

CANADA / JUDGMENT

R. v. Monteith

2022 BCSC 2019

COURT

Supreme Court of British Columbia

DECIDED

1 September 2022

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2022 BCSC 2019 R. v. Monteith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Monteith,

2022 BCSC 2019

Date: 20220901

Docket: X083817

Registry: New Westminster

Rex

v.

Carlos Nathaniel Monteith

Before: The Honourable Mr. Justice Verhoeven

Oral Ruling on Voir Dire Number 1

Re: recognition evidence

Counsel for the Crown:

R. Flannigan

Counsel for the Accused:

P.T. Gardiner

Place and Dates of Hearing:

New Westminster, B.C.

August 29-31, 2022

Place and Date of Judgment:

New Westminster, B.C.

September 1, 2022

I. Introduction

- [1] Carlos Monteith is charged with the first-degree murder of Kristijan Coric on September 28, 2019, at Surrey, B.C.
- [2] The Crown applies for a pre-trial ruling as to the admissibility at trial of the recognition evidence of a witness, Howard Kwan, regarding the identity of Trion Castello, a former co-accused in this matter. Mr. Monteith's trial is expected to be by a judge and jury.

II. Background

- [3] The Crown's theory and the facts that the Crown hopes to establish at trial are set out in detail in the Crown's Notice of Application, filed with the court July 29, 2022, and in its written submissions on this voir dire. For convenience, I will adopt certain portions of the written submissions of the Crown on the voir dire, with some minor amendments:
 - 1. It is the theory of the Crown that Carlos Monteith killed Mr. Coric on September 28, 2019, at the Mobil Gas Station located in Surrey, BC (the "Gas Station") for money. On that date, Trion Castello was the driver of a 4 door Toyota Corolla with BC License plate GT3 03W, while Mr. Monteith was the passenger in the Toyota. The Toyota followed the Mercedes G-Wagon westbound on Fraser Highway at approximately 6 pm as it pulled into the Gas Station. Mr. Monteith got out of the Toyota and went across Fraser Highway to the Gas Station where he shot Mr. Coric in the passenger seat of the Mercedes G-Wagon.
 - 3. On October 27, 2021, Castello entered a plea of guilty to being an accessory after the fact to the intentional discharge of a firearm by Carlos Nathaniel Monteith, on September 28, 2019 in Surrey British Columbia, contrary to sections 244.2(1)(b) and 463(b) of the Criminal Code.
 - 11. The Crown says that the surveillance video from the surrounding area of the Gas station revealed a Toyota Corolla following the G-Wagon prior to the shooting and leaving the scene after the shooting.
 - 12. Dashcam footage was obtained from [a driver], who was driving southbound on 188 St at approximately 6:10 p.m. on September 28, 2019. This footage captured the Toyota driving northbound on 188 Street shortly after the shooting of Mr. Coric.
 - 14. The Crown alleges that the Shooter is the Respondent.

...

16. Dashcam footage from [a driver's] vehicle was provided to the Forensic Video Analysis Unit ("FVAU") and photographic stills were created from this footage. These photographic stills were shown to Howard Kwan on September 28, 2020 by Constable Jennifer White of the Vancouver Police Department. Mr. Kwan identified the driver in the stills as Mr. Castello.
- [4] Counsel agree that the issue of balancing the prejudicial effect and probative value of the Crown's proposed recognition evidence should be deferred. Therefore, this ruling deals with admissibility of the evidence subject to potential arguments from the defence with respect to that issue.
- [5] The defence has made certain admissions of fact for purposes of this voir dire. The admitted facts relate to: (1) known photographs of Mr. Castello; and (2) evidence regarding footage from a CCTV camera and a dashboard camera that the Crown relies on to establish the alleged movements of Mr. Monteith as passenger and Mr. Castello as driver of the Toyota Corolla sedan, as well as Mr. Monteith's movements on foot from the Corolla sedan to the scene of the homicide and back to the vehicle.

III. The Position of the Crown and Defence

- [6] The Crown's position is that the evidence of Mr. Kwan meets the legal threshold for admissibility, and that issues as to the weight to be given to the evidence are for the trier of fact at the trial.
- [7] The defence position is that, first, Mr. Kwan's evidence should not be admitted as it is tainted in a number of ways. The defence says that in making the recognition Mr. Kwan was pointed in the direction of Mr. Castello, primarily as a result of information Mr. Kwan had as to Mr. Castello when Mr. Kwan made the identification in the interview with Constable Jennifer White on September 28, 2020.
- [8] Secondly, the defence argues that there are other problematic aspects of Mr. Kwan's evidence that go to admissibility, relating to the reliability and accuracy of his observations. The defence argues that the quality of the photos is so poor that this is one of those "rare cases" where the court should determine that no weight should be given to the evidence, and therefore it should not be admitted.

IV. Legal Principles

- [9] The applicable legal principles are neatly summarized in the decision of the British Columbia Court of Appeal in *R. v. Field*, 2018 BCCA 253 [Field]. In that case, the accused was convicted at a Provincial Court trial of robbery and of having his face masked with intent to commit an indictable offence. The sole issue at his trial was identification.
- [10] The key evidence that led to his conviction came from two probation officers who gave evidence that they recognized the accused in photographs.

- [11] The Court of Appeal set out the circumstances in that respect:
- [5] On November 20, 2014, a clerk at the Surrey Central Inn was robbed by two masked men armed with a firearm. Shortly after, two individuals attempted to car-jack a vehicle owned by Mr. Burns. The Crown's theory was that the two men had been driven to the location of the robbery by taxi and had attempted to car-jack Mr. Burns' vehicle to escape from the scene of the crime.
- [6] Following the robbery, police investigators circulated an email containing still photos taken from inside the taxi of the individuals who were thought to have committed the offences. One of the emails was received by Ms. Nash, a probation officer who had worked with Mr. Field. She subsequently testified that she recognized Mr. Field as one of the individuals in the photos.
- [7] Ms. Nash forwarded the photos to Ms. Fuess, another probation officer who had worked with Mr. Field. Ms. Fuess also identified Mr. Field from the still photos. The Crown charged Mr. Field with robbery, wearing a mask to commit an indictable offence, and the attempted theft of the vehicle.
- [12] The Provincial Court judge held a voir dire relating to the admissibility of the evidence of the two probation officers. That procedure and the decision is summarized by the Court of Appeal as follows:
- [9] With respect to the probation officers, the trial judge first held a voir dire to determine if their evidence was admissible at all. Ms. Nash testified that she had first encountered Mr. Field in 2009 and had met with him on a number of occasions in her capacity as probation officer. She met with Mr. Field about five times in 2014, the year the robbery took place. She was "extremely certain" that she recognized him from the photos.
- [10] Ms. Fuess also testified. She first met with Mr. Field in June 2014 and had subsequently met with him between five to 45 minutes on approximately five occasions. She also identified Mr. Field from the still photos, stating that she was "very certain" of this identification.
- [11] Both Ms. Nash and Ms. Fuess identified particular characteristics of Mr. Field's overall face shape and details about his face to explain why they were so certain of their identification.
- [13] Two out the accused's three main arguments against admissibility of the evidence are particularly relevant here.
- [14] The Court of Appeal summarized these arguments as follows:
- [12] First, he argued that the poor quality of the still photos was not sufficient to allow any recognition. The trial judge rejected this argument on the basis that the quality of the photos was a question of weight, not admissibility.

- [15] Finally, Mr. Field argued that Ms. Fuess' evidence should not be admitted, as she had received the email with the photos directly from Ms. Nash, which tainted her evidence by in effect pointing Ms. Fuess in the direction of Mr. Field. The trial judge pointed out that there was no mention of Mr. Field in the communication between Ms. Nash and Ms. Fuess. The email had simply included the photos and asked, "Do you recognize anyone from it?"
- [15] In summary, the first argument centered on the quality of the images. The second argument was that the second probation officer's recognition evidence should not have been admitted because it was tainted, in that the witness was pointed or directed to the accused.
- [16] The legal principles relevant to me are summarized by the court as follows:
- [23]
- (iii) Recognition evidence: The Crown may also choose to tender opinion evidence from a person or persons who can identify the individual shown in a photo or video. This evidence is admissible if the witness had a prior acquaintance with the accused and is therefore in a better position than the trier of fact to conclude whether the individual in the photo is the accused: *R. v. Leaney*, 2 S.C.R. 393; *R. v. Brown*, (2006), 215 C.C.C. (3d) 330 (Ont. C.A.).
- [28] In *Leaney*, the Supreme Court of Canada held that where a videotape of the crime was available, recognition evidence based on prior acquaintance could be admitted to establish identification of the perpetrator. The Court did not discuss in detail admissibility considerations for such evidence, but subsequent judgments have clarified the factors to be considered in determining the admissibility of such evidence.
- [29] The issue was addressed by D. Smith J. (as she then was) in *R. v. Anderson et al*, 2005 BCSC 1346. Justice D. Smith held that:
- [20] the threshold level for admissibility of recognition evidence is that of a helpful witness, who is in a better position than that of the trier of fact to identify the accused. The issue then becomes what degree of familiarity is needed in order to meet the threshold level for admissibility.
- [30] She concluded that:
- [25] the indicia for determining whether the threshold degree of familiarity for the reception of recognition evidence has been met is threefold: (i) the length of the prior relationship between the witness and the accused; (ii) the circumstances of the prior relationship between the witness and the accused; and, (iii) the recency of the contact between the witness and the accused prior to the event where the witness recognized the accused.
- [31] In *R. v. Panghali*, 2010 BCSC 1710 aff'd 2012 BCCA 407, Holmes J. summarized the significance of prior acquaintance in this way:

- [42] Common experience teaches that people have vastly different abilities to identify and articulate the particular features of the people in their lives that they know, recognize, and distinguish on a regular basis. Where a witness has but little acquaintanceship with the accused, his or her recognition evidence may be of little value unless the witness can explain its basis in some considerable detail. But at the other end of the spectrum, the bare conclusory recognition evidence of a person long and closely familiar with the accused may have substantial value, even where the witness does not articulate the particular features or idiosyncrasies that underlie the recognition.
- [43] That said, a complete inability to respond to questions about the basis for the opinion may, even in a person long familiar with the subject identified, call into question the value of the opinion.
- [44] Also, many of the well-known frailties of eyewitness identification have application in this context of "recognition" evidence. Of particular concern is that witnesses may unconsciously approach the process of comparison with an eye to similarities, and not differences.
- [45] But those are matters relating to the weight of the opinion, and do not usually preclude its admission into evidence.
- [32] The Ontario Court of Appeal has expressed the criteria for admissibility of recognition evidence as "familiarity with the person identified and being in a better position than the court to make the identification" in *R. v. Behre*, 2012 ONCA 716 at para. 20.
- [33] The specific issue of whether the quality of the photographic or video evidence was an admissibility issue was addressed by Fisher J. (as she then was) in *R. v. McKinnon*, 2013 BCSC 2097:
- [35] No issue is taken at this stage about the admissibility of the videos themselves. It is clear that such evidence is admissible provided it is relevant and of sufficient quality to give a clear picture of events and individuals. This comes from *R. v. Nikolovski*, 1996 CanLII 158 (SCC), [1996] 3 S.C.R. 1197.
- [36] Issue is taken with the admissibility of video recognition evidence that is based on a video that provides either a fuzzy or fleeting glimpse of the subject. The defence says that in such circumstances, the evidence is of no weight and should be excluded.
- [37] There is no guidance on this in the case law, as the quality of the video was not in issue in relation to video recognition evidence in any of the cases referred to me. However, it is my view that generally, issues related to the quality of a video will not affect the admissibility of recognition evidence if the video is otherwise admissible. As long as there is a visible image of the person being identified, the judge on a voir dire is not to weigh the recognition evidence. It would be a rare case where the judge could properly determine that no weight could be given to such evidence.

[Emphasis added.]

- [34] In my opinion, these judgments set out the appropriate principles for determining the admissibility of recognition evidence based on photographic or video evidence. When such evidence is tendered, the trial judge must conduct a voir dire to determine admissibility: Leaney. The purpose of the voir dire is to determine whether the recognition witnesses are in a better position than the trial judge as a result of their prior acquaintance with the accused to determine whether the person depicted in the photo or video is the accused. Provided the trial judge is satisfied that the image in the photo or video is capable of identification, issues as to the quality of the photographic or video evidence will go to the weight of the evidence. Once admitted, the trier of fact will need to consider the recognition evidence along with the evidence as a whole to determine whether the Crown has established identification beyond a reasonable doubt.
- [17] The court held:
- [35] For these reasons, it is my view that the trial judge did not err in declining to hold the recognition evidence inadmissible on the basis of the quality of the photos. The question for the trial judge was whether the prior acquaintance of the two probation officers with Mr. Field was such that they were in a better position than the judge to assess whether the photos were that of Mr. Field. The trial judge considered the circumstances of the witnesses' interactions with Mr. Field and, importantly, the time frame of those interactions, in concluding that their evidence would be helpful to him.
- [18] The court also affirmed the decision of the Provincial Court judge not to refuse admission of the evidence of the second probation officer, Ms. Fuess, on the ground that it was tainted by the manner in which she saw the photographs in question. The Court of Appeal stated:
- [37] Second, Mr. Field submits that the trial judge should have considered Ms. Fuess' evidence to be tainted because she received the photos directly from Ms. Nash. I would not give effect to this argument. The judge reviewed the circumstances of the communications and concluded that there had been no pointing in the direction of Mr. Field by Ms. Nash. It was open to him to come to that conclusion.
- [19] The court refers to this argument as being one of bias or tainting of the evidence of Ms. Fuess: para. 21.
- [20] Similarly, at paras. 44 to 45 of *R. v. Panghali*, 2010 BCSC 1710, aff'd 2012 BCCA 407, quoted above in *Field*, Holmes J. speaks of matters that would also be considered bias or predisposition, which is akin to the tainting argument made by the defence here. She states that these are matters that usually go to weight.

V. The Viva Voce Evidence

A. Corporal Yung

- [21] Corporal Wilson Yung is with the police Integrated Homicide Investigation Team ("IHIT"). He is the file coordinator. He testified about the video footage and the still photographs.
- [22] In addition to the testimony of Corporal Yung, the viva voce evidence on the voir dire consisted of the testimony of Constable White of the Vancouver Police Department, who obtained Mr. Kwan's statement concerning recognition of Mr. Castello in photographs on September 28, 2020, and the testimony of Howard Kwan, the parole officer who gives the recognition evidence.

B. Constable White

- [23] Constable White testified that she was asked by Staff Sergeant Heard of the Vancouver Police Department to speak to a parole officer. She had no information about the file. She was asked to show the parole officer some stills. She called Mr. Kwan on that day, or called to his office, and left a message. She also sent him an email. She testified that in the voicemail she simply requested a call back, and no information was given to Mr. Kwan; she had no real information to give. He called back. A meeting was arranged for that day at his office, the parole office at 877 Expo Boulevard in Vancouver. They met at about 12:15. Constable White was in uniform. She had 15 still photographs that were obtained from the dashcam of the drivers' vehicle. She asked Mr. Kwan whether he could identify anyone in the photographs.
- [24] Constable White had the photographs in a document that was in digital form included on a USB drive. She gave the USB drive to Mr. Kwan, who put it into his computer and began looking at the photographs. The interview took about six minutes in total. She audio recorded it. I have reviewed a transcript of the audio recording.
- [25] As is shown by the transcript, and as Mr. Kwan conceded, initially Mr. Kwan was somewhat uncertain. Constable White characterized his response as being "not adamant", but he said that the person looks like Trion Castello. He became more certain as he continued to look at the photographs during the course of the brief interview.
- [26] After the identification Mr. Kwan began speaking freely regarding his relationship with Mr. Castello, as his parole officer. Constable White also asked some questions about how often he had met with Mr. Castello, and about his ability to recognize him.

C. Howard Kwan

- [27] Mr. Kwan testified he has been a parole officer since November 2018. Prior to that, he spent five years working for Correctional Services of Canada at the Matsqui Institution in Abbotsford. As part of his duties as a parole officer, he manages and monitors federal parolees in the community. His duties include monitoring parolees' compliance with conditions of release, which includes checking their physical appearance and condition.

- [28] He was the parole officer for Trion Castello for about six months, from January 22, 2020, to July 16, 2020. At the time, Mr. Castello was residing at a halfway house, Harbour Light, on East Cordova Street in downtown Vancouver. For at least part of the time that he was being supervised or monitored by Mr. Kwan, Mr. Castello was working at a business called Van-Whole Produce on Malkin Avenue in Vancouver.
- [29] Prior to the COVID-19 restrictions coming into effect on March 17 or 18, 2020, Mr. Kwan met with Mr. Castello face to face on a weekly basis. After the COVID restrictions came into effect, he met face to face with Mr. Castello for half of the meetings, which continued to occur on roughly a weekly basis. The other half of the meetings took place on the telephone. The in-person meetings and the telephone meetings alternated. In the result, Mr. Kwan met with Mr. Castello in-person approximately every two weeks.
- [30] His last meeting with Mr. Castello was on July 6, 2020, about two-and-a-half months before the September 28, 2020, meeting with Constable White at which he identified Mr. Castello.
- [31] Based upon Mr. Kwan's evidence, I calculate that Mr. Kwan met with Mr. Castello in-person approximately 13 times.
- [32] Mr. Kwan testified that the meetings would take about 10 to 30 minutes. They took place at Mr. Kwan's office, or at times outside the halfway house, or at a park across the street from Mr. Castello's place of work. Mr. Kwan would meet with Mr. Castello during Mr. Castello's lunch break.
- [33] In each meeting, Mr. Kwan confirmed Mr. Castello's identity by reference to his appearance, as well as by having Mr. Castello provide him with his FPS number, which is short for Fingerprint System number. He could compare Mr. Castello's appearance with Mr. Castello's photograph on Mr. Kwan's file, which is of good quality. After COVID protocols came into effect, he and Mr. Castello would be masked, but he required Mr. Castello to pull down his mask in order to confirm his identity.
- [34] Mr. Kwan testified that he made a point of checking Mr. Castello's physical appearance at each meeting. He wanted to note any changes in his appearance. He wanted to assess whether his appearance suggested that he could be under the influence of substances; in other words, drugs. One of Mr. Castello's special conditions was that he was not to consume drugs.
- [35] Mr. Kwan testified that he would look for things such as changes in body weight, facial appearance, facial hair, and head hair, or any signs that Mr. Castello was using drugs, such as on his arms, his face, his skin colour, redness of eyes, and his manner of speech.
- [36] He would also have discussions with Mr. Castello concerning his status, his plans, any interactions with police, whether he was abiding by his conditions, and so on.

- [37] On the voir dire, Mr. Kwan was able to give a reasonably detailed description of Mr. Castello's appearance, including variations in his appearance over the course of time that he was supervising him.
- [38] In summary, Mr. Kwan had substantial and frequent interpersonal meetings with Mr. Castello that allowed him to gain a very good familiarity with his appearance.
- [39] I agree with the Crown's description of the meetings. They were not casual meetings. They were meetings for a purpose, which included careful observations of Mr. Castello's appearance.
- [40] With respect to the interview with Constable White, Mr. Kwan testified that on September 28, 2020, he was working in his office. Constable White contacted him. He was unaware as to what the contact was about. According to Mr. Kwan, Constable White did not tell him anything before the meeting. They met at his office. When they met, she told him that her attendance involved a case that she was working on. She told him the requested identification was for IHIT. She gave him the USB. He put it into his computer and began looking at the photographs, as he was requested to do. He said it took him a bit of time, but he recognized Trion Castello.
- [41] He acknowledged that as of September 2020, when the interview took place, he was aware that IHIT was investigating Mr. Castello in relation to a homicide. He testified that this information did not influence his recognition. He testified that he was not expecting the Vancouver Police Department to contact him regarding Mr. Castello. He denied that he was expecting to see Mr. Castello or to identify Mr. Castello in the photographs.
- [42] He testified that he had a caseload of 17 to 20 parolees or offenders. He testified that he believed another offender who he was supervising might be the subject of police interest, because he knew that this other person had had some police dealings.
- [43] He conceded that the photographs were grainy. He testified that he was able to identify Mr. Castello in the photographs due to such factors as his forehead being somewhat prominent, puffiness of his cheeks, and the position of his mouth. He noted that the person in the photographs had his mouth slightly ajar. He recalled that Mr. Castello had a habit of holding his mouth in that position. He testified that he was and remains positively sure that the person in the photographs is Mr. Castello.

VI. Analysis

- [44] As noted, the defence argues that the recognition evidence is, to use the word used by the defence, "tainted". In my view, the issue is not simply a binary issue as to whether or not the word or description "tainted" can be applied. The real issue is whether the evidence could properly be given any weight by the trier of fact, or whether the evidence must be given no weight, on the ground that the witness was biased or predisposed, or perhaps even directed to make the recognition.

- [45] Constable White did not direct or point Mr. Kwan to Mr. Castello as the person in the photographs. Constable White knew nothing about the investigation or the identity of the person in the photos she was given, although it appears she knew she was being asked to assist with an investigation that related to a homicide that IHIT was investigating. She simply asked Mr. Kwan if he could identify the person in the photographs.
- [46] Mr. Kwan did indeed recognize Mr. Castello, independent of any suggestion from Constable White. In this sense, the facts have some similarity to those set out in Field. In that case, when the first probation officer sent the photos to the second probation officer via email, the email asked, "Do you recognize anyone?"
- [47] In my view, what the defence alleges as "tainting" is evidence that arguably undermines the weight that should be given to Mr. Kwan's recognition evidence.
- [48] In the interview with Constable White, after being shown the photos and providing or making the recognition, Mr. Kwan himself raises his awareness of some facts that could have made him predisposed to conclude that the person in the photos could be Mr. Castello. In particular, as he explained, he was aware that Mr. Castello's parole was suspended. He was aware that Mr. Castello was a suspect in a homicide investigation. He also knew the date of the homicide with which Mr. Castello was suspected of being involved--September 28, 2019--and indeed this date appeared on the photos he was shown by Constable White.
- [49] He was aware from Mr. Castello, who had informed him about this, that Mr. Castello had had some involvement and contact with the police in July, two months prior, and that the Vancouver Police Department was looking into Mr. Castello as a person who might have been involved in a flight from police.
- [50] Mr. Kwan agreed that he was responsible for supervising only two Black parolees at the time, and Mr. Castello was one of them. He agreed that this narrowed the pool of people who he was familiar with and who could be in the photographs. This was a fair concession on his part. In general, I formed the impression that Mr. Kwan was a fair witness.
- [51] In addition to the factors I have just listed, Mr. Kwan understood that if the police were showing him photos of someone, he could infer that it was a person he was thought to know. And I think it is fair to say that he might also assume that the photographs depicted someone who he had potentially dealt with in his work as a parole officer. This last point would be similar to many persons who are approached by police and asked to identify a person in photographs. The interviewee could infer that the police might have some reason to believe that the interviewee is familiar with the person in the photograph. The interviewee will be triggered to think about people that they are familiar with.

- [52] As mentioned, Mr. Kwan swears that his knowledge that IHIT was investigating Mr. Castello had no influence on his recognition of Mr. Castello. He also swears that he was not expecting to see photographs of Mr. Castello. Presumably he would give similar evidence at the trial. The credibility of Mr. Kwan's testimony in this respect is for the trier of fact, along with his credibility as a witness generally.
- [53] The defence raises fair and perhaps strong arguments regarding matters that could lead to predisposition on the part of Mr. Kwan. It is open to the jury to place little or no weight on Mr. Kwan's identification on this basis.
- [54] The defence also argues that there was a lack of procedural safeguards in the interview with Constable White, in that Constable White did not advise Mr. Kwan that she did not know the person in the stills, that Mr. Kwan may not know the person, that he did not need to make an identification, and that it is just as important to clear the innocent as it is to identify a suspect.
- [55] The defence makes arguments relating to what it contends is an evolution in Mr. Kwan's testimony. The defence argues that initially, when he viewed the photographs in the company of Constable White, it took Mr. Kwan approximately 20 seconds to respond; in other words, there was a pause. The defence notes that initially he was uncertain about the identification, and he used words like "looks like Mr. Castello." According to the defence's interpretation, Mr. Kwan became more certain as he continued to talk about Mr. Castello and his circumstances.
- [56] The Crown, on the other hand, says that Mr. Kwan's certainty or level of certainty increased as he continued looking at the photographs.
- [57] There are certainly facts and circumstances that the trier of fact may consider in deciding upon the weight, if any, to be given to the recognition evidence. But in my view, in the circumstances of this case, the issues raised by the defence all go to the weight to be given to the evidence, and so these are questions for the jury, as the trier of fact.
- [58] The second issue raised by the defence has to do with the reliability and accuracy of the recognition itself. The defence points to various weaknesses in the photographs shown to Mr. Kwan. As the defence argues, the photographs depict only the upper part of the body, not the full body. They show the head and neck area, and one shoulder. The photographs are not of good quality. They are grainy or fuzzy. The eyes of the person shown in the photographs are not really visible. Mr. Kwan conceded that what looks an outline of hair could also be a shadow, and that the position of the person's mouth that Mr. Kwan associates with Mr. Castello could instead depict a person who is in mid-speech.
- [59] I return to the test set out in Field at para. 34. The issue relating to the photographs is simply whether the trial judge is satisfied that the image in the photo or video is capable of identification. Issues as to the quality of the photographic or video evidence--in this case, photographic--will go to the weight of the evidence.

[60] In that respect, I remain mindful that in *Field*, the Court of Appeal endorsed the comments of Justice Fisher in *R. v. McKinnon*, 2013 BCSC 2097, quoted at para. 33 of *Field*, which I repeat, for convenience. In *McKinnon*, Justice Fisher stated (at para. 37):

However, it is my view that generally, issues related to the quality of a video will not affect the admissibility of recognition evidence if the video is otherwise admissible. As long as there is a visible image of the person being identified, the judge on a voir dire is not to weigh the recognition evidence. It would be a rare case where the judge could properly determine that no weight could be given to such evidence.

[61] As noted, the photos show only the person's head and neck area and the left shoulder of the person driving the car. The driver is wearing a hoodie which is pulled up over his head, so that only his face is seen, and indeed only the left side of his face is visible. However, Mr. Kwan articulated certain features of Mr. Castello's appearance that he was able to see in the photos, such as his forehead shape, his cheeks, his hairline, and the position of his mouth being slightly ajar, which he said was characteristic of Mr. Castello.

[62] On the basis of my own examination of the photographs, there may have been other features that are visible in the photos that could have assisted Mr. Kwan, such as the overall proportions of the person's face, the head shape, and of course his skin colour. Recognition may be based on a constellation of factors that a witness may not be able to articulate, or articulate fully. Things such as the relationship of facial features to each other would be a good example of something that is hard to describe, but might aid in recognition.

[63] The photographs are, in fact, fuzzy and grainy, and show limited details. However, in my view, these are visible images that can form the basis of recognition by a witness, especially someone such as Mr. Kwan who had substantial and recent opportunities to be familiar with Mr. Castello's appearance and, as noted, a duty to make regular observations of his appearance.

[64] In my view, the photos, while of limited quality, are sufficient to form the basis of the recognition evidence of Mr. Kwan, in all of the circumstances. I also have no hesitation concluding that Mr. Kwan is in a better position than the trial judge or the jury to make the identification of the person in the photographs, as a result of his prior acquaintance with Mr. Castello. Putting it another way, the photographs are likely not adequate in themselves for a person unfamiliar with Mr. Castello to identify him by, for example, comparison with better quality photographs or in court, but Mr. Kwan is in a better position to identify Mr. Castello in the photos than is the trier of fact.

VII. Conclusion

[65] So for these reasons, I rule that the recognition evidence is admissible.

"Verhoeven J."

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Prepared on 27 October 2026 · Esheria