have been incumbent on the judge to caution the jury clearly concerning the use they could make of the conviction.

VI. Issues

1. In my view, this appeal raises the following three issues:

(1) Was the Crown entitled to lead the appellant’s 1995 conviction on the similar fact *voir dire*?

(2) Was the appellant entitled to challenge his 1995 conviction on the similar fact *voir dire*?

(3) Did the trial judge commit reversible error in finding, on the trial proper, that the appellant was likely the person who assaulted J.S.?

VII. Analysis

A. *Issue 1 — Was the Crown Entitled to Lead the Appellant’s 1995 Conviction on the Similar Fact Voir Dire?*

(i) The 1995 Conviction Was Admissible As “Some Evidence” Linking the Appellant to the Assault on J.S.

1. In assessing whether the appellant’s 1995 conviction was admissible on the similar fact application, it is important to understand the purpose for which the Crown felt the need to introduce it. Context plays a central role in the analysis.
2. In this case, the appellant chose to challenge the admissibility of the similar fact evidence on the basis that it failed both of the *Arp* tests, that is: (1) the nature and circumstances of the assaults on J.S. and J.M. were insufficiently similar to warrant a finding that they were likely the work of one person; and (2) the evidence linking the appellant to the attack on J.S. was at best tenuous and it did not pass the “some evidence” threshold.
3. Had the appellant conceded his involvement in the attack on J.S. and restricted his challenge to the first of the *Arp* tests, there would have been no reason for the Crown to lead the 1995 conviction and no basis for doing so. The trial judge would have confined her inquiry to the similarities and dissimilarities between the two assaults, which on the facts of this case, did not involve a challenge to any of the other essential elements of the crime (such as consent) against J.S. Depending on her finding, she would then have gone on to decide whether, overall, the probative value of the proposed evidence exceeded its prejudicial effect.
4. But that is not what occurred. The appellant sought to contest the fact that he was the person responsible for the 1993 attack on J.S. — the second of the *Arp* tests — thereby requiring the Crown to prove his involvement. That of course was his right. In doing so, however, he sought to prevent the Crown from using his 1995 conviction to link him to the attack on J.S. The trial judge and the Court of Appeal ruled against him on that issue — as do I.
5. In my view, the appellant’s 1995 conviction constituted the best evidence the Crown had available to it to link him to the attack on J.S. In the context of a similar fact application, if an accused has been convicted of the conduct that forms the similar fact evidence, the conviction may be tendered to establish an essential element of the prior offence where that element has been placed in issue.
6. The fact that the appellant’s conviction stemmed from a jury trial, as opposed to a guilty plea, did not alter its cogency, and hence admissibility, as a means of establishing the narrow fact in issue, namely the issue of identity. In so concluding, I recognize that jury verdicts (and presumably verdicts rendered by judges alone) have in the past been characterized as a combination of hearsay evidence and opinion evidence, and for that reason, unlike pleas of guilty that constitute admissions, they ought not to be received for their truth. This view is attributable, at least in part, to the case of *Hollington v. F. Hewthorn & Co.*, [1943] 1 K.B. 587, where the English Court of Appeal held that, on a subsequent trial, a conviction in a previous criminal trial was not admissible as it constituted irrelevant opinion evidence (see p. 595). The appellant relies on this case for the proposition that his prior conviction was inadmissible.
7. I reject that line of thinking. In my view, jury verdicts and verdicts rendered by judges alone are presumptively reliable and, when it comes to the issue of identity, they should be treated that way unless overturned on appeal or later shown to be wrong. To hold otherwise would be to call into question the integrity of our entire justice system.
8. In the criminal context, we act on verdicts to deprive people of their liberty, sometimes for life. What better yardstick against which to measure the high degree of reliability we place in them. While not foolproof, our criminal justice system contains a myriad of safeguards designed to ensure that people accused of crimes receive a fair trial and that only those who are in fact guilty are found guilty.
9. The same holds true, in my view, if we consider verdicts as a form of opinion evidence. Jury verdicts represent the considered opinion of 12 people from different walks of life who bring a great deal of life experience to the table and who receive detailed instructions on how they are to go about their task. Judge-made verdicts represent the considered opinion of skilled men and women who are legally trained and who have promised, on oath or solemn affirmation, to uphold the law. Their work is open to scrutiny, and judges are obliged to provide reasons to explain how they arrived at their decision.
10. Thus, verdicts are not mere “opinions”;they are the considered result of informed deliberations and, as a result, carry a high degree of reliability. Were it otherwise, we would not and could not rely on them to deprive people of their liberty.
11. Against that backdrop, I find it counterintuitive and mechanistic to adopt a rule that automatically rejects trial verdicts for their truth on the basis that they constitute hearsay/opinion evidence of questionable value. In reality, they rank extremely high on the reliability scale and that is how they should be viewed when deciding whether they can be admitted for their truth.
12. This Court has recently questioned the application of *Hollington v. F. Hewthorn & Co.* in Canada. Binnie J., writing for a unanimous Court in *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, [2011] 1 S.C.R. 657, canvassed the rationale for rejecting the holding of that earlier English case (paras. 44-48). In doing so, he observed that the decision has come under academic and judicial criticism for decades. One such criticism appears in *Cross and Tapper on Evidence* (12th ed. 2010), at pp. 109-110, where *Hollington v. F. Hewthorn & Co.* is referred to as a bundle of “indefensible technicalities”, arguably at odds with the “modern emphasis on fairness and the abuse of process, especially where the prejudiced party had a full opportunity to contest the finding against him in the earlier proceedings”. I cannot improve on Binnie J.’s analysis and do not propose to repeat it here. I agree with his conclusion in *Malik*, at para. 52:

. . . a prior judicial decision between the same or related parties or participants on the same or related issues [is not] merely another controversy over hearsay or opinion evidence. The court’s earlier decision was a judicial pronouncement after the contending parties had been heard. . . . [F]or the reasons already discussed I would decline to give effect to the arguments made in *Hollington v. F. Hewthorn & Co.* They give rise to unnecessary inefficiencies and any alleged unfairness can be addressed on a case-by-case basis according to the circumstances.

See also the earlier Ontario Court of Appeal decisions of *Demeter v. British Pacific Life Insurance Co.* (1984), 48 O.R. (2d) 266, at p. 268; and *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1, at pp. 20-22, leave to appeal refused [1986] 1 S.C.R. viii.

1. Although *Malik* addressed the use of prior decisions in interlocutory proceedings, Binnie J. went on to observe that “[w]hether or not a prior civil or criminal decision is admissible in trials on the merits . . . will depend on the purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions. . . . [T]he ‘weight and significance’ to be given to [it] ‘will depend on the circumstances of each case’” (paras. 46-47; quoting *Del Core*, at p. 21).
2. I have applied that approach in assessing the issue at hand. The appellant’s 1995 conviction was the product of a jury verdict. The trial was contested and the appellant mounted a vigorous defence. He was represented by counsel and had a full and fair opportunity to defend. By its verdict, the jury made it known that it was satisfied beyond a reasonable doubt that the appellant was the person who sexually assaulted J.S. The appellant did not appeal that verdict, nor did he challenge the seven-year sentence he received.
3. In the circumstances, I am satisfied that the trial judge made no error in receiving the 1995 conviction on the similar fact *voir dire* for the limited purpose of linking the appellant to the sexual assault on J.S. The verdict giving rise to that conviction constituted highly reliable evidence. Moreover, it comprised the best evidence the Crown had available to it to refute the appellant’s contention that he was not J.S.’s assailant. As the trial judge observed, the long gap between the J.S. and J.M. incidents had taken a toll on the Crown’s ability to re-prove the J.S. case. Memories had faded, witnesses were missing and the trial transcripts were not available. The appellant’s 1995 conviction, however, remained constant and undisturbed. At a minimum, it provided “some evidence”, as required by *Arp*, that he was the person responsible for the assault on J.S.
4. Indeed, in my view, a prior conviction would constitute sufficient evidence upon which a trier of fact, on the trial proper, could conclude on a balance of probabilities that an accused was the perpetrator of the prior act that formed the basis of the conviction. The trier of fact would be entitled, but of course not bound, to make such a finding. Needless to say, in deciding the matter, the trier of fact would consider any evidence the accused might adduce on the subject. The same would hold true if the accused were to challenge any of the other essential elements of the crime that formed the basis of the similar fact evidence.
5. Of course, a finding that both of the tests in *Arp* have been met does not lead inexorably to the admission of the proposed similar fact evidence. Because similar fact evidence is presumptively inadmissible, the trial judge must be satisfied that, overall, its probative value exceeds its prejudicial effect. That brings me to the second of the appellant’s complaints concerning the admissibility of the 1995 conviction.

(ii) The Prejudicial Effect of Admitting the 1995 Conviction Did Not Warrant Its Exclusion

1. The probative value of the 1995 prior conviction is clear. Yet, the appellant submits that its admission rendered his trial unfair. It occasioned irretrievable prejudice to him. A trier of fact could not be expected to use it solely for the purpose of linking him to the assault on J.S. Inevitably, it would lead to general disposition and impermissible propensity reasoning. Moreover, responding to a prior conviction would be an insurmountable task he could not possibly overcome. As a result, its prejudicial effect outweighed its probative value, and it should not have been received.
2. I find the appellant’s submission unpersuasive for several reasons.
3. First, it is not uncommon for triers of fact to be exposed to prior convictions that stem from the similar fact evidence the Crown seeks to lead. Normally, these convictions are the product of guilty pleas as opposed to post-trial guilty verdicts (see, e.g., *R. v. Snow* (2004), 73 O.R. (3d) 40 (C.A.); *R. v. Fisher*, 2003 SKCA 90, 179 C.C.C. (3d) 138, leave to appeal refused [2004] 3 S.C.R. viii; and *R. v. James* (2006), 84 O.R. (3d) 227 (C.A.), leave to appeal refused [2007] 3 S.C.R. x). But for purposes of assessing prejudice, I see no meaningful distinction between the two. In both instances, the trier of fact is made aware of the prior conviction and the limited use that can be made of it; and in both instances, the accused can challenge or explain the prior conviction if he or she so chooses. The authorities cited above undercut the appellant’s *per se* submission that judges and juries will inevitably engage in impermissible propensity reasoning when confronted with a prior conviction stemming from the similar fact evidence the Crown proposes to lead.
4. Second, a prior conviction constitutes strong proof that the similar act conduct in question occurred. In that sense, it has greater probative value than an unproven allegation (see, e.g., D. M. Paciocco and L. Stuesser, *The Law of Evidence* (rev. 5th ed. 2008), at pp. 144-47). While a conviction may be harder to respond to than an unproven allegation, that does not make the conviction inadmissible. Just because a piece of evidence operates unfortunately for an accused does not of itself render the evidence inadmissible or the trial unfair (see *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 724-25, *per* La Forest J., dissenting on other grounds).
5. Third, an accused is entitled to a fair trial, not a trial in which the playing field is tilted in his or her favour. In the similar fact *voir dire*, the appellant chose to challenge his involvement in the J.S. incident. That was his right. But the rules of evidence did not permit him to keep from the trial judge the best evidence the Crown had available to link him to that attack. For that reason, it became permissible for the Crown to lead the conviction in its case in chief on the similar fact application.
6. Returning to the matter of fairness, I find the appellant’s overall position to be untenable. On his scenario, in order to establish the identity link required by the second *Arp* test,the Crown would be required to call the witnesses from the 1995 trial to re-prove its case. The appellant could cross-examine them with a view to impugning their testimony and the integrity of the police investigation — all the while suppressing the factthat he had been convicted of sexually assaulting J.S. following a trial by judge and jury. In oral argument before this Court, he went even further and submitted that if he were to testify and deny having sexually assaulted J.S., it would be impermissible for the Crown to cross-examine him on his prior conviction for credibility purposes.
7. As I see it, the appellant must bear the inevitable consequences of his own strategic choice. That is the way our criminal justice system functions. Again, the appellant was not entitled to a trial tilted in his favour. He was entitled to a fair trial — and that is what he received.
8. In the end, as with all similar fact evidence, it falls to trial judges, in the exercise of their discretion, to admit the evidence if its probative value exceeds its prejudicial effect and to exclude it if it does not. In concluding, as I have, that the trial judge in the instant case did not err in admitting the appellant’s 1995 conviction for the limited purpose of linking him to the assault on J.S., I should not be taken as holding that prior convictions will always be admissible when similar fact evidence is tendered. Each case must be assessed on its own facts and circumstances.
9. Here, the trial judge engaged in a comprehensive analysis of the evidence and, after applying the governing principles, she found that the probative value of the proposed evidence exceeded its prejudicial effect. Accordingly, she decided to admit the evidence. In doing so, she was entitled to consider the appellant’s 1995 conviction as “some evidence” linking him to the J.S. incident. I see no basis for interfering with her decision.

B. *Issue 2 — Was the Appellant Entitled to Challenge His 1995 Conviction on the Similar Fact Voir Dire?*

1. The trial judge precluded the appellant from challenging his 1995 conviction on the *voir dire*. She found that he was estopped from doing so by virtue of the doctrine of *res judicata*. The British Columbia Court of Appeal concluded that while the trial judge may have erred in this regard, had the appellant attempted to directly challenge his conviction at the *voir dire* stage, his attempt could have been rebuffed as an abuse of process.
2. In deciding whether the appellant could or could not challenge his conviction on the *voir dire*,I am respectfully of the view that labels such as *res judicata* and abuse of process are unhelpful and inappropriate. In the wake of this Court’s decision in *Mahalingan*, it is clear that neither of these doctrines can prevent an accused from challenging a prior conviction on a *voir dire*. The answer, I believe, lies in the trial judge’s right to control the proceedings.
3. In terms of controlling the proceedings, it is important in any given case to stay focussed on the purpose for which the similar fact evidence is being tendered and the rules that govern its admission. Here, the evidence was being put forward to prove identity. To be admissible for that purpose, among other things, the Crown had to lead “some evidence” linking the appellant to the assault on J.S. As discussed, it was open to the Crown to lead the appellant’s prior conviction to establish the necessary link, since the accused chose to put identity in issue.
4. To the extent that an accused wishes to challenge a prior conviction at the *voir dire* stage, I see no reason why he or she should be automatically foreclosed from doing so. If, for example, an accused could show that the conviction in question had been overturned on appeal or set aside pursuant to an Application for Ministerial Review under s. 696.3(3)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46, surely he or she should be able to lead that evidence. Likewise, if there were fresh or additional evidence available that could, if believed, cast serious doubt on the integrity of the prior conviction, a trial judge might well decide to hear it.
5. The situations I have mentioned, in which evidence challenging a prior conviction may be adduced on a *voir dire*,are not meant to be exhaustive and should not be taken as such. Such situations will, however, be rare.
6. In cases like the present one, at the *voir dire* stage, given the low evidentiary threshold (“some evidence”) that must be met to link an accused to the similar act, a trial judge could reject a request to lead evidence to challenge the admissibility of a conviction if he or she believed there was no reasonable likelihood that it would impact on the admissibility of the evidence. Again, this is a function of the trial judge’s right to control the proceedings. Judicial resources are scarce and they ought to be used constructively, not wasted on pointless litigation. As this Court held in *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343, at para. 31 — a case concerning the ability of an accused to cross-examine a police affiant on a *voir dire* dealing with the admissibility of wiretap evidence:

There is no point in permitting cross-examination if there is no reasonable likelihood that it will impact on the question of the admissibility of the evidence. The *Garofoli* threshold test is nothing more than a means of ensuring that, when a s. 8 challenge is initiated, the proceedings remain focussed and on track. . . . The *Garofoli* threshold test is all about relevancy. If the proposed cross-examination is not relevant to a material issue, within the narrow scope of the review on admissibility, there is no reason to permit it. [Emphasis added.]

1. At trial, the situation would be different. As *Mahalingan* explains, the accused is entitled to challenge his or her prior conviction at trial. But even then, it would be open to the Crown, having successfully passed the hurdle of the similar fact *voir dire*, to introduce the prior conviction as evidence linking the accused to the similar act conduct. If the accused wished to challenge it by way of re-litigation, he or she could call the witnesses from the previous trial. While that approach might make matters more difficult for the accused, I see no reason why it should be easy for an accused to challenge, by way of re-litigation, a conviction that has been obtained following a full and fair trial.
2. Returning to the case at hand, the situation proved to be somewhat unique in that the trial transcripts were not available. Because of that, it would appear that the Crown chose to call a number of witnesses from the 1995 trial on the *voir dire* to satisfy the second *Arp* test. As it turns out, the appellant was permitted to cross-examine them on the *voir dire* with a view to impugning their evidence and the integrity of the police investigation — just as he had at his trial in 1995. In other words, he got to challenge his conviction on the *voir dire* even though the trial judge could have precluded him from doing so on the basis that there was no reasonable likelihood that his attempt to re-litigate the J.S. incident would impact on the admissibility of the evidence in question.
3. In the end, the trial judge could have foreclosed the appellant from challenging his 1995 conviction on the *voir dire* on the basis that it would have been a wasteful and pointless exercise in the circumstances. Hence, the trial judge’s ruling that he was foreclosed from challenging it on a different basis was of no moment. The 1995 conviction provided the evidentiary link needed to tie the appellant to the similar act conduct. It constituted “some evidence” that he was the person who assaulted J.S., and it could not be displaced by simply re-litigating matters that had been litigated at the 1995 trial.

C. *Issue 3 — Did the Trial Judge Commit Reversible Error in Finding, on the Trial Proper, that the Appellant Was Likely the Person Who Assaulted J.S.?*

1. The evidence from the similar fact *voir dire* was admitted on the trial proper and formed part of the record for the trial judge’s consideration. In her reasons for judgment, the trial judge explained that, in her capacity as trier of fact, for reasons previously given on the similar fact *voir dire*, she could rely on the appellant’s 1995 conviction as proof of identification to the required balance of probabilities that he was the person who had assaulted J.S. Accordingly, she considered it unnecessary to “repeat the *voir dire* evidence pertaining to the identification of [the appellant] as the perpetrator of the sexual assault of J.S. in 1993” (para. 119).
2. The appellant takes issue with this aspect of the trial judge’s reasons. In accordance with *Arp*, he accepts that, on the trial proper, in order to use the 1993 incident as similar fact evidence, the trial judge had to be satisfied on balance that the appellant was the person who assaulted J.S. This is a higher threshold than the “some evidence” that is required on the *voir dire*. His complaint is that, in making that finding on the trial proper, the trial judge relied solely on the appellant’s 1995 conviction — and doing so, she failed to take into account material evidence adduced on the *voir dire* and admitted at trial that challenged the integrity of that conviction. Had the trial judge considered the pertinent evidence, she may not have been satisfied, on balance, that the appellant was the person who assaulted J.S., thereby rendering the similar fact evidence valueless. In light of that error, the appellant submits that he is entitled to a new trial.
3. I would not give effect to the appellant’s submission. The trial judge was fully familiar with the evidence on the similar fact *voir dire*. In particular, she was alive to the frailties in the Crown’s case in relation to the identification of the appellant as J.S.’s assailant. At para. 94 of her ruling on the similar fact *voir dire*, she made specific reference to “the weaknesses in the Crown’s case in 1995 via the cross-examination [by defence counsel] on this *voir dire* of some of the witnesses that the Crown [had] called at that trial”. In this regard, she noted that memories had faded, certain witnesses, including J.S., were unavailable and much had been lost with the passage of time. She also recognized that there were “some inconsistencies in the various descriptions of the perpetrator of the sexual assault of J.S. by the eyewitnesses now called on this *voir dire*, and potentially some dubious practices engaged in by the police regarding the issue of identification” (para. 94).
4. That said, in the end, the trial judge was satisfied that she could safely rely on the evidence of the Crown witnesses who testified on the similar fact *voir dire*. In her reasons for judgment at para. 193, quoted above at para. 25, she stated that, based on her assessment of the credibility and reliability of all of the witnesses who testified at the trial, she “accept[ed] the evidence of the witnesses called by the Crown, both in relation to the 1993 incident, and the present charge [involving J.M.]”.
5. Various witnesses called by the Crown on the *voir dire* identified the appellant as J.S.’s assailant. At para. 193, the trial judge plainly stated that she accepted their evidence. In so concluding, she would not have lost sight of the frailties in their evidence which she had earlier identified in her similar fact ruling.
6. From this, it is implicit there was nothing said by the identification witnesses that caused the trial judge to question the integrity of the appellant’s 1995 conviction. On the contrary, their evidence, which she accepted, supported it. Put simply, had the trial judge made specific reference to the witnesses who testified on the *voir dire* and who identified the appellant as J.S.’s assailant, the verdict, in my view, would inevitably have been the same.

VIII. Conclusion

1. In the circumstances of this case, the trial judge did not err in receiving the appellant’s 1995 conviction for the limited purpose of linking him to the sexual assault on J.S. The appellant did not provide a proper basis for seeking to challenge that conviction on the *voir dire*, since there was no reasonable likelihood that re-litigating the 1995 trial would have impacted on the admissibility of the evidence in question. Hence, the trial judge’s refusal to consider the matter occasioned no harm to him. On the trial proper, it is apparent that the trial judge considered the whole of the evidence in determining that she was satisfied, on balance, that the appellant was the person who assaulted J.S. The frailties in the evidence identifying the appellant as her attacker, though well known to the trial judge, did not cause the trial judge to doubt the integrity of the 1995 conviction.
2. In the result, I would dismiss the appeal.

*Appeal dismissed.*

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Solicitor for the respondent:  Attorney General of British Columbia, Vancouver.

1. The transcript of that trial was not available. The tapes had been disposed of some seven years after the trial in accordance with then-existing policies. A challenge based on the destruction of the tapes and the appellant’s consequential inability to make full answer and defence, under ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*, was dismissed by the trial judge and rejected as a ground of appeal by the Court of Appeal. That issue is not before us. [↑](#footnote-ref-1)
2. In framing the matter that way, the trial judge exceeded the “some evidence” test needed to establish the requisite link for admissibility purposes. [↑](#footnote-ref-2)