

CANADA / JUDGMENT

Thailand v. Obi

2020 BCSC 1071

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2020 BCSC 1071 Thailand v. Obi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thailand v. Obi,

2020 BCSC 1071

Date: 20200720

Docket: 29251

Registry: Vancouver

In the Matter of the Extradition Act, S.C. 1999, c. 18 as Amended

Between:

The Attorney General of Canada

on behalf of the Kingdom of Thailand

Requesting State

And

Prince Michael Obi

Person Sought

Before: The Honourable Madam Justice MacNaughton

Oral Reasons for Judgment

Counsel for the Requesting State:

A. Sanghera,

C. Benton

Counsel for the Person Sought:

A. Bonfield

Place and Date of Hearing:

Vancouver, B.C.

June 25-26, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 20, 2020

Introduction

- [1] Under s. 29(1)(a) of the Extradition Act, S.C. 1999, c. 18 [Act], the Kingdom of Thailand, represented by the Attorney General of Canada ("AGC"), applies for the committal into custody of Prince Michael Obi, also known as Mzwakhe Memela, to await surrender to it for prosecution.
- [2] In these reasons, I will refer to the person sought as both Mr. Obi and Mr. Memela. At the extradition hearing, the person sought indicated that he preferred to be addressed as Mr. Obi. In the Record of the Case ("ROC") filed by Thailand, he is referred to as Mr. Memela.
- [3] Mr. Obi is sought by Thailand for his alleged involvement in the murder of Susama Ruenrit (the "Victim") on March 24, 2019. According to the ROC, the Victim was found dead in her hotel room in Bangkok, Thailand. She had a wound on the back of her head, and an autopsy concluded that the cause of death was asphyxiation from neck compression.
- [4] After the arresting RCMP officer gave her evidence about the arrest of Mr. Obi pursuant to the Warrant of Provisional Arrest issued under s. 13 of the Act, counsel for Mr. Obi asked that I declare a voir dire to consider a constitutional challenge with respect to the last page of Thailand's ROC. In separate reasons, I concluded that the constitutional challenge did not have an "air of reality" and did not declare a voir dire. My reasons for that decision can be found at 2020 BCSC 991.
- [5] Due to Covid-19 quarantine rules, Mr. Obi was permitted to appear at this extradition hearing by video-link from the Fraser Regional Correctional Centre. He wished to appear by video-link as an in-person appearance would have required him to be quarantined within the institution for 14 days following the hearing, and he did not wish to be quarantined.

An Overview of the Extradition Process

- [6] In *M.M. v. United States of America*, 2015 SCC 62 at paras. 19-26, Justice Cromwell describes the three-stage extradition process. The process begins when the Minister of Justice receives an extradition request from a foreign state. If the Minister decides to authorize the request for extradition, he or she issues an Authority to Proceed ("ATP"). The ATP identifies the Canadian offence or offences that most closely correspond to the alleged conduct set out in the extradition request.
- [7] At the first stage of the process, the key question for the Minister is whether the double criminality principle, as set out in ss. 3(1)-(2) of the Act, has been met. This means that the Minister must be satisfied that the offence for which extradition is sought is criminal, and punishable for a maximum term of two years or more or by a more severe punishment, in the requesting state and there is a corresponding criminal offence in Canadian law. There is no issue in this case that the double criminality principle has been met; the conduct alleged in Thailand amounts to the offence of murder in Canada in accordance with s. 3(1)(b) of the Act.
- [8] Pursuant to s. 24(1) of the Act, the receipt of an ATP enables a superior court judge to hold a committal hearing, commencing the second stage of the process. The extradition judge's role in a committal hearing is mainly to decide whether there is admissible evidence that would justify committal for trial in Canada for the Canadian offences specified in the ATP. The extradition judge must also be satisfied that the person before the court is the person sought by the extradition partner. These reasons deal with the second stage of the process.
- [9] If an extradition judge issues an order of committal, the process moves to the third and final stage, which involves a determination by the Minister of Justice, pursuant to s. 40 of the Act, whether to surrender, or refuse to surrender, the person sought to the requesting state.

The ATP

- [10] On December 16, 2019, the Minister of Justice, through his authorized representative, issued an ATP under s. 15 of the Act.
- [11] The ATP was marked Ex. 1 in this proceeding and sets out that Mr. Obi is sought for prosecution in Thailand for the corresponding Canadian offence of murder contrary to s. 235 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. I note that s. 235 of the Code is the punishment section for murder. Section 229 defines the offence of murder. In referencing s. 235, the ATP follows the common practice in this jurisdiction of charging under the punishment sections of the Code, as it is the offence-creating provision.
- [12] There is no dispute that the ATP is not required to distinguish between first or second degree murder. This Canadian distinction exists solely for the purpose of sentencing: *United States of America v. Lopez-Turatiz* [Lopez-Turatiz], 2011 BCSC 1336 at para. 14, *aff'd* 2014 BCCA 39.

[13] The AGC relies on the following evidence in support of the application for the committal of Mr. Obi:

- (a) the Record of the Case ("ROC") from Thailand, certified on October 30, 2019, and marked as Ex. 2 in this hearing; and
- (b) the evidence of Cpl. Jennifer Cassidy with respect to the arrest and identification of Mr. Obi.

The Committal Hearing

The Test for Committal

[14] Where an individual is sought by a requesting state for prosecution, the test for committal is set out in s. 29(1)(a) of the Act:

29(1) A judge shall order the committal of the person into custody to await surrender if

- (a) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner

[15] It is through this lens that I will examine the evidence in the ROC and the evidence of Cpl. Cassidy.

Identification

[16] As set out in s. 29(1)(a) of the Act, to order committal, the court must be satisfied that the person before it is the person sought by the requesting state.

[17] In *Danielson v. United States of America*, 2008 BCCA 519 at para. 24, the s. 29(1)(a) identification analysis was described as having two distinct components:

1. on a balance of probabilities is the person before the court the person named in the RoC;
2. is there a prima facie case that the person before the court is the person who engaged in the alleged conduct that underlies the request for extradition?

[18] In *Danielson*, Justice Chiasson explained that, frequently, the two components of the identification analysis will rely on the same information although the onus of proof differs. He gave, as an example, the ROC containing a photograph of the person sought that is used by witnesses to identify the person linked to the alleged illegal conduct and the same photograph being used by the extradition judge to identify the person in the courtroom: para. 25.

[19] Section 37 of the Act specifically deals with the evidence of identification with respect to the first component; that is, whether the person before the court is the Mr. Memela named in the ROC:

37 The following are evidence that the person before the court is the person referred to in the order of arrest, the document that records the conviction or any other document that is presented to support the request:

- (a) the fact that the name of the person before the court is similar to the name that is in the documents submitted by the extradition partner; and
- (b) the fact that the physical characteristics of the person before the court are similar to those evidenced in a photograph, fingerprint or other description of the person.

[20] In *Danielson* at para. 27, Justice Chiasson considered whether the word "and" between subparagraphs (a) and (b) of s. 37 requires both similarity of name and physical characteristics and concluded that the use of the verb "are" in the main paragraph of the section clearly showed that, individually, both (a) and (b) can be evidence of identification. At para. 28, Justice Chiasson said that s. 37 sets a low threshold for evidence of identification and mere similarity of name, alone, can be sufficient.

Evidentiary Issues

[21] In *M.M.* at paras. 22-23 and in *United States of America v. Ferras*, 2006 SCC 33 at para. 16 [Ferras], the Supreme Court of Canada explained that s. 29(1) of the Act requires the extradition judge to determine: (i) the evidence admissible under the Act; and (ii) whether the admissible evidence is sufficient to justify committal.

Admissibility of Evidence

[22] Sections 32-35 of the Act set out the applicable rules of evidence at an extradition hearing. Pursuant to s. 32(1)(a), the ROC summarizing the requesting state's evidence against the person sought is admissible as evidence so long as it is certified in accordance with s. 33(3) of the Act. A properly certified ROC is admissible in the committal context even if it would not otherwise be admissible under Canadian law.

[23] Section 33(3) precludes the admission of an ROC unless a judicial or prosecuting authority in the requesting state certifies that the evidence contained within it is available for trial and is either: (i) sufficient under the law of the requesting state to justify prosecution; or (ii) gathered according to the law of the requesting state.

[24] In *Ferras*, the Supreme Court held that the requesting state's certification of the ROC vests the evidence contained in it with a presumption of threshold reliability and availability for trial. The fact that an ROC contains hearsay or other evidence that would be inadmissible under Canadian law does not affect the presumption of threshold reliability: *Ferras* at paras. 28-32, 58, 66, and 76-77. The presumption of threshold reliability stands until it is rebutted.

[25] In this case, Mr. Obi takes no issue with the certification of the ROC.

[26] Pursuant to s. 32(1)(c) of the Act, the person sought by the requesting state may tender evidence to rebut the presumption of reliability: Ferras at paras. 50, 52-54. Despite the broad wording of this subsection, the Supreme Court has held that the rebuttal evidence must be capable of demonstrating that the evidence in the ROC is "so manifestly unreliable or defective that it should be disregarded" and committal refused: M.M. at paras. 77-78; United States of America v. Smith, 2019 BCCA 186 at paras. 21-22. Thus, the rebuttal threshold is a high one.

Availability for Trial

[27] The term "available for trial", as referenced in s. 33(3)(a), is broadly interpreted. The question at the committal hearing is whether there is a prima facie case that evidence exists upon which the person sought may be tried: Ferras at para. 55. As the Supreme Court explained in Ferras, the certification by the requesting state fulfills this requirement: para. 58. However, certifying the availability of evidence for trial does not require the requesting state to prove that every witness listed in the ROC will attend the trial. As explained in United States of America v. Thornett, 2013 BCSC 1470 at para. 34, aff'd 2014 BCCA 464, the ultimate manner in which evidence will be tendered at trial is a matter for the requesting state, and does not impact its presumptive availability for extradition purposes.

[28] In this case, Mr. Obi takes no issue with the availability of the evidence for trial.

Sufficiency of Evidence

[29] As set out above, under s. 29(1) of the Act, after determining the admissibility question, the committal judge is to determine whether the admissible evidence would be sufficient to justify committal for trial in Canada on the corresponding Canadian offence set out in the ATP. If a judge determines the evidence to be sufficient, the person sought must be committed for extradition: Canada (Justice) v. Fischbacher, 2009 SCC 46 at para. 35; Ferras at paras. 38, 48 and 54; M.M. at para. 22.

[30] In both M.M. and Ferras, the Supreme Court set out certain principles for analyzing the sufficiency of the evidence to commit for extradition under s. 29(1) of the Act. In summary, and with some overlap, they are as follows:

- (a) The extradition judge cannot act as a rubber stamp, and the analysis may involve a limited weighing of the evidence presented by the requesting state to decide whether committal is justified: Ferras at paras. 25, 46.
- (b) The analysis involves evaluating whether the conduct described by the admissible evidence would justify committal for trial in Canada. That includes determining whether the admissible evidence "shows the justice or rightness in committing a person for extradition": M.M. at para. 65; Ferras at para. 46.

- (c) The extradition judge must consider whether evidence exists upon which a reasonable jury, properly instructed, could return a verdict of guilty: Ferras at para. 43.
 - (d) The extradition judge is concerned with whether the underlying facts of the charge would, *prima facie*, have constituted a crime if they had occurred in Canada: M.M. at paras. 38, 65.
 - (e) The extradition hearing is not a trial, and should never be permitted to become one. The process is intended to be expeditious and efficient to ensure prompt compliance with Canada's international obligations: M.M. at para. 64.
 - (f) The extradition judge's role, like that of a judge on a preliminary inquiry, is not concerned with defences or other matters on which the accused bears an evidential or persuasive burden: M.M. at para. 65.
 - (g) The extradition judge does not determine the guilt or innocence of the person sought nor do they engage in the ultimate assessment of reliability. The issue is threshold reliability - whether the evidence tendered possesses sufficient indicia of reliability to make it worthy of consideration by the extradition judge: M.M. at para. 62; Ferras at paras. 46, 53-54.
 - (h) The extradition judge does not weigh competing inferences that may arise from the evidence other than in the limited sense of considering whether the inferences sought to be drawn from circumstantial evidence are reasonable: M.M. at para. 71.
- [31] Ultimately, the Supreme Court said that there is a high threshold for refusing committal on the basis that the supporting evidence is unreliable. That threshold will only be reached when the evidence is so defective, or appears so unreliable, that it would be dangerous or unsafe to act on it: M.M. at para. 63; Ferras at paras. 40, 50, 54, and 65.

Circumstantial Evidence

- [32] In this case, the evidence against Mr. Obi is entirely circumstantial. The ROC does not contain any evidence from eyewitnesses to the alleged murder or to Mr. Obi entering and exiting the Victim's hotel room. However, as confirmed in M.M., the extradition judge does not have the authority to refuse committal simply because the requesting state's case appears to be weak or may be unlikely to succeed at trial. The certified evidence presented by the requesting state is presumptively reliable and, as I have said, this presumption may only be rebutted by evidence demonstrating "fundamental inadequacies or frailties in the material relied on by the requesting state": M.M. at paras. 71-72. This threshold will only be met in very rare situations: M.M. at para. 85.
- [33] Therefore, a competing view of the evidence does not meet the standard of manifest unreliability: *France v. Diab*, 2014 ONCA 374 at paras. 63, 116, leave to appeal ref'd [2014] S.C.C.A. No. 317. The fact that the evidence relied on by the requesting state comes from witnesses who are "tainted", "less than pristine", or who have become cooperating witnesses cannot justify discounting their evidence in determining whether the requesting state has met the test for extradition: *Attorney General of Canada and Jay Aneja*, 2012 ONSC 4062 at

paras. 19-24, aff'd *United States v. Aneja*, 2014 ONCA 423 at paras. 26-28, 41-46; *U.S.A. v. Ranga*, 2012 BCCA 81 at paras. 35-37.

- [34] Where direct evidence is lacking on any element of the offence charged, the court may engage in a limited weighing of the circumstantial evidence to determine whether there is sufficient evidence for committal based on the reasonable inferences that may be drawn from the circumstantial evidence: *M.M.* at paras. 71, 83-84.
- [35] Where a number of reasonable inferences may be drawn from the circumstantial evidence, one of which supports guilt, the person sought must be committed for trial (absent other serious reliability concerns). It is not necessary that guilt is the only possible inference to be drawn: *M.M.* at para. 83. The test is whether a jury could convict on the evidence, not whether it would convict: *United States of America v. Hislop*, 2009 BCCA 94 at para. 31.
- [36] In *United States of America v. Anderson*, 2007 ONCA 84, leave to appeal ref'd [2007] S.C.C.A. No. 159, Justice Doherty described the scenarios in which an extradition judge might reject evidence as insufficient to justify committal. He said, at para. 30:
- [30] Evidence may be rendered "so defective" or "so unreliable" as to warrant disregarding it due to problems inherent in the evidence itself, problems that undermine the credibility or reliability of the source of the evidence, or a combination of those two factors. [H]owever, it is only where the concerns with respect to the reliability of the evidence, whatever the source or sources, are sufficiently powerful to justify the complete rejection of the evidence, that these concerns become germane to the s. 29(1)(a) inquiry.

Application of the Law to the Evidence in this Case

- [37] Mr. Obi did not take issue with the requisite elements of the offence of murder under s. 229. They are: (i) the death of the victim; (ii) causation; (iii) identity; and (iv) the requisite mental state: *Lopez-Turatiz* at para. 38, citing *R. v. Charemski*, [1998] 1 S.C.R. 679 at para. 5. The requisite mental state, or mens rea, is that the accused intended to cause the death of the victim or intended to cause bodily harm that he or she knew was likely to cause death and was reckless as to whether death ensued: *R. v. Miljevic*, 2011 SCC 8 at para. 1.
- [38] As explained in *United States of America v. Walker*, 2008 BCSC 1811 at para. 20, aff'd 2011 BCCA 110, an accused's mental state can be inferred from the circumstances of the victim's death.
- [39] In this case, the evidence in the ROC establishes that the Victim was killed between 8:00 a.m. and 8:45 a.m. on March 24, 2019. At approximately 2:00 p.m. that day, the Victim's body was found, in Room 616 of the Vabua Asotel Hotel (the "Hotel"), by Payu Srikong, a Hotel employee, and Mineketa Sakaiba, a friend of the Victim. An autopsy conducted determined that the Victim had a wound to the back of her head but died from asphyxiation.

- [40] The Hotel's CCTV footage, for the relevant time periods, shows only the Victim and Mr. Memela entering and leaving Room 616. The Victim checked into Room 616 at 2:00 p.m. on March 23, 2019. She left her hotel room that evening and returned at approximately 4:00 a.m. on March 24. At 8:00 a.m., Mr. Obi can be seen walking toward Room 616, waiting for about one minute and then being let in. At 8:45 a.m., Mr. Obi can be seen opening the door and leaving Room 616.

The Investigation and the Witnesses

- [41] Teerachai Pairatchawan, the Senior Public Prosecutor in the Office of Executive Director of Criminal Case Section 9, Office of Attorney General, certified the ROC. He says that the investigation into the Victim's alleged murder was conducted by Police Lieutenant Colonel Phongsak Karnrat. Officer Karnrat interviewed eight witnesses and summarized their evidence in the ROC.
- [42] Four of the witnesses gave evidence identifying Mr. Memela as the man in the CCTV footage. They are: Mr. Srikong, the Hotel employee; and Naparat Buakam, Phakwalan Walansiri, and Anothai Saartsri, all of whom were friends of the Victim.

Payu Srikong

- [43] Mr. Srikong is expected to testify that he went to Room 616 of the Hotel to collect the rental and found the door locked. He contacted Mr. Sakaiba, who was a friend of the Victim's and was staying in Room 614, to knock on the door. When there was no answer at the door to Room 616, Mr. Srikong used a spare key to enter and found the Victim lying on the floor next to the bed, covered by a blanket, with blood at the edge of the bed and on the mattress. Mr. Sakaiba also gave a statement about the circumstances surrounding the discovery of the Victim's body.
- [44] Mr. Srikong was shown pictures from the CCTV footage and identified the individual who appeared in it as Mr. Memela. Mr. Srikong also confirmed that Mr. Memela was the same individual that appeared in South African passport #8106175684080 / A02657155 (the "South African Passport"), a copy of which is included in the ROC.
- [45] Mr. Srikong said that he recognized Mr. Memela as he had stayed at the Hotel earlier in March 2019 and, on the day Mr. Memela was leaving the hotel, Mr. Srikong had offered to call him a taxi. Mr. Memela chose to call a taxi himself, and Mr. Srikong clearly remembered Mr. Memela dragging his suitcases along with him.

Naparat Buakam

- [46] Naparat Buakam is expected to testify that she had known the Victim for about five or six years and was in regular contact with her.

- [47] On March 23, 2019, Ms. Buakam checked into the Hotel and, at approximately 10:30 p.m., she and some friends, including the Victim, met for dinner. While at dinner, the Victim said that Mr. Memela was leaving Thailand so she would like to take him for a treat before he left. The group of friends went their separate ways at about 4:00 a.m. on March 24, 2019. Ms. Buakam departed for her hotel room approximately five minutes after the Victim left.
- [48] Ms. Buakam left the Hotel at approximately 3:00 p.m. on March 24, 2019. At about 4:00 p.m., a friend called her and advised her that the Victim was dead.
- [49] Ms. Buakam was shown pictures from the CCTV footage, as well as the South African Passport, and confirmed the identity of the individual who appeared in both as Mr. Memela. She is expected to testify that she had seen Mr. Memela on two previous occasions in March 2019.

Phakwalan Walansiri

- [50] Ms. Walansiri is expected to testify that she had known the Victim for about two months prior to her death.
- [51] On March 23, 2019, at around 11:00 p.m., Ms. Walansiri had dinner with friends, including the Victim, at a restaurant located on the ground floor of the Hotel. At approximately 4:00 a.m. on March 24, 2019, the friends went their separate ways. Ms. Walansiri was not staying at the Hotel.
- [52] At approximately 5:00 a.m., the Victim called her and told her that she could not fall asleep. Ms. Walansiri asked the Victim to come to her residence, but she declined. On the afternoon of March 24, 2019, Ms. Buakam called her to tell her that the Victim was dead.
- [53] Ms. Walansiri said that she had seen Mr. Memela on two earlier occasions when he had visited the Victim. She had most recently seen him approximately a week before the death. She said that she knew that Mr. Memela was South African and that the Victim had been in regular contact with him. Officer Karnrat showed her a picture--although it is not clear from the ROC whether this was a picture from the CCTV footage or from the South African Passport--and confirmed the identity of the individual appearing in it as Mr. Memela.

Anothai Saartsri

- [54] Ms. Saartsri is expected to testify that she was also staying at the Hotel and had dinner with friends, including the Victim, late in the evening and into the early morning on March 23-24, 2019. At approximately 5:00 p.m. on March 24, 2019, Ms. Buakam told her that the Victim had been found dead in her hotel room.
- [55] Ms. Saartsri had met Mr. Memela on March 8, 2019, when they "made merit" together. It is not clear whether this reference in the ROC is a typographical error. She knew that the Victim and Mr. Memela had contacted each other regularly. She identified Mr. Memela as the person who appeared in the South African Passport she was shown.

Is the Person before the Court the Person Sought?

- [56] The ROC sets out the name of the person sought as Mzwakhe Memela. The photocopy of the identity page of the South African Passport, which is the final page of the ROC, indicates that it was issued to Mr. Memela whose date of birth is recorded as June 17, 1981. In accordance with s. 37(a) of the Act, the fact that the name of the person before the court is similar to the name in the ROC is evidence that Mr. Obi is the person referred to in the ATP.
- [57] Cpl. Cassidy is a 12-and-a-half-year member of the RCMP. For the past seven and a half years, she has been assigned to E Division - Major Crimes. Upon receipt of the Provisional Arrest Warrant with respect to Mr. Memela, she and her partner went to the Fraser Regional Correctional Centre where Canadian Border Services was holding Mr. Memela on an immigration matter. They were put into a private interview room, and Mr. Memela was brought in. Mr. Memela was advised that the officers were there to arrest him under s. 13 of the Act.
- [58] Cpl. Cassidy testified that Mr. Memela identified himself as Mzwakhe Memela and as Prince Michael Obi. He was cautioned and advised of his right to counsel. He said he wished to speak to a legal aid lawyer. Using her work cell phone, Cpl. Cassidy left a message with legal aid advising that Mr. Memela had been arrested and would be transferred to the Ridge Meadows detachment. Legal aid had not called back before Mr. Memela was transferred. They did so after he was transferred, and he spoke to them privately.
- [59] Mr. Memela was also offered access to the Nigerian Consulate, as he also holds a Nigerian passport. Cpl. Cassidy telephoned the Consulate on his behalf but received a message that their hours were from Tuesday to Friday from 9:00 a.m. to 1:00 p.m. She followed up on the following Tuesday, and they requested that she send them an email with respect to the details of Mr. Memela's arrest. She did so. Cpl. Cassidy did not know whether Mr. Memela spoke to the Consulate.
- [60] Cpl. Cassidy was satisfied that the person she arrested was Mr. Obi, a.k.a. Memela. She reviewed a colour copy of the South African Passport photo of Mr. Memela and concluded it was a true likeness. She had also seen an Interpol red notice with another passport in the name of Prince Michael Obi and was satisfied that it, too, was a true likeness of the man she arrested.
- [61] After Mr. Memela arrived at Ridge Meadows, the officers dealt with the paperwork to have him processed by a Judicial Justice of the Peace. Mr. Memela was detained until September 23, 2019, which was the following Monday. He was photographed, and his fingerprints were scanned.
- [62] In the courtroom, Cpl. Cassidy identified Mr. Memela as the person appearing in the courtroom by video-link.
- [63] In his submissions, counsel for Mr. Memela took no issue with his arrest.

[64] I am satisfied, on the balance of probabilities, that the person before the court is the person sought by Thailand.

Is There Sufficient Evidence to Warrant Committal?

[65] As I have explained, several witnesses, including a Hotel employee and friends of the Victim, are expected to testify that Mr. Memela was acquainted with the Victim. One of the Victim's friends, Ms. Buakam, informed the investigating officer that, while at dinner on March 23, 2019, the Victim told her that she wanted to take Mr. Memela for a treat as he was leaving Thailand.

[66] The evidence in the ROC also demonstrates that several of the witnesses saw Mr. Memela in and around the vicinity of the Hotel in the weeks before March 24, 2019. Mr. Srikong said that he recognized Mr. Memela from a stay at the Hotel earlier in March. Ms. Walansiri said that she had seen Mr. Memela approximately a week before the Victim's death.

[67] Finally, the CCTV footage demonstrates that the only people entering and leaving Room 616, the Victim's room, during the relevant time period, were the Victim and Mr. Memela.

[68] Mr. Srikong, and the Victim's friends, all identified Mr. Memela as the individual appearing in the CCTV footage and/or the South African Passport photo.

[69] The major thrust of Mr. Obi's submissions was that the witnesses' identification evidence was fraught with difficulty. His counsel referred to the findings and recommendations in the November 5, 2001 report by The Honourable Peter de C. Cory: The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation, on the frailties of eyewitness evidence.

[70] In particular, the frailties counsel relied on in this case include that:

- (a) it is not clear from the ROC whether the witnesses were shown the CCTV footage itself or still shots from it. If they were shown still shots, they do not form part of the ROC;
- (b) it is not clear from the ROC whether the witnesses were shown the photocopy of Mr. Memela's South African Passport that is attached to the ROC, the original photograph, or a better quality photocopy;
- (c) it is not clear where the investigating officer obtained the copy (or original) of Mr. Memela's South African Passport;
- (d) it is not clear who authored the handwriting at the bottom of the copy of the photograph from Mr. Memela's South African Passport, nor is it clear what the handwriting says. Counsel submits that the handwriting may have tainted the identification evidence in this case as it may indicate that the copy was reviewed and identified by earlier witnesses; and
- (e) the witnesses' identification evidence does not explain the extent of their earlier exposure to, or independent description of, Mr. Memela.

- [71] In support of his argument, Mr. Obi relies on the Court of Appeal's decision in *United States of America v. Walker*, 2008 BCCA 55 [Walker]. In *Walker*, the witness and the accused had not previously known each other, their encounter was brief, and the circumstances were traumatic for the witness who saw a shooting, killing a victim, and was also shot at himself. Both events led to the extradition request. The witness picked out the appellant (the person sought) as the shooter from a six-person photo montage and positively identified him when shown a single photo of the appellant. The ROC did not say in what sequence the witness was shown the single photo and the montage.
- [72] At para. 26, the court set out the deficiencies in the ROC and, at paras. 20-25 and 28, the inherent dangers in eyewitness identification evidence. The court concluded:
- [30] When it cannot be determined whether the eyewitness identification is dangerous or unsafe - because the summary is incomplete - then the requesting state has not met its burden. It would be speculation to assume the worst about the evidence; but by the same token, it would be speculation to assume the evidence is free of any defect that would render it insufficient for committal.
- [73] The court concluded that a Ferras assessment of the evidence demanded more of the extradition judge than to leave the question of the deficiencies in the identification evidence for the trial in the United States: at para. 30. Justice Donald wrote, at para. 31, "[i]f the evidence is so weak that a guilty verdict would be unreasonable, a judge should direct a verdict to avoid an injustice. Likewise, the extradition judge should discharge on such evidence."
- [74] Counsel for Mr. Obi argues that the same analysis should apply in this case. For the reasons that follow, I do not agree.
- [75] In this case, the identification evidence in issue is not eyewitness identification evidence by a stranger with all of its inherent frailties. Rather, it is identification evidence of another kind: recognition evidence. As the Court of Appeal said in *R. v. Field*, 2018 BCCA 253 at para. 23 [Field], leave to appeal ref'd [2018] S.C.C.A. No. 381, there are at least three distinct types of identification evidence that may be tendered, each with its own reliability characteristics. The frailties of eyewitness identification evidence are based on the unreliability of human observation and recollection. With respect to recognition evidence, the Court said:
- [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*, [1989] 2 S.C.R. 393; *R. v. Brown* (2006), 215 C.C.C. (3d) 330 (Ont. C.A.).

- [76] The court cited, with approval, the threshold for admissibility of recognition evidence described in Justice D. Smith's reasons in *R. v. Anderson et al*, 2005 BCSC 1346. There, she set out that the threshold of 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 focus was then on the degree of familiarity required to meet the threshold. At para. 25, Justice D. Smith set out three indicia of the degree of familiarity between the witness and the accused: (i) the length of the prior relationship; (ii) the circumstances of the prior relationship; and (iii) the recency of the contact prior to the event in which the witness recognized the accused.
- [77] At para. 33 of *Field*, the court also cited, with approval, Justice Fisher's reasons, when a member of this Court, with respect to the quality of photographic or video evidence in *R. v. McKinnon*, 2013 BCSC 2097. At para. 37 of her reasons, Justice Fisher expressed her view that, generally, issues relating 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 voir dire judge is not to weigh the evidence. Justice Fisher went on to say that "It would be a rare case where the judge could properly determine that no weight could be given to such evidence."
- [78] In *Field*, the court concluded at para. 34:
- [34] [T]hese 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.
- [Emphasis added.]
- [79] In this case, based on the evidence set out in the ROC, I am satisfied that the image of Mr. Memela in the passport photograph is capable of identification by a witness who was familiar with Mr. Memela. I am also satisfied, to the standard required, that it could be used to identify Mr. Memela in the Hotel's CCTV footage or in still photographs taken from it. Issues as to the quality of the photograph, the CCTV footage, or still photos taken from it, will go to its weight, to be determined in the context of the Thai proceedings.

- [80] Further, it will be up to the trier of fact in the Thai proceedings to determine the extent of the witnesses' familiarity with Mr. Memela and what impact that has on the weight of their evidence.
- [81] In reaching this conclusion, I have considered each witness' evidence in isolation and their evidence considered as a whole. It is of note that, unlike Walker, which involved a single eyewitness for identification, there are multiple recognition witnesses in this case.
- [82] As a whole, the identification evidence in the ROC is not so defective that it would be dangerous or unsafe to commit based on it.

Conclusion

- [83] I have concluded that the whole of the evidence establishes a prima facie case that Mr. Obi, also known as Mr. Memela, the person sought, engaged in the conduct underlying Thailand's extradition request for murder.
- [84] The evidence in the ROC supports a conclusion that the Victim is deceased. The autopsy report found that the Victim had wounds to the back of her head and concluded that she died from asphyxiation. On the basis of this evidence, a jury could reasonably infer that her death resulted from an unlawful act. Thus, there is evidence in the ROC with respect to the death of the Victim and causation, two elements of the offence of murder.
- [85] With respect to the necessary mental state, there is evidence in the ROC that can support an inference that either the person who caused the death of the Victim meant to cause her death, or meant to cause bodily harm, knowing that it would likely cause her death and was reckless as to whether death ensued. The Victim was found lying next to the bed with wounds to the back of her head indicative of being struck, and the autopsy report concluded that the cause of death was asphyxia from neck compression. The nature of the Victim's wounds and the autopsy report provide evidence from which the mens rea required for murder can be inferred. As the Quebec Court of Appeal concluded in *Sheppard v. United States of America*, 2016 QCCA 1082 at para. 25, the act of strangulation permits an inference that the death was a homicide and that the offender meant to cause death.
- [86] Further, a strong inference arises from the CCTV footage, as described in the ROC, showing Mr. Memela as the only person, other than the Victim, entering and leaving Room 616 of the Hotel during the relevant period. In all the circumstances, it is reasonable to infer that Mr. Memela murdered the Victim during the approximately 45-minutes in which he was in the Victim's room on the morning of March 24, 2019.
- [87] I am also satisfied, to the requisite standard of proof, that the identification evidence summarized in the ROC is admissible and sufficient to justify committal. In addition to the certification of the ROC, the evidence possesses sufficient indicia of reliability to make it worthy of consideration.

- [88] Given my conclusion that the admissible evidence would justify committal for trial in Canada on the offence of murder set out in the ATP, and having determined that the AGC has proven Mr. Memela's identity to the relevant standards of proof, I commit Mr. Memela for the corresponding offence of murder contrary to s. 235 of the Code.
- [89] Under s. 29(1)(a) of the Act, Mr. Memela, also known as Prince Michael Obi, is committed into custody to await a determination by the Minister of Justice of whether to surrender him to the Kingdom of Thailand.
- [90] Pursuant to s. 38(2) of the Act, I am required to inform you, Mr. Memela, that you will not be surrendered until after the expiry of 30 days and that you have a right to appeal this committal order and to apply for judicial interim release.
- [91] Pursuant to s. 38(1) of the Act, I direct that the following documents be transmitted to the Minister of Justice:
- (a) a copy of the committal order;
 - (b) a transcript of the evidence adduced at this hearing;
 - (c) copies of all exhibits introduced at this hearing; and
 - (d) copies of these reasons and my reasons cited as 2020 BCSC 991.

"MacNaughton J."

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