Citation: *R. v. Bill*, 2007 YKTC 56

Date: 20070725
Docket: 06–00759
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Barnett

R e g i n a

v.

Gordon Frederick Bill

Appearances:

Noel Sinclair	Counsel for Crown
Emily Hill and Gordon Coffin	Counsel for Defence

REASONS FOR JUDGMENT

[1] Gordon Frederick Bill, a young Aboriginal man, is charged with having robbed William O'Connell on March 15, 2007.

[2] William O'Connell, a young Caucasian man, was indeed robbed. At the time of the incident he was temporarily residing in an apartment located in Kwanlin Dun, an Aboriginal community within Whitehorse. The occupant of the apartment was not accustomed to locking the entry door and casual visitors at all hours of the day and night were common. Some other occupants of apartments in the building were known drug dealers and the place therefore had a certain reputation.

[3] On March 14th, Mr. O'Connell fell asleep while watching television. He was awakened about 1:00 a.m. on March 15th by the activity of a man who had entered the apartment. It seems that this person – a man not previously known to Mr. O'Connell – was initially friendly towards Mr. O'Connell and invited him to smoke some crack cocaine. But when the invitation was declined and Mr. O'Connell told the man to leave, he became antagonistic and expressed himself by saying that Mr. O'Connell, a "little white boy" should not be in "the village". A physical encounter followed: the man picked up a broken baseball bat and was threatening Mr. O'Connell who, in turn, grabbed something which he described as a stick and defensively hit the man.

[4] Before the man departed, he inflicted three bloody head wounds on Mr. O'Connell. He also stole two rings and a necklace from Mr. O'Connell.

[5] Mr. O'Connell left the apartment and went to a nearby gas station to call for help. He was taken to the hospital where he received a few stitches. He had also suffered a concussion and was therefore not released from the hospital until early that same afternoon.

[6] Upon being released from the hospital, Mr. O'Connell went to the Whitehorse RCMP detachment where he was interviewed by Cst. Monkman. The interview included a photo lineup: 10 photographs had been fairly prepared by another officer and Cst. Monkman conducted the selection procedures in a careful and proper manner.

[7] The 10 photographs presented separately to Mr. O'Connell included a photograph of Mr. Bill, who, for some reason, was a suspect from the outset of the police investigation.

[8] Mr. O'Connell examined the photographs for some considerable time. He focused his attention on two photographs and finally did select the photograph of Mr. Bill and told Cst. Monkman that he was the robber. This identification gave the police good reason to arrest Mr. Bill and that duty was assigned to Cst. Fradette.

[9] Cst. Fradette located Mr. Bill at the home of his aunt in the Kwanlin Dun "village" about 5:30 p.m. on March 15th. He had been asleep on a pile of clothes in the basement. The clothes which Mr. Bill was wearing were not similar to those which Mr. O'Connell had described to Cst. Monkman. He had a bloody facial injury which was consistent with having been hit in the manner Mr. O'Connell hit the robber.

[10] When he testified during Mr. Bill's trial, Mr. O'Connell identified Mr. Bill as the man who had robbed him.

[11] This case presents a singular and classic issue: does the evidence establish Mr. Bill's guilt beyond any reasonable doubt?

[12] The case against Mr. Bill is essentially founded upon Mr. O'Connell's identification of him. This is supported by the injury which I am satisfied Mr. Bill received somehow during the night of March 14/15 and by the testimony of his parents who do place him in the vicinity of the apartment that night: Mr. Bill told his father that he had encountered a white kid at the apartments but the encounter he mentioned to his father was not the robbery of Mr. O'Connell.

[13] The case against Mr. Bill does not include any admissions by him to the police.

[14] The case against Mr. Bill does not include any DNA or other forensic evidence.

[15] The case against Mr. Bill does not include the finding of Mr. O'Connell's jewellery in Mr. Bill's possession.

[16] In some countries, the case against Mr. Bill would be considered sufficiently persuasive so that, if he failed to testify, the court might infer guilt. That, however, is not the law in Canada: *R.* v*. Noble*, [1997] 1 S.C.R. 874.

[17] Mr. Bill's defence is straightforward. It does not rest upon any "tricks" or technicalities. Ms. Hill's submission is simply that the case against Mr. Bill, resting

as it does upon Mr. O'Connell's identification of him, is too frail to convincingly prove his guilt. Ms. Hill developed this submission carefully and thoroughly.

[18] The essential frailties in the case against Mr. Bill are:

- Mr. O'Connell did not know or recognize the man who robbed him. The apartment was only dimly illuminated by light from the television and the entire traumatic incident took no more than half an hour.

- Mr. O'Connell initially expressed confidence to Cst. Monkman that "I'll be able to recognize him again" but was obviously less than entirely confident when he was required to choose between the man in photograph #1 and Mr. Bill, whose photograph was #6.

- Mr. O'Connell told Cst. Monkman "the guy last night does not have the pimples and stuff as the guy in photo six". Mr. O'Connell's recollection was wrong, if indeed Mr. Bill was the robber. The photograph of Mr. Bill taken after his arrest on March 15th clearly shows that his face was then "messed up" in the same way that it was when photograph #6 was taken. Mr. O'Connell's recollections of the robber's height and weight were similarly inconsistent with Mr. Bill's characteristics.

- Mr. O'Connell told Cst. Monkman that the apartment entry door had been dead bolted that night before he fell asleep and that the robber had ripped the rings off his fingers. He now recalls that the door was never locked and that the rings were taken from a bedside table. Mr. O'Connell was an honest witness, but honesty and accuracy are different traits and an honest person will likely make flawed observations during and have flawed recollections of traumatic events.

[19] During the photo lineup, Mr. O'Connell first identified the man shown in photograph #1 as the robber (and that man does indeed have facial features not

unlike Mr. Bill's). Upon further consideration however, he identified Mr. Bill. When he testified in court, Mr. O'Connell acknowledged that he was not "dead sure" about his identification of Mr. Bill.

[20] "The danger of wrongful conviction arising from faulty but apparently persuasive eyewitness identification has been well documented." That statement was made by Madam Justice Arbour when she wrote the decision of the Supreme Court of Canada in the case of *R.* v*. Hibbert,* [2002] 2 S.C.R. 445 at p. 469.

[21] In Canada, the most notorious case of a wrongful conviction founded upon mistaken eyewitness identification testimony is that of Thomas Sophonow, who spent almost four years in jails for a 1981 murder that we now conclusively know he did not commit.[1] In England, in 1896, ten eyewitnesses positively identified Adolf Beck as a fraudster and he spent more than five years in custody. He was similarly convicted of similar crimes in 1904. When it was established that all the convictions were founded upon mistaken testimony, a Committee of Inquiry was appointed; the ensuing report[2] contains the observation that:

> "Evidence as to identity based on personal impressions, however bona fide, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury."

[22] In *R.* v*. Quercia,* (1990) 60 C.C.C.(3d) 380; 1 C.R. (4th) 385; 75 O.R. (2d) 463, a case with elements similar to the present case, Mr. Justice Doherty said that:

> "The spectre of erroneous convictions based on honest and convincing, but mistaken, eyewitness identification haunts the criminal law. That ghost hovers over this case." (page 383 in C.C.C.s)

[23] In the present case there are some "other facts" which, Crown Counsel submits, provide "a number of indicators of reliability" and therefore, he submits, when one considers the totality of the evidence against Mr. Bill, it is safe to decide that he was the man who robbed Mr. O'Connell.

[24] I have reviewed all of the evidence. My decision is not uncertain. I cannot say that I know that Mr. Bill was the robber. I am left with real doubts and therefore must and do dismiss count #2.

[25] I do not wish my decision in this case to be misunderstood. My decision is not a declaration of innocence, and my decision is not intended to imply an unjustified criticism of the police investigation.

BARNETT T.C.J.

[1] See the report of *The Inquiry Regarding Thomas Sophonow*. The report was delivered in September 2001 and is available online: http://www.gov.mb.ca/justice/sophonow.
[2] See *Identification as a Facet of Criminal Law*, 1951, Sydney Paikin, 29 Canadian Bar Review 372.