SUPREME COURT OF NOVA SCOTIA
Citation: *R.* v. MacLellan, 2017 NSSC 307

Date: 20171130
Docket: CRAT No. 458266
Registry: Antigonish

Between:

William Roger MacLellan

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 of the *Criminal Code of Canada*

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	May 2, 2017, in Antigonish, Nova Scotia
Final Written Submissions:	June 15, 2017
Counsel:	Mark T. Knox, Q.C, for the Appellant Thomas Kayter, for the Respondent

By the Court:

[1] The accused was convicted, in Nova Scotia Provincial Court, of sexual assault contrary to s. 271 of the *Criminal Code*. Sometime after initiating an appeal to this court, he died. An order has been requested to appoint a family member as his personal representative, so as to allow his appeal to continue.

Introduction

[2] The accused, William Roger MacLellan, was charged that on February 15, 2014 and October 19, 2014, he committed sexual assaults upon two young women, at or near Antigonish, Nova Scotia, contrary to s. 271 of the *Criminal Code.* These young women were alleged to have been passengers in his taxi cab when the events in question took place.

[3] The Crown, having elected to proceed summarily (the accused had consented pursuant to s. 786(2)), the trial took place at Antigonish in the Nova Scotia Provincial Court before her Honour, Judge Laurel Halfpenny MacQuarrie. It occurred over the course of five days. It began on June 1, 2015 and thereafter continued on January 19, May 12, June 3 and June 29, 2016.

[4] On January 19, 2016, the Crown indicated that it was not calling further evidence with respect to the first count, which was then dismissed. The trial continued with respect to the second count. On November 4, 2016, Judge Halfpenny MacQuarrie rendered her decision and convicted the accused of the second count of sexual assault contrary to s. 271 of the *Criminal Code.*

[5] Mr. MacLellan instructed his counsel to file an appeal of the decision. The original Notice of Appeal has already been amended once, and counsel for Mr. MacLellan has also sought to further amend the order. This "re-amended" Notice of Appeal would narrow the issues on appeal significantly. The Crown does not oppose it. The three issues remaining (if the order permitting the re-amendment of the notice was granted) would be:

1. That the learned trial judge erred in law in applying the law of identification evidence;

> 2. That the learned trial judge erred in law by failing to consider the cross-racial identification principle, also known as the "other-race" effect when applying i) the law of voice identification evidence ii) the law of circumstantial evidence, and iii) in the assessment and findings of credibility; and
>
> 3. That the verdict is unreasonable or cannot be supported by the evidence.

[6] Unfortunately, Mr. MacLellan passed away on April 5, 2017. His counsel has applied for an order pursuant to Civil Procedure Rule 36.01(1)f, appointing his sister, Ms. Dorothy MacLellan Lane, as his personal representative for the purpose of continuation of the appeal. It is this issue with which I propose to deal in these reasons.

[7] Crown counsel takes no position with respect to this application, but does point out in his brief, *inter alia:*

> 7. 'Taking-no-position' is not a Crown endorsement of the issue raised in the amended grounds of appeal, but a reflection that the issue is so novel, that the Crown is unable to research and take a position on the issue at law.
>
> …
>
> 12. It is possible (although the Crown contends improbable) that these grounds (the grounds pertaining to identification) are such that would result in a reversal and an acquittal.
>
> …
>
> 17. …if this Honourable Court grants leave for the summary appeal to be heard…the appellant (deceased) eventually succeeds on the appeal, the Crown acknowledges that a Judicial Stay of Proceedings will be an available remedy.

Issue

[8] The issue, then, is whether the court should appoint the accused's sister, Dorothy Lane, as his personal representative so that his appeal may continue posthumously.

The Law

[9] Civil Procedure Rule 36.01 states as follows:

> 36.01 (1) This Rule allows for a party to represent the interests of another person in a proceeding, in one of the following ways:

(a) as a public official, in an official capacity;

(b) as litigation guardian for a child, or person who is not capable of managing their affairs;

(c) as guardian under the *Guardianship Act* or the *Incompetent Persons Act*;

(d) under a private instrument giving the party management of the property or affairs of the other person or appointing the party as representative, such as an executor under a will, a trustee under a trust that includes powers to sell or manage, or an attorney under a power of attorney;

(e) under a public instrument, such as a trustee in bankruptcy, a receiver under an order, an administrator of a deceased's estate, or an authority appointed by a tribunal or by a public authority under legislation;

(f) by appointment under this Rule.

[10] Civil Procedure Rule 63 deals with summary conviction appeals such as this one. Rule 63.03(1) allows that:

> …Rules outside this Rule apply to the extent that they provide procedures that are suitable to a summary conviction appeal and are not inconsistent with the provisions of the *Criminal Code* or this Rule.

[11] I conclude that an application such as this is permissible under the Rules in an appropriate case.

[12] I agree with counsel that this type of application is not routinely encountered. That said, it is by no means unprecedented. Indeed, both counsel agree that I am bound by the principles set forth in *R. v. Smith*, 2004 SCC 14.

[13] At para. 10 of *Smith, supra*, Justice Binnie outlined the relevant considerations:

> 10 Accordingly, when an interested party seeks to continue an appeal notwithstanding the death of the appellant (or, in the case of a Crown appeal, the respondent), the following steps should be taken:
>
> 1. A motion, pursuant to the relevant rules of procedure, should be made for substitution of the personal representative or another interested party for the deceased accused, and
>
> 2. The appellate court must consider, in light of the interests of justice, whether it is proper to exercise its jurisdiction to hear the appeal despite it being rendered moot by the death of the accused, or to abate the appeal.

> Those cases in which it will be proper to exercise jurisdiction to hear a moot criminal appeal will be rare and exceptional.
>
> [Emphasis added]

[14] The court in *Smith, supra*, went on to examine what "interests of justice" means, at paras. 50 and 51 thereof:

> 50 In summary, when an appellate court is considering whether to proceed with an appeal rendered moot by the death of the appellant (or, in a Crown appeal, the respondent), the general test is whether there exists special circumstances that make it "in the interests of justice" to proceed. That question may be approached by reference to the following factors, which are intended to be helpful rather than exhaustive. Not all factors will necessarily be present in a particular case, and their strength will vary according to the circumstances:
>
> 1. whether the appeal will proceed in a proper adversarial context;
>
> 2. the strength of the grounds of the appeal;
>
> 3. whether there are special circumstances that transcend the death of the individual appellant/respondent, including:
>
> (a) a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;
>
> (b) a systemic issue related to the administration of justice;
>
> (c) collateral consequences to the family of the deceased or to other interested persons or to the public;
>
> 4. whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal;
>
> 5. whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the court in free-standing, legislative-type pronouncements more properly left to the legislature itself.
>
> 51 What is necessary is that, at the end of the day, the court weigh up the different factors relevant to a particular appeal, some of which may favour continuation and others not, to determine whether in the particular case, notwithstanding the general rule favouring abatement, it is in the interests of justice to proceed.
>
> [Emphasis added]

[15] Underpinning all of the above considerations is the principle espoused at para. 10 of *Smith, supra,* that the court should only grant an order in the nature of

what is sought herein in "rare and exceptional circumstances". It is put differently at para. 20, but to the same effect:

> …when an appellant dies….the court retains jurisdiction to proceed…but it is a jurisdiction that should be sparingly exercised.

The Decision Under Appeal

[16] Without purporting to be nearly exhaustive, this is what the victim alleged in this case. It is excerpted from the (as yet unpublished) decision of *R. v. MacLellan* (2016) NSPC *(*hereinafter referred to as the "decision"):

> 11. On October 19, 2014, she [the victim] and friends were hanging out on campus. The plan was to go to a pub in Antigonish known as Pipers. It was late in the evening probably 11 – 11:30 p.m. when they went. They had been in her friend's room, where she was drinking vodka mixed with red fruit punch, a red fruit punch is how she describes it. She and another girl had purchased a 20 oz. bottle of vodka between them. They had a few, and some guys drank half of it before going to Pipers. She did not consume any illicit drugs.
>
> 12. At Pipers Pub she continued to drink, tequila shots in particular, noting that she had probably 10 herself, they being 1 oz. each. She was "quite intoxicated". She recalls leaving Pipers in a hurry because a guy was there who is not permitted to have contact with her. She ran out the door and towards residence. She recalls falling.
>
> 13. She fell forward, damaging the plating on her wallet in her hand. Her entire body hit the ground. She is unsure if she hit her head. Someone helped her up but she does not recall being put in a cab. She was in the front seat of the cab with her head tilted towards the window, either having fallen asleep or resting her eyes.
>
> 14. [The victim] felt a hand down her pants and rubbing of her genital area. She explained "I was kind of coming out of haze. And then I, likely realized what was going on…I remember looking to my left and seeing a cab driver, he had…his hands down my pants…".
>
> 15. She remembers seeing the cab driver's face and indicated in court it was Mr. MacLellan. After knowing she was being touched, she called 911. She did not know what to say, she was scared and she knew what was happening was wrong. Her sense of being in the cab was that the driver of the cab did not take the most direct route to her residence which is a very short distance, usually one that they walk and feels it was longer than required. She described the clothing she was wearing, including a thong. The driver's hand was underneath it touching her genital area and in particular rubbing it, but there was no penetration. She recalls him removing his hand when she took her phone out.

> 16. The van stopped in front of her residence…, she was on the phone with 911 and she just sat there looking at the dash and crying.
>
> 17. The driver got out, there were some girls there who helped her, and she started running towards her residence and threw her phone and wallet on the ground. She was afraid to speak to the 911 operator in the cab because she was scared of what might happen, but once they stopped at the residence she felt safer and began talking. She recalls being in her residence with her Residence Assistant, …waiting for the police to arrive. She was taken to the hospital by ambulance for an evaluation by a SANE nurse.
>
> 18. The taxi was a van, with bucket seats. It seemed to be an older style van to her but stated "I wasn't taking notes on the inside of the cab". She looked at the cab as she was going back into her residence and feels the outside was a dark colour, it had a taxi sign on top which was lit but she does not remember what it said or the colour.
>
> 19. The 911 recording was played and [the victim] identified her voice. She believed the male voice to be that of the driver of the cab. [The victim] identifies herself to the operator and advises she was molested by her cab driver.
>
> 20. A male voice can be heard talking to other people outside of the residence telling them that she fell at the Pub and hit her head. The cab driver was someone not known to her previously. He was wearing dark clothes but more of a description than that she cannot give except that she said, she has a "vivid recollection of his face". She believes he had a long sleeve shirt on.

[17] Mr. MacLellan was a man of African Nova Scotian descent. He had grown up in a predominantly black community in Guysborough County, Nova Scotia. He was also the owner of a taxi company and limousine service located in Antigonish called Extreme Transport. He generally acted as a dispatcher for the company, but sometimes he took calls himself. The evidence suggested that the company had a black Dodge Caravan, a black Suburban and a van in its fleet. In addition to its taxi and limousine services, the company also ran a shuttle service whereby students from the Coady Institute would be transported to and from Halifax airport in the black Suburban.

[18] One of the accused's employees testified that the accused never drove the van (the assault occurred in what was described by the victim as a "dark van"). However, the accused himself confirmed that he had shuttled some Coady students earlier in the evening and later had fuelled the van up for a family trip expected to occur the next day (decision – paras. 41 and 47).

[19] As to the van in which the victim was transported, as described by other witnesses at the residence where she was dropped off, and from where she made the 911 call, the trial judge had this to say:

> 165. [The victim's] evidence is confirmed by other witnesses in relation to the van being dark, all three females who assisted her that evening testified to the same. Although the specific hue of the van may vary, the fact that it was a dark colour does not.
>
> 166. [One witness] says the van was dark, and had bucket seats, as did [the victim]. And the van was an older style, with a taxi light on the roof lit up in white with some black lettering. She, however, was unsure of that and agreed that it could have been another colour, as testified to by a previous witness. She recalls a chain being worn by the driver but was unsure if it was gold, it could have been silver.
>
> 167. [Another witness] confirmed it was a dark van with the driver with a black t-shirt, short sleeves and black jeans, who was a fairly dark complected male and only 5'8" – 5'9" in height. She believed the roof light to be yellow and was lit with dark lettering.
>
> 168. Further confirmatory evidence as to clothing was received from [a third witness] who said the driver was wearing a dark shirt, driving a dark van and was dark complected, about 5'5" or 5'6" and had a semi accent.

[20] Very important to the trial judge's ultimate conclusion was video evidence tendered by the Crown. As she noted in paras. 169 – 170 of the decision:

> 169. The video seized by Cst. Bezaire confirms that approximately 30 to 35 minutes prior to the call to the R.C.M.P. with the complaint from [the victim], Mr. MacLellan was in the Ultramar wearing a dark t-shirt, his evidence confirms he was driving a dark blue 2005 van, and the Court although did not receive evidence as to his height, can clearly find from his numerous appearances that he is not tall and would fall within the height range as given by [two witnesses].
>
> 170. I accept the evidence of [the victim and three other witnesses] that the driver of the taxi was wearing a dark shirt, driving an older model dark van, with a taxi sign on its roof. That he was dark complected, between 5'5" – 5'9" and had a bit of an accent.

[21] Another important link in the trial judge's reasoning is found in para. 179:

> 179. In this case Cst. Bezaire obtained the video in which Mr. MacLellan appears at 1:13 - 1:17 a.m. She heard the 911 tape and based on her interactions with him over a considerable amount of time, arrived at the opinion that it was

> Mr. MacLellan's voice. She is not a person who had no prior communication with Mr. MacLellan. She is not a person who's only able to do voice identification based on her interaction with him during this investigation. However, she did not stop there. It was her evidence that she attended at the Antigonish Town Hall to attempt to obtain photos of all non-white male taxi drivers, and she also went to Lower South River to where she knew Mr. MacLellan lived, to his residence to determine what vehicles, in terms of colours he had in his taxi fleet.

[22] Judge Halfpenny MacQuarrie concluded her analysis at paras. 197 – 201 as follows:

> 197. Mr. MacLellan is a dark skinned individual of African Nova Scotia descent. He agrees that he has somewhat of an accent and he identified the male voice on the recording as someone from the community and surrounding communities that he grew up in [sic] in Guysborough county. However, upon further questioning of Mr. MacLellan he tried to backpedal on what his initial evidence was. He agreed he'd listened he said to this recording several times as it was part of Crown disclosure but all of a sudden only noticed a distinction on the day of trial when pressed on the issue and during his cross-examination.
>
> 198. I do not accept Mr. MacLellan's evidence.
>
> 199. In applying **W.(D).** to the totality of Mr. MacLellan's evidence I reject it. As stated it was evasive at times and it did not have an air of reality to it. Mr. MacLellan was contradictory on the origin of the voice on the 911 recording. His demeanor on cross-examination was of someone less than forthcoming.
>
> 200. I specifically reject it, and I find that he was the driver of the taxi van that picked [the victim] up at Piper's Pub and sexually assaulted her.
>
> 201. He is shown in a video at the Ultramar Station at approximately 1:17 a.m. and it is the Court's finding that he left that location, made the trip to Piper's Pub, picked her up, committed the illegal act and dropped her in the front of her residence at [the university]. His physical description as to skin color, height, clothing and van colour, as to style or model of it being older, conform with what was seen approximately thirty minutes earlier at the Post Road Ultramar, and based on his own evidence and as to what was described by all four females at [the university]. That, along with the voice evidence from both he and Cst. Bezaire satisfy the Court of his guilt beyond a reasonable doubt. There can be lots of speculation as to other possible scenarios but as per **Villaroman** (*supra),* all such alterative inferences must be reasonable and not just possible. I find the accepted facts here are consistent with guilt and inconsistent with any other rational conclusion. And I find Mr. MacLellan guilty.
>
> [Emphasis added]

[23] The foregoing is not nearly exhaustive of the judge's reasons which are fifty-seven pages in length. They do, however, serve to contextualize the application before this court.

Discussion and Analysis:

Identification Evidence

[24] Counsel for the (deceased) accused asserts that the identification issues in this case raise two issues which were inadequately considered or appreciated by the trial judge:

i. what he describes as the "pure" or traditional law regarding identification evidence; and

ii. a "parallel" and "…equally as important issue...[that of] cross-racial identification (defence brief, p. 2).

i. "Traditional" Identification Evidence

[25] With respect to ground (i) the accused's brief evinces an intention to argue (should the appeal be allowed to continue) that the trial judge:

> …failed to apply the penultimate caution concerning identification evidence; even honest, sincere or well intentioned witnesses are subject to the frailties of human memory in the area of the identification of features individuals. Therefore the test in assessing an identification witness cannot be the same as assessing credibility of other witnesses during the criminal trial process (defence brief, p. 2).

[26] With respect, I do not find the above convincing in the present context. First, when I consider the *Smith*, factors, this issue does not have characteristics that "transcend the death" of Mr. MacLellan. The inherent frailties of identification evidence have been recognized in a myriad of ways for a long time in the existing jurisprudence. One of the best explications of the topic occurred in *R. v. Atfield*, 1983 ABCA 44, where at para. 3 the court observed:

> 3 The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing, and have been responsible for many cases of miscarriages of justice

> through mistaken identity. The accuracy of this type of evidence cannot be determined by the usual tests of credibility of witnesses, but must be tested by a close scrutiny of other evidence. In cases, where the criminal act is not contested and the identity of the accused as the perpetrator the only issue, identification is determinative of guilt or innocence; its accuracy becomes the focal issue at trial and must itself be put on trial, so to speak. As is said in Turnbull, the jury (or the judge sitting alone) must be satisfied of both the honesty of the witness and the correctness of the identification. Honesty is determined by the jury (or judge sitting alone) by observing and hearing the witness, but correctness of identification must be found from evidence of circumstances in which it has been made or in other supporting evidence. If the accuracy of the identification is left in doubt because the circumstances surrounding the identification are unfavorable, or supporting evidence is lacking or weak, honesty of the witnesses will not suffice to raise the case to the requisite standard of proof and a conviction so founded is unsatisfactory and unsafe and will be set aside. It should always be remembered that in the famous Adolph Beck case, twenty seemingly honest witnesses mistakenly identified Beck as the wrongdoer.

[27] Our Court of Appeal has had opportunity to discuss the law as it relates to this matter on many occasions. (See *R. v. Drummond,* 1999 NSCA 56, *R. v. Hall,* 1998 NSCA 90, as merely some examples). This court has considered the topic on many occasions as well, most recently in Justice Wood's decision in *R. v. Downey,* 2017 NSSC 39.

[28] While certainly issues of identification evidence, *simpliciter*, do require a great deal of scrutiny, the difficulty in individual cases always arises with respect to the application of the repeated cautions that have been administered, in the bevy of decided cases, to the particular evidence at hand. The jurisprudence would gain very little, in my view, by yet another explication by this court on that topic in the instant case.

[29] Nor, in my view, is the appellant's case very strong with respect to this ground of appeal. Judge Halfpenny MacQuarrie was alive to the dangers inherent in identification evidence, particularly with respect to the recognition of Mr. MacLellan's voice in the 911 call. For example, we have the following observations:

> 151. **R. v. Mitchell**, 2003 NSPC 29, set out factors a Court can use respecting the evidence of Cst. Bezaire's voice identification of Mr. MacLellan. Such includes other direct or circumstantial evidence that the speaker is the accused, whether there are events following the conversation in which he was identified, which are consistent with his identity, whether there is anything peculiar or

distinct about his voice, whether any facts are disclosed by the speaker, and the like.

152. Cst. Bezaire was an officer in this community for 10 years and had known Mr. MacLellan throughout that time, has had interactions with him that give her credibility, he suggests. She says his voice is distinctive, as an example she referenced how he pronounced words differently such as Antigonish, has a slight accent and a bit of a raspy voice. She described Basil MacLellan's voice as squeaky and not the unidentified male voice on the 911, speaking about the girl having fallen at the Pub and hit her head.

…

154. Mr. MacLellan confirmed on the night in question he was in fact driving a van, he was in a Suburban, then into a van, then into the Suburban and then into a van, and in particular in a van near the time of the alleged event. He listened to the 911 tape and suggested that the male voice on it was someone of African descent from Guysborough area and to the point of specifying Lincolnville or Sunnyville. Mr. MacLellan says he is from Lincolnville, and that no other taxi drivers in Antigonish are from either of those communities.

[30] By way of further example:

180. Justice Hill's decision in **Pinch** (*supra),* is very instructive on the inherent frailties with voice identification and what the Court needs to concern itself with in determining what weight, if any, should be give to the same. As stated earlier, he divides "listener evidence" into three sub-groups, including people who have acquired a familiarity with the speaker's voice which can include friends, family ember, co-workers, or in some instances police witnesses. Cst. Bezaire falls into that group. It is important to note that she was not declared, or asked to be declared, an expert witness with respect to voice identification but rather hers is opinion evidence and is a matter of weight based on her interaction and familiarity with Mr. MacLellan's voice.

181. At paragraph 75 he warns about the difficulties of such evidence. The reliability of the same has to be tested so as to reduce "misidentification, false positives and factual miscarriages". He then considers a number of factors which impinge upon the reliability of the same including:

(1) is the witness sufficiently familiar with the witness' voice to be able to recognize it…

(2) the quality of the voice sample and its size or length and repetition of exposure…

…

> (4) while it has been observed that '*all* voice descriptions must be treated with extreme caution'… is there some peculiarity, mannerism or distinctive feature to the subject's voice that wold make it more readily identifiable…
>
> …
>
> (9) is the trier aware of the difficulties which the telephone imposes on voice identification because of the loss of acoustic information…
>
> …
>
> (12) the dangers and potential prejudice of cross-racial voice identification evidence…
>
> …
>
> (15) is there circumstantial evidence whether from content, surveillance or otherwise tending to confirm the identified subject as the speaker…
>
> 182. Cst. Bezaire has had, what the Court would call moderate amounts of continued communication over a significant number of years with Mr. MacLellan. She said he has a distinctive voice in that is somewhat raspy, and has a slight accent. She gave examples of words that he would pronounce that make it distinguishable.
>
> 183. She gave examples of the times of communication with him. Her evidence in that regard is given more than minimal weight by the Court however, it is in no way conclusive as to identification. However, it is part of the totality of the evidence in this case.
>
> [Emphasis added]

[31] The case did not solely turn on the identification of Mr. MacLellan's voice on the 911 call, or actual identification by the witnesses, although the complainant did identify him (decision, para. 161). Moreover, the paragraph which the trial judge quoted from the authority cited in para. 181 of her decision specifically raises the spectre of "…the dangers and potential prejudice of cross-racial voice identification evidence…".

[32] Further, as we have seen, the trial judge summarized the other evidence in para. 170:

> 170. I accept the evidence of [the victim and three other witnesses], that the driver of the taxi was wearing a dark shirt, driving an older model dark van, with a taxi sign on its roof. That he was dark complected, between 5'5" – 5'9" and a bit of an accent.

ii. Cross-racial Identification

[33] Counsel for the appellant argues that this is a discrete aspect of identification evidence. He elaborates upon that point:

> Ground of Appeal Number Two involves an issue of systemic importance in the criminal justice system: how can finders of truth know what is, and is not acceptable in terms of the cross-examination of witnesses who are of a minority race or culture? Where should the line be drawn regarding this endeavor?
>
> The Applicant's counsel explained to Your Lordship that this area-cross racial identification-was completely unfamiliar to myself. I understand that it may have been an unique field for the Crown Attorney at trial as well. As this topic was not referred to in the learned trial judge's decision, perhaps this is an area that the learned trial judge was also not familiar with. Regardless, the topic should have been brought to the attention of the learned trial judge and it was not.
>
> …Without further jurisprudence and appellate review, it is unlikely that necessary education for practitioners will occur; unless reviewed, further errors may occur. Ground Two is an issue that clearly transcends the death of the accused; it is submitted that this case/this appeal is rare and exceptional.

[34] A parallel has been drawn by the appellant with a feature integral to the wrongful conviction of Donald Marshall Jr. The Royal Commission Report on the Donald Marshall Jr. Prosecution (1989) at p. 10 criticized the trial judge for emphasizing the accused's soft spokenness and reluctance to look people in the eye (while testifying) in assessing his credibility. The parallel asserted is with respect to features of giving evidence that may differ between cultures.

[35] Additionally, I have been referred by the appellant to a paper prepared by former Dalhousie law student, Alison Aho: "Identification and Recognition Evidence: Determining Admissibility with Respect to Race."

[36] In the course of her excellent paper, Ms. Aho notes that evidence provided by the witness testifying as to the identity of a person previously known to him or her constitutes recognition evidence, which is a subset of identification evidence proper. When a witness purports to identify someone accused of a crime, for example, as the person that was observed perpetrating it (a person previously unknown to the witness) this is classic identification evidence. The author goes on to say at p. 10, that when it comes to both identification and recognition evidence:

> …there is a clear lapse in our criminal justice system that has not only been historically ingrained, but can also be influenced by a psychological

> predisposition. In my opinion, no amount of cultural competence, or education can entirely remedy this problem. Nevertheless, there is a responsibility on behalf of the court and counsel to take precautions where this may arise.

[37] Cross-racial identification evidence has been identified by the courts as fraught with particular difficulty for some time. For example, in *R. v. Powell*, [2007] O.J. No. 4196, 2007 CanLii 45918 Ontario Supreme Court, Ducharme J. culled a number of factors which have been found to be of use when assessing the probative value of eye witness identification from the decided jurisprudence:

> 15] Obviously, where an eye-witness expresses confusion or uncertainty about their identification, this undermines the weight that can properly be accorded it. However, the converse is not true. As Arbour J. stated in *R. v. Hibbert* (2001), 2002 SCC 39 (CanLII), 163 C.C.C. (3d) 129 (S.C.C.) at 148 there is a "very weak link between the confidence level of a witness and the accuracy of that witness." Thus, while in this case H.S., M.V. and T.D. all express great confidence in their identification of Mr. Powell as their assailant, this is of little assistance to me. Rather, I must carefully examine the totality of the circumstances which gave rise to their identification in order to determine the reliability of that evidence. Consequently, in assessing the probative value of their eyewitness identification, I should be guided by the following factors which have been recognized by our courts as useful in assessing the value of identification:
>
> > [1] How much time has lapsed between the identification and the events being described by the witness? Generally speaking, the longer the intervening period of time, the greater the risk of error.[5] Did the witness do anything to lessen this concern such as taking notes contemporaneously to the sighting or reporting her observations to another person or the police in a timely way?
> >
> > [2] Is the witness identifying someone they know or someone they have never seen before? If the witness has seen the person before, how often have they seen him and in what circumstances? If the witness did not previously know the person being observed, their identification should be viewed with greater caution. On the other hand, the witness's previous acquaintance with the person being observed may make the identification particularly reliable.
> >
> > [3] The physical circumstances of the sighting. This involves a consideration of such factors as the distance between the witness and the person seen, the sight lines involved, whether the view was clear or obstructed in any way, the lighting at the time of the sighting, whether the witness and the person observed were moving or stationary, etc.

[4] The duration of the observation, was it just a "fleeting glance" or was it something that took place over a longer time? Identifications based on a "fleeting glance" are regarded with greater caution.

[5] The emotional state of the witness at the time of the sighting. Was the witness surprised to see the person? Was the witness under any psychological stresses such as fear at the time of the observation. Was the witness's attention distracted by various things or did she have and opportunity to observe the person with care?

[6] What is the quality of the witness' description of the person? Is it rich in specific detail or is it merely a generic listing of such similar characteristics as weight, height, race, etc. The more generic the description, the less probative it is. Has the witness' description remained consistent in its material details or has the witness contradicted herself about important details?

[7] How does the witness' description compare to that provided by other witness? Where there are competing, inconsistent descriptions one or all of them may have to be viewed with caution. Similarly, where several witnesses are equally well situated to observe the person and one or more are unable to do so, the purported identification may be suspect.

[8] Has the eye-witness been exposed to other images of the person being identified? Where the eye-witness has previously seen composite drawings, photos, video clips or other representations of the person the trier of fact must be alive to the possibility that the witness is, intentionally or unintentionally, identifying, not the person they originally saw, but rather the person depicted in such images.

[9] What sort of pre-trial identification process did the eye-witness participate in? Given, the almost negligible value of an in court identification, pre-trial identification processes are of critical importance in any assessment of the probative value of an eye-witness' identification.[It is therefore essential that these processes are fair and unbiased in order that the eye-witness' identification occurs, "without suggestion, assistance or bias, created directly or indirectly." Thus, courts have commented adversely on the negative effects of such procedures as showing eye-witnesses only a photograph or photographs of a single suspect; suggestive photo arrays or in person lineups, "show up" identifications, etc. Thus, a trier of fact must carefully consider both the possibly suggestive nature of the procedures as well as whether the details of the eye-witness' account or their confidence in their identification have evolved or changed through this process.

[10] Has the witness's identification been influenced by that of other witnesses? Thus, it is important that eye-witnesses participate separately in the pre-trial identification processes. Similarly, neither the police,

> victim support personnel, nor Crown Attorneys should comment on the identifications made by an eye-witness or tell her the details of any other eye-witness's evidence. Finally, a trier of fact should be alive to the possibility of collusion amongst eye-witnesses, intentional or unintentional.
>
> [11] How does the eye-witness' description of the person compare with their appearance at the time of the incident? As already mentioned a generic description is of little probative value. However, where the description is more detailed and those details are consistent with the appearance of the person at the relevant time, the identification may be entitled to greater weight. This is particularly true, if the witness identifies some distinctive feature in the person's appearance, physique, speech, mannerisms, etc. On the other hand, regardless of the number of similar characteristics in an eye-witness' description, an eyewitness description that contains dissimilarities to the accused is either valueless or exculpatory.
>
> [12] Where cross-racial identification is involved the trier of fact must be alive to the possibility that this might cause the eye-witness some difficulty or constitute a reason to regard their evidence with greater caution.
>
> [13] Is there any other reliable circumstantial evidence capable of confirming or supporting the identification evidence of identification in a material particular? The existence of such evidence "can go a long way to minimizing the dangers inherent in eyewitness identification."
>
> [Emphasis added]

[38] It is also true that in *Powell, supra,* the court concluded that the identification evidence was frail, due (in part) to cross-racial identification. But the evidence had other problems too – for example:

> 26 In my view, the foregoing reasons are a sufficient basis to conclude that it would be unsafe to convict Mr. Powell based on H.S.'s evidence. However, I would note that there are additional reasons to view her identification with extreme caution: First, she admitted that she had exaggerated details of her account both when speaking to the police and when testifying at the preliminary inquiry. She attempted to justify this by explaining that, "when something sticks in my mind that much, I might exaggerate a little bit because just to show how much it stuck out." While she claimed to be getting better at controlling her tendency to embellish this is little comfort. I am especially concerned with the fact that she would so blithely ignore her oath while testifying at the preliminary inquiry; Second, I find that H.S. intentionally downplayed the effects that methadone had on her during the videotaped interview on July 13, 2004. She had to be taken to her testimony at the preliminary inquiry where she testified, "I am

> saying I was high on methadone and everything looked different. I wasn't even in my right state of mind." Having viewed the videotape, I find that she was deliberately downplaying the effects that the drugs had on her in order to enhance her value as a witness. Third, I am concerned that H.S.'s use of both heroin and crack cocaine before and during the attack affected her powers of observation. I do not believe her protestations to the contrary. Here again, I think she was being less than honest. Fourth, I am concerned that her identification of Mr. Powell was tainted by a seriously flawed pre-trial identification process. I have discussed these problems at greater length in my ruling dismissing Mr. Powell's application to exclude the identification evidence under s. 7 of the Charter. For these purposes it is sufficient to point out two particular deficiencies in what was done: (a) on both July 11 and July 13, 2004, when the police showed her photographs H.S. was under the influence of drugs; and (b) on both of these dates the photo array used by the police was highly suggestive as the Mr. Powell was the only individual with hair braided in the way H.S. described..

[39] In *R. v. Richards*, 2004 CanLii 39407 (Ontario Court of Appeal), *R. v. A.C.* (2009) CanLii 46651 (Ontario Supreme Court) and *R. v. MacIntosh*, 1997 CanLii 3862 (Ontario Court of Appeal), the difficulties associated with cross-racial identification were repeatedly stressed. So, too, the fact that there is an increased risk of error (and consequently a need for increased vigilance on the part of the trier of fact) when such evidence is presented. Other cases which deal with this concept will be discussed later in these reasons.

[40] Although not as many examples exist, courts in Nova Scotia have considered these principles as well. In *R. v. Downey, supra,* Justice Wood observed:

> 40 Mr. MacEwen argued that there might be an issue of cross racial identification since Ms. MacLean is white and Mr. Downey is black. This is a legitimate concern in some cases but requires an evidentiary basis. It will usually arise where the witness has little familiarity with individuals from the race or culture of the accused. There is no such evidence here and I take judicial notice that Cole Harbour High School has a significant number of African Nova Scotian students. Ms. MacLean would likely be quite familiar with individuals from that community.

[41] In this case the "in dock" identification rendered by one or two Crown witnesses was rightly discounted as bearing little to no probative weight. That aside, what identification evidence there was came from the witness descriptions tendered of the cab (and the driver thereof) in which the victim was situate when she made the 911 call, and in which she was dropped off at the destination. It also came from the video of the descriptively same vehicle being driven by a man

identified (by the accused and his own nephew) as the accused himself, going into an Ultramar gas station relatively proximate, less than 30 minutes before the assault occurred, as well as Cst. Bezaire.

[42] This is how the learned trial judge (who accepted the victim's evidence that she was sexually assaulted) summarized the witness accounts:

> 193. In this case the accepted evidence is that [the victim] was sexually assaulted in a dark van, by a person with a dark complexion, wearing dark clothes in Antigonish, Nova Scotia, on the date of October 19, 2014. This occurred a short time before 1:49 a.m. when a 911 call was made reporting a molestation by a taxi driver. This dark van had a taxi sign on its roof and the van was an older model. The drier was frantic to get the female out of the front seat and was saying she was "crazy" and "she fell and hit her head at the pub" and "she doesn't know what she's saying".
>
> …
>
> 195. Much is made by defence counsel as to the exact colour of the van, whether it was black, dark green or dark. Again, nothing turns on that as it is the common evidence that this was a dark coloured van. This was 2:00 am in the morning. There is no evidence from anyone that it was anything other than dark, be it dark green, dark blue or black. There is no evidence that it was yellow, red, or orange. The description as being dark is consistent by everyone throughout.
>
> 196. The identification of the driver is crucial to this prosecution for the Crown. Again, much is made by counsel that descriptions such as Latin, Filipino or Mexican have been used. Upon review of the evidence we see that these terms mostly suggested to the four female Crown witnesses by counsel. Ethnic descriptions, as noted by Mr. MacLellan, are very personal. All four described the driver as dark skinned or dark complected. Two of the females said this dark complected individual spoke with a semi-accent.
>
> 197. Mr. MacLellan is a dark skinned individual of African Nova Scotia decent. He agrees that he has somewhat of an accent and he identified the male voice on the recording as someone from the community and surrounding communities that he grew up in Guysborough county.
>
> [Emphasis added]

[43] We have already seen how she tied all of this together in para. 201 of the decision which has been previously referenced.

[44] This was a circumstantial case. What was described by almost all of the witnesses was a collection of characteristics that the driver/perpetrator and his taxi or van possessed. The voice recognition by the female officer, who positively

identified the background voice on the 911 tape as that of the accused, was another circumstance which the trial judge considered in this context. It was pointed out that the voice appeared to have an accent common to residents of a particular black community in Guysborough County, and the accused himself agreed that this characteristic was present in the voice in the recording.

[45] As we have seen, these were circumstances that were added to the others and it was the totality of these circumstantial facts from which the learned trial judge drew what she considered to be the only reasonable inference available to her: the identity of the accused as the perpetrator of the sexual assault.

[46] In *R. v. Gallimore*, 2014 ONSC 1822 (CanLii), it was observed at para. 90:

> 90 The issue of cross-racial identification has also been raised. Where cross-racial identification is involved, the trier of fact must be alive to the possibility that this might cause the eye-witness some difficulty or constitute a reason to regard their evidence with greater caution: *R. v. McIntosh* (1997), 35 O.R. (3d) 97 (C.A.). Appellant's counsel submits that the trial judge failed to avert to the cross-racial issues. These are indeed very important considerations. However, with respect, I do not find that the judge fell into error on this point. It is clear that in this case, the distinctness of the identity of the perpetrator was premised on the appellant being present at the scene with a district hair style and clothing as compared to a finite number of black individuals in the proximity of the incident. The dangers surrounding inaccurate cross-racial identification are all but extinguished.

[47] The dangers inherent in cross-racial identification and the need for extreme caution therewith is well known in Canadian courts. It is a phenomenon that has been addressed in courts across the country as we have seen. Most unfortunately, it will likely continue to generate cases which will require further reference to it, and a continuing re-emphasis and reinforcement of the need for a great deal of caution when assessing such evidence. The essential caution which emerges from cases which do advert directly to the issue emphasizes the need for increased vigilance when assessing such evidence, and to look for other corroborating evidence when determining whether to accept it and how much weight to give it. The learned trial judge did that.

[48] Appellant’s counsel is indeed correct that this is a weighty and often troubling issue. The court must be extremely vigilant when dealing with this type of evidence because of the danger that it may lead to a wrongful conviction for reasons which are amply discussed in the existing jurisprudence. Context, and

whether other evidence exists which supports such evidence, should be examined thoroughly when the credibility and/or reliability of a witness proffering cross-racial identification is assessed. The trial judge, to repeat, did just that. Moreover, to repeat, it is clear that the trial judge did consider the issue, which is referenced in the quote that she extracted (at para. 181 of the decision) from *Pinch, supra,* as to "the dangers and potential prejudice of cross-racial voice identification evidence".

[49] As we have seen, many cases across the country make this very point. Sadly, it appears that opportunities will exist in all courts, at all levels across the country, to re-emphasize it in the future.

Synthesis

[50] In very summary form, then, the *Smith* factors as applied in this context are as follows:

i. Adversarial Context.

[51] This factor presents little difficulty. The Crown has properly conceded that Ms. Lane would be an appropriate representative of the deceased accused in this case. In *Smith, supra,* itself, where counsel was retained by the family of the deceased appellant, it was clear that the appeal would proceed in proper adversarial context (supra, para. 53). In *R. v. Michaud,* 2014 ONCJ 243 at para. 18, the court held that since the appellant's widow had taken his place in the proceedings "it was clear that a proper adversarial context existed". I so find in this case as well.

ii. Grounds of Appeal.

[52] These have been discussed at length. In *Smith, supra,* the court noted that the real possibility of a new trial leading to an acquittal was a significant factor to be considered (*supra,* at para. 54). However, in this case, I cannot conclude that there exists the real possibility of a new trial leading to an acquittal, for the reasons discussed earlier.

iii. Special Circumstances.

[53] This adverts to an issue of public importance. The rarer or more pressing the issues on appeal, the more this factor has weighed (in the jurisprudence) in favor of continuing with the appeal. The less rare the issue on appeal, the less

importance this factor has assumed. A comparatively trivial example occurred in *R. v. Hicks*, 2016 ONCA 291, where the court declined to review the appeal of a traffic ticket, given the vast numbers of them decided annually.

[54] In *R. v. Lewis*, 2008 BCCA 266, a decision concerning the admissibility of evidence, though it was "important to the deceased appellant at the time" was not found to have far reaching consequences and was considered not to be an issue of public legal importance.

[55] In *Trang v. Alberta*, 2004 ABQB 497, the court held that "an application for release from disciplinary segregation may be evasive of judicial review because the question is moot as soon as the inmate is released". This was considered to be an example of a rare issue that was considered to weigh in favour of hearing a moot appeal.

[56] As discussed above, the appellant says that this case addresses an issue of transcendent or public legal importance. I agree that cross-racial identification or recognition is indeed a serious issue that concerns the public. In particular, the dangers of misidentification of African Canadians touches upon a number of core Canadian values.

[57] That said, such issues, although of public legal importance, and while certainly not ubiquitous, are encountered often enough in the existing jurisprudence such that the phenomenon has been identified and is well known across the country. I cannot conclude that the case at bar deals with a public issue that is "evasive of appellate review" (as the term is used in *Smith*, para. 49).

[58] The paper cited by the appellant as earlier referenced, itself cites four recent cases that have all dealt with the issue of cross-racial identification. Of those cases, two were decided by the Ontario Court of Appeal within the last five years: *R. v. Jack*, 2013 ONCA 80 and *R. v. Yigzaw*, 2013 ONCA 547. This, in conjunction with the case law canvassed earlier, tends to further support the conclusion that the topic is not one which is "evasive of appellate review".

iv. Investment of Court Resources

[59] The appellant has pointed out that *R. v. T.W*, 2016 NLCA 3, stands for the proposition that a Court of Appeal under s. 686(8) of the *Criminal Code* may grant a stay of proceedings instead of a new trial or any other order that justice requires. The respondent's position is that "the only potential remedy that could realistically

result with an accrued benefit to the deceased appellant would be a judicial stay of proceedings" (Crown post-hearing submissions, para. 13 emphasis added). I agree. Further, I consider the Supreme Court of Canada's observation in *Smith, supra*. This was to the effect that a stay is not the same as an acquittal and "the fact that, even if successful, the outcome of the appeal would be inconclusive is a factor that militates against its continuation" (*Smith*, para. 59)

[60] To repeat, I was not able to conclude that the continuation of the appeal would likely result in an acquittal. It is certainly true, as counsel for the applicant points out, that the accused became very upset when asked questions on cross-examination touching upon his ethnicity. His reaction to this line of cross-examination was only one factor that was considered in relation to his credibility (decision, para. 155). In any event, it is not necessary that the present appeal be heard posthumously in order that an opportunity for judicial comment either with respect to same or upon the dangers of cross-racial identification will present itself.

v. Other Factors

[61] The appeal was filed approximately one month after conviction and this motion was heard within several months of the appellant's death. There are no issues of delay or other factors that could further weigh in favour or against the hearing of the appeal.

Conclusion

[62] Consideration of the *Smith, supra,* factors (as noted above) strongly militates against the order which the applicant seeks. The application to have the appeal continue posthumously through Ms. Lane, Mr. MacLellan's personal representative, is accordingly dismissed.

Gabriel, J.