Case Name: **R. v.**

Between Her Majesty the Queen, and

[2014] O.J. No. 6600

Ontario Superior Court of Justice Toronto, Ontario

J.B. McMahon J.

Heard: July 2, 2014. Oral judgment: July 2, 2014.

(35 paras.)

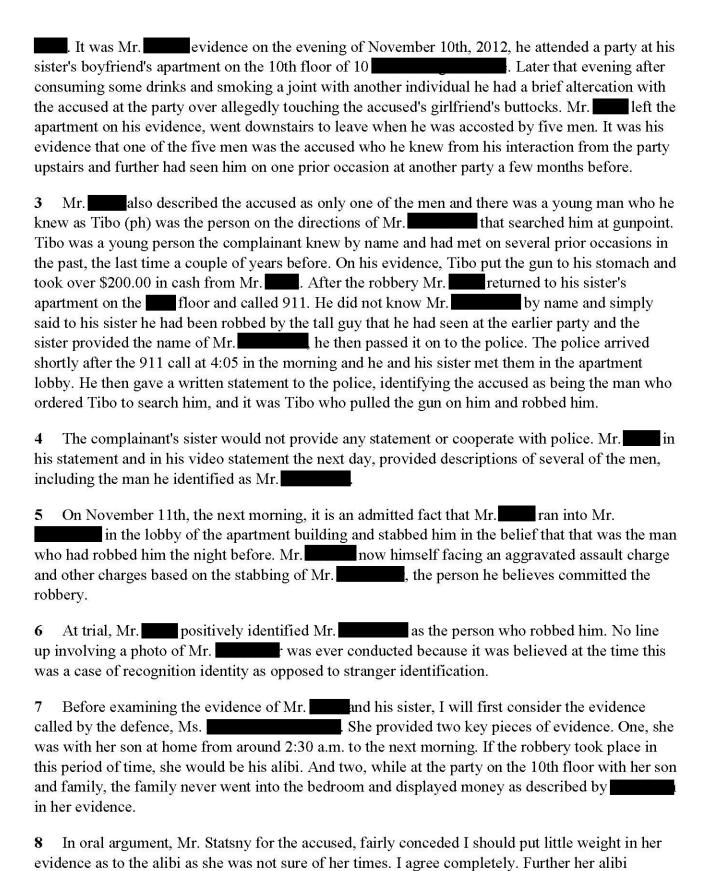
Counsel:

G. Kim, Esq., Counsel for the Crown.

A. Stastny, Esq., Counsel for the Accused.

REASONS FOR JUDGMENT

- J.B. McMAHON J. (orally):-- The accused, Mr. proceeded before me judge alone on a two Count indictment. Robbery with a Firearm and Robbery with an Imitation Firearm. At the end of the Crown's case, the Crown, Mr. Kim, fairly conceded there was insufficient evidence to satisfy the Court beyond a reasonable doubt on the Robbery with a Firearm Count, and invited me to enter an acquittal, which I have done. The trial proceeded on the one Count of Robbery with an Imitation Firearm.
- 2 The Crown's case turns on two witnesses, the complainant, Mr. and his sister, Ms.

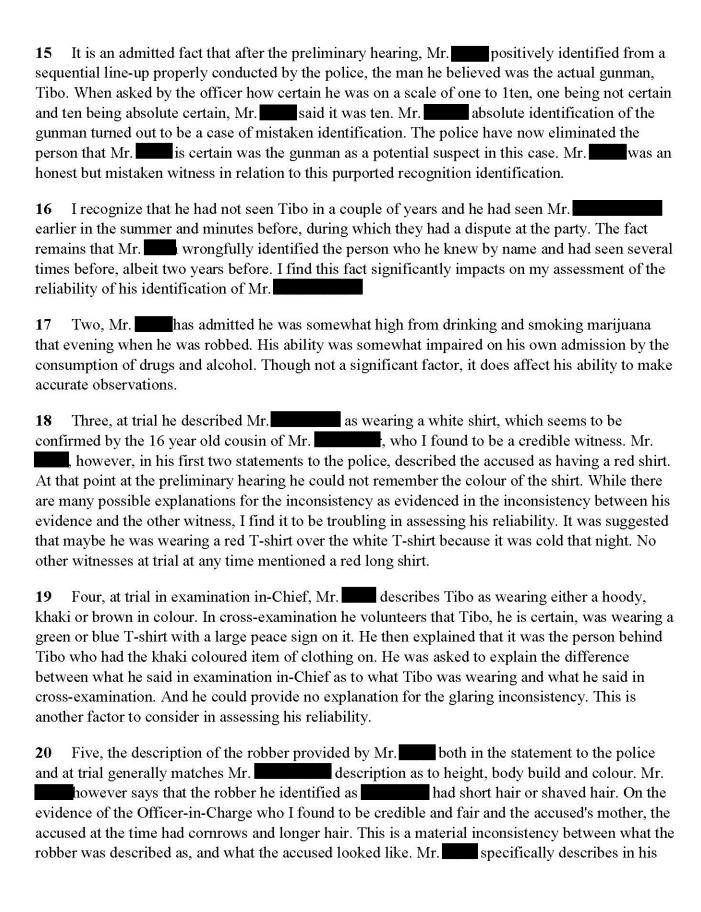


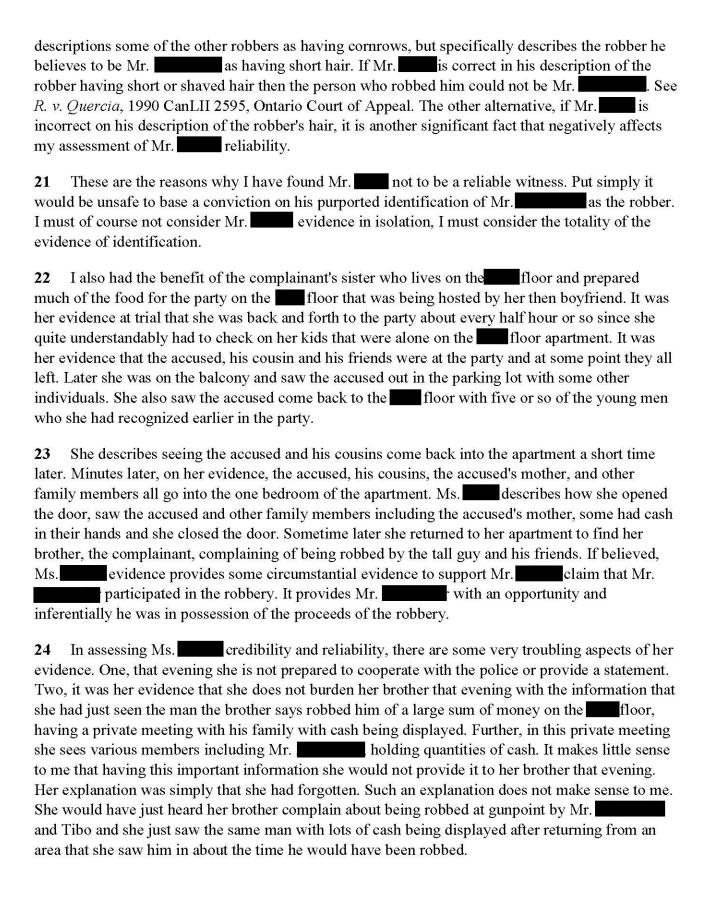
disclosed a few weeks ago is inconsistent with her initial statement to the police as to how long she was home before the robbery was reported by the complainant.

- I remind myself, simply because I reject her evidence as to alibi, I can draw no adverse inference against the accused by doing so. Further, the rejection of the alibi evidence does not shift the burden of proof from the Crown. 10 The second key piece of her evidence is she denies that there was ever a family meeting at the 10th floor party where money was displayed in a bedroom. This was contrary to the evidence of who provided the information of such meeting for the first time in a statement to the police when subpoenaed here at trial. In assessing Ms. Alexander's evidence I recognize she has a vested interest in the outcome of her son's trial. I found her not to be an impressive witness. She was both confrontational and evasive. She continued to interrupt the questions of Mr. Kim in cross-examination. Her evidence as to time was all over the map. I do not find she was a reliable witness. At the end of the day on her evidence, I am not sure whether she is telling me the truth about no meeting taking place. Simply put, I cannot accept her evidence. 12 In rejecting her evidence as to alibi and not being sure about whether she was present for any family meeting I must carefully assess the evidence of both Mr. and his sister, assessing this case and their evidence I instruct myself on the frailties of identification evidence and the fact that honest but mistaken identification witnesses have led to wrongful convictions. Wrongful convictions have also been registered in cases of apparent recognition identification. I must carefully examine all the circumstances surrounded the purported identification as well as whether there is other evidence to support the identification of Mr. described by Mr. In assessing Mr. evidence, I have absolutely no doubt that he was robbed at gunpoint that evening, by several men. I have no doubt that he honestly believes that the accused, Mr. , is one of the robbers. This is the reason why he stabbed the accused the next morning and has been subsequently charged. The issue however is whether the evidence of is sufficiently reliable to prove the Crown's case beyond a reasonable doubt. There are
- 14 One, Mr. had seen the accused on only two prior occasions, earlier that evening and at another party several months before. Mr. indicated, however, that the man who put the gun to his stomach he knew by the name of Tibo. On his evidence he had met Tibo on numerous occasions. Mr. had a far better ability to recognize the gunman due to the numerous prior interactions between himself and the man he calls Tibo. He acknowledged this in cross-examination.

several aspects of Mr. evidence that I find troubling in assessing his reliability and purported

identification of Mr. as the person directing the robbery.





25 The third concern is in the days and weeks after the robbery, the Officer-in-Charge diligently made efforts to get a statement from however she again refused to cooperate with the police.
The fourth factor to consider, the first time she provided a statement was 17 months after the event. And she did so after she had been subpoenaed by the Crown. Up until then she had been completely un-cooperative. She provides two reasons for not cooperating with the police. One that was in an intimate relationship with the accused's relative at the time and did not want to basically rock the boat. And two that she was scared of retribution for assisting.
It is important to note that the person she had the intimate relationship with was deported from Canada two months after the event, in January 2013. Their relationship ended. The reason for not cooperating because of that relationship no longer was valid for the last 17 or 18 months. As to the fear factor, everyone knows everyone in this community. She had already had a sit down with the accused mother after her brother had stabbed the accused and told the mother of her belief the accused robbed her brother at gunpoint. This is not a case of an unknown eye witness not wishing to come forward out of fear.
28 She also notes that she is aware that her brother who is facing serious charges for stabbing the accused could face potential deportation if convicted. It simply defies common sense and life experience to believe that she had this very important information that would assist in bringing the man to justice who apparently was involved in the robbery, but she does not do anything to assist her brother until the day of trial. I cannot accept her explanation for why she had not assisted in the case until the trial commenced, and it adversely affects my assessment of her credibly and reliability.
Also she, like the accused's mother, was also not an impressive witness. I found her to be confrontational and evasive, much in the way the accused mother was. For the reasons articulated, particularly the late disclosure, I find that I cannot find Ms. to be a credible and reliable witness. I cannot accept her evidence that she saw the accused coming into the apartment, or that there was a meeting in the bedroom. She simply is not reliable.
30 As such at the end of the day I am left with the evidence of Mr. to his purported identification of Mr. As I have indicated, it would be unsafe to base a conviction on such frail recognition identification with the difficulties I have articulated. For these reasons the Crown has not met its onus of proving identification beyond a reasonable doubt. The accused is entitled to that reasonable doubt. And as such, for these reasons, I find the accused not guilty on Count 2, and there will be acquittal on that Count as well.

So folks those are the reasons of the Court. I have noted now on the indictment directed

verdict not guilty to Count 1, adjourned to July 2nd for judgment, and I am putting for oral reasons,

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accused not guilty to Count 2 and signed it.

- 32 Gentlemen, Mr. Kim, that you very much.
- 33 MR. KIM: Thank you.
- 34 THE COURT: The officer and Mr. Stastny, a fair manner in which everybody conducted the trial.
- 35 MR. STASTNY: Thank you, Your Honour.