

# Case raises 'troubling' questions about justice system



By [Jacob Stilman](#)

A recent decision by Justice Mel Green of the Ontario Court of Justice – [R. v. Pal-Deng](#), 2015 ONCJ 2 (CanLII) – raises fundamental and troubling questions as to the operation of our criminal justice system.

At first blush, this case of assault, brought against a marginalized young Sudanese man, appears unremarkable. Anguei Pal-Deng is precisely the sort of accused person whose ubiquitous presence in the courts goes unnoticed, uncommented upon, and seldom makes a ripple in the consciousness of the public. But if ever there was a case that is emblematic of the flaws that systemically mar our criminal justice system, it is here.

Justice Green's strongly-worded and unambiguous criticism of the Crown's handling of this prosecution compels us to re-evaluate our understanding of major components of our justice system, starting with police investigative techniques, bail eligibility, the assessment of eyewitness testimony, and finally, to the accountability of the Crown attorney's office for its actions, or in this case, inaction.

Pal-Deng was a Sudanese émigré who speaks little English. He had remained, in the words of Justice Green, "culturally challenged and unsophisticated." Despite living in Canada for about a decade, he had few connections in the community.

On March 6, 2014, 82-year-old Maria Ferreira fell down a flight of stairs at the Dufferin Mall. Ferreira and two independent witnesses testified that Pal-Deng deliberately, and in unprovoked fashion, pushed her from the top step where he had been standing. The accused denied the assault and testified that he merely gestured to the woman to pass by him, and made incidental contact with her arm, which must have precipitated her fall.

Without burdening the reader with the details of the evidence, the case was determined by the trial judge's careful review of the only truly "independent" piece of evidence, the video footage from the mall security camera. This evidence unequivocally established that the contact was unintentional and non-assaultive. It further demonstrated that the two independent witnesses, women who were in the vicinity of the staircase at the time of the incident, were completely in error in their interpretation and assimilation of their observations.

In and of itself this may sound unremarkable: An accused person is acquitted of a charge on the basis of reasonable doubt. However the consequences of being charged were anything but mundane for Pal-Deng, as he spent the next seven months of his life incarcerated and was forced to endure the uncertainty of a criminal trial. This was the cumulative result of erroneous eyewitness accounts, shoddy and incomplete police work, an overly regimented bail system and a lack of Crown accountability.

Consider the issue of denial of bail. Due to his lack of resources and his having no roots in the community, Pal-Deng spent the next seven months in pre-trial detention even though the maximum sentence available for assault is six months. The right to reasonable bail is enshrined in the Charter, but this case demonstrates the sad reality that there can be, in practice, an absurdly low threshold for pre-trial detention. Daily in our system it is the marginal, unrepresented accused who is subjected to pre-trial detention, often for minor charges, and for periods of time that well-exceed the appropriate range of sentence.

But it gets worse. The police investigation here consisted of an uncritical acceptance of eyewitness testimony. They utterly failed to evaluate these accounts in view of the readily available contradictory evidence from the video surveillance. Had the police examined it and contrasted this evidence with the accounts provided by the witnesses, it is difficult to see how the investigation could have proceeded any further. And yet, as most defence counsel can attest, too frequently the extent of a police investigation involves gathering statements, which are then uncritically compiled into a Crown brief, and ignoring contradictory or exonerative evidence. From the police perspective, it is much easier to "let the judge figure it out," rather than risk offending the sensibilities of an apparent victim of crime by declining to lay a charge.

And it gets worse, even still. Why did the Crown attorney not engage in a proper review of this evidence? Justice Green puts it succinctly:

“Less understandable is why the prosecution was pursued following a video-based assessment of these witnesses’ evidence. Fleeting observations that generate misidentification are a notorious cause of wrongful convictions. Momentary observation of ambiguous conduct resulting in adverse consequences can also lead to miscarriages of justice. A videotaped recording, like DNA evidence, has the forensic power to both convict the guilty and, as in the instant case, exonerate the innocent.”

And who is accountable for this failure to exercise a critical review of the case? A human being lost seven months of his freedom for a crime for which he was found to be “factually innocent.” Will anyone responsible be called to account? It's unlikely, if precedent is any guide. The situation of the factually innocent client who is forced to proceed through the ordeal of a trial due to the failure of the Crown to critically evaluate their case is hardly an outlier.

Pal-Deng will not get those seven months of his undeserved incarceration back. Doubtful, too, is the likelihood of there ever being any form of monetary redress for this injustice: The public is only outraged to the point of demanding such redress in the most egregious of cases, such as Guy Paul Morin, David Milgaard or Steven Truscott. Yet, on a daily basis, small injustices occur in this country due to the systemic flaws in our system, which this case highlights – too easy for the police to lay a charge, too easy to deny bail and too easy for the Crown to take the path of least resistance and prosecute, rather than undertake a critical review of the evidence. Thus, incrementally, decades of aggregate incarcerative sentences are meted out to those who do not deserve it, days, weeks or months at a time.

An often-repeated adage in the criminal justice field states: “The Crown neither wins nor loses,” meaning the Crown is never personally invested in the outcome of a trial. This is true, but beneath this lurks another, unstated corollary: “The Crown never pays.” If the case of Pal-Deng demonstrates anything, it is the harsh injustice of this reality.

In the final analysis, the only likely comfort Pal-Deng will derive from this experience comes from the closing words of Justice Green’s judgment: “I believe, in short, that the defendant is factually innocent. I regret that I do not have authority to do more on behalf of this court than extend to him an apology for the protracted ordeal he has endured.”