

CANADA / JUDGMENT

HMTQ v. Cooper

2000 BCSC 342

COURT

Supreme Court of British Columbia

DECIDED

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Citation:

HMTQ v. Cooper

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2000 BCSC 342

Docket:

CC991286

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN

v.

PHILLIP THOMPSON COOPER

REASONS FOR JUDGMENT**OF THE****HONOURABLE MR. JUSTICE HOOD**

Counsel for the Crown

R.G. Ruttan

Counsel for the Accused

P. McMurray

Date and Place of Hearing/Trial:

February 1-4, 2000

Vancouver, BC

- [1] The Accused is charged with one count of robbery of Amarjit Gill on May 28, 1999 at the City of Vancouver, contrary to s.344 of The Criminal Code of Canada, R.S.C. 1985, c.-46.
- [2] On Thursday, February 3, 2000, I gave my decisions on the admissibility of certain evidence, and on the following day I found the Accused guilty as charged. These are the Reasons for those decisions.
- [3] On May 28, 1999, shortly before 5:00 p.m. closing time, the Canadian Imperial Bank of Commerce situate at 3297 Kingsway, was robbed by a man, whose facial features have been described by eyewitnesses as Asian or Hispanic/Mexican or aboriginal in appearance. He was wearing a hard hat, a woollen shirt and jeans. On entering the Bank he waited in line and then eventually went to Ms. Gill's teller station. They were a few feet apart. The man handed Ms. Gill a note which read:

This is a robbery.

Give me \$4,500.00. 45 \$100.00 bills.

Be quik Be discreet

Don't! Fuck with me

I will shoot you and everybody around me.

He then told her to hurry up.

- [4] Ms. Gill testified that she immediately went a short distance to a cash dispensing machine situate behind the tellers' stations, where she spoke to a fellow teller, Ms. Matendi, and showed her the note. She did not get any money out of the machine. She does not know why, perhaps she pressed the wrong button. She was quite nervous at the time.
- [5] She returned to her teller's station where the man was waiting, and he immediately told her to hurry up or he would shoot her. She then pulled open her cash drawer, and took out a "\$250.00 burglary bundle" of marked bills, and some other loose bills, and gave them to the man, who then departed.
- [6] There is no doubt that Ms. Gill and the Bank were robbed. That is not in issue. What is in issue, the sole issue, is identification; whether the Crown can prove beyond a reasonable doubt that the Accused, Mr. Cooper, was in fact the robber.
- [7] Ms. Gill said that Bank employees received some training about what to do if a robbery occurs; basically, not to ask any questions, and pay the money so that no one is hurt. They are required to write a report after the event, describing what happened, and what the robber looked like. She prepared her report after the robbery.

- [8] She described the robber's racial origin as "looking like a Korean/Mexican mixture". He was about 5'8" in height and weighed about 150lbs. His complexion, that is the colour of his skin, appeared to be white. His eyes were brown. He was wearing working clothes, a chequered shirt and jeans, and a yellow hard hat. She identified the Accused in the stand as the robber. She had done so at the Preliminary Inquiry as well.
- [9] On July 15, 1999, the police presented her with a photograph line-up containing photographs of individuals with quite similar facial features. She was told that the suspect may or may not be in the photo line-up. She was to select any photograph, by number, of any person whom she recognized. She eventually completed a photographic line-up form and signed it. It is stated under the topic "Investigator's Notes":

Looked at line-up for approximately one and a half minutes and said: "Everybody looks different". Wrote down "None". Then at 9:20 added that face of No.4 looks similar.

Ms. Gill confirmed that she did not select a photograph, and that later on she did indicate that the man in photograph #4 looked similar.

- [10] On cross-examination Ms. Gill said that she looked at the man in the Bank for about five seconds when he handed her the note, and for approximately a further five seconds after she returned to her wicket and gave the man the money.
- [11] She was asked why she thought the man might be a mixture of Korean and Mexican. She said that all kinds of mixed race people come into the Bank. She was describing him as a mixture of Asian and Hispanic. She had had experience dealing with "people like that" as a teller. She said that "some people's faces were like that", and that is why she wrote down the mix. The facial feature which caused her to do that was the man's big cheekbones. The best she could do was say that he had big cheekbones and that his face was "smaller at the bottom", referring to his chin. She could not recall any facial hair or scars or tattoos on the robber's face, any earrings or an accent, or any indication that he was on alcohol or drugs. She said that she was nervous and just tried to do what she was supposed to do.
- [12] She agreed that the reason she picked out the Accused in Court was because he was the only person in the Courtroom who looked anything like the man who robbed her; that she recognized him because she saw him at the Preliminary Hearing. On re-direct she said that she not only saw him in the Courtroom and at the Preliminary Hearing, but also when she was robbed.
- [13] Ms. R. Matendi, the second teller, verified that she was at the cash machine, attempting to get money out, with her back to both Ms. Gill and the robber, when she heard Ms. Gill say 'help'. She thought that Ms. Gill wanted help to use the machine, so she did not turn around. Ms. Gill then came up beside her and showed her the note. She read it, turned and looked at the man, and their eyes met. She then told Ms. Gill to pay the money, and looked away so as not to make the man suspicious.

- [14] She described the man as Asian in appearance, wearing a white hard hat, a woollen shirt with red, white and blue checkers or pattern on it and blue jeans. His face was a bit tanned, and a bit round. He looked a bit dirty at the time.
- [15] On July 15, 1999 she was shown the police photograph line-up. She looked at it for about ten minutes. She selected photograph #6, which was not a photograph of the Accused.
- [16] On cross-examination she said that she believed that the robbery occurred over an hour before closing time. She was familiar with the area of Kingsway and Joyce. There was a lot of construction going on, and it was not uncommon to see men in work clothes, or wearing hard hats, in the area.
- [17] She believes that she looked at the robber for five to ten seconds. He was a bit dirty, like someone who had just come off a construction site. His face was tanned a bit and a bit round. His complexion was lighter at trial. He was between 20 and 30 years old, slightly over five feet and 140-150lbs. In her statement she had said 130lbs. However, she has revised her estimate as a result of a second bank robbery in which she was involved, and as a result of which she learned some tips from police as to how to estimate weight.
- [18] When shown the photograph line-up she looked at it for several minutes before choosing photograph #6. She appreciated that she was not to guess. "#6 fitted my memory at the time" she recalled. She is not sure if the Accused, who she identifies as the robber, is the same person shown in photograph #6. She cannot now recall how the photograph looked.
- [19] She said again that at trial the Accused's skin appeared lighter, i.e., he was not as tanned, and he was more groomed. She identified the Accused at the Preliminary Inquiry as the robber. She would not agree that she identified him in the Courtroom as the man she saw at the Preliminary Inquiry, as opposed to the man she saw in the Bank.
- [20] At trial the Crown led three categories of identification evidence in addition to the evidence of the two tellers, to which I have just referred. The first was the video tape filmed in the Bank at the time of the robbery, and still prints of the robber taken from that tape. The second category was the recognition evidence of three Corrections Officers and one Parole Officer, who had had previous dealings with the Accused. The third consisted of the expert evidence of Constable G. Fredricks, consisting of further stills of the bank robber taken from the Bank's video tape, with enlarged or blown-up images, and video slides of three enlarged known still photographs of the Accused, compared to a number of enlarged stills taken from the Bank video tape.

THE BANK VIDEO TAPE AND STILLS TAKEN THEREFROM, EXHIBITS 2 AND 1 RESPECTIVELY.

- [21] The robbery was video tapped through a number of the five security cameras situate in different areas of the Bank, which feed into a time-lapse recorder which switches from one camera to another, in an adjustable sequence and continually.

- [22] The cameras basically recorded the robber's movement in the Bank, for example, when standing in line waiting for a teller, and when standing in front of Ms. Gill's wicket. Numerous frames of the robber's face from different angles can be seen, including frontal views.
- [23] I viewed the video at some length, with particular regard to the facial and other features of the robber in comparison to those of the Accused in the stand. The video tape was run by Mr. G. Hepting, an employee of the video surveillance company. It was he who took the still prints from that video at the Bank some time after the robbery, at the direction of the police. The tape was stopped from time to time so that a more careful look could be taken of the robber's facial features. At the same time I had before me the stills contained in Exhibit #1.
- [24] In my view the video tape, and the stills taken from it by Mr. Hepting, are of good quality and give a clear picture of the robber, and, in particular, of his facial features. When I viewed them I concluded that it would be safe to make a finding on the identity issue on them alone, for it seemed to me that the facial features of the robber, particularly the shape of his face, the width and appearance of his eyes, his nose and the set of his lips, were identical to those of the Accused, and that the Accused was indeed the robber. However, being alive to the frailties of identification evidence, and the difficulties and dangers involved in taking a rigid approach to it, I looked forward to the other categories of evidence to be led by the Crown to see if they supported what appeared to me to be the obvious conclusion, as well as any other evidence that might be led by the defence and which might contradict that evidence and raise a reasonable doubt in that regard. It will be seen that the other Crown evidence, to which I will refer in a moment, simply bolstered my conclusion as to the identity and guilt of the Accused; that no evidence was led on behalf of the Accused.

THE RECOGNITION EVDIENCE

- [25] Mr. C. Duston was the first of a number of witnesses called by the Crown to give recognition evidence. Mr. McMurray agreed to this evidence going in, subject to his right to argue that such evidence was not admissible, because no proper foundation for it could be laid, that is to say, that the witnesses could not establish a level of familiarity with the Accused which would enable them to give the evidence.
- [26] Mr. Duston has been a Correctional Officer at the Kamloops Regional Centre since 1988. His duties include booking and discharging inmates, transfers, seeing that the inmates follow the rules and regulations and so on. He gives them directions to be followed, duties to perform, and at times, talks with them directly, whenever it is required.
- [27] He testified that he came to know the Accused because of his numerous attendances at the Kamloops District Correctional Centre. He estimated that over the years the Accused had spent approximately eight months in total at the Centre; that he had been at the Centre between five and ten times. He recalled one specific conversation with the Accused, and estimated that he probably had spoken to him on a number of occasions, the last being two

or three years ago. The last time that he could clearly remember seeing the Accused at the Centre was two or three weeks before he spotted the Accused's photograph on a wanted poster.

- [28] Mr. Duston testified that in June 1999, he was looking through a clipboard of wanted posters, which is kept in the Centre's administration office, when he saw a 'wanted for robbery' poster containing two still photographs taken of the man in the Bank. He recognized the man "pretty well right away" as the Accused, Phillip Cooper. He said that the Accused was easily recognized by him because of his high cheekbones, wide set apart eyes, and his nose, which the witness described as a little flared and flat. He recalled that the Accused wore his hair longer, at shoulder length, when he had met him earlier; that most of the time he was clean shaven.
- [29] After identifying the Accused he then checked the Accused's local records to make sure, and after doing so he prepared a package and sent it to the Vancouver Police Department in response to the poster. He identified the Accused in the stand as the man in the wanted poster. He also identified the Accused in Exhibit #1, the still photos taken from the videotape, noting that they are much clearer.
- [30] On cross-examination he reiterated that he had seen the Accused a number of times over the total eight month period that he had been at the Centre. He had checked his Provincial case file in this regard, before sending the package to the Vancouver Police Department Detective. He reiterated his estimate that he had direct contact with the Accused five or ten times, adding that the number of contacts he had with the Accused were too numerous to count. He last saw the Accused two or three weeks ago, and the time prior to that was about two years ago. He could not recall any distinguishing scars or marks on the Accused's face, nor could he see them in the photographs which he looked at.
- [31] He agreed that the photographs on the wanted poster are somewhat blurry; not of the same clarity as the photographs shown in Exhibit #1. He estimated that he looked at the two photographs in the poster for about a minute before he identified the Accused. It was after that that he went to his records.
- [32] He agreed that the Accused usually wore his hair longer than it now appears; that at times it could have been in a ponytail. He has seen him wearing a ball cap at time, but not a hard hat. After sending the information to the Vancouver City Police Detective, he was not asked to look at photographs or other documents. He was asked to provide a statement. He eventually was required to appear at the Preliminary Inquiry. He knew then that the Accused had been charged. This reinforced his view that his identification was accurate. On re-direct he said that he believed that his information was accurate, before he was asked to be a witness.
- [33] Mr. J. E. Kay also gave recognition evidence. He has been a Probation Officer for ten years. He has been at the Chilliwack Community Correctional Office since the fall of 1998. He got to know the Accused in November 1998. He was preparing a report on the Accused and met

him officially for ten to fifteen minutes. The conversation took place in his office. The next meeting was on November 24, 1998, and took place in the Accused's livingroom in Rosedale. The meeting lasted for approximately two hours. The next meeting was in April 1999, again at his office. He actually met with the Accused on three occasions in April 1999, the first occasion being for about one half hour, the second for ten to fifteen minutes and the third for two to three minutes.

- [34] When asked to describe the Accused, he said in effect that nothing stood out except that he had a rounded face, black hair and appeared to him to be of native descent. He does recall some acne or pock marks on the Accused's cheek at one time, but he is not sure of this. He is not good at estimating height, but believes that the Accused is of medium build. He identified the Accused in the stand as the man in the wanted poster. He also identified the Accused in Exhibit #1.
- [35] Mr. Kay testified that on July 20, 1999, he received a call from Constable Humayun, the author of the wanted poster, and he met the Constable on July 21, 1999, in his office at the Chilliwack Correctional Centre. The Constable wanted him to look at photographs, but was not prepared to tell him who or what he was investigating.
- [36] When shown the photographs (they are the first two pages of the photographs contained in Exhibit #9, which contain stills taken from the Bank video tape, and blown-up, by Constable Fredricks) he immediately recognized the individual as someone he knew, but his name would not come to mind. He knew that he had done a Report on him so he checked the Report Sheet until he found the name of the person he had seen in the photographs, the Accused. The Sheet simply listed the names of the people he had compiled Reports on.
- [37] On cross-examination he acknowledged that he came to know the Accused primarily in connection with his preparation of the Report in November 1998. He does not recall communicating with any other members of the Accused's family, other than his common law wife. His hair could have been longer in November 1998. He may have had some facial hair, but he is not sure. He does not recall taking the Accused's photograph. He was not given any photographs to assist him in the preparation of the Report.
- [38] He had three meetings with the Accused. From November 24, 1998 to April 1999, there was no contact. By then the Accused's hair could have been long enough for a ponytail, and he may have had a moustache. Mr. Kay has no April 1999, photograph on file. He spoke extensively with the Accused over the course of the four or five meetings. He described the Accused as soft spoken. He did not agree that the Accused had an accent, but felt that he spoke like an aboriginal or native. Some words were different, but there was no accent.
- [39] When Mr. Kay spoke to Constable Humayun, the latter would not tell him whom he was investigating or what he was investigating; just that he wanted him to look at some photographs. He did not know that the Constable was a member of the Robbery Squad.

- [40] Mr. B. Colter also gave recognition evidence. He was a Corrections Officer from July 1995 to August 1999. He worked at the Surrey Pre-Trial Service Centre. His duties included working in Admissions and Discharge, Inmate Transfer and so on. Occasionally he would speak with inmates. He knew the Accused when he was there. He probably had direct dealings with him but could not recall specifics. He saw him in the Centre on several occasions.
- [41] In June 1999, Mr. Colter had occasion to see the wanted poster. He had looked through some wanted posters, which were posted on the wall in the Administration and Discharge area, and saw the one pertaining to the Accused. It was a new one and he recognized the person in it as Phillip Cooper. He agreed that he could identify Mr. Cooper today, and he pointed to the Accused in the witness stand.
- [42] Mr. Colter was shown Exhibit #1, which he had never seen before. He identified the Accused in the photographs. He felt that the last photograph, on the back, a frontal shot, was most the helpful in identifying the Accused, although it was clear to him that the other photographs were of the Accused as well. There was nothing outstanding about the Accused that enabled him to recognize him. However, he had seen the Accused in the Centre a week before he looked at the photographs on the wanted poster.
- [43] In cross-examination he agreed that in May and June 1999, the number of persons at the Pre-Trial exceeded the capacity, and that there was a fair amount of movement of people at the time. He identified the poster, Exhibit #5, which he had seen. He agreed that the two photographs on it were a bit blurry. When he looked at it he recognized Mr. Cooper by name. He did not consult records to confirm this. He knew who it was. However, later he checked the records to confirm that the Accused was not in the Centre for the same earlier charge. He did not believe that there was any difference between the Accused's appearance now, and when he saw him before. He did not recall his hair length or whether he had any facial hair earlier on. Nothing really stood out. There were no distinguishing features of his face which caused him to recognize him. When he communicated with the Vancouver Police he was not asked to look at other photographs. He was asked for a statement.
- [44] The final recognition witness was Mr. G. Teixeira, a Corrections Officer. He has been stationed at Fraser Regional Correction Centre for ten years. He had spent two years at Okalla Prison prior to that. He maintains security at the Centre, and as well works in the Inductive Unit. He has direct dealings with inmates. He met the Accused on numerous occasions in the Centre. The Accused came through the Induction Unit in November 1999, and earlier in mid-May 1999. As part of his duties he tells the new inmates the rules and regulations of the Centre and what is expected of them and answers any of their questions. This is done face-to-face. The inmate has to sign a document indicating that he understands the rules of the Centre.

- [45] In June 1999, when Mr. Teixeira saw the wanted poster pertaining to the Accused, he recognized the Accused's facial features, referring especially to the flat nose and high cheekbones. He recognized him as someone who had been in his Unit at some time. He could not remember when, and could not place the name. A fellow worker came along and said in effect "that's Cooper". He then put the face and name together. He then went to the Records Department to compare photographs to confirm his identification.
- [46] Mr. Teixeira identified the Accused in the photographs in Exhibit #1. He found the bottom left photograph particularly helpful. This is a frontal view of the Accused's face, while he is standing in front of Ms. Gill's wicket and looking directly at her. It is noted that in this photograph his right hand can be seen stuck into his shirt, just above the belt buckle area, suggesting perhaps that he had a gun in his right hand. He was never shown any other photographs.
- [47] When Mr. Teixeira met the Accused in the Fraser facility he was working in the Livingroom Unit, and possibly on a Gang. He had one-on-one and group dealings with the Accused. He did not think that there was anything distinctive about the Accused's voice, other than that he "speaks in soft tones, almost a whisper".
- [48] His most recent recollection of seeing the Accused was in late November 1999. His hair was shoulder length at that time, and he may have had a light moustache.
- [49] He acknowledged that the two photographs in the poster were grainy and blurry. He did not see any marks or scars on the cheeks of the Accused. You can see that he has a flatten face and nose, according to the witness.
- [50] Constable Humayun took over the investigation of the bank robbery in July 1999. He has been with the Vancouver Police for eight years. His predecessor had prepared and distributed the poster.
- [51] As a result of receiving the information from the witness, Mr. G. Teixeira, he prepared the photograph line-up. The Accused's photograph in the line-up was taken on June 1993. All are photographs of young aboriginal men with long hair and somewhat similar facial features. He showed the line-up to Ms. Gill and Ms. Matendi in turn and separately. They were presented with the written instructions on the ballot and the instructions were explained to them. They were then given the opportunity to read them as well. They were told that if the person they saw in the Bank was there they should select him; that if they did not see the person they need not select anyone.
- [52] He took statements from Mr. Duston and Mr. Colter. He also communicated with Mr. Kay and went to Chilliwack to show him some photographs. He did not advise Mr. Kay who he was investigating or what he was investigating until after Mr. Kay had identified the Accused in the photographs. When Mr. Kay saw the photographs he immediately laughed, like a chuckle. He recognized the individual as the Accused immediately he was shown the photographs. He said that he knew the person but could not recall the name, and would

have to look it up in his records. And he did so.

- [53] On cross-examination Constable Humayun acknowledged that the note passed by the robber to Ms. Gill had been dusted for fingerprints; that none had been found. The Crown makes this admission. No attempt was made to compare the handwriting on the note to the Accused's handwriting. The monies were never recovered.

THE FORENSIC VIDEO EVDIENCE

- [54] Constable G. Fredricks was qualified as an expert in forensic video productions, including digitization and analysis of video. His expertise was accepted by Mr. McMurray, subject to his right to argue that the witness' evidence was not admissible.
- [55] Constable Fredricks said that the digitization of videos involves transferring images on the video into the realm of computers. He assists investigations by protecting the evidence and securing it. Once the digitized elements are transferred into the computer, the video tape is returned to the investigators. The digitization does not change the original images in the video tape. The reason it is done is because it enables the investigators to receive the tape and play it only once. This avoids damaging or stripping to the tape caused by frequent playing. Further, once the images are in the computer the investigators can examine them as long as they like. They can be distributed to the crown, to the defence, and shown in Court. Digital images never change, while tapes can be damaged. Images are not damaged or altered by the process.
- [56] The process enables its user to digitize a specific frame of a video, and then take one copy and isolate a specific area, and then blow it up, which may be of some value to the Court. Exhibit #9, which is four pages of stills or prints taken by Constable Fredricks from the Bank video tape, is an example of this. On the left side of each page there is a normal still. On the right side, a part of each still has been isolated and blown-up. The process also enables its user to lighten dark pictures or darken light pictures, so that there is a better contrast to be seen. I observe here that the blown-up images in Exhibit #9 do make it easier to see the distinguishing features of the robbers face.
- [57] Constable Fredricks also prepared a number of video slides which I carefully perused. They contained three known photographs of the Accused, one of which is the photograph used in the photograph line-up. The other two are more up-to-date, the first being taken on May 8, 1999, about 20 days before the robbery, and the second on August 3, 1999, about three months after the robbery. The video also contains slides of stills he took from the Bank video tape. The purpose of the slides is to enable the Court to compare the blown-up known photographs of the Accused's face, to the blown-up stills of the Accused's face, which he selected from the video tape; also to compare the latter to the Accused in the Courtroom. When I did so the similarity between the stills and the Accused's face generally, but more particularly, with regard to his eyes, cheek bones, cheek lines, nose and mouth, were even more remarkable. The comparison simply bolstered my previous conclusions. The

eyebrows, the eyes, the cheek bones, cheek lines, nose and mouth of the two faces were, in my view, identical.

- [58] On cross-examination constable Fredricks acknowledged that when digitizing the analogue images he is simply transferring them into a format that can be read and processed by the computer. A software tool is used to "crop", that is to blow up certain portions of an image taken from the video tape. The contrast in the stills can be changed, which the witness described as "more akin to changing the lighting in a room". He agreed that the VCR itself was not capable of cropping, nor could it alter the black and white level of the picture elements.
- [59] It was put to him that in effect he was adjusting the image on the video tape. He did not agree. He noted that all of the images on the left side of Exhibit #9 are untouched copies of the video images; that those on the right are simply blown-up copies of those images. He did acknowledge that one of the purposes of digitization was to improve the quality of the image coming out of the video tape. However, in my view, his evidence on cross-examination in no way suggested that the process changed the images, which appeared to be the thrust of the cross-examination.

THE ADMISSIBILITY ISSUES

The Recognition Evidence

- [60] Mr. McMurray submitted that generally speaking the evidence of the four recognition witnesses was not admissible. He submitted that such witnesses had to have a particular body of knowledge greater than the trier of fact in order to qualify to express an opinion that the Accused is the person depicted in the video tape. He relies on the decision of the Supreme Court of Canada in *Leaney and Rawlinson v. The Queen* (1989), 50 C.C.C. (3d) 289. There, five police officers were allowed to give opinion evidence and identify the Accused in a video tape which was taken at the time of a robbery. One of the officers knew the Accused since childhood. However, the other four had had no dealing with him.
- [61] At pg.303 McLachlin, J., as she then was, speaking for the majority, had this to say on the point:

The second error was the admission of the evidence of the police officers as to the identity of the person shown on the video tape. Four of the officers had no acquaintance with the Accused and were in no better position than the Trial Judge to say whether the person shown in the video was the Accused. Thus their evidence could not assist and should not have been received. The fifth, Sargent Cessford, knew one of the Accused, Leaney, since childhood, and had spent time with him shortly before the two incidents. The Judge erred in not determining as a preliminary matter the qualification of Sargent Cessford before receiving his evidence, as well as that of the other police officers. However, this failure is irrelevant in the case of Cessford, since I am satisfied his evidence was clearly admissible in any event. I note in this regard that Cessford was cross-examined clearly as to his acquaintance with Leaney. (My emphasis).

Counsel also referred to the decision of Wilson, J., in dissent, speaking to the same point at pg.301:

In my opinion, the Trial Judge erred in admitting the opinion evidence of at least four of the police officers. Opinion evidence is not admissible when the witness offering the opinion is in no better position than the Trier of Fact to assess the situation under scrutiny: See *Graat v. The Queen* (1982), 2 C.C.C. (3d) 365 at 378 (S.C.C.). (My emphasis).

[62] Counsel also relies on the decision of the Supreme Court of Canada in *Regina v. Mohan* (1994), 89 C.C.C. (3d) 402 at 411 whereat Sopinka, J., giving the Judgment of the Court, set out the test for the acceptance by the Court of expert opinion:

(1) Expert Opinion Evidence

The admission of expert evidence depends on the application of the following criteria:

- (a) relevance;
- (b) necessity in assisting the Trier of Fact;
- (c) the absence of any exclusionary rules;
- (d) a properly qualified expert

[63] Counsel submitted that the test outlined applied to each of the recognition witnesses, like any other expert.

[64] I pause here to note that Crown Counsel, Mr. Ruttan, also took the position that the tests set out in *Moran* were applicable in the case at Bar; that each criteria had been met. In my view these witnesses are not expert witnesses. They are non-expert witnesses giving lay opinions on matters of fact based on personal knowledge, as defined in *Graat* which was cited by Wilson, J., in *Leaney*, where the test relied upon by both her and by McLachlin, J., is set out. In order to give such evidence the witness must be in a better position than the Trial Judge to give the opinion, (here to say whether the person shown in the video was the Accused), and thus to be a real help to him. In my view, the exceptional circumstance that I am able to identify the Accused as the robber on my own, by comparing the video of the robber to the Accused in the stand, does not lessen the witnesses' advantageous position.

[65] Having said this, I observe that both Counsel seemed to take the position that the test in the present case is whether each of the witnesses was sufficiently acquainted with the Accused, and therefore in a better position than the Trial Judge, to say whether or not the robber in the video was the Accused. Thus, they seem to apply the *Graat* test, although relying on the *Moran* test, and I need not deal with the point further.

[66] Mr. McMurray acknowledges that *Leaney* is not of much assistance because it deals with two extremes, the case where one witness has known the Accused for many years, and the case where the witness does not know the Accused at all. As he points out, in the present case the witnesses' evidence lies somewhere in between. And the question remains, as I see it, what

is the threshold amount of knowledge of the Accused which a witness must have before he is found to be qualified to give recognition evidence. While I was not referred to any case on the point, I am of the view that the threshold should not be very high; that the real question to be decided is the weight to be given to such evidence. I will also observe here that I need not consider factors which the Court may have to consider where a jury is involved, for example, the balancing of the probative force of the evidence of each officer against its prejudicial effect, given the circumstances giving rise to their evidence.

- [67] It seems to me that in order for a recognition witness to qualify to give such evidence, in this case an opinion as to the robber in the video tape being the Accused, the Court must be satisfied that the witness has had a prior opportunity to personally observe the Accused, and thereby has some acquaintance of him, which may enable him to identify the Accused and to assist the Court. I say may, rather than can, because the acceptance of the opinion would depend on the weight given to it by the Court, and perhaps other evidence as well. The extent of the prior opportunity to observe the Accused, and the circumstances of it, may be a factor at the admissibility stage in a given case. However, they usually will be the primary factors to be considered by the Court, after the evidence has been admitted, when considering the weight to be given to the evidence. Here, while I have the video tape and stills to compare to the Accused in the stand, these witnesses, generally speaking, are in a better position than I am to say whether the Accused is the person shown in the tape; although this does not take away from my ability to decide the issue on my own, that is, without reference to the recognition evidence.
- [68] Such evidence then will be admitted into evidence unless on the Voir Dire it is clear that some foundation for the opinion is simply not there. The real issue will be the weight to be given to the evidence once admitted. See in this regard Graat, at pgs. 378 & 379, and Sopinka, on Evidence, (1992), pgs. 523 to 533, and in particular, pg.526 where the "helpfulness" test is discussed. And the ultimate issue prohibition does not come into play.
- [69] Mr. McMurray in effect conceded that the evidence of the witness Kay probably met even his test of a high degree of familiarity with the Accused. He also acknowledged that the evidence of the witness Colter was the "best evidence", because he had seen the Accused at the Centre the week before he identified the Accused's picture on the wanted poster.
- [70] Mr. McMurray submitted that the evidence of Duston, Colter and Teixeira did not meet the familiarity test, in that it did not establish that the witnesses were in a better position than the Court to opine the person in the video was the Accused. Their familiarity is too vague and too general to raise it to the specific level required. Their evidence can be of no assistance to the Court. He pointed out that Duston had no specific recall of his dealing with the Accused, i.e., times, dates, or even circumstances. He could not give any specific evidence of his interaction with the Accused.

- [71] Mr. Colter was in the same position, unable to give any real specifics of his interaction with the Accused. There was nothing outstanding about the Accused's appearance that enabled Mr. Colter to recognize him, and it is open to the Court to find that he had to check his photographic records in order to confirm his identification. Mr. Teixeira as well could give little particulars of his relationship with the Accused. His identification also was assisted by his co-worker, and the subsequent records or photographs which he had to look at.
- [72] I am unable to agree with Counsel's submissions; most of which went to weight rather than admissibility. While a failure to provide some details of a witness' interaction with the Accused may result in a finding that the witness' evidence is inadmissible, particularly where the witness' observations are fleeting, or the degree of familiarity is negligible, this is not so in the case at Bar. I am satisfied that each of the recognition witnesses had the opportunity, on a number of occasions, and generally in a fairly confined area and in an atmosphere perhaps more conducive to being observant than in others, to observe and speak to the Accused prior to the robbery in question; that such observations qualified each of them to give his recognition or identification evidence.
- [73] As pointed out in Mr. Justice Sopinka's text referred to, the threshold for the modern opinion rule of "helpfulness" is not a high one. The real issue here is the weight to be given to the evidence of each of the officers. However, this is not a matter which I need to deal with further at this point, because in my view the totality of the evidence before me leads to only one conclusion, and that is the Accused is the robber seen in the video tape.

ADMISSIBILITY OF THE FORENSIC VIDEO EVIDENCE OF CONSTABLE G. FREDRICKS

- [74] Mr McMurray submitted that the Constable's evidence was not admissible because it does not fall within the parameters of admissibility discussed by the Supreme Court of Canada in *R. v. Nikolovski*, (1996), 111 C.C.C. (3d) 403 (S.C.C.). There the facts were similar to those in the case at Bar, including the fact that the eye witness clerk in Nikolovski could not identify the robber from the photograph line-up. Counsel submitted that the case stands for the proposition that a Trial Judge can only compare the original video tape to the Accused, and then make his determination on whether or not he is satisfied beyond a reasonable doubt that the person on the video is the Accused. At pg.416, Mr. Justice Cory, speaking for the majority, pointed out that the video tape in that case had not been altered or changed, and that it depicted the scene of the crime, and therefore was admissible and relevant evidence.
- [75] Counsel submitted that Nikolovski does not contemplate what happened in the case at Bar. Here he says that the format of the images on the video tape were altered in order to permit the use of the computer software to enhance the quality of the images. A portion of the stills were blown up, which can only be done when the image is digitized. The format also allowed specific portions of the video images to be isolated and the lighting to be altered. In doing so the witness suggests that the quality on the video tape was not sufficient, and needed to be better. Hence, the format of the original video tape was changed, and cannot

be put into evidence.

- [76] Mr. Ruttan submitted that the work done by Constable Fredricks does not amount to alteration or tampering with the original video tape, within the meaning of the words used by Cory, J. Blown-up photographs are taken into evidence in this Court every day. The fine tuning of photographs which are too light or too dark does not change the image. Constable Fredricks made it clear that his work does not change the images on the video tape. I agree.
- [77] In my opinion the digitization, blowing-up, and lightening of the images on the video tape does no more than enhance or clarify the images. They are not changed. The digitized images are the same images seen on the video tape. One need only compare the faces to see that the images have not been changed in the manner contemplated by Nikolovski. Digitalization is clearly a useful tool to assist the Court in viewing and comparing the video tape images. Accordingly I find that Constable Fredricks' video slides and other work product are admissible into evidence.

THE SUBMISSIONS

- [78] Mr. Ruttan submitted that the evidence identifying the Accused as the robber was overwhelming. Little weight could be given to the evidence of Ms. Matendi, since her view of the Accused was little more than a fleeting glance and at some distance. However, greater weight can be given to the evidence of Ms. Gill, who observed the Accused close-up on two occasions for about five seconds on each occasion. While she, like the other teller, could not pick the Accused out of the photograph line-up, she did give a fairly good general description of the Accused as evidenced by the video tape, including his brown eyes, big cheekbones and the tapering of his face, i.e., "smaller at the bottom".
- [79] The four recognition witnesses each identified the Accused independently of the others. All were familiar with the Accused. Kay had seen him on numerous occasions during the previous year; Colter had seen him about one week before he identified him by name from the poster. The accumulative effect of their evidence is compelling. It confirms the identification made by Ms. Gill.
- [80] The video tape, and the first stills taken from it by Mr. Hepting, clearly identify the Accused as the robber; as do the stills taken from the video tape by Constable Fredricks. His evidence is simply another form of reproducing the images caught by the original video tape. His evidence clearly disclosed and matches distinguishing features of the Accused's face, including the colour and space of his eyes, the slope of his face, the high cheekbones, the distinct slope and highlight of the nose, the flattened profile, and the slight pursing of the lips.

- [81] The video tape and the initial stills, Exhibit #1, are sufficient alone to support a finding of guilt beyond a reasonable doubt. The Court may not have need of the other evidence, which basically are all different forms of identification which alone and together add up to only one conclusion, and that is that the Accused was the robber. I am in basic agreement with these submissions.
- [82] Mr. McMurray commenced by reminding me of the dangers and frailties of identification evidence. Little weight should be given to the evidence of the tellers. Save for Ms. Gill's reference to the Accused's high cheekbones, neither gave any description of the Accused's face. They could not pick the Accused out of the photograph line-up.
- [83] The video tape must be considered with care and caution as to its clarity, quality and duration. The tape is of reasonable quality. The best facial views were taken when the robber was at Ms. Gill's wicket. The quality of those images is such that one might consider that his face resembled the Accused, but they do not go beyond that. They do not establish his identity beyond a reasonable doubt.
- [84] The recognition evidence must be carefully scrutinized and then given little weight. Mr. Duston could not recall any changes in the Accused's appearance. He had to go to the Centre's records to confirm his identification from the blurry photographs on the poster. His identification was thereby tainted. The quality of the photographs in the poster were not sufficient to enable any of them to identify the Accused from them alone. Confirmation from other photographs or records had to be obtained, thus tainting the identification. Their Courtroom identifications are based on images confirmed by looking at earlier photographs of the Accused, opinions which may be wrong. What has been said does not apply to Mr. Kay, although he had some inconsistencies in his evidence as well.
- [85] Mr. Colter could not give any evidence of distinctive facial features on the part of the Accused. The quality of the photographs in the poster on which he relied are poor. He had to look at the records in the Surrey Pre-Trial Centre in order to confirm his opinion. That taints his recognition. Little weight should be given to his evidence, which is not enough to find that his opinion is reliable and trustworthy.
- [86] The evidence of Mr. Teixeira is the least reliable. It is vague, dependant upon Mr. Winter's assistance, and required confirmation by looking at a photograph of the Accused in the Centre's records.
- [87] There is nothing to link the Accused to the robbery, save the opinions of the recognition witnesses. The evidence should be scrutinized very carefully with particular regard to the fact that the witnesses had to seek confirmation of their poster photograph identification by looking at other earlier photographs of the Accused. No fingerprints were found on the note. None of the monies were recovered. The Accused was not found at the scene of the robbery. The Court has to rely strictly on the identification evidence of the two tellers and the video tape and stills taken from it. There is sufficient uncertainty to raise a reasonable doubt.

[88] In reply Mr. Ruttan emphasised that the Crown relied on the evidence of the three recognition witnesses as to their initial reaction to seeing the photographs on the poster, and to Mr. Kay's initial response when he first saw the photographs. Subsequent looking at other records or photographs cannot "contaminate backwards", only forward. Only one of the three officers, Mr. Teixeira, agreed that he sought confirmation of his initial opinion. It is recognized that his original opinion then was tentative, and that lesser weight should be given to his opinion. Finally, Mr. Kay did not need anything else. He immediately recognized the Accused when shown the photographs. Colter recognized the Accused because he had seen him just the week before. Duston had no need to check the file to confirm his opinion. When the independent evidence of the four recognition witnesses are added together, guilt beyond a reasonable doubt is the only conclusion.

DISCUSSION

[89] I doubt that there is any Trial Judge, who has sat for any length of time, who has not experienced, and does not appreciate, the inherent dangers and frailties of identification evidence. Laskin, JA., as he then was, put it appropriately, for the purposes of this case, in *Regina v. Spatola* (1970), 4 C.C.C. 241 (Ont.) (C.A.) when discussing the duty to warn juries to be specifically cautious about identification evidence, at pg.249 as follows:

Errors of recognition have a long documented history. Identification experiments have underlined the frailty of memory and the fallibility of powers of observation. Studies have shown the progressive assurance that builds upon an original identification that may be erroneous: (authorities omitted).

And further down the page:

Bare recognition unsupported by reference to distinguishing marks, and standing alone, is a risky foundation for a conviction, even when made by a witness who has seen or met with the Accused before. Of course, the extent of their previous acquaintanceship must have a very important bearing on the cogency of the identification evidence, as will be circumstances in which the alleged recognition occurred.

[90] Leaney and Nikolovski make it clear that a Trial Judge may on his own observations of a video tape, and of his comparisons of the tape to the Accused in the stand, conclude beyond a reasonable doubt that the person seen in the video is the Accused. In *Nikolovski*, Cory, J., speaking for the majority, reviewed the evolution of the use of audio tapes, photographs, and video tapes as evidence in Canada. At pg.411 he pointed out that in *R. v. B(K.G.)* (1993), 1 S.C.R. 740, the Supreme Court of Canada praised the evidence obtained from video tapes as a "milestone" contributing to the "triumph of a principled analysis over a set of ossified judicially created categories". And after referring to the majority decision of McLachlin, J., as she then was, in *Leaney*, he had this to say:

Similarly, in *R.v. L.(D.O.)* (1993) 4 S.C.R. 419, 85 C.C.C. (3d) 289 (S.C.C.) L'Heureux-Dubex, J., in concurring reasons, noted that the modern trend has been to admit all relevant and probative evidence and allow the Trier of Fact to determine the weight which should be given to the evidence in order to arrive at a just result. She observed that this is most likely to be achieved when the decision-makers have all the relevant probative information before them. She wrote at pg. 455 that:

"It would seem contrary to the judgments of our Court, (*Seaboyer v. B.(K.G.)*) to disallow evidence available through technological advances such as video taping, that may benefit the truth seeking process".

In my opinion the forensic video evidence of Constable Fredricks did not alter or tamper with the images on the video tape in the case at Bar. His digitization and video analysis was a most useful tool in the performance of my task. It is in my view the type of evidence referred to by Mr. Justice Cory in *Nikolovski*, and by L'Heureux-Dubex, J., in *R. v. L. (D.O.)*, being at most an extension of the video taping evidence.

[91] During the trial I carefully reviewed the video tape, in conjunction with the stills obtained from it by Mr. Hepting, and compared the images of the Accused's face, both frontal and profile views, with the Accused's facial features while seated in the stand. Although I proceeded with caution, because of the nature of the evidence, I was satisfied that the images on the tape and in the stills, without more, were of sufficient quality and clarity to enable me to conclude beyond a reasonable doubt that the robber depicted on the tape and the stills was the Accused. The shape of his face, front and profile, his eyes, his nose and his turned down mouth, was what I saw when I looked at the Accused, and gave rise to no reasonable doubt.

[92] I will deal with the recognition evidence, although it is not necessary for my decision, since Counsel spent some time on it.

[93] I am cognizant of the thrust of Mr. McMurray's able argument that little weight should be given to the evidence of Messrs. Duston, Colter and Teixeira because of the strong possibility that their original identification or recognition of the Accused, from the two blurry photographs on the poster, may be tainted. The focus must be on their original reaction to the blurry poster photographs.

[94] I observe that while the two photographs on the poster, which are in fact stills taken from the video tape, were somewhat blurry, they are a fair likeness of at least some of the Accused's facial features, and this of course would be particularly so to someone who knew him, that is to say, someone who had the opportunity previously to observe his face. I note also that the description on the poster, while not referred to by Counsel, cannot simply be ignored, for I am satisfied that the three men would have read it as part of their identification process. That description is as follows:

Suspect description: Native, Hispanic or Asian/male, 35 years, 5'8", 140 lbs, dark complexion, distinct cheekbones, black hair, brown eyes, clean shaven

- [95] Mr. McMurray says that the recognition by the three men of the Accused from the poster is tainted, because of their use of their institution's records, namely a photograph, to confirm their recognition identification. I will start first with Mr. Texeira. He did in fact confirm that after his initial recognition of the Accused from the poster, referring particularly to his flat nose and high cheekbones, he then went to the department records to compare photographs therein to those on the poster to confirm his recognition.
- [96] Mr. McMurray says that by looking at the Department photographs of the Accused to confirm his poster recognition or identification, the latter was tainted. His subsequent identification of the Accused then is based, at least in part, on a poster image confirmed by looking at the department photographs. He thereby confirms an opinion that may be wrong. There is a risk that when later identifying the Accused he is identifying him because he saw him in the Department photographs, and not solely because he identified him from the poster photographs, which Mr. McMurray emphasises are of poor quality. The witness he says relies solely on those photographs, not having given evidence of any distinct facial features on the part of the Accused, and which he recognized.
- [97] As usual, the evidence in this area is somewhat grey. The witness did say that he recognized the Accused's facial features, referring in particular to the flat nose and high cheekbones, when he saw the wanted poster. However, he did say also that he went to the Department records to compare photographs to confirm his recognition or identification. In a given case, where the only recognition or identification evidence before the Court was that of this witness, it may well be that a finding would be made that the evidence alone was not sufficient to support a finding of guilt beyond a reasonable doubt, because of the possibility of the recognition being tainted by the use of the Department photograph or photographs. However, I need not go further down this road given the totality of the evidence before me, which makes me less inclined to find that contamination is likely and to give no weight to this witness' evidence. Further, of course, it does not really matter.
- [98] Mr. Colter's situation was different. He testified that on looking at the poster he recognized the Accused by name, and that he had no need to consult the Centre's records to confirm his recognition. While I would have perhaps preferred some more particulars of his opportunities to view the Accused's facial features when he was at the Centre, there is the added feature that he did see the Accused at the Centre about one week before he looked at the poster. Again, because of the totality of the evidence, it is not necessary that I scrutinize this witness' evidence and weigh it in the manner required if the situation was that he was the only identification witness or that he and Mr. Texeira were the only witnesses. It is not a case where I must carefully weigh their evidence and consider other contrary evidence, to decide the issue of identity and therefore of guilt.

- [99] Mr. Duston's evidence is also perhaps in a different category. Of the four recognition witnesses it appears that he saw the Accused more often than the others, and according to his testimony he knew the Accused because of this. He said that he could recognize him easily because of his facial features. He had had direct contact, involving conversation, with the Accused on five or six occasions, the last occasion being about two years ago. He last saw the Accused at the Centre two or three weeks before he perused the poster, but he had not spoken to him on that occasion.
- [100] He said that his initial recognition was "pretty positive", although he did check the Centre's records "to make sure before sending the package" to the inquiring detective. Mr. McMurray argues that his initial recognition was tainted by his use of the Centre's records. I am not satisfied that that is the case, in that he appears to have made a positive recognition before checking the records, and he was able to give a fair description of the Accused's facial features having seen him on many occasions. I would give substantial weight to his recognition evidence, and point out again that I am not considering it on an isolated basis, and there is no contrary evidence; save perhaps that of the two tellers, one of whom I am satisfied only had a brief glance at the robber, and the other, while having more time on two occasions, was clearly nervous, and probably frightened, having had her life threatened.
- [101] The evidence of the final recognition witness, Mr. Kay, is not dependent upon the wanted poster in any way. When shown some stills taken from the video tape by Constable Fredricks Mr. Kay immediately recognized the Accused, although at that moment he could remember his name. His recognition evidence was based on a number of face-to-face, and fairly lengthy meetings, and conversations with the Accused, from November 1998 to April 1999, when he saw the Accused on three occasions. This was about two months before he was asked to look at the stills by Constable Humayun, who for obvious reasons did not disclose to the witness who or what he was investigating. His evidence was much less susceptible to criticism when weighing it
- [102] I have already found that all of the recognition witnesses had some familiarity with the Accused. Each of them independently recognized the Accused as the robber, three on the basis of the stills and information on the poster, and one on other stills taken from the video tape. Some, on an individual basis, deserve less weight than others and I have discussed this above. However, I must say, although not necessary to my decision, that the accumulative effect of their evidence is such as to satisfy me beyond a reasonable doubt that the Accused was the robber. In any event, the evidence bolsters my earlier conclusion on identification and guilt based solely on the video tape.
- [103] I turn again briefly to the forensic evidence produced and given by Constable Fredricks. If I had any doubts whatsoever on the earlier evidence referred to, and I did not, the forensic evidence would have allayed that doubt to a certainty.

[104] The further stills taken from the video tape by Constable Fredricks and contained in Exhibit #9, simply add to and bolster those taken by Mr. Hepting and contained in Exhibit #1; and the blow-ups, including the wanted poster stills, are even more convincing. Finally, as I have already indicated, the blown-up stills, when compared to the three known photographs of the Accused, enable one to literally match the overall faces, the eyebrows, eyes, cheek bones, noses and mouths. The comparison leaves no ground for any doubt whatsoever as to the identity of the robber.

[105] The forensic evidence, like the recognition evidence, but even more so, bolsters my earlier conclusions based alone on the video tape and the stills taken therefrom and contained in Exhibit #1. In my opinion, any one of the three categories of evidence is sufficient to find the Accused guilty beyond a reasonable doubt. Combined they are overwhelming in that regard.

[106] I find the Accused guilty as charged.

"S.W. Hood, J."

The Honourable Mr. Justice S.W. Hood

Vancouver, B.C.

March 2, 2000

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