
CANADA / JUDGMENT

R. v. Wong

2014 BCCA 486

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 486 R. v. Wong

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Wong,

2014 BCCA 486

Date: 20141212

Docket: CA041026

Between:

Regina

Respondent

And

Peter Quon San Wong

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Lowry

On appeal from: Orders of the Supreme Court of British Columbia, dated February 23, 2012 and June 6, 2013 (R. v. Wong, Vancouver Docket No. 25608).

Counsel for the Appellant:

H.M. Patey

Counsel for the Respondent:

F.G. Tischler

Place and Date of Hearing:

Vancouver, British Columbia

November 10, 2014

Place and Date of Judgment:

Vancouver, British Columbia

December 12, 2014

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Madam Justice Saunders

Concurring in the Result:

The Honourable Mr. Justice Lowry (Page 27, para. 71)

Summary:

Appeal from convictions for first degree murder and discharging a firearm with intent. Appellant submits trial judge erred in admitting recognition evidence without hearsay analysis where it was not clear whether the witness was adopting her previous statement, and in failing to give a Vetrovec warning with respect to the testimony of one of the victims.

Held: Appeal dismissed. Discussion of recognition evidence and the "prior identification" rule. Assuming without deciding that the evidence was hearsay, the curative provisio was applied and this ground of appeal dismissed given the significant probative value of other evidence. Vetrovec warning not required because the witness was not the type of witness sought to be caught by such a warning.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] Mr. Wong appeals his conviction, by a jury, of the first degree murder of Ms. Ping Li and discharging a firearm with intent to wound Mr. Xing Li. There was no evidence of planning and deliberation, but the Crown's theory was that the murder occurred during the forcible confinement of the deceased victim, and that therefore the requirements for first degree murder in s. 231(5)(e) of the Criminal Code were met. The appellant was acquitted of the attempted murder of Mr. Li.

- [2] The charges arose out of events that took place on March 3, 2009. Xing Li (whom I will refer to as "Mr. Li") was operating a brothel out of a condominium located in an apartment tower in Burnaby. Evidently, he lived there with his wife. Ping Li (whom I will refer to as "Ms. Li") was working in the second bedroom as a prostitute and was the only woman working on that date. Mr. Li testified that he had employed between 15 to 25 "girls" in the brothel over the previous several months.
- [3] At about 3:52 in the afternoon on March 3, Mr. Li received a call on his cell phone from a man using a phone registered to a "Herman Singh". (It appears this name was fictitious.) Mr. Li was not in the apartment at the time. The caller, who spoke without an accent, asked if a "girl" was available. Mr. Li said there was one and informed the caller of her age and the price. The caller said he wanted to come to the apartment. Twenty minutes later, the man called again on the same phone and said he was at the apartment building. Mr. Li, who was still absent, buzzed him into the building. Ms. Li was in the apartment at the time, as was Mr. Li's wife. The individual who attended was granted access to the building and the apartment at about 4:11 p.m. Evidently, he entered the apartment for a brief time. The security records of the building suggest that he left a few minutes after entering.
- [4] Mr. Li returned to the apartment at about 7 p.m. He received another call on the "Herman Singh" phone. Mr. Li testified that he recognized the caller's voice as the same one from the afternoon. The caller asked how many "girls" were there, and Mr. Li replied that one was there but another might be coming later on. The caller said he was coming to the apartment.
- [5] A little later, the caller phoned a fourth time on the Herman Singh phone and said he was at the front door. Mr. Li testified that Ms. Li viewed the security camera image of the person on the television in the apartment. She told him it was the same person who had come earlier and "left right away" and that they had not 'done anything'. (This statement was led in evidence by the Crown as admissible hearsay and the trial judge's ruling on that issue is not in appeal. The jury was given a caution about hearsay evidence being untested by cross-examination.)
- [6] The security records show that an individual entered the building at 7:50 p.m. Mr. Li met a man who came off the elevator on the 25th floor, led him down the hallway and let him into the apartment. He testified that the man took Ms. Li into the guest bedroom. Within seconds, the man emerged from the room, standing behind Ms. Li with his left hand around her neck and a pistol in his right hand pointing at her temple. The man said "Robbery, robbery" and directed Mr. Li to lie down on the living-room floor next to a couch. Mr. Li knelt down, but the man kicked him and told him to lie down with his hands behind his head. Mr. Li did as he was told.
- [7] The man then demanded the access code to the apartment so he could let in an accomplice waiting downstairs. Evidence from the security camera at this time showed a second man talking on a cellphone while walking towards the entrance from a white car parked in front of the building.

- [8] Mr. Li refused to disclose the access code, whereupon the man said "Do you think this gun is fake?" He shot Mr. Li in the shoulder. Mr. Li fell to the floor and heard Ms. Li pleading, "Let me live. I will give all my money to you." Shortly thereafter, two shots were fired, wounding Ms. Li. The gunman left the apartment. Mr. Li estimated that the gunman had been in the apartment for about 5 minutes; the building's security cameras suggest that he was in the building for about 11 minutes.
- [9] Mr. Li's wife, who had been in the master bedroom, emerged and tried to help the two injured people. She called 911 at about 8:01 p.m. but since she did not speak English, handed the phone to her husband, who summoned emergency services. Ms. Li had suffered two gunshot wounds to the abdomen.
- [10] The security camera shows that at 8:01 p.m., the white car drove away from the entrance of the building and past the parking lot. A minute and a half later, a man is shown running across the parking lot. At 8:03 p.m., the records pertaining to the "Herman Singh" phone indicate that a call was made to the appellant's sister, Ms. Anna Wong.
- [11] Meanwhile, Ms. Li was bleeding to death in the apartment. She was later pronounced dead at Vancouver General Hospital. Mr. Li was placed in a medically-induced coma until March 14, and ultimately recovered. On March 15, while still in hospital, he gave a statement to police. He eventually picked Mr. Wong from a photo lineup, and also identified him in court as the assailant.
- [12] The assailant left a cellphone in the apartment. The phone was registered to the appellant's father, with the appellant himself listed as the user (the "Wong phone"). Records pertaining to that phone show that two calls were made to a phone registered to Hai A. Muoi (the "Muoi phone") at 7:53 and 7:57 p.m. on March 3, 2009 - apparently from inside Mr. Li's apartment. Two calls from the Muoi phone to the Wong phone were also made between those two calls. Hai A. Muoi is the mother of Derrick Wong, an associate of the appellant.
- [13] As noted, Mr. Li later picked the appellant out of a photo lineup and identified him at trial. However, he had had little opportunity to see his assailant's face and had done so in very stressful circumstances. Counsel therefore agreed at trial that the "main" question for the jury was identification. Mr. Li's wife did not testify. Obviously, the videos taken from the apartment's security cameras were important evidence, as were the records pertaining to the "Herman Singh" phone, the Wong phone and the Muoi phone.
- [14] If identification was proven, the jury also had to decide whether Ms. Li had been forcibly detained and whether the assailant's shooting of Mr. Li constituted attempted murder.

Ms. Wong's Pre-trial Statement

- [15] In October 2009, Ms. Wong was interviewed by police. She was aware her brother had been arrested, but was not aware of the charges. The police showed her the video footage and still photos from the building's surveillance system, both from 4 p.m. on the date of the offences

(the "daytime clips"), and at 8 p.m. ("the "nighttime clips"). In direct examination at trial, Ms. Wong said the person in the daytime clips "looked like Peter", i.e., her brother the appellant. She was asked if she had told the police in giving her statement that the person in the "daytime clips" was her brother, and replied "Yes." Defence counsel made no objection.

- [16] Crown counsel anticipated that Ms. Wong's identification of her brother in the nighttime clips would be less straightforward. He had not been able to interview her before trial. He told the trial judge that, depending on the answers he elicited from Ms. Wong, there might be an application under either s. 9(1) or 9(2) of the Canada Evidence Act. Defence counsel agreed with the Crown's characterization of the circumstances.
- [17] Crown counsel asked Ms. Wong if she had been shown the nighttime clips from the same location. She said she had. She recalled she had been asked to look at one photo in particular and whether the person looked like anyone she knew. She said, "At the time I believe I said yes." Crown counsel then asked who was the person she believed was captured by the photo. She replied, "I read over my statement and I said it looks like Peter." Asked if she had told the constable that, she said, "I think so."
- [18] Crown counsel asked if it would help refresh her memory to look at a transcript of her statement to the police. She agreed it would. She was told to read a portion of the prior statement to herself and was asked whether her memory was refreshed as to "whether or not you told Constable Fortin that the person depicted in the nighttime video clips resembled someone you knew." She replied, "I guess so."
- [19] The Crown began questioning her further, when defence counsel objected that the questions were unfair. The defence argued that when the police had questioned Ms. Wong, they had not made any note of what photos were being shown to her or whether they came from the daytime or nighttime clips. Ms. Wong and the jury were excused. An exchange took place between counsel and the trial judge. The transcript of Ms. Wong's statement was marked for identification to assist the Court. Eventually the trial judge said it was clear from the overall context of Ms. Wong's statement that the nighttime video was being shown to her during the passage she had been directed to by Crown counsel. The latter noted that:

But at this stage, the Crown has to get her to adopt her statement and what I've been referring her attention to is her statement which, in the Crown's submission, she has adopted as her own. I'm not, at this stage, going to give her a vetted copy and ask her to adopt it as her own because it wouldn't be.

- [20] The Crown again asked Ms. Wong whether during her interview she had recognized the appellant in any of the nighttime clips. She replied, "I was never sure about the nighttime but in the statement I did say the person looked like Peter." She was asked if that was what she "believed at the time" and replied "Yes." She was not asked if her statement was accurate or if she still believed the person "looked like Peter."

- [21] In cross-examination, Ms. Wong was asked to compare the features of the individual depicted in the daytime clips with the individual depicted in the nighttime clips. She noted some differences in the facial features between them. Counsel then asked Ms. Wong to look at a daytime photo. She agreed with him that the person in it had "something of a baby face," while the nighttime photo she was shown had, she said, a "really sharp face" and arched eyebrows. Eventually, Crown counsel objected, arguing that it was for the trier of fact to determine whether the person shown in all the images was the same person. After another discussion in the absence of jury and witness, defence counsel agreed to limit his questioning. Finally, he asked Ms. Wong why she was "unsure about the nighttime images" if she had recognized the person in the nighttime clips. She replied that the photo was "very unclear".
- [22] No written statement or transcript of the interview was admitted as evidence at trial. Defence counsel agreed with the trial judge that Ms. Wong's testimony had not elicited any prior inconsistent statements, so that the trial judge could delete the references to that matter in his charge to the jury.

Pre-charge Submissions

- [23] In the course of his closing address to the jury, Crown counsel said this about Ms. Wong's identification evidence:

Ms. Wong told the police the suspect in the evening looked like her brother. Look at the similarities in their appearances. Look at the similarities in their clothing, and the phone call to Anna Wong a minute and 11 seconds after the person flees. It is from these proven facts, ladies and gentlemen, that you are entitled to draw inferences

and further:

She recognized her brother and she told the police on three occasions she recognized her brother from the afternoon attendance clips at 2345 Madison Avenue, and she told the police the person who attended in the evening looked like her brother. Put yourself in the position that Ms. Wong was in.

She was cross-examined with respect to her nighttime identification, and she told you what she thought were the things that were different between her brother and the person on the video. Again, you can attach whatever weight you deem appropriate to the evidence of any particular witness, you can accept some, all or none, and I am going to suggest to you you have to consider the position that people are in, the motivation, that they may have in that assessment. So when Anna Wong gets in the witness box and she says, "Well it looks like my brother, but there's these dissimilarities", considering that very carefully, and the position she found herself in testifying before all of you with respect to the charge against her brother.

With respect to what she told the police, one would think that if ever there was a motivation to lie, it would have presented itself back on October 24 of 2009 [the date of Ms. Wong's statement to the police]. She knew, and what she testified to, her brother had been arrested, she knew, which

is clear from what you have heard, that her brother was in trouble. And yet she told Cpl. Fortain on these three occasions that that was her brother. If anything, you'd expect it to be otherwise, you'd expect her to say well I don't know. I don't know if that's my brother or not, given the position she found herself in. But no, ladies and gentlemen, she told the police and she told you from that witness box that the person in the afternoon attendance she recognized as her brother. [Emphasis added.]

[24] In this court, the Crown conceded that to be complete, counsel should have added "but that she was never sure" after the underlined words. However, defence counsel at trial pointed this out, telling the jury that:

Now, the prosecutor, at least in my submission, clearly thought that you needed some help with the video surveillance images because they called Anna Wong to identify her brother in the afternoon visit. Now, he's right, a sibling would have a better ability to recognize an individual than a stranger, certainly I can't disagree with that. But I do point out that Anna Wong was not at all clear that the person who attended at the evening visit was her brother. [Emphasis added.]

[25] Defence counsel submitted that the evidence before the jury did not establish that Peter Wong was the person who shot Mr. Li and killed Ms. Li. He characterized Mr. Li's evidence as inconsistent and "vague when it suited him" and continued:

We do know about Xing Li that he tried to hide the exact nature of his business, and you'll recall that he was questioned about that. He initially told the police and - - and testified under oath at a previous proceeding that it was just a massage business. It was only after cross-examination at the preliminary inquiry, and his evidence here at this trial, that he came clean and admitted the fact that he was in fact a brothel owner. That would have been difficult to maintain in any event because you have before you I believe Exhibit 12, which is a clear ad for sexual services, not for massage services. So that's just one example, I say, of the difficulty of accepting the evidence of Xing Li.

[26] In their submissions to the trial judge concerning the jury charge, neither lawyer made any reference to a Vetrovec charge.

Judge's Charge to the Jury

[27] In his remarks to the jury at the start of the trial, the judge had cautioned them to be impartial as among the witnesses, and to carry out their responsibilities "without fear, without favour, without prejudice and with integrity." He reiterated this in his charge, adding that "We expect and are entitled to your impartial assessment of the evidence."

[28] In connection with the assessment of the reliability and credibility of witnesses, the trial judge told the jury to observe Mr. Li, and the varying descriptions he had given to the police, as well as his evidence at trial:

The defence says the evidence of Mr. Li, the Crown's sole eyewitness, is unreliable, given the brief encounter he had with the assailant, his opportunity to observe him, and Mr. Li's varying descriptions, which he gave of the assailant on both March 15th and 27th, as well as his evidence in the witness box. Mr. Johnson says Mr. Li was an evasive witness when he gave his testimony.

[29] With respect to the Crown's use of Anna Wong's evidence, he told the jury:

In asking you to make that assessment [whether to accept Xing Li's evidence of identification], the Crown also relies on the testimony of Anna Wong to identify the suspect as Mr. Wong. You will recall her evidence. She recognized her brother, the accused, as the person captured on the surveillance camera in the afternoon, but as to the night time clip she said, "I'm not sure about the night time. On my statement I said the person looked like Peter." As triers of fact, you will consider Ms. Wong's evidence in the light of all the evidence put before you. [Emphasis added.]

[30] After deliberating for approximately one day, the jury returned with a guilty verdict on the first degree murder of Ms. Li, and not guilty on the attempted murder of Mr. Li, but guilty of the lesser included offence of discharging a firearm with the intent to wound Mr. Li.

On Appeal

[31] In this court, the appellant asserts that the learned trial judge erred in failing to provide an appropriate warning regarding Mr. Li's evidence in accordance with *Vetrovec v. The Queen* [1982] 1 S.C.R. 811; and in allowing the Crown to cross-examine its own witness, Ms. Wong; allowing the Crown to lead evidence of prior out-of-court statements from her; and allowing the Crown to rely on those statements for the truth of their contents, all without a proper application and ruling. I will deal first with the grounds relating to Ms. Wong's evidence.

[32] I will say at the outset that, having read the transcripts of Ms. Wong's testimony, I see no merit in the assertion that she was "cross-examined" by the Crown or that he asked the jury to disbelieve her evidence.

[33] Counsel's submissions on the subject of Ms. Wong's evidence relied on this court's decision in *R. v. Chu* 2011 BCCA 80. Since *Chu* in turn relied on *R. v. Campbell* 2006 BCCA 109, and both relied heavily on the decision of the Ontario Court of Appeal in *R. v. Tat and Long* (1997) 117 C.C.C. (3d) 481, it may be helpful to review those cases, beginning with *Tat*.

Tat, Campbell and Chu

[34] In *Tat*, the accused were charged with one count of first degree murder and two of attempted murder after a shooting at a restaurant. The Crown called "Q", who had been shot in the chest, as a witness. A police officer testified that Q had selected the accused Long from two photo arrays, identifying him as one of the shooters. At trial, however, Q maintained that the accused were not the persons who shot him and his friends, and that a statement prepared by the police was inaccurate in that it did not note his "correction" of his earlier identification of Long. The police officer testified that the witness was very

concerned about his safety and that of his family and that they, the police, had assured him he would not have to testify. The officer conceded that Q had "wavered" in his interview with the police, but denied that Q had ever retracted his identification of Long or denied that Long was one of the shooters. No notes had been taken, or recording made, of the photo identification process.

- [35] There was also evidence in Tat from a Ms. T, but I need not describe her (highly questionable) testimony here. The Crown's case against Long rested entirely on the alleged identification evidence of Long by Q and Ms. T.
- [36] Q was called as a Crown witness but was quickly ruled to be adverse to the Crown. On the stand, he acknowledged that he had initially identified photographs of Long and that he had told the police he was "sure" Long was one of the shooters. Then, he testified, he had quickly reconsidered and decided he was wrong and had told the police that Long was not one of the shooters. He had refused to sign a statement prepared by the police because it did not reflect his correction of his initial erroneous identification.
- [37] The Crown at trial did not suggest that Q had identified Long. Instead, it argued that the police officer's evidence of Q's identification was admissible to identify Long as one of the shooters. As noted by Doherty J.A. for the Court:

In other words, the Crown argued that [the police officer's] evidence of what Q. had said concerning the identification of Long was admissible for the truth of its contents. The defence took the position that [the police officer's] evidence was not admissible for its truth, but only as a prior inconsistent statement relevant to Q.'s credibility. [At 492; emphasis added.]

- [38] The trial judge agreed with the Crown's position and instructed the jury that evidence of any prior identification was admissible "not only as to credibility of the witness, but also as original independent evidence of identity." When the defence objected to the admissibility of Q's statement (which was not made an exhibit and only parts of which were referred to) as evidence of identification, Crown counsel contended that:

* In the course of his cross-examination by Crown counsel, Q adopted the entirety of his January 5, 1991 statement to Dobro [a police officer]. To the extent that he qualified this adoption in other parts of his evidence, those qualifications were matters for the jury to consider in weighing the evidence.

* The evidence was admissible under the "prior identification" exception to the hearsay rule.

* Q's out-of-court identification to Dobro was admissible for its truth under the reformed principles governing the admissibility of prior inconsistent statements as substantive evidence set down in *R. v. B.(K.G.)* ; [At 493.]

[39] Writing for the Court, Doherty J.A. had no difficulty in rejecting the first argument, observing that Q's evidence could not be read as an 'adoption' of the portion of the previous statement in which Long had been identified. (At 494.) With respect to the Crown's second argument, he noted that if the police officer's testimony as to what Q had told him was admissible to prove that Long was one of the shooters, it fit "any functional or analytical definition of hearsay." (At 496.) Doherty J.A. then continued:

Out-of-court statements identifying or describing the perpetrator of an offence are sometimes admitted both through the testimony of the maker of the statement (the identifying witness) and the testimony of persons who heard the prior description or witnessed the prior identification. These statements have been classified by some as hearsay and are said to be admissible under a prior identification exception to the hearsay rule .

Other authorities contend that, while evidence of out of court identification is admissible in some circumstances, it is admitted as original evidence and does not engage any exception to the hearsay rule .

Regardless of which characterization is preferred, none of these authorities suggest that all out-of-court statements of identification are admissible as substantive evidence. There is high authority to the contrary: *Sparks v. The Queen*, [1964] A.C. 964 (P.C.) at 981. [At 497; emphasis added.]

[40] Doherty J.A. took the view that the circumstances in which such statements are admitted do not involve a hearsay use of the out-of-court statements and that no hearsay exception is recognized by the current jurisprudence "where the maker of the statement denies making the previous identification and testifies that the accused are not the persons who committed the offence." (At 497; my emphasis.) He identified two situations in which Canadian case-law allows the admissibility of out-of-court statements of identification. The first is where the witness identifies the accused at trial. (*R. v. Christie* [1914] A.C. 545 (H.L.) and *R. v. Alexander* (1981) 145 C.L.R. 395 (H.C.) were cited as examples.) He explained:

Clearly, evidence of the prior descriptions given and the prior identifications made by the identifying witness constitute prior consistent statements made by that witness. Generally speaking, evidence that a witness made prior consistent statements is excluded as irrelevant and self-serving. However, where identification evidence is involved, it is the in-court identification of the accused which has little or no probative value standing alone. The probative force of identification evidence is best measured by a consideration of the entire identification process which culminates with an in-court identification .

If a witness identifies an accused at trial, evidence of previous identifications made and descriptions given is admissible to allow the trier of fact to make an informed determination of the probative value of the purported identification. The trier of fact will consider the entirety of the identification process as revealed by the evidence before deciding what weight should be given to the identification made by the identifying witness. Evidence of the circumstances surrounding any prior identifications and the details of prior descriptions given will be central to

that assessment. [At 498-9; emphasis added.]

[41] The second situation referred to by Doherty J.A. was where the identifying witness is unable to identify the accused at trial but can testify he or she previously gave an accurate description or made an accurate identification. In *R. v. Swanston* (1982) 25 C.R. (3d) 385, for example, this court allowed a Crown appeal where the trial judge had ruled that the Crown could not call police officers to testify that the accused was the person the victim had identified previously at a lineup and at the preliminary inquiry. By the time of trial, the accused had changed his appearance and the witness could not be certain that the accused was the person who had robbed him. Chief Justice Nemetz reasoned that:

None of the exclusionary rules of evidence is infringed by permitting the identifying witness, who cannot identify the accused in court, to state that whoever he identified on an earlier occasion was the culprit. The Crown may then prove by another witness that the man identified by the identifying witness was the accused in the dock. [At 391; emphasis added.]

In these circumstances, Doherty J.A. observed, the officer's evidence had no hearsay purpose, having been offered up only to prove that the victim had identified the accused previously. He emphasized that the police officer's evidence would not be admissible under this rubric unless the witness testified that he or she had made a prior accurate identification. (See 501.) In his words:

Swanston does not create an unqualified exception to the hearsay rule admitting prior identification evidence. Swanston recognizes that where the identifying witness testifies that he or she previously identified the perpetrator of the offence, evidence of out-of-court statements is admissible as original evidence to show who it was that the identifying witness previously identified. Swanston vividly demonstrates the difference between an out-of-court statement identifying the person who the identifying witness testifies committed the crime (a non-hearsay use of the evidence), and evidence of an out-of-court statement relied on as evidence that the person identified committed the crime (a hearsay use of the statement). [At para. 52; emphasis added.]

[42] Finally, dealing with the third argument in *Tat* to the effect that the police officer's evidence was admissible under the "reformed" principles governing prior inconsistent statements as substantive evidence, Doherty J.A. was not persuaded that the criterion of reliability had been met, or that it could be met in most cases where a witness denies his or her identifying statement at trial.

[43] In the end, Q's out-of-court statement was found to have been inadmissible, as was Ms. T's statement. The appeals were allowed and acquittals entered on all counts against the accused.

[44] In *Campbell*, this court allowed an appeal from a conviction for robbery of a video store. The only issue at trial was whether the appellant's identity as the robber of the store had been proven beyond a reasonable doubt. A female clerk at the store had spoken with the

robber for 5 or 10 minutes before the robbery. He then showed her an (imitation) gun and demanded money from the till. A struggle ensued between the two but ultimately he pulled the gun and she cooperated by opening the till. He took \$240 and ran out of the door. Immediately after the robbery, the police attended and she gave a description to a constable which, she testified, had been true and accurate. She also testified she believed the man had had no facial hair and wore a pinkish visor. Crown counsel asked the clerk in direct whether she had given a description to the police and whether it had been accurate; she replied "I believe so."

- [45] The police officer who had interviewed the clerk was then called by the Crown and asked to provide the description of the robber given to her by the store clerk. The defence did not object. The constable proceeded to read the description given and stated that her notes recorded the height of the robber as being 5'-8". The "Suspect Information" sheets she had filled out, however, recorded the height as 5'-11". The officer testified that she thought 5'-11" was accurate and that the clerk had changed her mind at the time of the interview. (Para. 84.)
- [46] In his reasons for conviction, the trial judge referred to the clerk's testimony and to the contents of the police officer's notes, concluding that despite the minor inconsistencies between the two descriptions, the clerk's evidence was reliable and that identification had been proven. One of the grounds of appeal was that the trial judge had erred in admitting the description given by the store clerk to the police immediately after the robbery, for the truth of its contents. (Para. 4.)
- [47] A majority of this court allowed the appeal. In the course of her reasons for the majority, Madam Justice Ryan observed that Tat makes it clear that prior statements of identification by a witness who identifies the accused at trial are not admissible as substantive evidence of identity. On this point, she quoted paras. 31-4 of Tat: see *supra* at para. 39. She reasoned as follows:

In my view there are only two bases on which the notes of the prior description would be admissible for proof of the truth of their contents: as past recollection recorded (*R. v. Fliss*, [2002] 1 S.C.R. 535) or as a principled exception to the hearsay rule (*R. v. Khan*, [1990] 2 S.C.R. 531). The notes might also be admissible, not to prove the truth of their contents, but for the purpose of assessing the weight of the in-court identification (*R. v. Tat*.)

If the prior statements of Ms. Portillo [the store clerk] as to the description of her assailant were admissible as past recollection recorded or as a principled exception to the hearsay rule, then they were admissible for the use to which the trial judge put them, that is, for the truth of their contents. They would be admissible as proof of what the robber looked like on the day in question. On the other hand, if the statements were admissible only for the purpose of assessing the probative value of the in-court identification made by Ms. Portillo, then the trial judge went beyond their permitted use. [At paras. 86-7.]

In the result, the majority found that the trial judge had erred in using the officer's notes and Suspect Information sheet to "provide details of the man who robbed [the store] contrary to what was said under oath at trial." (Para. 98.) The appeal was allowed.

- [48] In *Chu*, one of the victims of a robbery told the police that one of the men who had gained access to her home by asking over an intercom to be admitted for acupuncture treatment, had had a 'Toishan' accent. At trial, the accused called expert evidence to the effect that his accent was Vietnamese rather than the dialect the wife had identified. When asked about this in evidence in chief, the wife said she could not "clearly distinguish as to the accent because I am not of the Toishan variety or the Sanwui variety. I only understood it to be Cantonese."
- [49] The trial judge convicted the accused and in the course of his reasons observed that the evidence concerning the assailant's accent or Mr. Chu's accent did not raise "any doubt in my mind regarding the identification of Mr. Chu as the Asian robber." On appeal, the appellant argued that the trial judge had overlooked the witness's out-of-court statements describing the robber as having had a Toishan accent and that the judge had been required to weigh the evidence even though defence counsel had not confronted her with her prior statements.
- [50] This court dismissed the appeal even though it agreed the judge had "failed to consider" the wife's prior statement. (Para. 31.) Madam Justice Bennett for the Court quoted a passage from *Campbell* which in turn had quoted a long passage from *Tat* with approval. On the basis of Doherty J.A.'s remarks in *Tat*, Bennett J.A. noted that although the wife's evidence as to the assailant's accent had been entitled to "some weight", the use to which it could be put was very limited, since the wife had not adopted her prior statements as true at trial. By the same token, however, it could not be said the trial judge's "misapprehension" went to the "core" of his reasons for conviction, since he could not have considered the evidence as "substantive" evidence that the robber had spoken Toishan. The wife had never been asked to adopt her prior statements; thus there was no evidence that the robber in fact spoke with a Toishan accent. The "core" of the reason for conviction was that Mr. Chu had called the victims and revealed that he knew about the details of the robbery. The appeal was dismissed.

R. v. Williams

- [51] Counsel did not refer us to *R. v. Williams* (2003) 178 O.A.C. 84, a decision of the Ontario Court of Appeal that is more analogous to the case at bar than *Tat*, *Campbell* or *Chu*. In *Williams*, the appellant was convicted of robbing three banks. In each incident, a large black man wearing a jean jacket, sunglasses and a baseball cap entered the bank, stood in line for a teller, and produced a note demanding money and saying he had a gun. As in the case at bar, the identity of the accused was the primary issue at trial. The Crown relied on eyewitness evidence of a bank customer that identified the appellant and on some physical evidence linking him to the robberies. As well, it adduced police evidence of out-of-court statements made by the appellant's sister to the effect that she had recognized the appellant

as the perpetrator shown in surveillance photographs from two of the robberies. At trial, the sister effectively denied identifying her brother, saying she had told them, "The man only looks like my brother." The judge accepted the evidence of the police officers and disbelieved the sister's testimony. In his reasons, he observed:

I also accept the evidence of Detective Wilson that Ms. Morrison [the sister] identified the accused as her brother on the three still photos made from the film at the Bank of Nova Scotia during the robbery ... I also accept the officer's evidence that Ms. Morrison identified her brother from the photo made from the CIBC film. [At 86.]

[52] On appeal, the Crown acknowledged that on the basis of Tat, the trial judge should not have admitted the police evidence concerning the sister's out-of-court statements for the purpose of proving the truth of their contents. (The Court of Appeal agreed with this proposition, "leaving aside any issue concerning whether Tat creates an exception to the hearsay rule", on the basis that Ms. Morrison was not an eyewitness.) The Crown argued, however, that the Court should adopt a rule, similar to that in Tat, for accepting out-of-court statements of witnesses who give "recognition" evidence relating to photographs. The Court of Appeal also rejected this submission, reasoning that:

Ms. Morrison's evidence at trial was "I'm satisfied that it looks like my brother, but I'm not certain that it is my brother". She did not say, "I'm satisfied that it is my brother" nor did she acknowledge that that is what she told police. Moreover, the trial judge expressly rejected Ms. Morrison's evidence that she told police that the man looked like her brother.

Assuming that it was open to the trial judge to find that Ms. Morrison adopted the police version of her out-of-court statements, in our view, the trial judge did not make that finding.

Second, although Ms. Morrison's evidence is not eyewitness identification evidence, the Crown submits that this court should adopt a rule, similar to Tat, for accepting out-of-court statements of witnesses who give "recognition" evidence relating to photographs.

Again, leaving aside the question of whether Tat creates an exception to the hearsay rule, we reject this submission. In our view, the admissibility of the statement evidence for the truth of its content is governed by the principles set out in *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith (A.L.)*, [1992] 2 S.C.R. 915 and *R. v. K.G.B.*, [1993] 1 S.C.R. 740. No application was made to admit the evidence at trial on the basis of those principles and the Crown did not ask that we do so on appeal. [At 86-7; emphasis added.]

The Court also declined to apply the curative proviso for reasons explained at 87-8.

[53] I note that in a footnote in *Williams* relating to whether Tat "creates an exception to the hearsay rule", the Court referred to Doherty J.A.'s statement at para. 34 of Tat that the circumstances in which out-of-court statements like those made by the sister in *Williams* are admitted, do not involve a hearsay use of the statement. The Court referred the reader, however, to *R. v. Starr* [2000] 2 S.C.R. 144 at para. 221.

[54] In *Starr*, the Supreme Court reviewed what it referred to as the "prior identification exception to the hearsay rule" which had been canvassed in *Tat*. The issue in *Starr* was the admissibility of the testimony of police officers regarding an out-of-court identification of the accused by a Ms. Ball. At trial, she testified that she:

... thought she pointed to one of the three photographs shown to her and said that the person in the photo "looks kind of familiar". She met with the police again on August 30, 1994, but did not recall at trial having said anything to police about any of the photos at that time. Cheryl Ball did not testify at trial as to why the person in the photo shown to her on August 23, 1994 looked familiar, or where she had seen the person. ... She did not mention the appellant in her testimony, or identify the appellant in court. She did testify, however, that nothing she said in her conversations with police was untrue. [At para. 120.]

[55] The Supreme Court of Canada allowed an appeal from conviction. In the course of his reasons for the majority, Iacobucci J. said this about "prior identification" evidence:

In the present case, only the second branch of the "prior identification" exception could possibly be applicable to permit the admission of the police testimony under the exception, because Ball did not identify the appellant in court. However, in my opinion, the requirements of this second branch are not satisfied in the circumstances. Ball did not testify that she could not remember whether the appellant was the person whom she identified. She was not asked to compare the appellant with her recollections about the person she saw on the night of the murders. Accordingly, the underlying circumstances of necessity required to trigger the second branch of the traditional exception did not exist. Even aside from this point, the police evidence went far beyond the scope of the "prior identification" exception. Part of the rationale underlying the second branch of the exception is that the testimony that is being admitted to complement the testimony of the identifying witness does not truly constitute hearsay. If the witness can at least testify that at some point she made an accurate identification, then a police officer's testimony that he or she observed the identifying witness in the act of identification is original evidence that the identifying witness did indeed select a particular person, and that that person is the accused. However, for this rationale to apply, the identifying witness must confirm that the person he or she identified in the police officer's presence was the person who committed an act that is relevant in the immediate proceedings. The testimony of the identifying witness may thus have its own hearsay component, but this issue is beyond the scope of this appeal: see H. Stewart, "Prior Identifications and Hearsay: A Note on *R. v. Tat*" (1998), 3 Can. Crim. L. Rev. 61. The point is that the officer's testimony should merely state who the witness identified, once the witness has already testified to the identification itself, and why the identification is relevant to the case.

The evidence provided by Constables Madden and MacLeod went beyond simply asserting that Cheryl Ball identified the accused on August 23, 1994. Their testimony provided almost the entirety of the narrative underlying the identification. Of particular importance, as already mentioned, Cheryl Ball did not testify that the person she pointed to in the photo line-up as being "familiar" was present at the Mohawk gas station or in the car that followed the Weselowski station wagon to St. Norbert. All of the links between the act of identification and the reasons for

the identification were provided by Constables Madden and MacLeod. As Doherty J.A. emphasized in *Tat*, the evidence explaining why the identifying witness identified the accused must come from the identifying witness himself or herself. In his words, at p. 505: "Absent some evidence connecting the person identified at the line-up to the crime, I fail to see how identification at the line-up has any relevance to the issue of identity". Similar comments were made by Twaddle J.A. below, who stated (at p. 175) that "[w]here the identifying witness is unable to recall the prior identification, the situation is the same as if he or she has not testified. In that scenario, the trier of fact is left with the bald assertion of the recipient as to the person identified without the ability to cross-examine the eyewitness on the actual identification". It follows that the trial judge erred in admitting the police evidence regarding Ball's out-of-court identification under a traditional exception to the hearsay rule. [At paras. 222-3; emphasis added.]

[56] Thus while the majority took the view at para. 222 that police evidence regarding the previous statement of an identification witness "does not truly constitute hearsay", it described the general "prior identification" rule set out in *Tat* as an "exception to the hearsay rule". Ultimately, nothing much would appear to turn on this distinction: if the evidence was not hearsay, then it was admissible; if it was hearsay, then it was also admissible under the exception to the hearsay rule for the reasons set out in *Tat*.

The Case at Bar

[57] In the case at bar, of course, we are not concerned with police evidence of Ms. Wong's statement. The appellant contends that as in *Chu*, Ms. Wong did not 'adopt' her prior identification of the nighttime clips, and that accordingly, her evidence regarding them could not be used as substantive proof of identification under the first class of statements described in *Tat*. In the appellant's submission, one could not be sure whether the Crown would have succeeded in having Ms. Wong's prior statement admitted for its truth if the "proper procedures" for determining whether the principled exception to the hearsay rule should apply. At the same time, the sister's recognition of the accused was said to be a "powerful piece of evidence that might well have been determinative on the issue."

[58] In my respectful view, if any error was made in the trial judge's treatment of Ms. Wong's statements regarding the "nighttime clips", it was a highly technical one. To begin with, we are not dealing in this case with "identification" evidence in the usual sense, but with the recognition by the witness of her brother in the daytime and nighttime photos. As such, the evidence does not carry all the dangers of the eyewitness identification of strangers who are observed committing offences. Indeed, the jury was able to look at the photos in the same way Ms. Wong was, and to decide themselves if they showed the accused. (For this reason also, the recognition evidence was not, in my opinion, of critical importance or even of significant probative value.)

[59] I acknowledge that Ms. Wong's evidence seems to occupy a no-man's-land between the two types of statements described in *Tat*. It is debatable whether she "adopted" her previous statement identifying the person in the nighttime clips as her brother, and no finding was

made to this effect. Yet she did not retract her statement or deny identifying her brother - unlike the situation in Tat and to a lesser extent, Williams. Thus her identification might be admissible under the first category in Tat if the judge had found she identified "Peter" in the nighttime clips. On the other hand, it is also debatable whether she can be said to have acknowledged at trial the accuracy of her previous statement. Her testimony remained uncertain: she said she was "never sure about the night time but in the statement I did say the person looked like Peter" and that that was what she had believed at the time. Neither the Crown nor counsel for the defence took the obvious next steps of asking her if her statement had been accurate or even if she still believed the person in the nighttime clips "looked like Peter."

[60] I do not find it necessary, however, to decide whether the trial judge erred in admitting this evidence. In my view, even if the evidence qualified as hearsay, no substantial wrong or miscarriage of justice occurred as a result of the fact that it was admitted, given the nature and quantity of the other more probative evidence at trial and given the low probative value of Ms. Wong's evidence. I would therefore apply the curative proviso at s. 686(1)(b)(iii) of the Code and dismiss this ground of appeal.

Vetrovec Warning?

[61] The appellant's second ground of appeal was that the trial judge was required to give the jury a Vetrovec warning in light of the unsavoury character of Mr. Li, as revealed by his occupation, which Mr. Patey describes as 'pimping'. Mr. Li had no criminal record and was not alleged to have any "gang" or other associations that might have indicated that his evidence would be generally untrustworthy.

[62] Counsel for the appellant, however, noted the Supreme Court of Canada's observation in *Canada (Attorney General) v. Bedford* 2013 SCC 72, that pimps engage in "parasitic, exploitative conduct". This, combined with the fact that Mr. Li's evidence was the only evidence on many points on which the jury had to be satisfied before convicting in this case, is said to have made a Vetrovec warning necessary. Instead, as mentioned earlier, the trial judge told the jury only that they must make their decision "without sympathy, prejudice or fear. You must not be influenced by public opinion. We expect and are entitled to your impartial assessment of the evidence."

[63] In his closing address to the jury, defence counsel characterized Mr. Li's evidence as "evasive". He continued:

I'm sure that you noticed that he rarely answered any of my questions directly, and to be frank, from our everyday experiences we know that people who are evasive are generally either untruthful or have something to hide.

We do know about Xing Li that he tried to hide the exact nature of his business, and you'll recall that he was questioned about that. He initially told the police - and testified under oath at a previous proceeding that it was just a massage business. It was only after cross-examination at

the preliminary inquiry, and his evidence here at this trial, that he came clean and admitted the fact that he was in fact a brothel owner. That would have been difficult to maintain in any event because you have before you I believe exhibit 12, which is a clear add for sexual services, not for massage services. So that's just one example, I say, of the difficulty of accepting the evidence of Xing Li.

He did not seek a Vetrovec warning; nor did the trial judge offer to give one.

[64] In *R. v. Vetrovec* itself, Dickson J., as he then was, began his analysis by tracing the historical development of "the law of corroboration of accomplices". He characterized this law as overly complicated and in need of reform. (See 816-9.) He continued:

The common law, rejecting the 'numerical criterion' common to some legal systems, has traditionally held that the testimony of a single witness is a sufficient basis for a criminal conviction. The general rule applied equally in the case of accomplices: where the testimony of an accomplice was admissible, it could justify a verdict of guilty. But while the common law (after some initial doubts) recognized an accomplice as a competent witness, it continued to harbour some suspicions as to the trustworthiness of his testimony. There appeared to be something unsavoury about a self-confessed knave, often for reward, accusing his companions in crime. Thus the practice arose in the 18th century of warning the jury that, while they might legally convict on the basis of the testimony of an accomplice, it would be dangerous to do so unless the testimony were supported or 'corroborated' by other unimpeachable evidence. [At 819-20.]

[65] In 1916, in *R. v. Baskerville* [1916] 2 K.B. 658, what had been a matter of discretion for trial judges had hardened into a more categorical approach which divorced "corroboration" from the issue of the credibility of the accomplice. (Vetrovec at 824.) The Supreme Court in *Vetrovec* advocated a return to the earlier "common sense" approach foreshadowed in *Warkentin et al. v. The Queen* [1977] 2 S.C.R. 355 and in England by *Director of Public Prosecutions v. Kilborne* [1973] 1 All. E.R. 440. Departing from its own prior decisions, the Court concluded there should be no special category for the evidence of accomplices and that an accomplice is to be treated "like any other witness testifying at a criminal trial and the judge's conduct, if he chooses to give his opinion, is governed by the general rules." (At 830.) Dickson J. then added:

I would only like to add one or two observations concerning the proper practice to be followed in the trial court where as a matter of common sense something in the nature of confirmatory evidence should be found before the finder of fact relies upon the evidence of a witness whose testimony occupies a central position in the purported demonstration of guilt and yet may be suspect by reason of the witness being an accomplice or complainant or of disreputable character. There are great advantages to be gained by simplifying the instruction to juries on the question as to when a prudent juror will seek some confirmation of the story of such a witness, before concluding that the story is true and adopting it in the process of finding guilt in the accused as charged. It does not, however, always follow that the presiding justice may always simply turn the jury loose upon the evidence without any assisting analysis as to whether or not a

prudent finder of fact can find confirmation somewhere in the mass of evidence of the evidence of a witness. [At 831; emphasis added.]

The Court ruled that it would have been sufficient for the trial judge simply to have told the jury they should view the testimony of the alleged accomplice witness "with great caution" and that it "would be wise" to look for supporting evidence before convicting the appellants. (At 832.)

[66] The Supreme Court of Canada had occasion again to consider Vetrovec warnings more recently in *R. v. Brooks* 2000 SCC 11. In that instance, two jailhouse informants testified that the accused had, while in prison with them, admitted that he had murdered a 19-month-old child to stop her crying. Both informants had long criminal records of dishonesty; one sought a lighter sentence in return for his testimony and had testified as an informant before; the other had a history of substance abuse and serious psychiatric problems. Both had histories of offering to testify in criminal trials. The trial judge did not give a Vetrovec warning to the jury.

[67] A majority of the Court held that the judge had thereby erred in law and that the appeal must be allowed. Bastarache J., speaking for himself and Chief Justice McLachlin and Gonthier J., said this about Vetrovec warnings:

this Court in *Vetrovec* deliberately chose not to formulate a fixed and invariable rule where "clear and sharp" warnings would be required as a matter of course regarding the testimony of certain categories of witnesses. Rather, where a witness occupies a central position in the determination of guilt and, yet, may be suspect because of a disreputable or untrustworthy character, a clear and sharp warning may be appropriate to alert the jury to the risks of adopting the evidence "without more".

In exercising his or her discretion to warn the jury regarding certain evidence, the trial judge may consider, *inter alia*, the credibility of the witness and the importance of the evidence to the Crown's case. These factors affect whether the Vetrovec warning is required. In other words, the greater the concern over the credibility of the witness and the more important the evidence, the more likely the Vetrovec caution will be mandatory. Where the evidence of a so-called "unsavoury witnesses" represents the whole of the evidence against the accused, a "clear and sharp" Vetrovec warning may be warranted. Where, however, there is strong evidence to support the conviction in the absence of the potentially "unsavoury" evidence, and less reason to doubt the witness's credibility, the Vetrovec warning would not be required, and a lesser instruction would be justified. [At paras. 3-4.]

[68] In the case at bar, there is no doubt that Mr. Li's evidence was important to the case against Mr. Wong. At the same time, much of his evidence was 'corroborated' by the video, photographic and cellphone evidence. A reading of the transcript indicates that his reliability, rather than credibility, was the focus of the defence's cross-examination.

[69] In any event, a Vetovec warning was in my view not necessary because Mr. Li was not the type of witness whose evidence is sought to be caught by Vetovec. The circumstances of this case place it at the opposite end of the continuum from the circumstances in Brooks. Mr. Li was certainly not an "accomplice"; nor is there any suggestion that he was acquainted in any way with the appellant, or that he had any motivation to lie about the shooting. Mr. Li, we must remember, was the victim, not an associate or a jailhouse informant seeking special treatment from the Crown. Taking a "common sense" approach, I can think of no reason why Mr. Li's credibility would be presumptively suspect as regards the identity of his assailant when he had every reason to want to correctly identify his assailant. The defence alerted the jury to the weaknesses in his testimony and it was up to the jury to assess them. No special caution was necessary.

[70] For this reason, I would also dismiss this ground of appeal.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Saunders"

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[71] I concur with Madam Justice Newbury's disposition of this appeal. I agree no Vetovec warning was necessary. I also agree the admission of the testimony of the appellant's sister, Anna Wong, does not impair the verdict, although my reasons differ somewhat from those of my colleague.

[72] In the course of the witness giving her testimony at the trial, the transcript of her conversation with the police officer was referred to as her "statement", which Crown counsel told the judge he sought to have the witness adopt. He asked the witness if the transcript refreshed her memory as to what she had said to the officer concerning her recognition of the person in the video clips and how many times she had said it. She said she recognized the transcript and when asked if it served to refresh her memory, she said, "I suppose" and later, "I guess so". Ultimately, however, following discussion in her absence, the testimony she gave concerning the video clips was as follows:

Q Ms. Wong, regarding the daytime video clips only, all right? Regarding the daytime video clips that you were shown on October 24th of 2009, by Corporal Fortin, did you recognize your brother, Peter Wong, in the daytime video clips that Corporal Fortin showed you?

A Yes.

Q Now, let's talk about the nighttime clips, Ms. Wong. Regarding the nighttime video clips shown to you by Corporal Fortin on October 24th, 2009, did you recognize your brother, Peter Wong, in the nighttime video clips that Corporal Fortin showed you?

A I was never sure about the nighttime but in the statement I did say the person looked like Peter.

Q And is that what you believed at the time?

A Yes.

[73] Ms. Wong testified then that when she was shown the video clips the person she saw in the daytime clip was her brother. She believed at the time the person she saw in the nighttime clip looked like her brother but she was not sure. What she said to the police officer (or for that matter could have said to anyone else) was incidental to the substance of her evidence being the extent to which she recognized her brother in the video clips when they were shown to her.

[74] Apart from reflecting on her credibility (a person would not normally be expected to implicate her brother in a crime by talking to the police unless what was said was true), I consider the fact that the witness told the police officer what she saw in the video clips to be largely neutral.

[75] The Crown did not seek to prove the extent to which the witness recognized her brother in the video clips by having the police officer testify to what she had said to him. No question of hearsay such as would render a statement inadmissible for the truth of its content arose. For this reason, it is my view that there is nothing in the authority discussed by Newbury J.A. that undermines the admissibility of the witness's evidence. Indeed, it appears to me her evidence is largely akin to the evidence considered admissible in this Court's decision in Swanston (discussed at para. 41).

[76] The probative value of the witness's evidence may be of concern given that the questions put to her were somewhat leading and, more importantly, her response with respect to the nighttime clips was qualified: her recognition of her brother was equivocal. But the strength of her evidence was for the jury to consider. There was no objection taken to the admissibility of her evidence and the jury was in a position to assess the extent to which the appellant could be recognized in the video clips (or prints thereof) for themselves. I see little basis on which it can now be suggested the evidence should not have been admitted such that there must be a new trial. If it were otherwise, I would, like Newbury J.A., invoke the curative provision of the Criminal Code.

[77] Thus I too would dismiss the appeal.

"The Honourable Mr. Justice Lowry"

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